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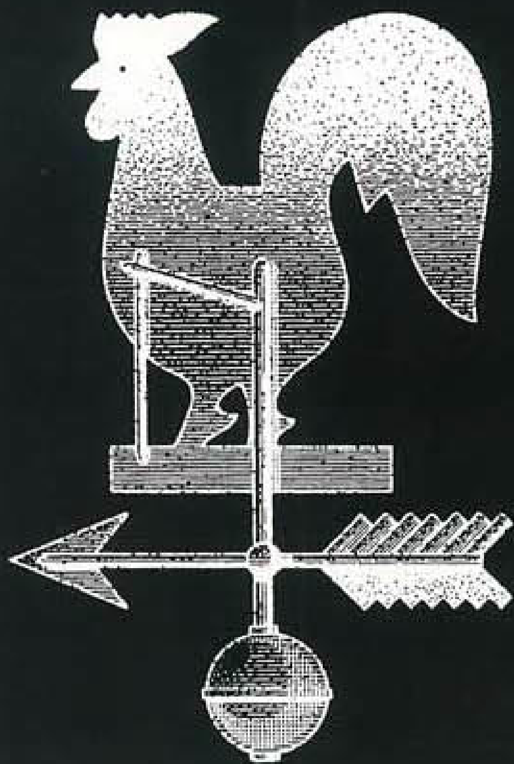

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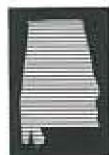

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IN BRIEF

January 1995 Volume 56, Number 1

ON THE COVER:

The new Supreme Court of Alabama contains many interesting features. Among them are:

- The marble supporting the bench and columns is from Carrara, Italy, where Michelangelo acquired marble for some of his famous sculptures.
- The dome was built from Indiana limestone, from the same quarry used for the Empire State Building, Pentagon and National Cathedral.
- The seal on the mahogany bench was hand carved by a former Vietnam War POW.
- A lawyer speaking to the court is standing in the very center of the judicial building, both vertically and horizontally.

Photo by Paul Crawford, Montgomery, a member of the Alabama State Bar and District of Columbia Bar

INSIDE THIS ISSUE:

Pitfalls in Estate Planning with IRAs
By Wendell Cauley and Pamela L. Mable 20

Opening of Court
By Retired Justice Oscar W. Adams, Jr. 32

Liability of a Municipality Under Alabama Law
By Alex L. Holtsford, Jr. and Steven Anthony Higgins 35

Psychotherapy and the Law
By Shirley Darby Howell 44

Cumulative Index, January 1994 – December 1994 50

President's Page 4
Executive Director's Report 6
Legislative Wrap-Up 9
About Members, Among Firms 10
Building Alabama's Courthouses 12
Bar Briefs 17
Opinions of the General Counsel 18
New Admittees 24
Lawyers in the Family 27
CLE Opportunities 30
Disciplinary Report 52
Recent Decisions 53
Young Lawyers' Section 59
Memorials 60
Classified Notices 63

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ALABAMA STATE BAR SUPPORTS THIRD CITIZENS CONFERENCE

Put down December 9, 1994 as a red letter day in the history of our bar. On that date, the Alabama State Bar, by unanimous resolution of the board of bar commissioners, called for and authorized the formation of a Third Citizens Conference on Alabama State Courts to study the selection of judges in Alabama, judicial campaign financing, and other important issues affecting the administration of justice in Alabama. The full text of the resolution is set out as an appendix to this page.

The resolution is a balanced, thoughtful approach to starting a process to address the great concern of the public and the bar about judicial elections in Alabama. The resolution was approved unanimously by your bar commissioners who represent the various viewpoints of Alabama lawyers. I particularly thank Richard Gill of Montgomery for his excellent draftsmanship on this document.

In recent months, and particularly since the November elections, an overwhelming number of judges, lawyers and lay people have urged the bar to do something about the way we select judges and conduct judicial elections. No doubt you have read the many editorials across the state calling for action. Editorial titles such as "Something is Terribly Wrong!" and "The Court Mess" were bandied about; while some of these columns lacked complete candor, they did raise issues that we all know must be addressed, and addressed now.

Broox G. Holmes

Historically the Alabama State Bar has taken the lead in movements to improve our judicial system. The bar was instrumental in organizing the First Citizens Judicial Conference held in 1966 and the second such conference held in 1973, both of which led to the drafting and passage of the judicial article of the Alabama Constitution and the creation of Alabama's unified judicial system.

The bar's Task Force on Judicial Selection spent the last four years studying issues involving the elected judiciary, including a study of the nonpartisan election of judges, other alternative means of judicial selection, and campaign financing for judicial elections. In the May 1994 *Alabama Lawyer* then-President Spud Seale set out very clearly the work of the task force and issues that needed to be addressed.

In December 1990, the board of bar commissioners adopted a resolution calling for nonpartisan election of judges with a recommendation that the legislature pass an act making the necessary changes in the election laws. Subsequently, a bill providing for nonpartisan elections of appellate, circuit and district court judges was introduced in the legislature. Unfortunately, the bill did not advance.

The movement recommended by the December 9 resolution is also consistent with the role of the Alabama State Bar in fulfilling its obligations as outlined in the bar's long range plan adopted last September:

(1) To provide leadership in enhancing the quality of justice and access to legal services; and

(2) To support an independent and quality judicial system.

Creation of the Citizens' Conference does not mean that the extensive work of the Task Force on Judicial Selection will be wasted. As noted in the resolution, the report of the task force, in some form, will be available to serve as a resource for the citizens conference and the task force will act as a liaison to the citizens conference on behalf of the bar to render assistance as the work of the conference progresses.

Reaction to the resolution calling for the citizens' conference has been tremendous and widespread. An editorial proclaimed "A Citizens Panel to look at reforming the way we select judges is an excellent idea" and even stated that the Alabama State Bar deserves a standing ovation for its moves to give the citizens a better system.

The selection of Governor Brewer and Justice Adams to head the citizens conference also received wide acclaim. It would be very difficult to find two more well-respected people in Alabama. Governor Brewer and Justice Adams have enthusiastically embraced the citizens conference concept and the job they have undertaken.

At this point we do not know what changes or recommendations will be made by the conference and we do not presup-

pose any particular outcome. We do know with the effective guidance of Governor Brewer and Justice Adams and with the input of this bar, the diverse group of citizens will conscientiously look for measures and methods to improve our judicial system.

We have asked that the Conference make a report to the board of bar commissioners and the Judicial Conference by April 10, 1995. It is hoped from this report appropriate legislation can be prepared for submission to the legislature which goes into session in late April 1995.

Now it is time for all of us to put aside differences we may have and get behind this effort. Now is the time when we must rise above special interests and do what is right for our profession and for the public we serve. I believe when we look back to 1994-95 we will be proud that the Alabama State Bar took a leadership role and did the right thing. ■

RESOLUTION OF THE ALABAMA STATE BAR CALLING FOR THE THIRD CITIZENS' CONFERENCE ON THE ALABAMA STATE COURTS

WHEREAS there is widespread public concern, which is shared by the Alabama State Bar, about judicial elections in Alabama, and the Alabama State Bar, through its Task Force on Judicial Selection, has previously spent much time extensively studying issues on involving the elected judiciary, including a study of the nonpartisan election of judges, other alternative means of judicial selection, and campaign financing for judicial elections; and

WHEREAS the Alabama Judicial Conference has also expressed an interest in an examination of the means and methods of judicial selection, and changes in the organization and operations of the Alabama Unified Judicial System; and

WHEREAS the Alabama State Bar was instrumental in organizing the first Citizens' Judicial Conference, held in 1966, and the second such conference, held in 1973, both of which led to the drafting and passage of the Judicial Article of the Alabama Constitution and the creation of Alabama's Unified Judicial System;

NOW, THEREFORE, BE IT RESOLVED that the Alabama State Bar, through its Board of Commissioners, hereby calls for and authorizes the formation of a Third Citizens' Conference on the Alabama State Courts, to be modeled generally on the 1966 and 1973 conferences, to study the selection of judges in Alabama, judicial campaign financing and other important issues affecting the administration of justice in Alabama;

BE IT FURTHER RESOLVED that former Governor Albert P. Brewer and retired Supreme Court Justice Oscar W. Adams, Jr. seek nominations for and select the participants in such conference.

BE IT FURTHER RESOLVED:

(1) That the persons designated above to solicit nominations and to select the participants are urged to ensure, to the extent possible, that the diversity of the state's population is represented at such conference, together with appropriate geographical, professional and political diversity;

(2) That the Alabama State Bar's Task Force on Judicial Selection report to the Citizens' Conference on its work and study in the area of selection of judges and campaign financing guidelines, and serve as a resource for the conference, as well as serving as a liaison to the Citizens' Conference on behalf of the Alabama State Bar, and rendering any other assistance to the Conference and reporting to the Board of Bar Commissioners on the work of the Conference as matters progress;

(3) That former Governor Albert P. Brewer and retired Supreme Court Justice Oscar W. Adams, Jr. retain vital, active and direct roles with the Conference;

(4) That the Citizens' Conference is requested to make an initial report to the Board of Bar Commissioners and to the Judicial Conference by April 10, 1995 on the issues of judicial selection and judicial campaign financing prior to the 1995 session of the Alabama Legislature.

AND BE IT FURTHER RESOLVED that the Alabama State Bar and its staff cooperate with the Administrative Office of Courts to coordinate staff support and facilities, and to seek funding for the Third Citizens' Conference on the Alabama State Courts.

DONE this 9th day of December 1994.

Keith B. Norman, Secretary
Alabama State Bar

WELCOME SUSAN ANDRES AND ED PATTERSON

In the fall of 1993, the Committee on Lawyer Public Relations and Advertising recommended to the board of bar commissioners that an audit of the bar's communications program be conducted. The board approved the audit which was conducted through the auspices of the Public Relations Section of the National Association of Bar Executives as a service to local and state bars. We were fortunate to have David Anderson, director of Public Affairs for the Illinois State Bar Association, spend two days at the state bar headquarters in March analyzing the bar's communication function. In his written report, Dave recommended the creation of the full-time position of director of communications and public information. This past September, at the recommendation of the bar's Public Relations Committee, this position was created.

Keith B. Norman

The timing of the board's action creating this new position was fortuitous because we were able to bring on board the ideal person for this position—Susan Andres. Susan, and her husband, Hoyt, had recently moved from Chattanooga, Tennessee. I say that Susan is the ideal person to serve as director of communications because she has the four key qualities for which we were looking: vision, enthusiasm, experience, and commitment.

A native of Oklahoma, Susan graduated from the University of Oklahoma. Having worked in the radio medium for 16 years, she possesses extensive marketing experience and media skills. Prior to coming to Montgomery, Susan spent the last two years as executive director of the Chattanooga Bar Association. In this position, Susan won wide praise and acclaim for her leadership in helping transform that association into one of the most dynamic small bars in the country. During Susan's tenure, Chattanooga bar members witnessed increased membership benefits, while the community at large benefited from new and innovative public service programs. As one of her past board members described:

Susan Andres

"Susan has demonstrated a highly sophisticated ability to tie together community needs and perceptions of lawyers in the practice of law with creative, positive ways in which CBA members individually may address those needs and perceptions...

"In summary, Susan can be credited with moving the CBA from being an intangible annual expense in an attorney's budget to a vibrant, productive professional organization which provides tangible resources for the multifaceted needs of its diverse membership."

Ed Patterson

Coupled with this background is Susan's commitment to public service and her past involvement with many professional and civic organizations. We are very fortunate to have a person of Susan's ability to serve as communications director. Susan and Hoyt have two children, a married daughter, Claire, who is with Prudential Securities in Jacksonville, Florida, and a son, Hoyt Hudson, who is a student at the Cincinnati Conservatory of Music.

The new director of programs is Ed Patterson. If Ed's name is familiar, it is because he joined the bar staff in 1976 following his clerkship with Justice Hugh Maddox. Ed entered private practice in 1981 after serving as the bar's assistant general counsel for four years and a brief stint as an assistant in the Attorney General's Office. Over the last 14 years, Ed has practiced in a law firm environment and as a sole practitioner.

I think Ed possesses many outstanding characteristics which make him well-suited for this position, including organizational ability, leadership and, most importantly, a high sense of professionalism. In addition, Ed has a keen apprecia-

tion for the rigors of private practice. A native of Montgomery, Ed received both his undergraduate and law degrees from the University of Alabama. He and his wife, Beverly, have two daughters, Elliot, a freshman at Auburn, and Erin, a junior at Trinity Presbyterian School. Besides his past and continuing involvement in many local community activities, in 1980 Ed received the Alabama State Bar Award of Merit for his outstanding service to the legal profession.

We are pleased to welcome Susan to the bar staff and to welcome Ed on his return. The bar is extremely fortunate to have these two truly outstanding people to compliment our fine staff.

Caution!

Attorneys in Active Practice in Alabama

Be sure that you have the required occupational license in your possession!

If you are actively practicing or anticipate practicing law in Alabama between October 1, 1994 and September 30, 1995, PLEASE BE SURE THAT YOU HAVE THE REQUIRED OCCUPATIONAL LICENSE.

The dual invoice which was mailed in mid-September provided you with the option of paying special membership dues (if you were not in active practice in Alabama) or buying the required occupational license to practice (if you were in active practice in Alabama) on this one invoice.

Direct any questions to:

Christie Tarantino, Membership Services Director, at 1-800-354-6154 (in-state WATS) or (334) 269-1515 immediately!

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 1995 to assume the presidency of the bar in July 1996. Any candidate must be a member in good standing on March 1, 1995. 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, 1995. 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 18, 1995**.

Commissioners

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits: 1st; 3rd; 5th; 6th, place no. 1; 7th; 10th, places no. 3 and 6; 13th, places no. 3 and 4; 14th; 15th, places no. 1. 3 and 4; 25th; 26th; 28th; 32nd; and 37th. Additional commissioners will be elected in these circuits for each 300 members of the state bar with principal offices therein. The new commissioners positions will be determined by a census on March 1, 1995 and vacancies certified by the secretary on March 15, 1995.

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 28, 1995).

Ballots will be prepared and mailed to members between May 15 and June 1, 1995. Ballots must be voted and returned 5 p.m. on the second Tuesday in June (June 13, 1995) to state bar headquarters.

Legislative Wrap-Up

By ROBERT L. McCURLEY, JR.

The new Legislature

When all the votes have finally been counted, the Legislature will find itself with 39 new House members and 14 new Senators; six of the Senators are first-timers in the legislative process. These 45 brand new legislators met at the Law Center in Tuscaloosa for an orientation December 7-9, 1994. They were joined by the returning legislators to hear about the legislative process, the state's financial condition, litigation involving the State of Alabama, and federal mandates which have been imposed on states due to the cutting back of federally financed programs, as well as the challenges for the next four years. They were addressed by Governor-elect Fob James, Lieutenant Governor-elect Don Siegelman and Speaker of the House of Representatives Jimmy Clark.

This orientation, the sixth held since 1974, was attended by over 130 legislators.

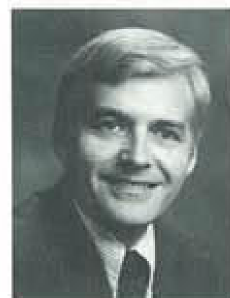
Lawyers comprise 13 of the 35 senatorial positions, but only 12 of the 105 seats in the House of Representatives. These law graduates come from eight law schools. Nine lawyers attended the University of Alabama; six, Cumberland School of Law; and five, Birmingham School of Law. There is one each from Jones Law School, Miles Law School, Harvard Law School, Catholic University, and Boston University.

The Legislature will convene for an orientation session January 10, 1995 with the inauguration held Monday, January 16, 1995. Some of the first items of business will be to develop legislative rules, elect officers and receive committee appointments. The Legislature will also receive the declaration of results of the elections for constitutional officers. In the event of a contest, the Legislature in joint assembly must determine any contest for these offices.

In addition to the annual budgets, the Legislature will have to solve the pending lawsuit involving equity funding of schools. Governor-elect James promised the Legislature that they would be presented with ethics reform legislation and also a revamping of the selection process of judges.

Attorney General-elect Jeff Sessions promised legislation that would shorten the time from arrest to trial to 90 days, similar to the federal system. He stated that he recognized there would be a phase-in period. Currently, time standards show that a felony is disposed of on the average of 270 days after indictment. Lt. Governor-elect Siegelman promised that the Senate would be more accessible to the public, and promised major reforms to make the legislative process work better.

For further information write Bob McCurley, Alabama Law Institute, P.O. Box 1425, Tuscaloosa, Alabama 35486, or call (205) 348-7411, fax (205) 348-8411. ■



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.

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Elizabeth Potter Graham, formerly managing attorney of Legal Aid Society of Birmingham, Inc., announces the opening of her office located at 3600 Clairmont Avenue, Birmingham, Alabama 35222. The mailing address is P.O. Box 12422, Birmingham 35202-2422. Phone (205) 323-5961.

Stephen H. Jones announces the relocation of his office to 2205 Morris Avenue, Birmingham, Alabama 35203. Phone (205) 251-6666.

Miles Logan Brandon, formerly with Lammons & Bell, announces the opening of his office at 101 Bob Wallace Avenue, Suite C, Huntsville, Alabama 35801. Phone (205) 533-9991.

E. Wray Smith, formerly of Webb & Eley, announces the opening his office located at 312 Montgomery Street, Suite 210, Montgomery, Alabama. The mailing address is P.O. Box 4386, Montgomery, Alabama 36103-4386. Phone (334) 263-5611.

Michael G. Strickland announces the opening of his office at 420 S. Lawrence Street, P.O. Box 563, Montgomery, Alabama 36101-0563. Phone (334) 269-3230.

Leigh A. Bradley, formerly Special Assistant U.S. Attorney in the Middle District of Alabama, was appointed by the President and sworn in by the Secretary of the Navy as the Principal Deputy General Counsel of the Department of the Navy. Bradley is a 1982 admittee to the Alabama State Bar.

Charles C. Elliott announces the relocation of his office to 956 Montclair Road, Suite 108, Birmingham, Alabama 35213. The mailing address remains P.O. Box 530893, Birmingham 35253-0893. Phone (205) 595-9400.

JoAlison Taylor announces the relocation of her offices to 215 N. 21st Street, Suite 903, Birmingham, Alabama 35203. Phone (205) 328-2606.

Richard C. Bentley is an administrative law judge with the Social Security Administration, Office of Hearings and Appeals. His office is located at 770 S. McDonough Street, Room 109, Montgomery, Alabama 36104. Phone (334) 223-7769.

E. Ray Large announces the relocation of his office to New South Federal Savings Bank Building, 4th Floor, 215 N. 21st Street, Birmingham, Alabama 35203-3776. Phone (205) 328-9650.

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AMONG FIRMS

Randolph B. Moore, III, Michael R. White and **Bruce B. Stone** announce the formation of **Moore, White & Stone**. Offices are located at 22 Scott Street, Montgomery, Alabama 36101 and 4161 Carmichael Road, Montgomery 36106. Phone (334) 262-7200, 271-1819.

Darla T. Furman and **M. Bruce Pitts** announce the formation of **Furman & Pitts**. Offices are located at 200 W. Court Square, Suite 748, Huntsville, Alabama 35801. Phone (205) 534-6410.

Jack B. Hinton, Jr., formerly of Rushton, Stakely, Johnston & Garrett, is now with **Carpenter & Gidiere**. Offices are located at 904 Union Bank Tower, 60 Commerce Street, Montgomery, Alabama 36104. Phone (334) 834-9950.

Darrell L. Cartwright and **Allan L. Armstrong** announce the formation of **Cartwright & Armstrong**. Offices are located at 3800 Colonnade Parkway, P.O. Box 43446, Birmingham, Alabama 35243. Phone (205) 969-5900.

Thomas Troy Zieman, Jr., Jerome E. Speegle, Thomas P. Oldweiler, Robert Gerald Jackson, Jr., and **Anthony M. Hoffman** announce the formation of **Zieman, Speegle, Oldweiler & Jackson.** Offices are located at 3200 First National Bank Building, 107 St. Francis Street, Mobile, Alabama 36602. The mailing address is P.O. Box 11, Mobile 36601. Phone (334) 694-1700.

L. Sharon Egbert announces that **Lora Lea Johnson** has joined the firm as an associate. Offices are located at Houston Place, 119 S. Foster Street, Suite 103, Dothan, Alabama 36301. Phone (334) 702-0502.

J. Callen Sparrow and **Patrick M. Lavette**, formerly of Hare, Wynn, Newell & Newton, announce the formation of **Sparrow & Lavette**. Offices are located at Brown Marx Tower, 2000 1st Avenue, North, Suite 940, Birmingham, Alabama 35203. Phone (205) 252-4111.

Randolph B. Walton and **Allen A. Ritchie** announce the formation of **Walton & Ritchie**. Offices are located at 80 Saint Michael Street, Staples Pake Building, Suite 304, Mobile, Alabama 36602. The mailing address is P.O. Box 470, Mobile 36601-0470. Phone (334) 433-1737.

W. Lewis Garrison, Jr. and **Kathryn H. Sumrall,** both formerly of Corley, Moncus & Ward, announce they have merged with **K. Stephen Jackson** and will practice as **Jackson, Garrison & Sumrall**. Offices are located at 2420 Arlington Avenue, Birmingham, Alabama 35205. Phone (205) 933-2900.

H. Jerome Thompson announces the association of **Sean D. Masterson**. Offices are located at 15086 Court Street, Moulton, Alabama. The mailing address is P.O. Box 593, Moulton 35650. Phone (205) 974-3007.

Gerard J. Durward and **Terry M. Cromer** announce the formation of **Durward & Cromer**. Offices are located at 1150 Financial Center, 505 20th Street, North, Birmingham, Alabama 35203. Phone (205) 324-6654.

Holt, Cooper & Upshaw announces that **Kelli Hogue-Mauro** has joined the firm as an associate. Offices are located in the Frank Nelson Building at 205 N. 20th Street, Suite 1020, Birmingham, Alabama 35203. Phone (205) 322-4551.

Leitman, Siegal, Payne & Campbell announces that **Charles M. Elmer, John Joseph Kubiszyn, David M. Loper** and **Thomas A. Edenbaum** have become associated with the firm. Offices are located at 600 N. 20th Street, Suite 400, Birmingham, Alabama 35203. Phone (205) 251-5900.

Dominick, Fletcher, Yeilding, Wood & Lloyd announces that **Jim McLaughlin** and **Hunter Compton, Jr.** have become associated with the firm. Offices are located at 2121 Highland Avenue, Birmingham, Alabama 35205. The mailing address is P.O. Box 1387, Birmingham 35201. Phone (205) 939-0033.

Tanner & Guin announces the association of **Blake A. Madison** and **Joseph K. Beach**. Offices are located at Capitol Park Center, 2711 University Boulevard, Tuscaloosa, Alabama 35401. Phone (205) 349-4300.

Clark & Scott announces that **Albert Ashley Ayers, Michael B. Odom, Michele C. O'Brien** and **Keith S. Miller** have become associates. Offices are located in Mobile and Birmingham, Alabama.

Watson, Gammons & Fees announces that **Samuel H. Givhan** has become associated with the firm. Offices are located at 200 Clinton Avenue, West, Suite 800, Huntsville, Alabama 35801. Phone (205) 534-3463.

Morris, Cloud & Conchin announces that **Clinton C. Carter** has become an associate. Offices are located at 521 Madison Street, 2nd Floor, Huntsville, Alabama 35801. The mailing address is P.O. Box 248, Huntsville 35804. Phone (205) 534-0065.

Cabaniss, Johnston, Gardner, Dumas & O'Neal announces that **Lisa J. Wathey, David C. Skinner** and **James T. Pugh** have become associates of the firm. Offices are located at Park Place Tower, 2001 Park Place North, Suite 700, Birmingham, Alabama 35203. The mailing address is P.O. Box 830612, Birmingham 35283-0612. Phone (205) 252-8800.

Merrill, Porch, Dillon & Fite announces that **Robert M. Field**, former district attorney for Calhoun and Cleburne counties, and **William J. Miller** have joined as associates. Offices are located at SouthTrust Bank Building, 1000 Quintard Avenue, Anniston, Alabama 36201. Phone (205) 237-2871.

Gobelman & Love announces that **O. Mark Zamora,** formerly of Rumrell & Johnson, has joined as a senior associate. Offices are located at SunBank Building, 200 W. Forsyth Street, #1700, Jacksonville, Florida 32202. Phone (904) 359-0007. Zamora is a 1988 admittee to the Alabama State Bar.

Ford & Hunter announces that **Christa L. Hayes** has become an associate. Offices are located at 645 Walnut Street, Suite 5, Gadsden, Alabama 35902. The mailing address is P.O. Box 388, Gadsden. Phone (205) 546-5432.

Clark, Scott & Sullivan announces that **Michele C. O'Brien** and **Keith S. Miller** have become associates. Offices are located at First Alabama Bank Building, 10th Floor, P.O. Box 1034, Mobile, Alabama 36633.

Rosen, Cook, Sledge, Davis, Carroll & Jones announces that **Paige M. Carpenter** has become associated with the firm. Offices are located at 1020 Lurleen Wallace Boulevard, North, Tuscaloosa, Alabama 35401. Phone (205) 345-5440.

Gaines, Gaines & Rasco announces that **Thomas M. Little** has become an associate. Offices are located at 127 North Street, Talladega, Alabama 35160. The mailing address is P.O. Box 275, Talladega 35160. Phone (205) 362-2386.

Engel, Hairston & Johanson announces that **Nathan R. Norris** has become an associate. Offices are located at 109 N. 20th Street, 4th Floor, Birmingham, Alabama 35203. Phone (205) 328-4600.

McRight, Jackson, Dorman, Myrick & Moore announces that **William T. McGowin, IV** and **Randall Scott Hetrick** have become associated with the firm. Offices are located at 1100 First Alabama Bank Building, P.O. Box 2846, Mobile, Alabama 36652. Phone (334) 432-3444.

Wainwright & Pope announces that **George M. Vaughn** has become associated with the firm. Offices have been relocated to 2 Metroplex Drive, Suite 305, Birmingham, Alabama 35209. Phone (205) 802-7455.

Lehr, Middlebrooks & Proctor announces that **Julie S. Scharfenberg** has become an associate. Offices are located at 2021 3rd Avenue, North, Suite 300, Birmingham, Alabama 35203. Phone (205) 326-3002. ■

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BUILDING ALABAMA'S COURTHOUSES

DALLAS 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.*

DALLAS COUNTY

The first contact of Europeans with present-day Dallas County probably took place in the summer and fall of 1540 when Hernando DeSoto passed through on his way to the Indian town of Maubila. The DeSoto chronicles relate that DeSoto arrived at a small village named "Casiste", which many believe was the original site of Cahaba, located where the Cahaba River joins the Alabama.

During the next century and a half, there was only limited contact between Europeans and the native population. However, an early map by the French cartographer D'Anville in 1732 marked another important site in what is now Dallas County. French Governor Bienville from Mobile had encountered the Alibamo Indians at a bluff overlooking the Alabama River. This locale became known as "Ecor Bienville" on D'Anville's map. This place was later called the "High Soap Stone Bluff" by the few white settlers in the area. In 1815 a pioneer from Tennessee, Thomas Moore, settled at the site and the area became known as Moore's Bluff. This place was located on the Alabama River upstream from Cahaba. Both of these locations, Cahaba and the Bluff, subsequently served as county seats of Dallas County.

On March 3, 1817, Congress created the Alabama Territory. The Territory contained seven counties that were previously part of the Mississippi Territory. Within one year, due to the arrival of more settlers, 13 new counties were created. Dallas County was established on February 9, 1818 as one of the 13. The county was named for Alexander James Dallas.

Dallas was born on the island of Jamaica on June 21, 1759. He studied in Edinburgh, Scotland and London, England. In 1783, he came to Philadelphia and practiced law there. He held public office in Pennsylvania and was named

Present Dallas County Courthouse

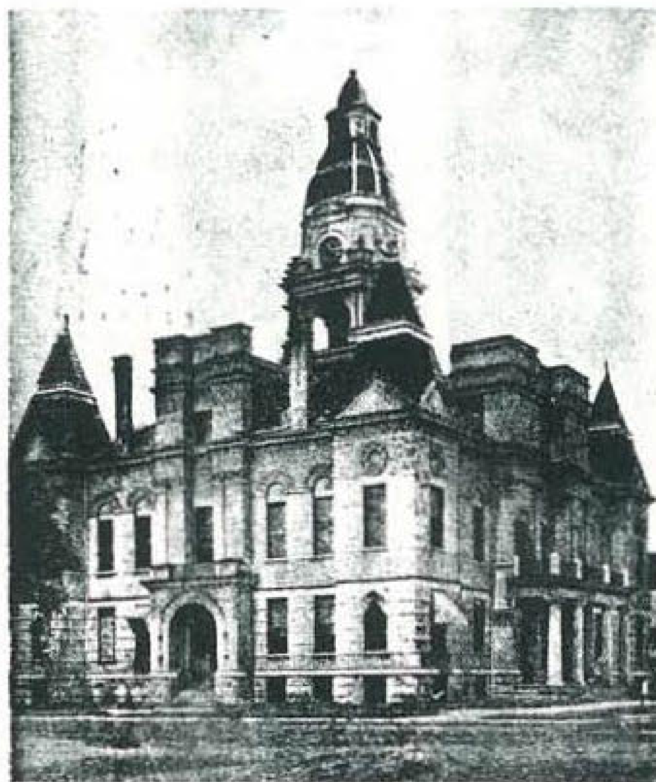
Dallas County Courthouse annex, 1979

Secretary of the Treasury by President James Madison, serving in that capacity from 1814 to 1816. He recommended the incorporation of a new United States Bank, and when he left office, the United States Treasury had a surplus of $20 million. Dallas died on January 14, 1817. One year later the Alabama Territorial Legislature named a county in Alabama for him.

As a sidenote to history, his son, George M. Dallas, followed his father into public service. George was vice-president of the United States from 1845 to 1849 under President James K. Polk. The Mexican War took place during this administration. Dallas, Texas was named for the vice-president. Thus, Dallas County, Alabama, and Dallas, Texas were named respectively for a father and a son.

When the Alabama Territory was created by Congress, St. Stephens became the territorial capital. It was a small but flourishing town in Washington County. However, Alabama had to establish a permanent capital as it moved toward statehood. On February 13, 1818, the legislature appointed a commission to select the most central and eligible location for the seat of government. This committee reported back to the legislature that the capital should be located at the mouth of the Cahaba River where it joins the Alabama. The legislature approved this report on November 21, 1818. This selection was a victory for the promoters of south Alabama. A second recommendation, to placate representatives from the Tennessee Valley, named Huntsville as the temporary capital until the new capital city could be established. Thus, when Alabama attained statehood in December 1819, the first state legislative session took place in Huntsville.

Governor William Wyatt Bibb was authorized by the legislature to secure the suggested land for a capital from the United States government, to have a town to be called "Cahaba" surveyed into lots, and to advertise and sell the lots. The public sale took place during the fourth week of May in 1819. One hundred eighty-two lots were sold for $123,856. One-fourth of this amount was collected in cash. The proceeds from the sale were earmarked for the erection of necessary public buildings.


1902 courthouse

The governor proceeded with a request for bids for the first "permanent" statehouse of Alabama. No contemporary description after construction and no pictures exist of this building. The advertisement for bids called for a brick structure, two stories high, 58 feet long, 43 feet wide, with each story 12 feet in height. Two chimneys and eight windows were to be included at each end, with 12 windows on each front of the structure. The contract was to be completed on or before the first Monday in June 1820.

David and Nicholas Crocheron were low bidders and received the contract for $9,000. The time for completion was extended until August 1, 1820. The second state legislative session of Alabama, the first held in Cahaba, convened on November 6, 1820.

When Dallas County was created in February 1818, no town of Cahaba existed. The legislative act specified that courts would be held at the mouth of the Cahaba River or due to the lack of necessary buildings, the courts might adjourn to "some convenient place contiguous thereto". The first court in Dallas County was held at the home of Captain John Howard in June 1818. Over the years other private citizens were paid for the use of rooms in their homes for holding court.

On December 3, 1819, the town of Cahaba was incorporated. On December 13, 1819, Cahaba was officially named the county seat of Dallas County. Thus, the new town was at the same time the state capital and the capital of its county. Cahaba rapidly gained in prominence. In April 1825, for example, the town hosted a lavish banquet for the visiting General LaFayette during his tour of the United States.

However, Cahaba's rapid rise soon faltered. Cahaba's geographical significance was its location at the confluence of two rivers. The Cahaba River encircled the town on two sides, and the Alabama bordered it on a third. Soon after its creation, flooding and high waters became a frequent problem. And, due to all the standing water, there was a fear of yellow fever and similar diseases during the summer "sickly season". It was reported that many members of the bar and even certain justices refused to attend supreme court sessions due to their apprehensions about sickness.

Perhaps the legislature that selected Cahaba as the "permanent" capital fore-

saw these problems. Perhaps that legislature knew that the Indian word "Cahaba" meant "water above" referring to the river's penchant for frequent flooding. In any event, the Act naming Cahaba the capital contained an escape clause. It stated that legislative sessions would be held in Cahaba beginning from 1820 through the first session of the legislature in 1825. After that time the capital could be removed.

There was much political maneuvering to move the capital during the legislative session of 1825. Several sites for the capital had supporters including Selma, Montgomery, Wetumpka, Centreville, and Tuscaloosa. On Monday, December 12, a proposal in the House to locate the capital in Autauga County (Wetumpka was part of Autauga at that time) lost by vote of 31 to 30. The next day a vote was taken to remove the capital to Tuscaloosa. This time the vote was 38 to 26 in favor of removal. All state offices would be moved to Tuscaloosa by June 1, 1826.

The legislature gave the Senate doorkeeper the duty of collecting and storing all moveable state property in the senate chamber, and giving the key to that room to the state treasurer. The treasurer was to sell all items not moved to Tuscaloosa and was specifically authorized to sell the statehouse itself for not less than $3,000.

Although Cahaba was no longer the State capital, the town refused to die. It became the leading cotton shipping port on the Alabama River. Large warehouses and mercantile enterprises were established. Old homes were repaired and new residences of fine architectural design were erected. And Cahaba remained the county seat town of Dallas County.

After the capital relocated to Tuscaloosa, the State of Alabama was not able to sell its former statehouse building. On January 13, 1830, the state donated the old capital building and the lot on which it stood to Dallas County for use as a courthouse. Then a flood on March 26, 1833 severely damaged the structure. The courthouse could no longer be used, and so once again the courts were housed in temporary quarters in Cahaba.

On December 7, 1833, the legislature approved an election to be held on the first Monday in February 1834 for the purpose of determining public sentiment on removing the county seat. The election result did not favor removal, so Dallas County leveled the damaged former statehouse at Cahaba and used the bricks and other materials for a new courthouse structure. Unfortunately, the builder could not complete the job quickly and a new courthouse was not finished until late summer or early fall of 1838. The new courthouse was two stories in height. It was located within the enclosure of Arch Street at the corner of Vine and First North streets.

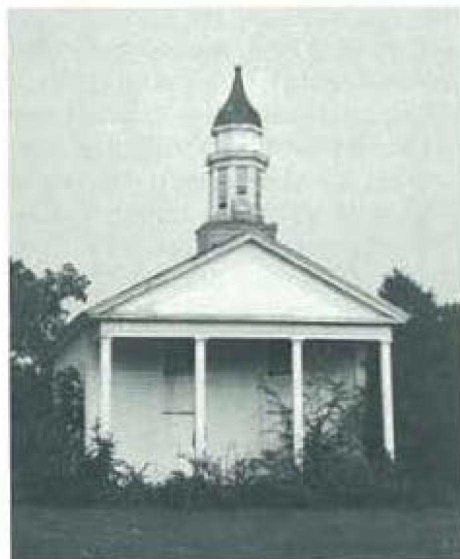
First Selma courthouse

Courthouse after 1926 annex was added. Note changes in roof lines.

Between 1840 and 1860, Cahaba reached the height of its prosperity, attaining a population of approximately 5,000. After 1860, Cahaba began to decline, ultimately becoming a ghost town. The reasons that Cahaba became a ghost town are numerous. The town was bypassed by new railroads. River traffic declined. The Civil War depleted the male population, many of whom left to join the "Cahaba Rifles", a local regiment. The cotton trade ended and a cotton warehouse was converted into the second largest prison in the South, known as "Castle Morgan". Finally, another devastating flood inundated the town in March 1865. Following this flood the federal prisoners were paroled, and the end of the Civil War, with the freeing of the slaves, left the area without its usual source of labor.

An Act of the legislature on December 14, 1865 called for an election on removal of the county seat from Cahaba to Selma. The vote, taken on the first Monday in May 1866, approved the move. By the 1870s, most of the citizens in Cahaba had moved away also. By 1900 most of the structures had deteriorated, burned, or been moved. Few buildings survived past 1930. Today plans are being made for a state historical park at the site of Alabama's first state capital, but the area remains only a ghost town with dirt roads and a

The State House at Cahaba



Church at Lowndesboro (1833) with dome from first state capitol and Dallas County Courthouse

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.

few signs to mark the significance of this place in the past.

A part of the past at Cahaba dating back to 1820 still exists today. The crown of the original statehouse, flood damaged in 1833, was saved. Major William Robinson (1799-1882), a wealthy planter, purchased the three-staged cupola from Dallas County. It consisted of an octagonal belfry, lantern, and copper-plated dome. He removed this work to the Methodist Church built at Lowndesboro in 1833. This building is one of the oldest church structures still standing in the Black Belt area of Alabama. In later years the church was taken over by a black congregation. It ceased to be used in 1983, but the dome from Alabama's first capital building still rises above the Alabama landscape. It is hoped this feature will be permanently preserved.

It was previously mentioned that a high bluff overlooking the Alabama River had been successively called Ecor Bienville (Bienville's Bluff), the High Soap Stone Bluff, and Moore's Bluff. In 1819 a land development company, which included William Rufus King among its six members, purchased the site to develop a new town. He suggested the name "Selma" after reading the "Song of Selma", from James McPherson's *The Poems of Ossian.* In Gaelic, Selma means a "high throne", and the particular poem considered by King referred to Selma as a royal fortress.

William Rufus King, before becoming one of Selma's founding fathers, had been a Congressman from North Carolina. He represented Dallas County in the first Alabama Constitutional Convention. He was elected Alabama's first United States Senator, and he held that position from 1819 to 1844, and from 1848 to 1853. He was elected vice-president of the United States in November 1852, but, due to declining health from tuberculosis, he went to Cuba for the winter prior to assuming his office. He is the only major American government figure to begin his term of office on foreign soil when he took his oath of office in Cuba on March 4, 1853. He returned to Selma where he died on April 18, 1853 at the age of 67. He is buried at Live Oak Cemetery in Selma.

In its early years, Selma was overshadowed by its neighbor, Cahaba, the state capital. Once the capital was removed from Cahaba, however, the two towns became rivals for dominance in Dallas County. Selma became prominent as a cotton shipping port. The Ladies' Educational Society organized the building of schools there. A number of its leaders worked to make Selma a railroad center, and to introduce industries to the town. During the Civil War, the Confederate government located an arsenal, naval yard, and naval ordnance works at Selma. Confederate iron clad ships for defense of Mobile were built there. During the war Selma was surpassed only by Richmond in the manufacture of war material. The city was captured by the Federals on April 2, 1865. Its industry soon lay in ashes.

Within a very short time Selma was rebuilt. In 1866 the county seat moved to Selma, and its dominance in Dallas County became secure.

The first courthouse in Selma was a building constructed in the 1840s. It was built by the Selma Fraternal Lodge No. 27 of Free and Accepted Masons at a cost of $15,000. The Masons and the Ladies' Educational Society operated a school in this building which was known as the Central Masonic Institute. The Institute was incorporated on February 19, 1848, and opened for students in October of that year. The

purpose of the institute was to educate orphans and the children of indigent Masons. The venture was ultimately a financial failure, though, and the building was foreclosed.

During the Civil War, the former school was converted into a hospital and served sick and wounded Confederate soldiers. Perhaps it was this humanitarian purpose that persuaded Union General James Wilson, who captured Selma, to spare the building. Shortly after the war, the City of Selma purchased the building and offered it to Dallas County for a courthouse if the county seat would be moved. As previously described, the move took place in 1866.

This courthouse is a three-story red brick Greek Revival structure. It is rectangular with four Ionic columns rising three stories to support a pediment above a central portico. The front facade has both a second- and third-story balcony.

The first floor of the structure housed the probate judge's office, an office for the tax collector, and one for the sheriff. The second floor contained the register in chancery office, the circuit clerk's office, and an office for the clerk of the city court. One-half of the third floor was used for a courtroom. The other half was used for jury rooms with one room set aside for a law library used by the Dallas County bar. This building served as the courthouse until the spring of 1902 when a new courthouse was completed and occupied.

In later years the building reverted to its former uses. In 1904 it again housed a school, the Selma Military Institute. In 1911 the trustees of the Henry W. Vaughan estate converted the building into the Vaughan Memorial Hospital. It remained a hospital until 1960 when a new Vaughan Hospital was built. The building stood vacant for almost ten years and became a target for vandals and vagrants.

In 1969 the City of Selma repurchased the property that it owned over 100 years previously. With the assistance of Dallas County, the Selma Housing Authority, and a federal grant, the building was renovated and renamed "The Historic and Civic Building". It was listed on the National Register of Historic Places on June 20, 1975. Today the structure is known as the Joseph T. Smitherman Historic Building. It was named for the long-time mayor of Selma, Joe Smitherman, who played a major role in preserving and restoring the building. It now serves as a museum and civic meeting place. The City of Selma must be commended for saving this historic structure.

According to the census of 1870, Dallas County was third in population in Alabama following Mobile and Montgomery. By 1880, Selma was the fourth largest city in the state. Befitting its status and its wealth, and due to the growth of the county, a new courthouse was needed. Also, it was felt that the old Masonic building was too far away from the business center of Selma. A new courthouse was then planned for the northwest corner of Alabama Avenue and Lauderdale Street.

The cornerstone was laid at 11 a.m. on October 9, 1900. The contract price was approximately $38,000. This building was built in the Romanesque style and contained a massive clock tower. It was completed in the spring of 1902. In 1926, an annex was added to the structure on the Lauderdale Street side.

On Sunday, July 7, 1957, the clock tower of the Dallas County Courthouse collapsed into the building, causing extensive damage. Luckily no one was hurt because the disaster took place on a Sunday. Five days previously, lightning had struck the courthouse. The county contended in a lawsuit that this act of nature caused the crash. Insurance companies believed that faulty construction and the addition of air conditioning units weakened the structure and caused the damage.

Regardless of the true cause, Dallas County decided to rebuild the courthouse on the same site. A modern design was chosen and Warren, Knight & Davis from Birmingham were architects for the project. Cooper Brothers Construction Co., Inc. of Selma served as contractor.

This new courthouse is three stories in height with a basement and a modern clock tower. The 1926 annex was retained but modernized. The project was completed and the building occupied in April 1960, and cost more than one million dollars. It was on the steps of this courthouse where demonstrators led by Dr. Martin Luther King, Jr. confronted law enforcement officials in 1965 in an attempt to register to vote. The demonstrations and protests in Selma led to the passage of the 1965 Voting Rights Act.

In 1979, Dallas County added another annex to the courthouse building. At this time the architect was Wiatt, Wilson, & Cole, Inc. and the general contractor was Andrew & Dawson. The cost of the annex was approximately $360,000. This annex is brick and of modern design. It houses the commissioners' court, circuit judges' offices and courts, and other offices. ■

The author gratefully acknowledges assistance given to him in the preparation of this article by attorney William J. Bryant of Birmingham, formerly of Selma; attorney Ralph N. Hobbs of Selma; and author Kathryn Tucker Windham of Selma.

Additional sources: *Three Capitals*, William H. Brantley, Jr., *Selma, Queen City of the Black Belt*, Alston Fitts, III; *Selma: Her Institutions and Her Men*, John Hardy; *The Story of Selma*, Walter M. Jackson.

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• **M. Clay Alspaugh** and **W.A. Kimbrough, Jr.** recently became Fellows of the American College of Trial Lawyers. Membership, which is a position of honor, is by invitation of the Board of Regents.

Alspaugh is a partner in the Birmingham firm of Hogan, Smith & Alspaugh, and is a graduate of Cumberland School of Law.

Kimbrough is a partner with the firm of Turner, Onderdonk, Kimbrough and Howell, with offices in Chatom and Mobile. He is a graduate of the University of Alabama School of Law.

• **Gregory S. Cusimano** was recently designated a Diplomat of Trial Advocacy by the National College of Trial Advocacy. He is the first lawyer in Alabama and one of only nine lawyers in the U.S. to have received this distinction. He practices in Gadsden with the firm of Floyd, Keener, Cusimano & Roberts.

In addition, he and **Michael L. Roberts**, of the same firm, have recently co-authored the *1994 Cumulative Supplement of the Alabama Tort Law Handbook*, released for publication by the Michie Publishing Company.

• **Macon County District Judge Aubrey Ford, Jr.** was recently appointed to be the 1994-95 co-chairperson of the Committee on Rural Courts of the ABA National Conference of Special Court Judges.

The National Conference of Special Court Judges is composed of hundreds of judges from across the nation and is part of the ABA Judicial Administration Division. The mission of the conference is to represent special court judges to the legal profession and the public; to promote a representative, educated and sensitive judiciary providing equal justice under the law; and to assist judges in meeting challenges facing the judiciary.

Judge Ford has been on the bench since 1977 and is a graduate of Howard University School of Law in Washington, DC. Judge Ford is also a member of the Alabama State Bar Committee on Alternative Dispute Resolution. ■

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OPINIONS OF THE GENERAL COUNSEL

By ROBERT W. NORRIS, general counsel

UESTION:

"This letter concerns a business enterprise I am currently in the process of forming and my need for a formal opinion from the bar association concerning my solicitation for clients of said business.

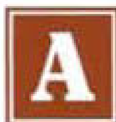
"Earlier this year, I was contacted by several persons in the medical/dental field (providers) to handle their collection accounts. It occurred to me that these persons might derive great benefits from a data bank which would in turn provide them with information concerning any past due accounts their prospective patients owed to providers in the general geographical area, as well as the state.

"The business would operate very similarly to an ordinary credit bureau, except it would be limited to information given to me by the providers, not any other businesses. The provider would contact me prior to accepting the person as a patient to see if they have any outstanding accounts with other providers in the geographical area. I would charge the provider a yearly fee for this service. Absolutely no collections would be given to my law as this new business would not operate as a 'feeder' for the firm for collections work. My questions are these:

1. May I inform the providers I wish to solicit on my letterhead, and if so, do I need to provide a disclaimer pursuant to Rule 7.2 of the Code of Professional Responsibility?

2. If I am unable to solicit this business on my letterhead and do it on the letterhead of the new enterprise (tentatively called The Dental Co-op, Inc.) will I have to put the disclaimer on said solicitation pursuant to Rule 7.2, simply because I am an attorney?

"Your opinion would be greatly appreciated as I am getting geared up with this project and do not want to violate any possible rules concerning solicitation. I do need an official opinion for my files as quickly as time would permit."



NSWER, QUESTION ONE:

You may inform the providers you wish to solicit on your letterhead. Pursuant to Rule 7.2(e), Rules of Professional Conduct, your solicitation letter must include the "disclaimer."

ISCUSSION:

The Rules of Professional Conduct allow you to use the proposed form of targeted mail solicitation to contact providers about your credit information "network." Your participation must be restricted to that of an employee of the "network." The Disciplinary Commission has previously held in RO-85-05 that:

"As a stockholder or partner in the computer services company you could not ethically act as manager of its debt collection and if the debts are not collected by the methods ethically employed by a typical collection agency (See *State v. Dunn and Bradstreet, Inc.*, 352 F. Supp. 1226, affirmed 472 Fed. 2d 1049 and *State v. Alabama Association of Credit Executives*, 338 So. 2d 812), as an attorney file suit against the debtor for the claim since you would be using another business or profession as a cloak for solicitation of legal work or as a feeder to your law practice."

The Commission therein reasoned that as part owner of said business, the lawyer had a "feeder" for his law practice which activity and/or arrangement was prohibited by Disciplinary Rules 2-103(A)(1) and (4).

The Disciplinary Commission has consistently held that direct targeted mail solicitation by a lawyer is permissible provided that the mailed solicitation letter complies with the applicable Rules of Professional Conduct, including the "disclaimer" provision of Rule 7.2(e).

NSWER, QUESTION TWO:

The answer to Question One, allowing use of your lawyer letterhead, pretermits consideration of this question.

[RO-91-14]

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PITFALLS IN ESTATE PLANNING WITH IRAS

By Wendell Cauley and Pamela L. Mable

This article discusses the minimum distribution rules applicable to individual retirement arrangements or IRAs and focuses on some of the benefits and problems which can arise when an IRA is part of a decedent's estate.

Overview of IRAs

An IRA is a generic term referring to either an individual retirement account or an individual retirement annuity. An individual retirement account is a trust or custodial account established for the exclusive benefit of an individual and the individual's beneficiaries[1] while an individual retirement annuity is an annuity contract or endowment contract issued by an insurance company that meets certain requirements set out in the Internal Revenue Code and promulgated by the Treasury Department.[2]

Basically, an IRA is the personal equivalent of a moderately funded retirement plan that allows employees, self-employed individuals and certain other individuals (whether or not they participate in qualified employer retirement plans such as profit sharing plans, Keogh plans, simplified employee pensions (SEPs), tax-sheltered annuities, or government plans) to establish IRAs and make annual contributions to them. Individuals can contribute an additional $2,000 of their compensation or earned income for an individual IRA or, if married, can also contribute an additional $250 for a spousal IRA. Contributions made to an individual's IRA may be available as deductions against income to the owner of the IRA but certain deduction limits apply if the individual's adjusted gross income exceeds specified amounts and the owner's spouse participated in a qualified employer retirement plan.[3] Also, certain specialized IRAs can be used to receive lump sum distributions from an individual's employer-sponsored qualified retirement plan.

Because IRAs are readily available to individuals for deductible contributions and, under other circumstances, for nondeductible contributions as well as depositories for lump sum distributions from an employer-sponsored qualified retirement plan, an IRA could potentially constitute a major asset of the individual's estate. Although many of the rules applicable to IRAs apply to qualified retirement plans such as pension, profit sharing, stock bonus and annuity plans, as well, where an IRA comprises an asset of an individual's estate an estate planner should not overlook the application of the minimum distribution rules applicable to an IRA. The minimum distribution rules may have a substantial impact not only upon an IRA owner's retirement planning such as withdrawals from an IRA by the owner during his or her lifetime, but also upon the ultimate distribution of the IRA owner's estate at death and upon any beneficiary of the IRA. Also, failure to satisfy the minimum distribution requirements may result in certain onerous economic burdens and even penalties.[4]

Overview of the Minimum Distribution Rules

Once distributions from an IRA are required to begin, the IRA owner must withdraw a certain amount during each year or be subject to a penalty for insufficient withdrawals. The minimum distribution rules require that the IRA owner's interest in the IRA be distributed in its entirety (a) no later than the required beginning date (generally, April 1 following the calendar year in which the IRA owner reaches age 70), or (b) beginning no later than the required beginning date during one of the following four time periods:

(1) the actual life of the IRA owner;

(2) the combined actual life of the IRA owner and the life expectancy of a "designated beneficiary";

(3) a period not extending beyond the life expectancy of the IRA owner; or

(4) a period not extending beyond the life expectancy of the IRA owner and his "designated beneficiary."

Thus, if the IRA owner has named a beneficiary that, for purposes of the minimum distribution rules, qualifies as a "designated beneficiary," the designated beneficiary's life expectancy can affect (i) the time period during which the IRA owner's interest is distributed

and the amount of each distribution during the IRA owner's lifetime, and (ii) the period after the IRA owner's death during which the assets remaining in the IRA must be distributed to the designated beneficiary.

Who is a "Designated Beneficiary" for purposes of the Minimum Distribution Rules?

A "designated beneficiary" is any *individual* designated as a beneficiary under the terms of the IRA, or, if the IRA provides, by the IRA owner's affirmative election specifying the beneficiary, and who is, upon the IRA owner's death or other specified event, entitled to the remaining portion of the IRA owner's interest or benefit. According to the minimum distribution rules, only an individual may be a "designated beneficiary." One exception to the "individual only" rule is applied to certain trusts resulting in the trust beneficiaries being treated as "designated beneficiaries" of the IRA.

While an estate may be named as a beneficiary of an IRA, the estate will *not* be a "designated beneficiary" for purposes of the minimum distribution rules.[5] Some analysis here may be helpful. It is not uncommon for a decedent to designate his or her estate as a beneficiary on such items as a life insurance policy or other personal effects. However, naming an estate as an IRA beneficiary will not alter the period over which the IRA owner's benefits may be paid; that is, the lives of the beneficiaries of the estate will *not* affect the period over which the IRA is distributed. The reason for this is quite obvious: If the IRA owner's estate remains the named beneficiary of the IRA, distributions from the IRA commencing during the owner's lifetime will have to be entirely paid out over (i) the owner's actual life, or (ii) over a period that does not exceed the owner's life expectancy. The potential effect of naming one's estate as beneficiary of the IRA is to accelerate the payment of income taxes on distributions from the owner's IRA over considerably shorter time periods than would be required if distributions from the IRA could be stretched out over the IRA owner's and a "designated beneficiary's" joint lives, or joint life expectancies.[6]

Like an estate, a trust may also be an IRA owner's named beneficiary, and upon the IRA owner's death, the recipient of any remaining interest in an IRA. For purposes of the minimum distribution rules, however, the trust itself will not be the "designated beneficiary." Nevertheless, if the following requirements are met in regard to a trust named as a "designated beneficiary," the beneficiaries of the trust will, for purposes of the minimum distribution rules, be treated as "designated beneficiaries":

(1) the trust is a valid trust under state law, or would be valid if it were funded;

(2) the trust is irrevocable;

(3) the beneficiaries of the trust can be identified; and

(4) a copy of the trust instrument is provided to the IRA custodian (e.g., the sponsor of the IRA).

For purposes of the minimum distribution rules, where there are multiple beneficiaries of a trust, the beneficiary whose life expectancy is the shortest is treated as the "designated beneficiary" and that beneficiary's life expectancy is utilized in determining the period of distribution.

If an IRA owner designates a trust as a beneficiary and the four criteria listed above are *not* met, then the IRA owner is treated as if he or she does not have a "designated beneficiary," and the IRA distributions that commenced during the owner's life will have to be paid out entirely either (i) during the IRA owner's actual lifetime, or (ii) during a period that is no longer than the IRA owner's actuarially-determined life expectancy. We will discuss below how the four trust requirements listed above might be met with respect to a typical IRA and estate plan.

Overview of distributions after death

Under the minimum distribution rules, where distribution to an IRA owner begin during the owner's lifetime, but are not completed prior to the owner's death, the remaining interest must continue to be distributed at least as rapidly as it would have been under the method of distribution that was in effect at the date of the IRA owner's death.[7] When an IRA owner dies before

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payments begin or before the required "beginning date" (i.e., April 1 of the year following the calendar year when the IRA owner reaches age 70), the distributions are nevertheless treated as having commenced during the IRA owner's life and the owner's IRA must be distributed in one of following methods:

(1) The entire IRA must be distributed within five years after the IRA owner's death (this provision is referred to below as "the five-year rule");

(2) Distributions may be made to (or for the benefit of) a "designated beneficiary" under an exception to the five-year rule, if the benefit, or the portion payable to the "designated beneficiary," is distributed, over the life of the "designated beneficiary" beginning within one year after the IRA owner's death, or is distributed over a period which does not extend beyond the life expectancy of the "designated beneficiary"; or

(3) Distributions may be made to the IRA owner's surviving spouse under an exception to the five-year rule, if the portion to which the surviving spouse is the "designated beneficiary" is distributed over the life of the surviving spouse, or over a period not longer than the life expectancy of the surviving spouse, beginning no later than when the employee would have reached age 70.[8]

Application of the foregoing rules to an IRA owner's estate plan

The designation of an IRA owner's estate as the IRA beneficiary, if not modified, will mean that, for purposes of the minimum distribution rules discussed above, the IRA owner will have *no* "designated beneficiary," and any distribution of benefits which begins during the IRA owner's life will have to be distributed either (i) over the period of the owner's life, or (ii) over a period that is not longer than the owner's life expectancy. If the distribution of benefits does not commence until after the owner's death, the five-year rule would apply, meaning that the owner's IRA would have to be entirely distributed within five years after the owner's death.

Under these circumstances, income taxes which could have been deferred for several years would have to be paid earlier than would have been the case. That is, income taxes on the owner's entire IRA would have to be paid within five years of the IRA owner's death. Thus, in some instances, it may be desirable to modify the beneficiary designation in an IRA to name a beneficiary that will, for purposes of the minimum distribution rules, be a "designated beneficiary" so that a reasonable deferral of the income taxes on the distribution of the owner's IRA may be effected or accomplished.

Application of the foregoing rules with the use of trusts

As was explained above, where a trust is named as an IRA owner's beneficiary, if the four requirements outlined above are met (i.e., (1) the trust is a valid trust under state law, or would be valid if it were funded; (2) the trust is irrevocable; (3) the beneficiaries of the trust can be identified; and (4) a copy of the trust instrument is provided to the plan) the beneficiaries of the trust are, with respect to the trust's interest in the IRA, treated as "designated beneficiaries." If these four requirements are *not* met as of the date of the IRA owner's death, however, the IRA owner is treated as having no "designated beneficiary," and distribution must be made under the five-year rule (i.e, the IRA owner's interest must be entirely distributed within five years after the owner's death).

Impact of revocable trusts

In some estate plans, a "family trust" is used and named as the designated beneficiary of the owner's IRA. However, certain problems can arise because the trust fails to meet all of the four requirements under the minimum distribution rules. Where, for example, the family trust is not irrevocable, the family trust would not meet all of the four requirements qualifying the beneficiaries of the family trust as "designated beneficiaries." If the family trust is not irrevocable or if the family trust will become irrevocable upon the IRA owner's death and the IRA owner had survived to the required beginning date (i.e., April 1 of the calendar year following the calendar year in which the owner reaches age 70) and had been receiving distributions from the IRA, the family trust will not then have become irrevocable within the statutory time limit because arguably the owner could, prior to death and subsequent to the date the distributions began, modify or revoke his or her will including the family trust provisions. In this situation, the beneficiaries of the family trust would not, therefore, qualify as "designated beneficiaries" under the minimum distribution rules. This would bar the use of the life expectancy of one of the trust's beneficiaries, in conjunction with the IRA owner's life expectancy, and obfuscate the time period to be taken into account in determining the period over which the owner's IRA would be paid out. Under these circumstances, in determining the period over which the owner's IRA benefits would be distributed, only the IRA owner's life expectancy could be taken into account, which means that during the owner's life, the owner would be paying taxes on larger annual distributions than would be required if an individual, such as a child, was the owner's "designated beneficiary." Based upon these possible contingencies, a "family trust" created under an IRA owner's will and designated as the beneficiary of the IRA may not be a good choice.

Impact of irrevocable trusts

Although having an IRA as a substantial asset of an estate portends potential pitfalls, some options remain available to avoid the various disadvantages discussed above in relation to the minimum distribution requirements. One option available to an estate planner and the IRA owner would be to create an

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irrevocable trust similar in form, use and other respects to the family trust created under the provisions a will. An irrevocable trust of this type would be the designated beneficiary of the owner's IRA (or, by formula, the irrevocable trust could be named as beneficiary of that fraction of the IRA that could be shielded from estate taxes payable by the IRA owner's estate and gift tax unified credit). Prior to the death of the IRA owner, the irrevocable trust could be funded nominally to give it legal effect and viability. Thereafter, in order to shield any additional amount of the IRA interest from estate taxes by the unlimited marital deduction at the death of the IRA owner, the IRA owner could designate his or her spouse as the beneficiary of the remaining fraction of the IRA (i.e., that portion in excess of the owner's unified credit equivalent amount).

As explained above, for purposes of the minimum distribution rules, where there are multiple beneficiaries of a trust, the beneficiary whose life expectancy is the shortest is treated as the "designated beneficiary" and that beneficiary's expectancy is utilized in determining the period of distribution. Thus, if in creating an irrevocable trust, an income interest was provided for the spouse of the IRA owner under the terms of a family trust, all of the beneficiaries of the irrevocable trust, including the named spouse, would be "designated beneficiaries" for purposes of the minimum distribution rules; however, for purposes of determining the distribution period, the "designated beneficiary" with the shortest life expectancy would be the "designated beneficiary."

A second option or alternative that may be available to the estate planner and IRA owner includes establishing an irrevocable trust substantially the same as the irrevocable trust discussed above except for the spouse's income interest. Under this alternative, the IRA owner's child or children, as the case may be, would be the designated beneficiary or beneficiaries. This alternative allows for an extended payout period for the owner's IRA (i.e., based on the owner's child's life expectancy), but would not give the spouse the income interest available under the first alternative discussed above.

Conclusion

Because of the wide use of IRAs in retirement planning and ultimately in an individual's estate plan, it is important to understand and recognize the effect of the minimum distribution requirements to the owner of the IRA and the interplay of these rules during and after the lifetime of the IRA owner. Because of the potential consequences to not only the IRA owner but to the owner's estate plan, any financial and estate planning conducted with a living client and any probate and estate services rendered on behalf of a deceased client should be undertaken with caution and with the assistance of an attorney whose practice routinely incorporates estate and tax planning advice. ■

ENDNOTES

1. I.R.C. § 408(a); Treas. Reg. § 1.408-2.
2. I.R.C. § 408(b); Treas. Reg. § 1.408-3(3).
3. I.R.C. §§ 408 & 219.
4. Among them an annual nondeductible 50 percent excise tax imposed on the difference between the minimum required distribution from an IRA and the amount actually distributed. I.R.C. § 4974. The Internal Revenue Service, however, may waive the penalty if the shortfall resulted from a reasonable error and the individual is taking steps to correct the situation. I.R.C. § 4974(d).
5. The Internal Revenue Service has issued proposed regulations detailing the methods for satisfying the minimum distribution requirement. See Proposed Treasury Department Regulations § 1.401(a)(9)-1. The proposed regulations indicate that distributions from an IRA are subject to requirements similar to those governing minimum distributions from qualified retirement plans, including the minimum distribution incidental benefit requirement. Proposed Treasury Department Regulation § 1.408-8.
6. The ability to stretch payments out over extended periods through the selection of a very young "designated beneficiary" is limited, however, because IRAs also are subject to the minimum distribution incidental benefit requirement (or "MDIB"). The MDIB requirement essentially provides that where a spouse is not the "designated beneficiary," the amount of the payments to be made to the IRA owner before death must be determined under the principles of the required minimum distribution rules, using a hypothetical individual not more than ten years younger than the IRA owner as the IRA owner's "designated beneficiary." Thus, even if the "designated beneficiary" actually is twenty-five years younger than the IRA owner, for purposes of the minimum distribution rules, the "designated beneficiary" will be treated as being only ten years younger than the IRA owner.
7. I.R.C. § 401(a)(9)(B)(i); Ltr. Rul. 9119067.
8. I.R.C. §§ 401(a)(9)(B)(ii), 401(a)(9)(B)(iii), 401(a)(9)(B)(iv); Ltr. Ruls. 9322005, 9253052, 9106044.

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Craig David Dahle
Heather Carol Harrison
Richard Rudolph Klemm
Charles Angelo Nervine, II
David Cornelius Points, Jr.
Charles Franklin Raper
George Mark Russell
Deborah Lynn Stevenson
Deborah Denise Tillman
Phillip Maxwell Whitehead

LAWYERS IN THE FAMILY

Reid Hamilton Harbin (1994) and Robin H. Harbin (1967) (admittee and father)

John W. Lowe (1970) and Jonathan Blake Lowe (1994) (father and admittee)

Liles C. Burke (1994) and Claud Burke (1968) (admittee and father)

David H. Hayden (1994), Walter Hayden, III (1987) and Jon Hayden (1990) (admittee and brothers)

Kelly A. McGriff (1994) and Charles M. T. Sawyer, II (1954) (admittee and cousin)

Foster Douglas Key (1994) and Douglas L. Key (1974) (admittee and father)

Robert B. Stewart (1994) and Joseph G. Stewart (1966) (admittee and father)

Mary Margaret Kendall Bailey (1994) and Judge Robert G. Kendall (1963) (admittee and father)

John C. Piazza (1994) and Linwood Bragan (1991) (admittee and cousin)

Rick Davidson (1994) and Kelly Davidson (1994) (husband and wife admittees)

Ashley Hale Rives (1994) and Oscar H. Hale, Jr. (1978) (admittee and father)

Sunny Smallwood (1994) and Judge T. M. Smallwood, Jr. (1963) (admittee and father)

LAWYERS -IN THE- FAMILY

Brenen G. Ely (1994) and Kathryn Juneman Ely (1994) (husband and wife admittees)

John W. Adams, Jr. (1994) and Tori L. Adams-Burks (1990) (admittee and cousin)

Kelli Hogue-Mauro (1994) and Jeffrey P. Mauro (1994) (wife and husband admittees)

Joel S. Isenberg (1994), Bari G. Miller (1987) and Charles P. Miller (1960) (admittee, mother and stepfather)

David Jeffrey Beaird (1994), James Robert Beaird (1979), Hugh Beaird (1959) and Sam L. Sullivan, Jr. (1990) (admittee,cousin, uncle and cousin)

Daniel Joseph Sullivan (1994), William J. Sullivan, Jr. (1949) and William J. Sullivan, III (1975) (admittee, father and brother)

Betsy L. Montgomery (1994) and Robert Montgomery (1982) (admittee and brother)

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Brooks Pitman Milling (1994) and Judge Bert W. Milling, Jr. (1971) (admittee and father)

Frederic Ransom (1994) and Judge Ralph D. Cook (1968) (admittee and father-in-law)

LAWYERS -IN THE- FAMILY

Joel P. Smith, Jr. (1994) and Maury D. Smith (1952) (admittee and uncle)

Elizabeth Dale Welch (1994) and Judge Sam Welch (1976) (admittee and brother)

Leigh M. Dulaney (1994) and Scott Dulaney (1993) (admittee and husband)

Jerrolyn L. Martin (1994) and Gerald M. Martin (1993) (admittee and brother)

Jamie M. Brabston (1994) and James K. Brabston (1993) (admittee and husband)

Lisa J. Brown (1994) and Franklin I. Brown (1988) (admittee and husband)

Janie Baker Clarke (1985), Robert Foster Johnston, Jr. (1994) and John Baker (1967)(mother, admittee and uncle)

Mark Sabel (1994) and M. Wayne Sabel (1968) (admittee and father)

Chief Justice Sonny Hornsby (1960), Emily H. Nelson (1994) and Ernest Clayton Hornsby, Jr. (1988) (father, admittee and brother)

FALL 1994 BAR EXAM STATISTICS OF INTEREST

Number sitting for exam 502
Number certified to Supreme Court of Alabama 357
Certification rate .... 71 percent
Certification percentages:
- University of Alabama School of Law .... 94 percent
- Cumberland School of Law .... 87 percent
- Birmingham School of Law .... 33 percent
- Jones School of Law .... 42 percent
- Miles College of Law .... 4 percent

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10 Tuesday

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12 Thursday

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13 Friday

OSHA COMPLIANCE UPDATE IN ALABAMA
Huntsville, Marriott
National Business Institute, Inc.
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19 Thursday

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Alabama Judicial College, Alabama State Bar
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HOW TO PROTECT SECURED INTERESTS IN BANKRUPTCY
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20 Friday

SOCIAL SECURITY LAW
Birmingham, Medical Forum Building
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(715) 835-8525

27 Friday

NURSING HOME LAW
Birmingham, Medical Forum Building
Cumberland Institute for CLE
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(800) 888-7454

FEBRUARY

3 Friday

SOLO AND SMALL FIRM SUCCESS
Birmingham, Pickwick Center
Cumberland Institute for CLE
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7 Tuesday

ALABAMA ELDER LAW
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National Business Institute, Inc.
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8 Wednesday

ALABAMA ELDER LAW
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9 Thursday

INJURIES IN THE WORKPLACE IN ALABAMA
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10 Friday

INJURIES IN THE WORKPLACE IN ALABAMA
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17 Friday

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Cumberland Institute for CLE
(800) 888-7454

23 Thursday

WORKERS' COMPENSATION IN ALABAMA
Birmingham
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24 Friday

HANDLING DUI CASES
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Remarks By Retired Justice Oscar W. Adams, Jr.

OPENING OF COURT CEREMONY 1994-95 TERM OCTOBER 3, 1994

MAY IT PLEASE THE COURTS - Mr. Chief Justice, Justices of the Supreme Court, Judges of the Courts of Appeals, members of the clergy, members of the Alabama State Bar, members of the staffs of the courts, honored guests.

I am extremely honored to have been invited to give the opening of court and memorial address after only 11 months off the bench. At the opening of court ceremony last year, I sat right there where Justice Houston sits today. I wish I could truthfully say that I do not miss the court, but I do—the stimulating arguments of general conference, yes, even the heated arguments of general conference—the court's junkets to far flung places in Alabama, cities large and small—bringing the court to the people. But I did not retire in the first place because I disliked the work that I was doing. I retired because after 33 years of private practice and 13 years on the bench, I thought it was time to surrender the mantle to a younger person. Every good soldier knows there comes a time to withdraw from the firing line. I have watched Justice Cook's work on the court and in my opinion Governor Folsom made an outstanding appointment.

October 31st of last year was my time to retire from the firing line—to give myself a chance to reflect—maybe to consider a third career—to write a book and perhaps to trace my ancestry as far back as Haley did in *Roots*.

I mention my 47-year love affair with the law because what I am going to say today is extremely personal—as personal as the deaths of the 75 lives we celebrate today were to their families. In the 11 months that I have been off the bench, I have had time for reflection on our profession and the judiciary relative to other institutions in this country. I see storm clouds on the horizon and they have been gathering for some time.

Having lived as long as I have, I personally knew more than half of those whose lives we celebrate today. Although the list of deceased attorneys is diverse—the old, the young, the black, the white, the male, the female, the rich, the poor—there are two things they had in common with the rest of us—a love for the law and a love for this country that allowed a judicial system such as ours to exist—and we all resent any encroachment by other branches of government on the judicial branch. We also have another thing in common. We all took a solemn oath to demean ourselves as attorneys according to the best of our learning and ability, and with all good fidelity, to the courts as well as to the client, swore that we would use no falsehood or delay any person's cause for lucre or malice, and that we would support the Constitution of the State of Alabama and of the United States so long as we continued as citizens thereof, so help us God.

I wish I could say a word about all of our deceased brothers and sisters, but time will not permit. Some stand out so indelibly in my mind that I pause to remember them. Joe Bernard was a circuit judge in Birmingham handling divorce matters. He promised Anne-Marie that if she brought her divorce case to him, he would put me in jail. Don't worry, Joe. Anne-Marie won't have to bring me to court. Annette Clark Dodd. Annette, Janie's and my friend, taught at Cumberland with Janie and was one of the sweetest people I had ever met. I remember her for wanting every ticket that I could get for her for the Alabama football games. Harry Gamble. Harry Gamble was one of my bar examiners and was always known to give a fair exam. He, along with Sam Hobbs, paved the way for me to be the first black to speak to a Rotary Club in Selma, Alabama. James Russell McElroy. As a teenager, I would run up to his courtroom and listen to him try cases. Sometimes he would try a case with his hat on. He said he did this to keep his bald head warm. He was a friend of my father's. He was Mr. Evidence in Alabama. Connie Walter Parson, a black lawyer and member of my church. He had justly earned the reputation of being an astute criminal lawyer when he was cut down at the young age of 48. We'll miss you Connie. Willard Livingston, son of a chief justice of this court, J. Ed Livingston.

Willard's son is married to our deputy clerk, Louise Livingston. Ben A. Engel. The last time I saw Ben he was in one boat and I was in another, fishing in the Gulf of Mexico a few miles from Nassau. Don't let the big ones get away, Ben.

When I was 12 years old, after first going through the cowboy and Indian stage, I knew for sure that I wanted to be lawyer. It had always been my father's ambition and he probably cleverly instilled it in me. Every chance I got, I would go down to the Jefferson County Courthouse and sit in Judge McElroy's court and other judges' courts and listen to the lawyers trying cases, and particularly their closing arguments to the jury. Some lawyers had deep, powerful voices and I would hear those voices ringing down the corridors of the courthouse. I visualized myself doing the same thing and you know I really did do that on many occasions after I passed the bar.

It was pretty hard for a black kid in 1936 to believe that he could be a lawyer in the State of Alabama. My grandmother, whom I admired, discouraged me and said, "If you ever got to be a lawyer, you couldn't make any money because lawyering was a white man's business. You should study to be a doctor." I worked in steel plant and my gang told me that, "Ain't no Negro gonna be no lawyer." And they used to call me a "lawyer" as a joke. But I had a secret weapon, the Constitution of the United States and I was banking on that section that said that "no person shall be denied the right to life, liberty, or property without due process of law, nor be denied the equal protection of the laws." Well, you know I got to be a lawyer, but I did even more. I never in my wildest dreams ever thought that I would take a seat on the highest court of this state, but that is what America is all about. The American dream is that if you work hard and study hard, you should be able to go as far as your talent will carry you. My life is a statement of that fact.

But so much for the past. We all know what I did and what the men and women whose lives we celebrate did, but what about our profession and our independent judiciary in the future? In order to answer that question, we have to come to grips with several fundamental principles. Firstly, America's success is inextricably tied up in a properly performing judiciary as envisioned by the founding fathers when they wrote our Constitution. Secondly, the judicial branch of government is the country's most fragile branch and has vitality only if respected by the people. It was recognized as such at the time of the framing of the Constitution and this condition has not changed even to this day. One reason this is so is because we have no army or navy to enforce our orders. Thirdly, the judiciary frequently comes under attack because in performing its historic role of protecting the weak, the minorities, and the defenseless, it collides with the interests of the rich and powerful. Fourthly, the media, all too frequently, fails to extol the virtues of courts and zeroes in on their perceived shortcomings. Fifthly, it was true at the time of the founding of this country, and it is true today, that many people distrust power in the hands of the people, and particularly the power of the people sitting on a jury. Although this power has survived intact since it was won in 1215 at Runnymede, England, many still distrust it.

It takes courage for a judge to perform his or her duties under the Constitution. However, we have had many Alabama judges who have had that kind of courage. Many do not know that an Alabama judge in 1933, Judge James Edward Horton, Sr., invalidated a conviction in the first Scottsboro trial on the basis of insufficient evidence. This was the case where nine black boys were arrested for the rape of two white women in a gondola car near Paint Rock, Alabama. One prosecuting witness later admitted she had lied about the boys. Judge Horton was told by the attorney general's office that he would be defeated at the polls if he did so and his response was, "What has that got to do with the case?" At first he got praise from the Alabama press and then in the face of mass community criticism, the press soured on Judge Horton. It took a decade before the appeals courts could come to the same conclusion that Judge Horton did—all that time the Scottsboro boys languished in jail for a crime they did not commit. As predicted, Judge Horton was defeated at the polls. It took courage for him to do what he did, but he performed a judicial responsibility.

In 1963, a petition was filed with another Alabama judge, Judge Walter Gewin, right after he was appointed to the Fifth Circuit Court of Appeals, to stay a desegregation of the schools because of the bombings and violence that erupted in the wake of the desegregation order. He wrote: "The howling winds of hate and prejudice always make it difficult to hear the voices of the humble, the just, the fair, the wise, the reasonable, and the prudent. We must not permit their voices to be silenced by those who incite mob violence. 'The best guarantee of civil peace is adherence to, and respect for, the law.'" It took courage for Judge Gewin to do what he did, but he performed a judicial responsibility.

While I was on the court, we struck down a provision of the Tort Reform Act that limited punitive damages to $250, 000 in every case, no matter how egregious the conduct, as offensive to Alabamians' constitutional right to trial by jury. In other words, if the wrong to one plaintiff justified a punitive damage award of $250,000 and the wrong to another plaintiff in another case justified an award of one million dollars, each must get no more than $250,000. A justification for this is that it will bring business to Alabama. This was clearly a violation of the right to a trial by jury because traditionally courts, as well as juries, decide cases on a case-by-case method. This is what equal and exact justice is all about. But we have been excoriated by the media and otherwise for our decision. It took courage for us to do this. Constitutional principles should not be sacrificed because they may be unpopular at a particular time.

We have the greatest court system in this country. The men and women who serve it are men and women of both intellect and integrity. I can make this statement because during the last three years that I was on the court, I served on the American Bar Association's most important commission. Our job was to hold public hearings in most of the major cities in American to determine what, if anything, is wrong with our legal system and the legal profession.

But we cannot expect these men and

women to take the heat, and put their lives in jeopardy for right, when we do not sustain and nurture them in times of crisis. How long can we continue to serve for love of the profession when all we get is a slap in the face from those who have the most to gain from a strong America? And it certainly is not for the money. I left a firm in 1980 in which I was making over $100,000 a year to a take a job making $49,000 because I knew that if I did not take the Governor's offer, no black would have been appointed.

At each of our ABA hearings we were confronted by an organization that called itself H.A.L.T., which stands for *Help Abolish Legal Tyranny*. Their staff was well educated and well prepared. Their agenda was that the legal profession was the only profession or trade that regulates itself and, therefore, the people cannot get justice. I asked them where do they think I, and a whole segment of people like me, would be if our freedom depended on the Legislature and Congress? They could not satisfactorily answer. I personally know that there are many other organizations throughout this county that seek to undermine the judicial system. I do not know where they come from, but they are there.

Another thing. The ABA and many of us have bought into the premise that the public does not like lawyers. I believe this is propaganda. If this were so, why is there such a great fascination with lawyers and judges in the O. J. Simpson trial? Furthermore, we are the only profession that has a whole television channel devoted to it.

I firmly believe that America is the greatest nation on earth because of the magic of our Constitution. Our greatest tension came in the 1860s when we engaged in the Civil War because our founding fathers would not deal with the issues of the inalienable rights of slaves in the Constitution. Lincoln thought that the tensions were so great that, indeed, a government of the people might fail. Now, we have fixed that.

Where we get in trouble is when we allow a watering down of Constitutional principles in the name of expediency, or when we fail to apply the principles as was obviously done in the Rodney King case in Los Angeles. Fortunately, the courts will not allow this, and we have been able to avoid the violence that we have seen in other countries.

We are doing so well in this country that we have almost taken our liberties for granted—the right to a trial by jury, freedom of speech, privilege against self-incrimination, speedy trial, and on and on. The price of liberty is eternal vigilance. We seem to forget that although we are the oldest constitutional democracy in the world, we are still young by old world standards. We must not allow one jot or tittle to be taken from our Constitution. Lawyers and courts see that does not happen, and this is why we are under attack. Government by the people is still an experiment. It is not yet too late for it to fail. Therefore, let us, from this day forward, in the name of those we honor today, dedicate ourselves to the proposition that our constitutional government of the people, by the people, and for the people will not perish from the earth. ■

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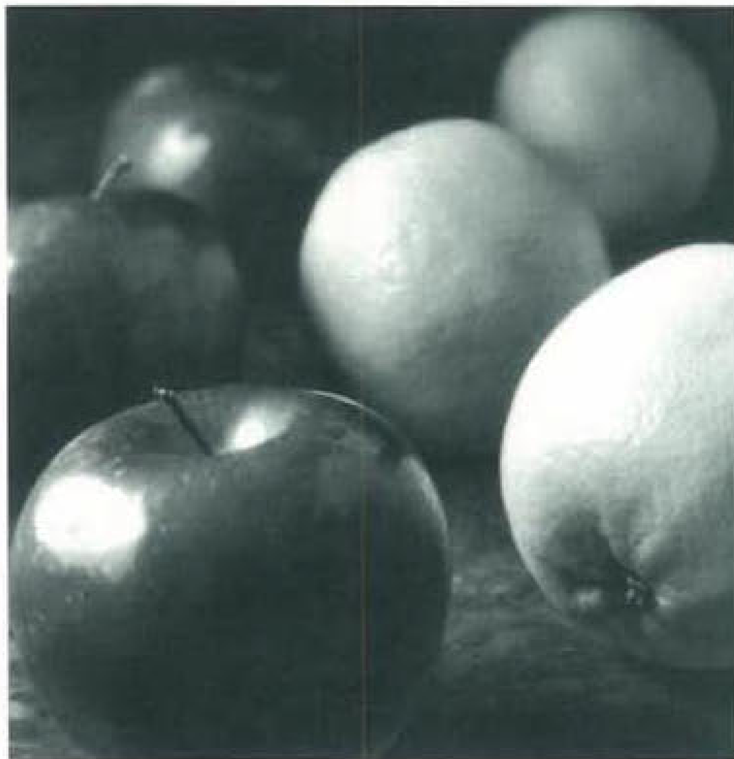

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LIABILITY OF A MUNICIPALITY UNDER ALABAMA LAW

By Alex L. Holtsford, Jr. and Steven Anthony Higgins

Introduction

The number of lawsuits alleging liability against municipalities has substantially increased over the past several years. Although various factors can be attributed to this rise in numbers, it is apparent that litigants, lawyers and jurors are no longer timid about placing liability upon local government.

Generally, a person pursuing a claim against a municipality has two primary vehicles of recovery. The first would be to pursue a civil rights claim based upon Title 42 of the United States Code, § 1983, and its related statutes. This article will not address that vehicle of recovery, as federal civil rights law would require a lengthy article for itself. Rather, this article will address recovery under the second vehicle, that being liability against a municipality based upon Alabama state law.

Prior to 1975, municipalities in Alabama enjoyed sovereign immunity from certain torts. The law placed a distinction upon whether or not the municipality was engaged in a "governmental" activity (e.g., maintaining public squares, parks, playgrounds, etc.) or whether it was engaged in a "proprietary" activity (e.g., engaging in the business of furnishing electricity, lights, water or gas to the public). Under this scheme, municipalities were not liable for injuries caused by wrongful or negligent performance of its governmental functions. However, a municipality could be held liable in exercising proprietary functions. Although this distinction eliminated a multitude of possible lawsuits against municipalities, it also created confusing and somewhat arbitrary law. For example, repair and maintenance of streets was held to be proprietary. *City of Birmingham v. Whitworth*, 218 Ala. 603, 119 So. 841 (1929). However, operating a street sweeper to keep the streets clean was held to be governmental. *Densmore v. City of Birmingham*, 223 Ala. 210, 135 So. 320 (1931).

In *Jackson v. City of Florence*, 294 Ala. 592, 320 So.2d 68 (1975), the Alabama Supreme Court eliminated the distinction between governmental and proprietary functions, making municipalities liable for negligent performance of a number of activities for which they had previously been immune.

For the most part, lawsuits against municipalities are presently governed by statute, and such lawsuits are subject to unique characteristics and requirements. It is those unique characteristics and requirements which will be discussed in detail below.

Notice of claim requirement

To pursue a claim against a municipality, the claimant must adhere strictly to the applicable time requirements. It is true that a normal two-year statute of limitations applies to the filing of a lawsuit against a municipality based upon tortious conduct. However, under § 11-47-23, Ala.Code 1975, a sworn claim "for damages growing out of torts" must be filed with the municipality within six months of accrual. This section is in the nature of a statute of nonclaim. A cause of action accrues as soon as the party in whose favor it arises is entitled to maintain an action thereon. *Buck v. City of Rainsville*, 572 So.2d 419 (Ala. 1990).

In connection, § 11-47-192, Ala.Code 1975, states that a sworn statement based on a claim "for personal injury received" must be filed with the municipal clerk stating sub-

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stantially the manner in which the injury was received, the day and time and the place where the accident occurred and the damages claimed. However, the filing of an action within the six-month period is sufficient presentment of the claim to comply with these sections. *Hill v. City of Huntsville*, 590 So.2d 876 (Ala. 1991). Furthermore, both the Eleventh Circuit and the Alabama Supreme Court have held that the tort claim notification requirements set forth in § 11-47-23 and § 11-47-192 do not apply to 42 U.S.C. §1983 actions. *Acoff v. Abston*, 762 F.2d 1543 (11th Cir. 1985); *Morrow v. Town of Littleville*, 576 So.2d 210 (Ala. 1991).

While compliance with §11-47-23 and §11-47-192 need not be alleged in the complaint, the plaintiff has a burden to prove such compliance if the defendant raises the defense that the plaintiff did not comply with the statutory requirements. *McCarroll v. City of Bessemer*, 289 Ala. 449, 268 So.2d 731 (1972). At the same time, noncompliance with the notice requirements is an affirmative defense, and if it is not raised by the municipality, recovery is not barred. *Ex parte City of Huntsville*, 456 So.2d 72 (Ala. 1984), *overruled on other grounds, Diemert v. City of Mobile*, 474 So.2d 663 (Ala. 1985).

Venue of actions

Section 6-3-11, Ala.Code 1975, states clearly that a civil action against a municipality for personal injury, death or property damage must be filed only in the county where the municipality is located, or where the act or omission occurred. Of course, an allegedly tortious act by a municipality will most likely have occurred in the county where the municipality is located. The only exception to this rule is where the action is also brought against another defendant for whom venue is appropriate in another county. In that circumstance, Rule 82 of the Alabama Rules of Civil Procedure dictates that the venue may be appropriate for the entire case in the county of the co-defendant, and the municipality's sole recourse for transfer of venue would be under the doctrine of forum non conveniens. See, *Ex parte City of Huntsville*, 541 So.2d 1094 (Ala. 1989).

Secondary liability

A municipality also enjoys the privilege of being secondarily liable in a case in which there is any other possible defendant. Pursuant to §11-47-191, Ala.Code 1975, an injured person "shall also join" any other person or corporation liable as a defendant to him in a civil action. This section is operative in cases where the injury results from the wrongful act of a third person for whom the municipality is not responsible under the doctrine of respondeat superior. In such cases, any municipal liability arises from negligent failure to remedy the condition created by the third person. See, *Brown v. City of Fairhope*, 265 Ala. 596, 93 So.2d 419 (1957). If the claimant fails to make such a person a defendant in that action, "the action shall be dismissed." This harsh directive can be avoided if the notice of claim requests the names of any other parties who might be liable to the plaintiff, other than the municipality, and the municipality fails to furnish any other name. See, *City of Birmingham v. Bowen*, 254 Ala. 41, 47 So.2d 174 (1950).

When any other party is named as a defendant, the municipality further enjoys the protection of being secondarily liable to pay a judgment which might be rendered. When a judgment is rendered against a municipality and some other party, "execution shall issue against the other defendant or defendants in the ordinary form and shall not be demandable of the city or town unless the other defendants are insolvent and the same cannot be made out of their property, and the city or town shall pay only so much of the said judgment as cannot be collected from the other defendants." §11-47-191(b), Ala.Code 1975.

There are relatively few cases interpreting part "(b)" of that statute as quoted above. It generally applies only if the injury is caused by a defect in a public way, which was caused by some other party such as a construction company. It does not apply to require the joinder of individual employees or agents of the defendant municipality.

Municipal tort liability under §11-47-190, Ala.Code 1975

The primary ground for tort liability against a municipality comes from §11-47-190, Ala.Code 1975. That statute, including an amendment effective April 26, 1994, states as follows:

> "No city or town shall be liable for damages for injury done to or wrong suffered by any person or corporation, unless such injury or wrong was done or suffered through the neglect, carelessness or unskillfulness of some agent, officer or employee of the municipality engaged in work therefore and while acting in the line of

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his or her duty, or unless the said injury or wrong was done or suffered through the neglect or carelessness or failure to remedy some defect in the streets, alleys, public ways or buildings after the same had been called to the attention of the council or other governing body or after the same had existed for such an unreasonable length of time as to raise a presumption of knowledge of such defect on the part of the council or other governing body and whenever the city or town shall be made liable for damages by reason of the unauthorized or wrongful acts or negligence, carelessness or unskillfulness of any person or corporation, then such person or corporation shall be liable to an action on the same account by the party so injured. However, no recovery may be had under any judgment or combination of judgments, whether direct or by way of indemnity under Section 11-47-24, or otherwise, arising out of a single occurrence, against a municipality, and/or any officer or officers, or employee or employees, or agents thereof, in excess of a total $100,000 per injured person up to a maximum of $300,000 per single occurrence, the limits set out [in] the provisions of Section 11-93-2 notwithstanding.

This section limits municipal liability to two distinct classifications. In the first class, the municipality may be liable under the doctrine of respondeat superior for injuries resulting from the wrongful conduct of its officers or agents in the line of duty. In the second class, a municipality may be liable for injuries resulting from its failure to remedy conditions created or allowed to exist on the streets, alleys, public ways, etc., by a person or corporation not related in service to the municipality. *Ellison v. Town of Brookside*, 481 So.2d 890 (Ala. 1985). Each of these two classifications will be discussed below.

I. *Liability for Negligence of Agents or Employees* - First, under § 11-47-190, liability may be assessed if an injury or wrong is done or suffered "through the neglect, carelessness or unskillfulness of some agent, officer or employee of the municipality engaged in work therefore and while acting in the line of his duty." Basically, this statute allows a cause of action for negligence when an agent acts as such during his work for the municipality and causes an injury. As in any other negligence action, the plaintiff must establish a breach of a legal duty owed by the municipality to the plaintiff in order to support an actionable negligence claim. *Shearer v. Town of Gulf Shores*, 454 So.2d 978 (Ala. 1984).

Negligence seems to be the only viable theory under this category. There is no cause of action against a municipality for wantonness. *Hilliard v. City of Huntsville*, 585 So.2d 889 (Ala. 1991). Likewise, there is no action against a municipality for intentional torts. See, *Altmayer v. City of Daphne*, 613 So.2d 366 (Ala. 1993) (claims against a city for the city manager's alleged misrepresentation and promissory fraud prevented by § 11-47-90); *Scott v. City of Mountain Brook*, 602 So.2d 893 (Ala. 1992) (holding that claims of malicious prosecution, intentional interference with business relationship and civil conspiracy are not encompassed by § 11-47-190); *Brooks v. City of Birmingham*, 584 So.2d 451 (Ala. 1991) (holding that, pursuant to § 11-47-190, a municipality has immunity from actions alleging unlawful arrest and false imprisonment based on negligence on the part of the city employees while acting within the scope of their employment).

It is clear that the interpretation of this first category primarily relates to affirmative acts by an agent of the municipality. No affirmative duty is imposed on a municipality to seek out defective conditions to rectify them. For example, in *Slade v. City of Montgomery*, 577 So.2d 887 (Ala. 1991), the court held that a municipality was under no affirmative duty to seek out defective storm sewer grates and could only be held liable to plaintiff, who was injured when his foot was placed through a broken grate, if the municipality had actual notice of the defect or if the defect had existed for such an unreasonable length of time that the municipality could have obtained notice or knowledge of the problem by use of ordinary diligence.

It is also clear that the affirmative act of negligence must be more than mere "wrongful decision-making." See, *Ott v. Everett*, 420 So.2d 258, 260 (Ala. 1982). Similarly, municipal officials are absolutely immune from suits attacking their legislative judgment. *Ex parte City of Birmingham*, 624 So.2d 1018, 1021 (Ala. 1993).

The courts have recognized that in certain situations, public policy considerations take precedence over the general rule that municipalities can be held liable for the negligence of their employees. In *Rich v. City of Mobile*, 410 So.2d 385 (Ala. 1982), the court created a narrow exception to the general rule in situations in which the public policy considerations of a municipality's paramount responsibility to provide for the public safety, health, and general welfare outweigh the reasons for the imposition of liability on the municipality. This exception, commonly known as the substantive immunity rule, is applied only in "those narrow areas of governmental activities essential to the well-being of the governed, where the imposition of liability can be reasonably calculated to materially thwart the City's legitimate efforts to provide such public services." 410 So.2d at 387. This exception has been applied in only a few narrow circumstances. See, e.g., *Hilliard v. City of*

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Huntsville, 585 So.2d 889 (Ala. 1991) (applying exception to allegedly deficient city electrical inspection); *Calogrides v. City of Mobile*, 475 So.2d 560 (Ala. 1985) (applying exception to a claim based on the failure to provide adequate police protection); *Rich v. City of Mobile*, 410 So.2d 258 (Ala. 1982) (applying exception to allegedly deficient city plumbing inspection of sewer drain). But see, *Ziegler v. City of Millbrook*, 514 So.2d 1275 (Ala. 1987) (holding that city not immune from liability for negligence in failing to provide adequate fire protection).

II. *Liability for Defects in Streets, Alleys, Public Ways or Buildings* - The second category of liability within § 11-47-190 comes from the next part of the statute, which states that there is liability for an injury or wrong "done or suffered through the neglect, carelessness or failure to remedy some defect in the streets, alleys, public ways or buildings," with knowledge or notice by the municipality of the defect. Such knowledge or notice can be express, implied or constructive.

This category of liability comes from the imposition of a legal duty on the municipality to keep its streets and sidewalks in a reasonably safe condition for the use of the public. The courts have stated that persons using a public street have a right to presume that the way is reasonably safe for ordinary travel, whether by day or night. *City of Florence v. Stack*, 275 Ala. 367, 155 So.2d 324 (1963). Under Alabama law, governmental entities have the exclusive right of control over and responsibility for the maintenance of public highways, and thus, those entities are subject to a common law duty to maintain roadways in a reasonably safe condition for their intended use. *Jefferson County v. Sulzby*, 468 So.2d 112, 114 (Ala. 1985). This duty may also extend to city alleys and dirt roads. See, *Macon County Commission v. Sanders*, 555 So.2d 1054 (Ala. 1990) (rural dirt road); *City of Tallassee v. Harris*, 431 So.2d 1177 (Ala. 1983) (narrow alley).

The test for determining whether a municipality has a duty to maintain a roadway is whether it has a right to control, or participate in the control, of the roadway. This duty does not apply for those roads within a municipality which are within the exclusive control of another entity, such as state highways which run through the municipality. See, e.g., *Harris v. Macon County*, 579 So.2d 1295 (Ala. 1991). In addition, in *Yates v. Town of Vincent*, 611 So.2d 1040 (Ala. 1992), the court held that a city and a county cannot concurrently exercise control over the same roadway.

As can be read from the statutory language, there must be "some defect" proven by the plaintiff before recovery is allowed. Such a "defect" is defined to be anything that may reasonably be expected to interfere with the safe use of the right-of-way. *City of Birmingham v. Wood*, 240 Ala. 138, 197 So. 885 (1940). Liability may be premised on a defect created by an agent of the municipality or by a third-party. However, before a municipality can be held liable for culpable neglect to remedy a condition negligently created by another, the municipality must have notice of the defect or the defect must have existed for such an unreasonable length of time as to raise a presumption of knowledge. *City of Birmingham v. Norwood*, 220 Ala. 497, 126 So. 619 (1930). In addition, such knowledge may be imputed to the municipality through the knowledge of its agents. On the other hand, if the plaintiff/traveler knew of the defect prior to entering the area in question, contributory negligence should be found. See, *City of Birmingham v. Monette*, 241 Ala. 109, 1 So.2d 1 (1941); *City of Birmingham v. Edwards*, 201 Ala. 251, 77 So. 841 (1918).

With regard to traffic signs, such as stop signs, the law is clear that a city is not under an affirmative duty to place a stop sign at any particular location. See, e.g., *Davis v. Coffee County Commission*, 505 So.2d 329 (Ala. 1987). Failure to do so will not result in liability. However, where a municipality chooses to place a stop sign or traffic signal in a certain location, and then fails to maintain it properly, liability can be imposed upon the municipality. As stated in *City of Prichard v. Kelley*, 386 So.2d 403 (Ala. 1980), when a city erects a stop sign at an intersection, it has volunteered to act and is thereafter charged with the responsibility of maintaining the sign with due care.

III. *Exclusivity* - It is clear that the categories created by § 11-47-190 limit liability of municipalities to these two distinct classes of negligent misconduct or omission, which necessarily means to exclude liability of a municipality on any other account. *City of Bessemer v. Chambers*, 242 Ala. 666, 8 So.2d 163 (1942). In fact, unless a complaint is framed under one of the two theories contemplated by this section, it should be dismissed for failure to state a cause of action for which a recovery can be based. *Hillis v. City of Huntsville*, 274 Ala. 663, 151 So.2d 240 (1963).

Damages

While there are strict standards for obtaining a liability judgment against a municipality, there are even more strict standards with regard to the amount which can be recovered

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from a municipality. However, this has been the subject of controversy in recent years, and very recent legislation has attempted to solve that problem.

Prior to 1994, the amount of damages which could be rendered against a municipality was governed exclusively by § 11-93-2, Ala.Code 1975. That statute states that any recovery for injury or death shall be limited to $100,000 for one person, and $300,000 for more than two people injured in a single occurrence, against a municipality. That statute directs that no governmental agency shall settle any claim for more than that amount. Further, the liability of a municipal insurer is limited by these same restrictions on recovery. See, *Kulp v. United States Fid. & Guar. Co.*, 529 So.2d 966 (Ala. 1988).

Most plaintiff lawyers have attempted to argue that the statute only applied to recovery against a municipality. The argument was made that recovery against individual employees of the municipality could be in any unrestricted amount. Pursuant to § 11-47-24, Ala.Code 1975, a municipality must indemnify an employee for liability assessed against him arising out of the operation of a motor vehicle. Therefore, in a case in which the liability is predicated upon an automobile accident caused by a city employee, the creative plaintiff lawyer would argue that liability against the municipality was limited to $100,000; but that he could recover any unrestricted amount against the employee. Then, it would be argued that, by statute, such recovery could come from the municipality and any insurance policy that it had in existence at that time.

The Alabama Supreme Court has never directly addressed whether or not the statutory cap could be bypassed by a large judgment against such an employee. At least one other state had addressed that issue and had held that the statutory cap could not be bypassed so easily, notwithstanding language virtually identical to that of the Alabama statutory scheme. *Jackson v. City of Kansas City*, 680 P.2d 877 (Kan. 1984).

On April 26, 1994, language was added to § 11-47-190, Ala.Code 1975, which limited damages to $100,000 against a municipality "and/or any officer or officers, or employee or employees, or agents thereof." Therefore, it is now clear that for suits against a municipality and its agent, for the negligence of that agent, the recovery is limited to $100,000 per injured person, whether it be recovered from the municipality or from the employee himself. The amendment to the statute is silent on whether it has any retroactive effect. It will be up to the courts to determine what cases are encompassed by this new language.

The statutory cap on damages of Ala. Code § 11-93-2 was recently challenged in *Garner v. Covington County*, 624 So.2d 1346 (Ala. 1993), a case in which both the county and the city were sued for failure to maintain an intersection. The challenge to the statutory cap on damages was based primarily on Article 1, Section 11, of the Alabama Constitution of 1901, which provides "that the right of trial by jury shall remain inviolate." As most lawyers are aware, various statutory caps on damages have been struck down in recent years based upon a challenge from that constitutional section. See, e.g., *Henderson v. Alabama Power Co.*, 627 So.2d 878 (Ala. 1993) (declaring unconstitutional the $250,000 cap on punitive damages). During the pendency of *Garner v. Covington County*, at the Alabama Supreme Court, many judges and lawyers assumed that this statutory cap would likewise by struck down by the court as unconstitutional.

Surprisingly, instead of striking down the statutory cap on damages, the Alabama Supreme Court affirmed the application and constitutionality of the monetary cap. In a lengthy opinion by Justice Almon, the court discussed at length the debate on the issue of municipal liability at the 1901 Alabama constitutional convention. The transcript of the debate at the constitutional convention led the Alabama Supreme Court to opine in *Garner v. Covington County* as follows:

> "It was clearly the delegates' understanding that, absent the incorporation into the Constitution of the proposed section, the Legislature would have power to regulate actions against municipalities. The delegates obviously viewed actions against municipal corporations as being different from actions against private corporations or individuals. This view is sustained by a reading of the cases on the subject, both before and after the Convention. Because the constitutional framers deliberately and specifically declined to add any constitutional preservation of the then-existing limited statutory provision for actions against municipalities, such actions were (and are) subject to legislative control."
>
> 624 So.2d at 1354.

Therefore, based upon that rationale, the Alabama Supreme Court held that because of "the competing needs of conserving public funds and of compensating injured parties and with deference to the Legislature in regulating and balancing these matters," the statutory cap on damages must be upheld.

It is also important to note that punitive damages are never recoverable against a municipality under Alabama law. Such punitive damages are clearly and unambiguously prohibited by § 6-11-26, Ala.Code 1975, which prohibits punitive damages against virtually any governmental entity in Alabama.

There is one other very new statute in Alabama which deserves a mention in this article. As of April 26, 1994, police officers employed by a county or municipality enjoy absolute immunity "from tort liability arising out of his or her conduct in performance of any discretionary function within the line and scope of his or her law enforcement duties." That new statute, which is codified at section 6-5-338, Ala. Code 1975, awaits future interpretation as to the scope of that immunity, and the effect that it may or may not have on a municipality.

Conclusion

In conclusion, liability against a municipality in Alabama may be alleged exclusively through civil rights law, exclusively through law of the State of Alabama, or under a combination of those theories. Numerous factors go into the consideration of which vehicle a particular claimant chooses to travel, with the federal court/state court choice being the most prevalent. If a state law theory is chosen, a claimant must adhere to the strict requirements to maintain such a suit. For the claimant's attorney, failure to realize those requirements will result in poor representation of that person. Likewise, an attorney representing a municipality must have a good knowledge of those unique characteristics to fully represent the city or town. ■

Mobile's Pro Bono Program

Legal Services and the Mobile Bar Association Join Hands to Help Poor People

The Mobile Bar Association is a *pro bono* leader in Alabama. Since 1985, when it approved its first *pro bono* proposal, it has worked hand-in-hand with Legal Services in a continuing effort to expand access to free legal assistance to Mobile's low-income citizens. Participation by local bar members has been exemplary: Since its inception five years ago, private lawyers working through the Mobile Bar Association's Pro Bono Program have closed more than 4,000 cases.

There are about 1,000 licensed lawyers in Mobile, including judges and government attorneys. Of these, roughly 800 are eligible to take part in the bar's *pro bono* project, and about 330 are currently signed up to take cases. These lawyers have agreed to handle either two cases each year or spend at least 20 hours in direct representation of a non-paying client.

Coordinated by Tonny Algood, the Mobile Bar Association's Pro Bono Program (PBP) is housed one floor above Legal Services Corporation of Alabama (LSCA) offices in the Van Antwerp Building in downtown Mobile. LSCA provides half-time secretarial services to the program. Funding for Algood, who began in 1989 on half-time status and has worked full-time since June 1990, is mainly provided by an IOLTA grant from the Alabama Law Foundation. In 1994, the Mobile Bar Association instituted an annual $10 dues check-off earmarked for *pro bono* to further support the PBP, and 756 lawyers contributed this way.

"It was another demonstration of the support we have from our local bar," said Algood.

Local law firms support *pro bono* participation. Hand, Arendall, Bedsole, Greaves & Johnston, Mobile's largest firm, has an official policy encouraging its members to take part, and about half of its 55 lawyers have signed up. Nearly all the 15 lawyers in Helmsing, Lyons, Sims & Leach participate, and many members of Miller, Hamilton, Snider & Odom also take part.

Irvin Grodsky (from left), former chair of the Mobile Bar Association's Pro Bono Committee, chats with Tonny Algood, Luke Coley Jr., and Dan McCleave, also a former chair, following their monthly luncheon committee meeting.

The Mobile Bar Association's Pro Bono Committee oversees the PBP. The group meets the second Wednesday each month over lunch at Michael's, a popular Mobile restaurant. Chair of the committee is F. Luke Coley, Jr., who also heads the Alabama State Bar's Committee on Access to Legal Services. Vice-chair is Joseph E. Carr, senior staff attorney in LSCA's Mobile office. Other members are Henry Brewster; Henry A. Callaway, III; G. Marie Daniels; Gilbert L. Fontenot; Theodore Greenspan; Irvin Grodsky; Christopher Knight; Gilbert B. Laden; Daniel L. McCleave; Matthew C. McDonald; Frankie Fields Smith; Michael A. Smith; Judson W. Wells; and Michael A. Youngpeter. Daniels is also a LSCA senior staff attorney, and Knight is LSCA's Mobile Regional Office managing attorney. In addition to setting policy for the PBP and dealing with any problems that arise, the Pro Bono Committee also holds occasional CLE seminars.

What has made *pro bono* so successful in Mobile? "First and foremost," said Coley, "the lawyers on the committee and the leaders in our bar are extraordinarily committed to this. Everyone in the leadership of the bar has agreed 100 percent this is something to do, and it comes across all political and economic lines."

Coley specifically cited Grodsky, former chair of the Pro Bono Committee, for his efforts to make sure the program worked, and Herndon Inge Jr., who

helped get the program started. "And all of our bar presidents have been tremendously supportive," he said.

Another factor contributing to the PBP's success is coordinator Tonny Algood. "His personality, dedication and skills—it's been a perfect marriage," said Coley. "The *pro bono* project is a vision he's really caught, and he's worked like a slave getting it done."

Another ingredient for PBP's accomplishments has been the support and commitment of the local Legal Services staff, Coley added. On April 15, 1994, the Mobile Bar Association passed a resolution honoring LSCA's Mobile Regional Office for its leadership and contributions to the *pro bono* project.

"Somehow it's all kind of clicked together," said Coley.

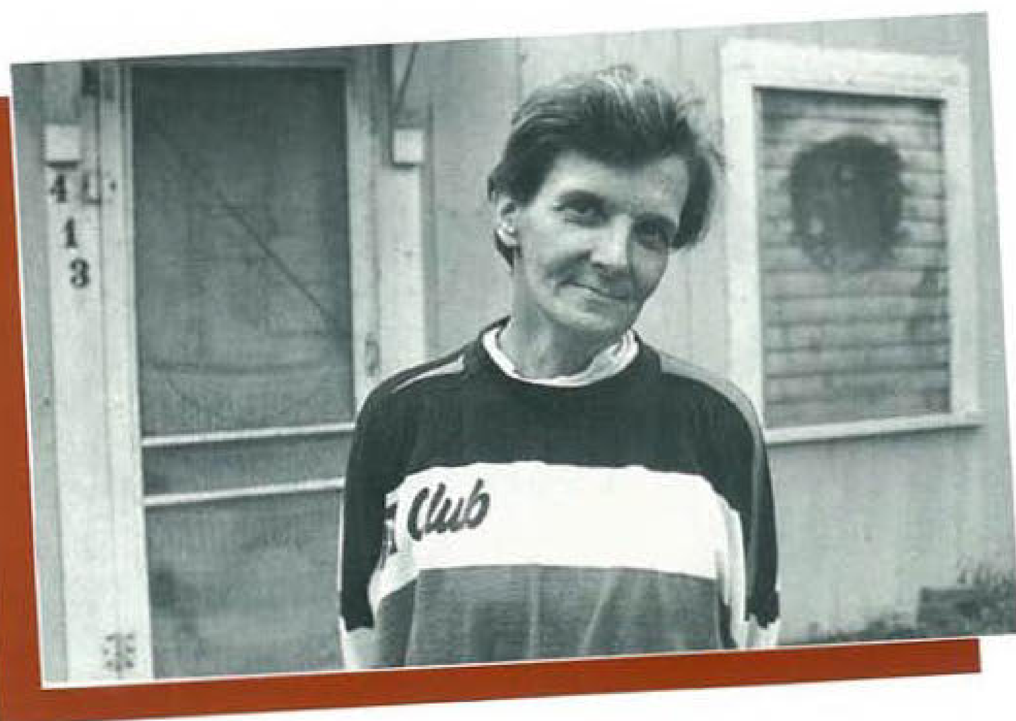
There is more than one way Mobile lawyers can participate in the PBP. Some come into the Van Antwerp Building office to interview clients there. Others accept cases that are referred to their offices. Some lawyers don't accept cases themselves but are willing to serve as mentors to other less experienced lawyers who agree to represent the poor.

"We still have attorneys who like to come to our office to interview clients," Algood said. "We try to match the client's case with the attorney. We usually schedule about eight clients, but sometimes there are no-shows. The attorney will take the cases he or she is comfortable with and that need additional work. Some cases are just advice and counsel. If they don't want to take a case, they'll get the information and return it to me for referral."

Algood maintains a computerized list of lawyers by areas in which they will represent *pro bono* cases, such as child support, wills, adoption, and housing. Most participating lawyers handle about three cases each year.

Although the PBP will handle post-divorce relief issues, it is against its policy to take straight divorce cases.

Clients are referred from a variety of sources —the private bar, social service programs, Legal Services, and the public at large. Applicants are screened for eligibility before their case is reviewed for acceptance. Some people call with problems that are not legal in nature, and Algood refers these to the appropriate agency.



With Henry Callaway's help, Dee found safe and sanitary housing. She's pictured here in front of her old quarters, which flooded every time it rained.

Each year, the PBP recognizes its participating lawyers at an awards ceremony held before a regular monthly Mobile Bar Association meeting.

Mobile's *pro bono* project has served as a model for the rest of the state, said Melinda Waters, director of the Alabama State Bar's Volunteer Lawyers Program. She is working to set up similar projects in urban and rural areas throughout Alabama and is finding that there are enthusiastic lawyers in all parts of the state.

"Everybody has their own reason why they do this," said Coley. "Mine are religious as well as civic." Further explaining, Coley provided his favorite quote, a passage attributed to Andrew Jackson:

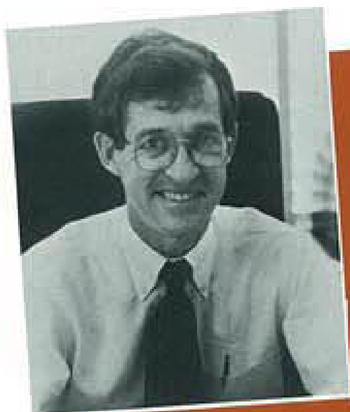
> "I did believe, and ever will believe, that just laws can make no distinction of privilege between the rich and poor, and that when men of high standing attempt to trample upon the rights of the weak, they are the fittest objects for example and punishment. In general, the great can protect themselves, but the poor and humble require the arm and shield of the law."

Beyond the call of duty: The story of Dee

Dee was desperate. Having once been homeless, she was afraid she would again be out on the street because her landlord was evicting her. With every heavy rainfall, her tiny house—set at the bottom of a downhill slope—was flooded with inches of water. All of her possessions stayed damp and dirty. Her experience with homelessness made her fearful to leave this home, but her complaints about its intolerable conditions went unanswered. Out of frustration, Dee withheld her rent and sought help when eviction proceedings began.

Her help came from Henry Callaway, a partner in Hand, Arendall, Bedsole, Greaves & Johnston who took the case *pro bono* when it was referred to him by the Mobile Bar Association's Pro Bono Program. His efforts went beyond the call of duty.

"My first thought was to look at the problem at the house and to see if we could get the landlord to make some repairs. I had a contractor look at the house with me, and the problem was that the house's slab was at ground level rather than being elevated as is required by code. I contacted the city inspection department, which turned up several other violations as well. The



■ Tonny Algood coordinates the Mobile Bar Association's Pro Bono Program.

■ Luke Coley, Jr. chairs the Mobile Bar Association's Pro Bono Committee and the Alabama State Bar's Committee on Access to Legal Services.

contractor told me there was no practical way to fix this problem. I then started making efforts to get her out of the house, and got her landlord to agree to hold off on eviction in the meantime," Callaway said in a November 1994 interview.

Dee's rent was $100 a month, but her only income was an SSI disability check of $422, leaving her with few housing options. Having no experience with federal low-income housing programs, Callaway sought assistance from the Mobile office of the Legal Services Corp. of Alabama, where he got information about Section 8 housing. "I was told there was a waiting list for Section 8 housing in Mobile of about 2,000 people, but Dee qualified for priority because of the large percentage of her income spent on housing and because of the substandard nature of her current housing," he said.

Even with priority status, it took several months to obtain Section 8 housing for Dee. "The immediate problem was that Dee needed to move right away," Callaway related. "I talked to several potential landlords, both with and without Dee, but could not find anyone who would take her, given her low income, until the Section 8 approval came through."

Finally, Tonny Algood, who coordinates the Pro Bono Program, got Dee into a local apartment complex. Just before Christmas 1993, Algood borrowed a pickup truck, and he and Callaway moved Dee into her new apartment. Algood took a special interest in Dee's case partly because of his volunteer work with a Mobile homeless group, which had referred her to him for help.

But Dee's story didn't end there. "After she got moved in, the next problem was keeping Dee afloat for the three months or so until her Section 8 subsidy kicked in. Her rent was $275 a month, plus utilities," Callaway said. "I collected some money from attorneys at my firm, and my minister also gave her money from his discretionary fund. Her Section 8 rent finally went into effect on March 24, 1994, reducing her portion of the monthly rent to $86.

"Thus, a year ago Dee was paying $100 a month for a wet, dirty and depressing house, and now she pays less for a nice clean apartment which has more room than her old place," Callaway said.

Callaway helped her through the Section 8 application process by making sure she was treated as a priority applicant, by taking her to the housing office several times, and by sitting with her during the initial application process and interview to help her fill out the required forms.

The story of Dee is atypical in that most of the Pro Bono Program cases are much simpler and do not require as much time. "I don't want lawyers to think that they are going to end up moving every *pro bono* client. Most involve something like drafting a will or handling an adoption," Callaway said. However, Dee's case is an excellent example of the spirit of commitment to *pro bono* service that exists in the Mobile Bar Association.

"I have enjoyed working with Dee because she has a consistently upbeat attitude despite having suffered some hard knocks in life. She is very appreciative of the help she received and comes by to see Tonny and me when she is downtown," Callaway said. ■

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Psychotherapy and the Law

"In a true dark night of the soul, it is always three o'clock in the morning."
— F. Scott Fitzgerald

by Shirley Darby Howell

As the 20th Century careens to its close, more and more Americans are exploring counseling as an aid to surviving and overcoming their personal dark nights of the soul. Because of the public's increased employment of the counseling services of psychiatrists, psychologists, social workers, and ministers, the legislatures and judiciaries nationwide have had to address the newly emerging field of psychotherapist liability.

Some rather clear lines of demarcation have been drawn regarding the malpractice liability of psychiatrists and psychologists who engage in certain acts of malfeasance. Unfortunately, the lines are considerably more blurred regarding the potential malpractice liability of social workers who engage in counseling. On the other extreme, the courts have found themselves largely without power to impose malpractice liability upon pastoral counselors without running afoul of the minister's First Amendment freedom of religious expression.

The term *psychotherapist*, as it is used in the scope of this article, will denote only psychiatrists, licensed psychologists, social workers, and clergymen who engage in pastoral counseling. The following is an overview of the evolving spheres of psychotherapist liability.

The Privilege

The legislature of Alabama has placed the imprimatur of social and legal acceptability upon the field of psychotherapy by granting a privileged status to the psychotherapist–patient relationship:

> "The confidential relations and communications between licensed psychologists and licensed psychiatrists and clients are placed upon the same basis as those provided by law between attorney and client, and nothing in this chapter shall be construed to require such privileged communication to be disclosed."(Section 34–26–2, Code of Alabama, 1975.)

In *Ex parte Rudder*, 507 So.2d 411 (Ala.1987), the court further entrenched the privilege by announcing "that the public policy upon which the psychotherapist– patient privilege rests will not easily be outweighed by competing interests" and went on to state the following:

> "Statutes such as §34–26–2 are intended to inspire confidence in the patient and encourage him in making a full disclosure to the physician as to his symptoms and condition, by preventing the physician from making public information that would result in humiliation, embarrassment, or disgrace to the patient, and are thus designed to promote the efficacy of the physicians advice or treatment. The exclusion of the evidence rests in the public policy and is for the general interest of

the community" (Ex parte *Rudder*, supra, at 413.)

Exceptions to the privilege

Clearly, the Alabama legislature envisioned few exceptions to the psychotherapist–patient privilege, and few have evolved judicially. In *Harbin v. Harbin*, 495 So.2d 72 (Ala. 1986) the court did recognize an exception where, in a child custody matter, the mental state of one of the parents is at issue and a proper resolution of child custody requires disclosure of otherwise privileged psychiatric records.

A second judicially created exception applies in certain criminal cases. The psychotherapist–patient privilege is unavailable in a criminal trial where the defendant raises the defense of insanity. *Magwood v. State*, 426 So.2d 918 (Ala. Crim. App.), aff'd, 426 So.2d 929 (Ala. 1982), cert. denied, 462 U.S. 1124, 10 3 S.Ct. 3097, 77 L. Ed. 2d 1355 (1983).

In *Magwood*, the defendant objected to the introduction of the testimony of a licensed clinical psychologist who had examined him prior to trial. The defendant's objection was based upon equal protection and the confidentiality of the communication. The objection was overruled. The appellate courts uniformly held that by pursuing an insanity defense to a murder charge the defendant had waived any potential psychotherapist– patient privilege or privilege against self-incrimination against the testimony of a psychologist who had examined him under state order.

Chief Justice Hornsby in 1993 opined that the legislature did *not* intend an exception to the psychotherapist–patient privilege to exist where the issue of a party's mental condition is raised in a civil proceeding. *Ex parte United Service Stations, Inc.* (Re Loan NHAM v. United Service Stations, Inc., 628 So.2d 501 (Ala. 1993). Thus, the privilege may be applied to protect a patient's psychological records from disclosure in a personal injury claim even though the complaint seeks damages for mental pain and anguish.

A statutory exception to the privilege has been created in the context of the Workman's Compensation claim. Section 25–5–77 of the Code of Alabama, 1975, contains the following language:

> "A physician whose services are furnished or paid for by the employer, or a physician of the injured employee who treats or makes or is present at any examination of an injured employee may be required to testify as to any knowledge obtained by him or her in the course of the treatment or examination as the treatment or examination related to the injury or disability arising therefrom."

The statute goes on add that the term physicians shall include medical doctors, surgeons, and chiropractors. Since psychiatrists are medical doctors, plainly, plaintiff's testimonial privilege to protect statements made to a psychiatrist is lost if a workman's compensation claim is based upon a psychiatric injury.

An additional statutory exception to the psychotherapist–patient privilege has been created for the protection of neglected or abused children. Code of Alabama, 1975, §26–14–10 states as follows:

> "The doctrine of privileged communication, with the exception of the attorney–client privilege, shall not be a ground for excluding any evidence regarding a child's injuries or the cause thereof in any judicial proceeding resulting from a report pursuant to this chapter."

Psychotherapist liability

1. Invasion of privacy

There are a number of ways in which a psychotherapist may engage in malpractice, not the least of which is by breaching the confidence of the patient. (The testimonial privilege set out above is personal to the patient and only the patient may waive the privilege.)

Psychotherapists are constrained by both ethical and legal duties to preserve inviolate the confidences of the patient inviolate. A failure to protect confidences of the patient may subject the psychotherapist to liability for invasion of the patient's privacy.

Alabama recognizes invasion of privacy in four distinct circumstances:

(1)an intrusion upon the plaintiff's physical solitude or seclusion;

(2)publicity which violates ordinary decencies;

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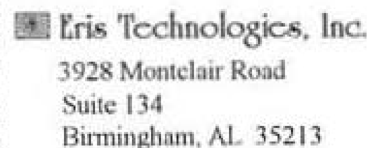

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(3) putting the plaintiff in a false, but not necessarily defamatory position in the eye of the public; or

(4) the appropriation of some element of the plaintiffs personality for commercial use. *Phillips v. Smalley Maintenance Services, Inc.*, 435 So. 2d 705 (Ala. 1983).

Any unauthorized disclosure of the patient's confidences would tend to fall within the category of publicity which violates ordinary decencies in view of the strong public policy favoring the protection of the patient's secrets and confidences.

In *Crippen v. Charter Southland Hospital*, 534 So.2d 286 (Ala. 1988), the defendant hospital, without authorization from Crippen, released records relating to Crippen's treatment for psychological and emotional problems to a physician employed by Crippen's employer, the U.S. Postal Service. Crippen sued Charter for invasion of privacy, breach of contract, breach of fiduciary relationship and abuse of privileged and confidential relationship, claiming mental anguish and aggravation of a pre-existing physical condition as well as humiliation damages. The trial court granted summary judgment for the hospital. The Supreme Court of Alabama reversed, finding that the patient had in fact stated a cause of action for invasion of privacy.

2. Sexual exploitation of the patient

A second area of potential psychotherapist liability involves the sexual exploitation of the psychotherapist–patient relationship. Annette M. Brodsky, in a well researched article concerning sexual exploitation in professional relationships, states that sexual contact is the second leading cause of psychiatrist malpractice in the United States. (Annette M. Brodsky, *Sex Between Patient and Therapist: Psychology's Data and Response, in Sexual Exploitation in Professional Relationships* 17 (Glen O. Gabbard ed. 1989). Nationwide, claims of sexual misconduct have been made against psychologists, social workers, clergymen who attempt to counsel parishioners, and family therapists. The reported cases have yielded disparate results.

One of the most infamous cases involving sexual contact between a psychiatrist and patient is *Zipkin v. Freeman*, 436 S.W.2d 753 (Mo. 1968) (en banc). In this case a female patient was referred to a psychiatrist when her

"The legislature of Alabama has placed the imprimatur of social and legal acceptability upon the field of psychotherapy...."

physical complaints did not appear to be physical in origin. At the insistence of the male psychiatrist, the patient participated in nude swimming parties with other patients, went on overnight trips with the psychiatrist, and was urged to sue both her husband and her brother. The court awarded Ms. Zipkin damages for the emotional injuries she sustained as a result of her psychiatrist's malpractice.

In Alabama, engaging in sexual intercourse or other sexual contact with a patient is grounds for revocation or suspension of a psychologist's license. (Code of Alabama, 1975, §34–26–46.) It is also grounds for denial of an initial certification to practice psychology in this state. *Id.*

By codifying this section, the legislature has left little doubt that sexual relations between psychologists and their patients is an act of malpractice in this state. What is somewhat less certain is whether the proscription against sexual contact with a patient equally applies to social workers who are often looked to for advice by their clients or patients.

In 1990, Justice Janie Shores addressed the issue of social worker malpractice in *Perkins v. Dean*, 570 So. 2d 1217 (Ala. 1990). Dean, a social worker at Northwest Alabama Regional Mental Health Center, was providing counseling services to Perkins and his wife. John Perkins was experiencing grief over the suicide of his daughter, drinking alcohol excessively, and experiencing marital difficulties when he sought treatment from Dean and Northwest. John's wife, Roberta Perkins, also began counseling sessions with Dean for similar reasons.

During a particular counseling session, Mrs. Perkins advised the social worker that she wanted to have an affair with him. Dean responded by explaining the psychological construct of transference of emotion to Mrs. Perkins. However, he also told her "to check back with me later and we'll see how it is between my wife and me and you and your husband."

No sexual relations took place between Mrs. Perkins and Dean during the 30 counseling sessions that were conducted.

Approximately five months after counseling was concluded, Mrs. Perkins and Dean began having an affair. During the interim period, Dean had resigned from Northwest.

The supreme court, in considering the malpractice claim, held as follows:

> "Assuming, without deciding, that a claim for social worker malpractice would be recognized in this State, the facts of this case do not support such a claim...."

The appellants cited *Cotton v. Kambly*, 101 Mich. App. 537 (1985), 300 N.W.2d 627 (1980) and *Zipkin*, *supra*, in support of their claims. The appellants argued that the time that the sexual relations took place is irrelevant. The

gravamen of their argument is that Dean and Northwest did not properly treat them and that as a proximate result they were injured.

The supreme court distinguished the factual situation in *Perkins* from that of *Zipkin*, noting that in the latter the acts of the psychiatrist were all committed under the guise of therapy and counseling while the plaintiff was still under the care of the defendant.

The court additionally held that Northwest was not liable under the doctrine of respondeat superior, finding that when Dean had sex with Roberta Perkins, he was not employed by Northwest, nor did the intercourse take place within the line or scope of Dean's employment with Northwest. *Beasley v. Schuessler*, 519 So. 2d 551, 553 (Ala. Civ. App. 1987).

Thus, while arguably there is no clear precedent for social worker malpractice as a result of sexual exploitation of a patient or other malfeasance by the social worker, neither is there any public policy which calls for the exclusion of social workers from malpractice liability. Perkins appears, on the contrary, to suggest the availability of a remedy for social worker malpractice when sexual overreaching occurs during therapy and under the guise of treatment.

It is notable that the Perkinses had to resort to cases from Michigan and Missouri to support their contentions. There is a paucity of caselaw in Alabama to date regarding psychotherapist liability, which is somewhat surprising in view of nationwide statistics regarding patient abuse. Reportedly some 13.7 percent of male therapists have engaged in sexual contacts with patients, and 3.1 percent of female therapists have engaged a patient in sexual activity. (See K. Pope, "Therapist–Patient Sexual Involvement: a Review of the Literature," 10 Clin. Psychol. Rev. 477 (1990).

The essence of the sexual exploitation malpractice claim is the mishandling of the psychological phenomenon known as transference, which was mentioned in *Perkins, supra*. Transference is a term used by psychiatrists and psychologists to describe a patient's emotional reaction to a therapist and generally refers to the patient's projection of feelings and emotions onto the therapist, who may have come to represent a key figure in the patient's past. Positive transference is often experienced as erotic attraction to a therapist, and it is not unusual for a therapist to experience a counter– transference toward the patient. When used in a professional manner, transference is often therapeutic. When transference is mishandled, the patient is inevitably harmed. (K. Pope, *supra*).

In order to prove psychotherapist liability for an exploitive act, the plaintiff must show that the psychotherapist was negligent. It is axiomatic that in order to state a claim for negligence in Alabama, the plaintiff must show that the defendant owed the patient a duty of care, that the duty was breached, and an injury was proximately caused by the breach of duty.

The duty of a psychologist not to have sex with a patient is plain because such an act constitutes grounds for revocation of his professional license. (See Code of Ala, 1975, §34–26–46.) Proof that the sexual act occurred and proof of the resultant harm to the patient will create a prima facie case of malpractice.

An argument can be made that sexual relations or sexual contact with a patient subjects the therapist to negligence *per se* liability in Alabama. The elements necessary for a cause of action involving statutory negligence are as follows:

(1)that the court must determine, as a matter of law, that the statute was enacted to protect a class of persons which includes the party seeking to assert the statute;

(2)that the party charged with negligence must have violated the statute; and

(3)that the jury must find that the statutory violation proximately caused the injury complained of. *Fox v. Barthoff*, 374 So. 2d 294 (Ala. 1979).

"If a statute creates a minimum standard of care, an unexcused violation, that is, an act done with less than minimum care, must be negligence. *Lowe v. General Motors Corp.*, 624 F. 2d 1373 (5th Cir. 1980) (applying Alabama Law).

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Whether sexual contact with the therapist caused harm to the patient is a question of fact, and the burden of proof rests upon the plaintiff.

Perhaps the most daunting burden of proof placed upon the plaintiff is that of proving that the sexual contact took place at all. Unlike in *Zipkin, supra*, where the patient was induced to swim in the nude in the presence of other patients, most sexually exploited patients will have no witnesses who can verify that alleged sexual acts occurred. In such cases, the ability of the patient to recollect details will contribute greatly to his or her credibility.

Attorneys representing plaintiffs alleging sexual exploitation should anticipate that the psychotherapist will deny the charge and may attempt to use the patient's "emotional instability" to explain away the plaintiff's suit. It is the exploitive mental health professional's trump card, and it is the unkindest cut of all for the patient–plaintiff. Again, the credibility of the parties will be of paramount importance in such instances.

3. Failure to prevent suicide

Psychotherapists must act reasonably to identify and protect those patients who are suicidal or at high risk for becoming so. Negligence on the part of the psychotherapist may occur upon a failure to recognize common indicators of suicide; by inadequate testing or evaluation of the patient; or from failure to restrain a suicidal patient. The duty of psychiatrists and licensed psychologists to identify precursors of suicide is plain.

More problematic is the scenario in which a clergyman attempts to counsel a parishioner. In *Nally v. Grace Community Church of the Valley*, 157 Cal. App. 3d 912, 204 Cal. Rptr. 303 (1984), the Supreme Court of California was confronted with the question of clergy malpractice arising from counseling by pastors. A minor who was receiving pastoral counseling committed suicide, and his parents sought relief based upon a theory of clergyman malpractice for negligent counseling. The trial court entered judgment for the defendant pastors upon the close of the presentation of evidence on the ground that to authorize the cause of action would violate the First Amendment of the Constitution of the United States. This case remains controversial. (See Barker, "Clergy Negligence: Are Juries Ready to Sit in Judgment?," Trial (July 1986).

Alabama's Supreme Court addressed clergy malpractice arising from counseling in *Handley v. Richards* 518 So. 2d 682 (Ala. 1987). The case involved a wrongful death claim arising from a suicide, allegedly caused by a minister's malpractice or outrageous conduct during counseling. The plaintiffs allege that Bobby Handley, the decedent, and his wife, Brenda Handley, were being counseled regarding their marital difficulties by the defendant minister. During the period of counseling, the minister allegedly had sexual relations with the wife and failed to disclose the affair to Mr. Handley. When Handley learned of the affair, he took his own life.

"Psychotherapists are constrained by both ethical and legal duties to preserve inviolate the confidences of the patient inviolate…."

The *Handley* case was tried and judgment was entered for the defendant clergyman. The supreme court, in a unanimous opinion, held that no cause of action for clergy malpractice had been made and cited first amendment freedom of religion as the basis of the opinion.

The question was left open as to whether any cause of action exists at all in Alabama for ministerial malpractice. On the other hand, the court did allow that the *intentional* torts of a cleric are actionable, even though they are incidents of religious practice and belief.

4. Failure to obtain informed consent

The legislature of Alabama has adopted the traditional view that a doctor must obtain the informed consent of the patient before proceeding with treatment. *Fain v. Smith*, 479 So. 2d 1150 (Ala. 1985). Since psychiatrists' are medical doctors, they clearly are bound to obtain the informed consent of their clients. In *Nolen v. Peterson*, 544 So. 2d 863 (Ala. 1989), Nolen was involuntarily committed to a mental health facility. Nolen brought a medical malpractice action against two physicians for administering potentially harmful antipsychotic drugs to him without first obtaining his informed consent. The trial court granted summary judgment for both doctors. The supreme court reversed stating the following:

> "Several cases have addressed the issue; and, without exception, every case has repeated the proposition that a person involuntarily committed to a mental hospital is

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not *ipso facto* barred from the invocation of the informed consent doctrine. Federal Courts of Appeals have held unequivocally that a mental patient confined to a mental facility maintains a constitutionally protected right to reject potentially harmful antipsychotic medications."

If a psychiatrist is compelled to honor the wishes of an involuntarily committed patient regarding treatment, there can be no doubt that the informed consent of voluntary patients must always be sought.

Problems arise for psychiatrists and other mental health professionals when the mental incapacity of the patient is so severe as to render informed consent a practical impossibility. Consent is not deemed to be *informed consent* unless the patient has the mental capacity to understand available alternatives for treatment, make a reasoned decision, and select the desired treatment.

If a patient has been adjudicated incompetent, the guardian of the patient is empowered to consent to psychiatric treatment for the patient. When there is no guardian, psychiatrists have historically relied upon the consent of the patient's family, a practice which may subject the psychiatrist to liability.

Informed consent for minors has historically been obtained through the parents of the child. The matter was reviewed in *Parham v. J. R.* 442 U.S. 584 (1979). The supreme court held in *Parham* that parents have the right and may voluntarily commit their minor child to a mental hospital or institution over the stated objection of the child so long as the decision is subject to review by a disinterested party.

By analogy, it is interesting to review the U. S. Supreme Court decision in *Ohio v. Akron Center for Reproductive Health*, 110 S.Ct. 2972(1990). The Supreme Court there granted minor females the right to obtain an abortion, despite her parents' objection, if she can demonstrate that she possesses sufficiently mature judgment to make the decision. In view of this decision, a rather persuasive argument can be made for a "mature minor's" right to be included in the informed consent decision-making process as it reltes to his mental health.

5. Failure to protect third parties from dangerous patients

The seminal decision announcing a duty to protect third persons from dangerous patients is *Tarasoff v. Regents of the University of California*. 17 Cal. 3d 425, 551 P. 2d 334, 131 Cal. Rptr. 14 (1976). In *Tarasoff*, mental health professionals at Berkeley's mental health clinic suspected that Mr. Poddar had formed the intent to kill Tatiana Tarasoff. Podder was temporarily detained by campus police at the instruction of the psychologists, but was subsequently released. Approximately two months later, Poddar killed Tarasoff, and her parents sued the University for failure to take reasonable steps to protect their daughter from Poddar. The California Supreme Court held that a cause of action had been stated for failure to warn and to take reasonable steps to protect the patient's intended victim.

The more compelling arguments against imposing such liability upon psychotherapists include the following:

A) The psychotherapist–patient relationship is predicated upon the therapist's duty to preserve the secrets of the patient.

B) If a patient knows that his aggressive mentation may be revealed, he will not confide such thoughts to a therapist, thus frustrating the therapist's ability to help the patient.

C) The ability of a therapist to predict dangerous behavior on the part of a client is questionable, and over–reporting is encouraged by placing such potential liability at the door of the therapist.

Nevertheless, despite the forceful arguments against the Tarasoff doctrine, the ruling has now become a generally accepted theory of therapist liability.

6. Failure to adhere to reporting requirements

All states now have statutes requiring reporting of suspected child abuse or neglect, and Alabama is no exception. Alabama's mandatory reporting statute is found at Code of Alabama, 1975, §26–14–3, and reads as follows:

(a All hospitals, clinics, sanitariums, doctors, physicians, surgeons, medical examiners, coroners, dentists, osteopaths, optometrists, chiropractors, podiatrists, nurses, school teachers and officials, peace officer, law enforcement officials, pharmacists, social workers, day care workers or employees, mental health professionals or any other person called upon to render aid or medical assistance to any child, when such child is known or suspected to be a victim of child abuse or neglect, shall be required to report, or cause a report to be made of the same, orally, either by telephone or direct communication immediately, followed by a written report, to a duly constituted authority.

Plainly, those mental health professionals who provide care for children are required by statute to report incidents of neglect or abuse of a child to the authorities. A failure to report abuse that can be shown to have proximately led to the child's having received additional injury is actionable as psychotherapist malpractice.

Conclusion

As psychotherapy becomes more and more acceptable to Americans of all economic classes, the practices of therapists will be scrutinized more closely by the public and by the judicial system. Despite the difficulties of proof which face potential plaintiffs, suits are beginning to proliferate throughout the United States on numerous theories of liability.

In conclusion, though many mental health professionals are not medical doctors and do not take the Hippocratic Oath, its first constraint appears, nevertheless, to be appropriate.

"First, do no harm."
Hippocrates ■

The author acknowledges the invaluable assistance of Judy Hughes, law librarian at Jones School of Law, and her superb professional staff, Janie S. Gilliland and Chris Thigpen. They compiled 3,000 pages of documentation for use in writing this article, and they did so on very short notice.

CUMULATIVE INDEX

JANUARY 1994-DECEMBER 1994

ATTORNEYS

Hardie, William H. "Liability of Professionals for Negligent Certification" **55:226**

Norman, Keith B. "The Alabama State Bar Quality of Life Survey Results" **55:152**

Brewer, Albert P. "Alabama State Budgets and Appropriations" **55:344**

Buffalow, Gregory C. "A Practitioner's Guide to Setting Aside Default Judgements" **55:297**

Byrne, David B. Jr. & Silberman, Wilbur G. "Recent Decisions" **55:51, 55:120, 55:247, 55:315**

Campbell, Gilbert R. Jr. "A Tribute to Reggie Hamner—A Gentleman From Alabama" **55:274**

CIVIL PROCEDURE

"A Practitioner's Guide to Setting Aside Default Judgements" Gregory C. Buffalow **55:297**

"The Alabama Class Action" Alan T. Rogers **55:105**

"The Alabama Class Action-Part Two" Alan T. Rogers & Gregory C. Cook **55:158**

Cook, Gregory C. & Rogers, Alan T. "The Alabama Class Action" Part Two **55:158**

Cox, William S. III "An Introduction to the Alabama Water Resources Act" **55:176**

Culverhouse, Renee Daniel, Lewis, Christine Whitesell & Goodson, Jane R. "The Tort of Outrage in Alabama: Emerging Trends in Sexual Harassment" **55:33**

Early, Bert H., "A Tribute to Reggie Hamner—A Statesman, A Facilitator, A Visionary" **55:275**

EDUCATION

"Equitable Funding for Alabama's Schools" Ira W. Harvey **55:354**

EMPLOYMENT LAW

"The Tort of Outrage in Alabama: Emerging Trends in Sexual Harassment" Christine Whitesell Lewis, Jane R. Goodson & Renee Daniel Culverhouse **55:33**

ENVIRONMENT

"An Introduction to The Alabama Water Resources Act" William S. Cox, III **55:176**

"What Is This Thing Called UST?" James G. Stevens **55:220**

EVIDENCE

"Pattern and Practice: Discovery and Use of Evidence—A Defendant's Perspective" Charles D. Stewart, Edward M. Weed & Philip G. Piggot **55:233**

Godbold, Judge John C. "Remarks" October 11, **1993 55:43** (Correction **55:89**)

Goodson, Jane R., Culverhouse, Renee Daniel, & Lewis, Christine Whitesell "The Tort of Outrage in Alabama: Emerging Trends in Sexual Harassment" **55:33**

GOVERNMENT

"Alabama State Budgets and Appropriations" Albert P. Brewer **55:344**

Hairston, William B. Jr. "A Tribute to Reggie Hamner—The-25-Year Love Affair" **55:270**

Hamner, Reginald T. "Executive Director's Report" **55:8, 55:70, 55:142, 55:207, 55:267**

Hardie, William H. "Liability of Profesionals for Negligent Certification" **55:226**

Hart, J. Mark "Wrongful Supervision: New Attention on an Old Tort" **55:96**

Harvey, Ira W. "Equitable Funding for Alabama's Schools" **55:354**

Hayes, Les III "Young Lawyers' Section" **55:10, 55:72, 55:183 55:245**

Holmes, Broox G., "President's Page" **55:264, 55:328**

INDEX

Cumulative Index January 1993—November 1993 **55:55**

Kimble, Belinda L. "Wrongful Birth: A Practitioner's Guide to a New Arrival" **55:84**

Kitchens, Lynne B. "1993: The Year of the ROM—CD ROM for Alabama Lawyers" **55:46**

LAW OFFICE MANAGEMENT

"1993: The Year of the ROM—CD ROM for Alabama Lawyers" Lynne B. Kitchens **55:46**

LEGAL SERVICES

"Who Represents the Poor?" Penny Weaver **55:382**

Lewis, Christine Whitesell, Goodson, Jane R., & Culverhouse, Renee Daniel "The Tort of Outrage in Alabama: Emerging Trends in Sexual Harassment" **55:33**

LITIGATION

"The Alabama Class Action" Alan T. Rogers **55:105**

"The Alabama Class Action" Part Two Alan T. Rogers & Gregory C. Cook **55:158**

Lyons, Champ Jr. "A Tribute to Reggie Hamner—Calling a Spade a Spade" **55:273**

McCurley, Robert L. Jr. "Legislative Wrap-Up" **55:49, 55:117, 55:144 55:210, 55:276, 55:332**

MEMORIALS

Bankester, Claude E. **55:255**
Barnard, Joe Graham **55:386**
Callaham, Lindsay Clay Jr. **55:321**
Dodd, Annette Clark **55:124**
Engel, Ben A. **55:254**
Garrett, Milton Guy **55:256**
Garth, Horace E. III **55:258**
Groom, Winston F. Sr. **55:321**
Harris, Julian **55:384**
Harris, Norman W. Jr. **55:254**
Harrison, George Mortimer **55:60**
Hobbs, Samuel Earle Greene **55:257**
Hogan, Roscoe B. **55:256**
Howell, T. O. **55:384**
Johnston, Gilbert E. Sr. **55:321**
Jones, Gilbert Ernest Jr. **55:125**
Keeling, Frank Marion Jr. **55:61**
Long, Grady Jackson **55:258**
Macon, Joe A. Jr. **55:255**
Marsal, M. A. **55:194**
Masters, Joseph Jerome Jr. **55:60**
McElroy, Judge James Russell **55:386**
Mims, Walter L. **55:59**
Parson, Connie Walter **55:254**
Pike, Daniel A. **55:385**
Salmon, Louis **55:61**
Sirote, Morris K. **55:256**
Stockham, Douglas W. III **55:322**
Wehl, Gabrielle U. **55:322**
Wildemire, Miller Arrington **55:124**
Wingo, Douglass P. **55:126**

Norman, Keith B. "The Alabama State Bar Quality of Life Survey Results" **55:152**
"Executive Director's Report" **55:330**

Norris, Robert W. "Opinions of the General Counsel" **55:20**

OPINIONS OF THE GENERAL COUNSEL

Attorney/Witness **55:289**

Contracts to Act as Substitute Counsel for Indigent Defendants **55:342**
Financing Arrangements for Legal Fees **55:20**
Percentage Fees in Foreclosure Sales **55:214**
Professional Fees, Disbursements and Other Expenses **55:190**

Piggot, Philip G., Stewart, Charles D., & Weed, Edward M. "Pattern and Practice: Discovery and Use of Evidence—A Defendant's Perspective" **55:233**

PROFILES

John Arthur Owens **55:150**

Reginald T. Hamner **55:269**

Rogers, Alan T. "The Alabama Class Action" **55:105**, "The Alabama Class Action" Part II **55:158**

Rumore, Samuel A. Jr. "Building Alabama's Courthouses" Chilton **55:17**, Perry **55:79**, Greene **55:146**, Hale **55:211**, Sumter **55:285**, Marengo **55:337**

Scruggs, William D. Jr. "A Tribute to Reggie Hamner–The Constant Professional" **55:272**

Seale, James R. (Spud) "President's Page" **55:4, 55:68, 55:132, 55:200**

Sides, Terry A. "Recent Decisions" **55:185**

Silberman, Wilbur G. & Byrne, David B. Jr. "Recent Decisions" **55:51, 55:120, 55:185, 55:247, 55:315**

Small, Clarence M. Jr. "Opening of Court" **55:57**

Smith, Robert Sellers "Overview of Alabama Taxes" **55:369**

Stevens, James G. "What Is This Thing Called UST?" **55:220**

Stewart, Charles D., Weed, Edward M., & Piggott, Philip G. "Pattern and Practice: Discovery and Use of Evidence—A Defendant's Perspective" **55:233**

TAX

"Overview of Alabama Taxes" Robert Sellers Smith **55:369**

TORTS

"Liability of Professionals for Negligent Certification" William H. Hardie **55:226**

"The Tort of Outrage in Alabama: Emerging Trends in Sexual Harassment" Christine Whitesell Lewis, Jane R. Goodson & Renee Daniel Culverhouse **55:33**

"Wrongful Birth: A Practitioner's Guide to a New Arrival" Belinda L. Kimble **55:84**

"Wrongful Supervision: New Attention on an Old Tort" J. Mark Hart **55:96**

Weaver, Penny "Who Represents the Poor?" **55:383**

Weed, Edward M., Piggott, Philip G., & Stewart, Charles D. "Pattern and Practice: Discovery and Use of Evidence—A Defendant's Perspective" **55:233**

West, Herbert Harold Jr. "Young Lawyers' Section" **55:314**

Disciplinary Report

Disbarments

• Birmingham lawyer **John Harvey Wiley, III** was disbarred by order of the Disciplinary Board for failing to comply with an order of the Disciplinary Commission in violation of Rule 2(d) of the Rules of Disciplinary Procedure; for knowingly failing to respond to a lawful demand for information from a disciplinary authority in violation of Rule 8.1 (b), Rules of Professional Conduct (ROPC); for failing to promptly deliver to a client property that the client is entitled to receive in violation of Rule 1.15, ROPC; and for engaging in conduct that adversely reflects on his fitness to practice law in violation of Rule 8.4, ROPC.

On September 29, 1993, Wiley was notified by certified letter that the Disciplinary Commission had determined that he should be publicly reprimanded, without general publication, and that he should make restitution in the amount of $2,500 to clients A and B. On February 2, 1994, Wiley was requested by certified letter to inform the Disciplinary Commission whether he intended to make restitution to his clients, A and B. Wiley did not respond to this letter nor did he make restitution to his clients. Formal charges were filed against Wiley for the above violations on March 25, 1994, and Wiley filed an answer to the charges on May 10, 1994. On May 18, 1994, the state bar filed its first set of interrogatories. The Disciplinary Board, on July 19, 1994, issued an order compelling Wiley to answer the above interrogatories. Wiley did not comply with this order and an application for default judgment was filed on August 12, 1994. The Disciplinary Board, on August 29, 1994, issued a default judgment against Wiley and set a hearing to determine discipline on September 23, 1994. Wiley did not respond further nor did he attend the hearing of the Disciplinary Board on September 23, 1994. At the conclusion of this hearing, the Disciplinary Board determined that Wiley should be disbarred and that he should make restitution to his clients, A and B, in the amount of $5,250.

The Supreme Court by order dated November 22, 1994 disbarred Wiley effective November 10, 1994, and struck his name from the roll of attorneys of the State of Alabama. [ASB No. 94-093]

• On October 26, 1994, Anniston attorney and former Circuit Judge **Harold G. Quattlebaum** was disbarred from the practice of law in the State of Alabama by order of the Alabama Supreme Court. Quattlebaum was found guilty of violating Rules 1.3; 1.4(a); 8.1(a); 8.4(b); 8.4(c); 8.4(d); 8.4(g); DR 1-102(A)(4); DR 1-102(A)(6). Quattlebaum was found guilty by default of filing fraudulent homeowners insurance claims with various insurance companies, filing fraudulent attorney's fee declarations with the State of Alabama, and willful neglect of legal matters entrusted to him. Quattlebaum did not appear at the hearing on these charges and did not file an appeal from the Disciplinary Board's actions. [ASB No. 93-160]

Suspension

• Dothan attorney **Gregory P. Thomas** has been suspended from the practice of law for a period of 91 days by order of the Disciplinary Board of the Alabama State Bar. In May 1992, Thomas was placed on probation for a period of two years in connection with disciplinary matters that were pending against him at that time. The order suspending Thomas for 91 days was entered in response to Thomas' plea of guilty to having violated the terms and conditions of his two-year probation. [ASB No. 89-313]

Public Reprimand

• On November 4, 1994, Montgomery attorney **Donald G. Madison** was given a public reprimand without general publication resulting from his being found guilty of willful neglect and misrepresentation by the Disciplinary Board of the Alabama State Bar. Madison agreed to represent a woman from Sacramento, California in a matter involving fraud and breach of contract claims. The client had purchased a restaurant building and had it moved to a lot in Lowndes County, where it was to be remodeled. On March 18, 1991, the client paid Madison $647 to proceed with the case. He told her he would get it filed in the next week as the client was leaving for Saudi Arabia. By August 3, 1991, Madison had still not filed the action and he was terminated by letter on that date. Madison responded to the termination letter and enclosed a copy of a draft complaint, which he said he would file. At that point, Madison had been paid over $2,000. The client called Madison and gave him the authority to continue with the representation. Madison still failed to file the action. On or about September 15, 1991, the client checked with the court in Lowndes County and upon learning that nothing had been filed in her case, she had nothing further to do with Madison. She filed a grievance in December 1991. On March 4, 1992, Madison wrote to an investigator from the Montgomery County Bar and stated that he had mailed the complaint to Lowndes County Circuit Court for filing. He had not done so, and did not actually file the action until May 6, 1992, or one day before his appearance before the Montgomery County Grievance Committee. [ASB No. 93-085] ■

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Recent Decisions

By DAVID B. BYRNE, JR. and WILBUR G. SILBERMAN

SUPREME COURT OF THE UNITED STATES

Federal drug conspiracy statute does not require government to prove overt act committed in furtherance of conspiracy

Shabani v. United States, Case No. 93-981 (November 1, 1994). In one of its first criminal cases of the new term, the Supreme Court was asked to consider whether 21 U.S.C. Section 846 requires the government to prove that a conspirator committed an overt act in furtherance of an alleged drug conspiracy. In a unanimous decision, the Court concluded that it does not.

Shabani was charged under the statute with conspiracy to distribute cocaine. At trial, he moved to dismiss the indictment because it did not allege the commission of an overt act in furtherance of the conspiracy, which act, he claimed, was an essential element of the charged offense. In addition, he asked the district court to instruct the jury that proof of an overt act was a requirement for conviction.

The district court denied both Shabani's motion and his requested jury instruction noting that prior circuit court of appeals' cases had established the "totally illogical" precedent of requiring proof of an overt act at trial but not mandating the allegation of an overt act in the indictment. Finding nothing in the language of Section 846 to support the appellate court's prior cases, the district court allowed the case to go to the jury without requiring proof by the government of a conspiracy furthered by an overt act.

On appeal, the Ninth Circuit followed its own precedent and reversed the district court, holding that proof of an overt act was required at trial. However, the circuit court did acknowledge that its prior cases "stand on weak ground."

In an opinion authored by Justice O'Connor, the Supreme Court confirmed the circuit court's suspicions when it reversed the lower court and held that the plain language of the statute did not require proof of an overt act. The Court rejected Shabani's request that it infer such a requirement from congressional silence, noting that it had declined to do so with other conspiracy statutes in the past. *See Nash v. United States*, 229 U.S. 373 (1913), and *Singer v. United States*, 323 U.S. 338 (1945). Moreover, since the general conspiracy statute and the conspiracy provision of the Organized Crime Control Act of 1970 both require an overt act, it appeared clear to the Court that Congress' choice to omit the requirement in Section 846 was quite deliberate.

UNITED STATES COURT OF APPEALS, 11TH CIRCUIT

Use of thermal imaging device does not amount to "search" under Fourth Amendment

Ford v. United States, CA 11, No. 92-5181 (September 21, 1994). In a case of first impression, the Eleventh Circuit considered whether the government's use of a thermal imager in the detection of a marijuana-growing operation constituted an unreasonable search under the Fourth Amendment. The circuit court concluded that it did not.

Based on their belief that Ford was growing marijuana inside his mobile home, law enforcement officers used a thermal imager to scan the mobile home in search of unusual infrared heat patterns. The officers determined that the home was indeed giving off an inordinate amount of heat, which is consistent with an indoor marijuana growing operation which generates heat because of the use of artificial lights. Using this information, and that from other sources, the officers obtained a warrant to search the mobile home. The subsequent search of Ford's mobile home uncovered a rather substantial marijuana-growing operation.

At his trial, Ford sought to suppress the evidence seized as a result of the warrantless use of the thermal imager. The district court denied his motion and he was subsequently convicted for possession of marijuana with intent to distribute. In his appeal, Ford urged the circuit court to find that the search violated his reasonable expectation of privacy in the heat emanating from his mobile home.

On appeal, the appellate court noted that the process of establishing a legitimate expectation of privacy is "a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'" *Katz v. United States*, 389 U.S. 347, 361 (1967). The court found ample evidence in the record to indicate that Ford made no attempt to conceal the heat generated inside his mobile home by the growing lamps. In fact, Ford was trying to expel the excess heat from his mobile home by using an electric bower to force the air through some holes he had punched in the floor. The court concluded that Ford did not exhibit a subjective expectation of privacy in the heat released from his mobile home. In addition, the Court held that a subjective expectation of privacy in the heat emanating from a home is not an expectation that society is prepared to recognize as being reasonable. The thermal imagery at issue was of such low resolution as to render it incapable of revealing the intimacy of detail and activity protected by the Fourth Amendment.

Notice of prior bad acts evidence

Perez-Tosta v. United States, CA 11, No. 92-4781 (November 8, 1994). In another case of first impression, the Eleventh Circuit considered whether the government gave reasonable pretrial notice of an intent to offer testimony of a drug conspiracy defendant's prior

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drug-related work for a co-conspirator where notice was given only minutes before voir dire. The issue required the appeals court to examine the construction of Fed.R.Evid. 404(b)'s reasonable notice requirement.

In 1991, the Rule was amended to require the government to give reasonable notice in advance of trial of its intention to present "prior bad acts" evidence, if the accused has requested the notice. The policy behind the amendment is "to reduce surprise and promote early resolution on the issue of admissibility." Fed.R.Evid. 404(b) Committee's Judiciary note. No specific time limit is imposed by the Rule beyond the general requirement of reasonable notice, and what is reasonable, according to the Committee notes, depends largely on the circumstances of the individual case. In this case, the district court found that the defense has six days' notice (because the witness was called during the latter part of the Government's case).

The circuit court set out three factors that should be considered in determining the reasonableness of pretrial notice under 404(b):

"(1) When the Government, through timely preparation for trial, could have learned of the availability of the witness;

"(2) The extent of prejudice to the opponent of the evidence from a lack of time to prepare; and

"(3) How significant the evidence is to the prosecution's case."

In applying those factors to the case before them, the Eleventh Circuit held that reasonable trial preparation would not have revealed the testimony to the prosecutor any earlier, and defense counsel did not indicate any additional measures that he could have taken to rebut the testimony if more notice had been given. The testimony went directly to the issue of the defendant's awareness of and participation in the alleged conspiracy.

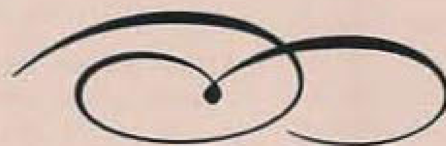
ALABAMA COURT OF CRIMINAL APPEALS

DUI suspects not entitled to *Miranda* warnings

Stone v. City of Huntsville, Ct.Crim. Apps., CR No. 93-617 (September 30, 1994). Stone was convicted of driving under the influence of alcohol. On appeal, he argued that the trial court erred when it denied his motion to suppress evidence of the roadside field sobriety tests that he was required to perform by the arresting officer. Specifically, Stone argued that he was entitled to Miranda warnings during the roadside stop, and, that the omission of those warnings rendered the field sobriety tests, or at least the verbal aspects of those tests, inadmissible. The court of criminal appeals rejected this argument.

To begin with, the court declined to hold, as Stone urged, that Article I, Section 6, of the Alabama Constitution, which provides that an individual "shall not be compelled to *give evidence against himself*," is broader in scope and provides greater protections than the Fifth Amendment to the federal Constitution which states that no person "shall be compelled in any criminal case *to be a witness against himself*." In doing so, the court reaffirmed the Alabama Supreme Court's statement that "despite the difference in language, the Alabama privilege against self-incrimination offers the same guarantee as that contained in the federal Constitution." *Ex parte Hill*, 366 So.2d 318, 322 (Ala. 1979).

Secondly, the court thoroughly examined the traffic stop in issue to determine whether the stop constituted a "custodial interrogation," which would require *Miranda* warnings. In its analysis, the court differentiated between the "custody" that would trigger the right to *Miranda* warnings and a "seizure" that triggers Fourth Amendment concerns. Custody arises only if an individual's freedom is restrained to the degree associated with a formal arrest. While the stop of a motorist who is suspected of driving under the influence is unquestionably "seized" within the meaning of the Fourth Amendment, it is equally clear that the motorist is not "in custody" under *Miranda* when he is stopped and briefly questioned. Thus, like a "*Terry* stop," a motorist suspected of drunk driving may be briefly detained, asked questions, and be asked to perform simple roadside tests. If the officer's suspicions turn out to be unfounded then he must release the motorist immediately.



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U.S. District Judge holds that IRS technical violations of automatic stay do not justify contempt holding

In re Jove Engineering, Inc., 171 B.R. 387 (N.D. Ala. 1994-J. Propst). Jove Engineering filed a Chapter 11 petition on October 20, 1992. Thereafter, the IRS, although being listed as a creditor, sent various delinquency notices to the debtor, requesting payment of taxes. On March 4, 1993, it filed a proof of claim of $304,239.08. Even so, the IRS continued with its notices, and on one occasion, an agent called upon the debtor. Jove filed a motion to hold the IRS in contempt, and then on motion of Jove, the case was withdrawn to the district court for consideration of the bankruptcy court's authority to rule on the motion for contempt. In his opinion, Judge Propst detailed the evidence, showing the numerous letters written by Jove's attorney to the IRS requesting that it cease its efforts to collect from the debtor, and the actions taken by the IRS. He distinguished the IRS actions as being extremely mild in contrast to egregious action delineated in *In re Lile*, 103 B.R. 830 (Bankr. S.D. Tex. 1989). Judge Propst determined that no malice, arrogant defiance, or reckless disregard was shown. He held it inappropriate to award attorney fees for contempt, but did award $500, stating that this amount would have been sufficient to resolve any purported dispute.

Chapter 12 modifications of rights of secured lender, time of valuation of assets, and "best interests test"—debtor not entitled to $5,000 surviving spouse homestead exemption

Matter of O'Neal Rice, debtor, 171 B.R. 399, Bkrtcy N.D. Ala., August 19, 1994, J. Caddell. In this Chapter 12 case pre-petition, debtor had obtained a loan in order to construct poultry houses. In 1993, debtor filed a chapter 12 petition, and in 1994 a plan supplemented by later amendments was filed. The value of the real property was established by the court on April 18, 1994 after which further plan amendments were filed. The lender bank objected to plan confirmation because of debtor's proposal to pay over a 15-year period at 8.5 percent. The court held that although §1222(b)(2) allows modification of rights of a secured creditor, and that the terms and conditions of loans to other customers do not bind the court, the risk factors in such modification should be minimal, and the rate of interest and term should be that of a commercial lender considering risk and security. Here Judge Caddell held both the rate and duration to be unreasonable. He did confirm the value established in April to be the same as that of the effective date of the plan (approximately three months later), but held that the plan failed to meet the "best interests of the creditors test" because it provided for a $5,000 exemption for debtor's deceased wife. The court, in citing Alabama Code §§6-10-6 and 6-10-11 stated that the proper date for determining bankruptcy exemptions is the date of the order for relief, and that the deceased wife's homestead exemption was not available to him on that date. Therefore, to claim such under a Chapter 12 plan when it would not be allowed under a Chapter 7 liquidation violated §1225(a)(4).

Comment:

This rather short case is a good review of Chapter 12 law, but do you think the debtor would have been entitled to the two $5,000 exemptions had the wife died pre-petition? Footnote 2 states that the wife was not a joint debtor, but does not indicate percentage of ownership of the house.

Look out for exemption claims in all cases—if not, store may be lost

In re Lois Imogene Green, 31 F.3d 1098, 11th Circuit (Ala.), September 13, 1994. Debtor filed a Chapter 7 case in February 1991. She claimed as an exempt asset a personal injury lawsuit valued at one dollar. Neither the trustee nor any creditor objected. However, the trustee followed the matter, being instrumental in obtaining a $15,000 settlement. The bankruptcy court judge denied debtor's motion to disburse all but one dollar to debtor. On appeal, District Judge Virgil Pittman reversed holding that the failure to object precluded the trustee from challenging debtor's claim tot the settlement funds. The trustee appealed, claiming that all but one dollar belonged to the estate. The Eleventh Circuit held that under *Taylor v. Freeland & Kronz*, 112 S.Ct. 1644 (1992), failure to object with the 30-day limitation of Rule 4003(b) from the conclusion of the creditors' meeting held pursuant to Rule 2003(a) is fatal. The court viewed this case as being no different from the *Taylor* case, even though the trustee contended vigorously that only one dollar could be set aside as exempt, as that was all claimed.

Comment:

If heed is taken of this case, it behooves trustees and creditors to examine schedules carefully in small or no-asset cases. Perhaps a trustee could continue the meeting generally without concluding it, and, thus, technically still have 30 days from the date of a formal conclusion, but I question the legality of so doing without a valid reason.

Substantive consolidation in husband and wife case not allowed

Reider v. FDIC, 31 F.3d 1102 (11th Cir. Sept. 13, 1994). This is a case of first impression in the Eleventh Circuit. The Reiders, husband and wife, encountered financial difficulties causing them to file a joint Chapter 11. In an order of December 15, 1986, the bankruptcy court held that certain real estate was titled solely in the wife, thus denying any exemption right in the husband, and holding that he had not equitable interest in the property. The FDIC, which was a creditor only of the husband, moved for substantive consolidation and the bankruptcy court granted

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 and covers the criminal decisions.

Wilbur G. Silberman

Wilbur G. Silberman, of the Birmingham firm of Gordon, Silberman, Wiggins & Childs, attended Samford University and the University of Alabama and earned his law degree from the University's School of Law. He covers the bankruptcy decisions.

the motion. The district court affirmed the ruling but, on appeal, the Eleventh Circuit reversed. It bottomed its decision on its historical equitable powers, together with §302 (joint cases) and FRBP 1015(b) (consolidation or joint administration). It reviewed the history of commingling of assets by corporations, with special attention to the injustice to creditors under particular facts of each case. The court discussed the emergence of two central themes, (1) disregard of corporate formalities and commingling of assets may indicate appropriateness of consolidation, and (2) consideration of harm to creditors determines the propriety of so ordering, but conversely a creditor may show the injustice because of its reliance on the credit and assets of one of the entities. The court reiterated its holding in Eastgroup Properties, 935 F.2d 245 (11th Cir. 1991) as to substantive consolidation of corporations, that pursuant to equitable powers granted in §105, consolidation may be ordered upon the evaluation of "whether the economic prejudice of continued debtor separateness outweighs the economic prejudice of consolidation."

The court cautioned against confusing joint administration with substantive consolidation, as the former merely is a procedural tool. In the case sub judice, the court held that because of weak evidence on substantial identity, and strong evidence of the separateness of the real estate in fact and conception of the public, the record did not support substantive consolidation.

Comment:

The opinion consisted of ten pages. As this is a seminal case, it is must reading for any case involving substantial consolidation, whether the representation of the attorney be for the movant or for the objector.

New Bankruptcy Legislation

The new bankruptcy legislation passed October 7, 1994 and was signed by the President on October 22, 1994. With a few exceptions, it becomes immediately effective for cases thereafter filed. There are approximately 100 pages containing approximately 60 substantive amendments, plus some technical corrections. In brief, some of the changes are: Chapter 13 limits are raised to one million dollars; in Chapter 11 cases of $2 million or less there is a provision for a fast-track process; expedited procedures on automatic stay; increased compensation for trustees; authority for bankruptcy judges to conduct a jury trial with consent of parties; reversal of the *DePrizio* decision; increase of perfection of purchase money security interests; and seller's right to reclaim goods, from ten to 20 days; allowance of valid security interests in rents (including hotel rooms) to lenders; in single asset real estate cases, placing burdens on debtors to file plan within 90 days; increased protection to lessor of personal property; clarification of rights of mortgagors on home mortgages under §1322; protection of child support and alimony; and protection against discriminatory treatment for student loans. Finally, it establishes a bankruptcy review commission to submit a report within two years after its first meeting. ■

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YLS EXECUTIVE COMMITTEE

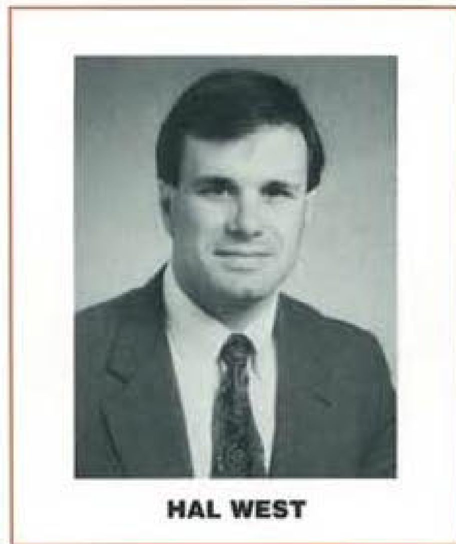
This year's Executive Committee of the Alabama Young Lawyers' Section held its first meeting October 17, 1994 at the state bar headquarters in Montgomery, Alabama. Among the items discussed were preparations for several of the section's upcoming projects and the results of projects completed in the past year. Although it would be impossible to describe all of the section's projects in detail, I will take a moment to mention some of the highlights.

Annual bar admissions ceremony

The Executive Committee discussed preparations for the then-upcoming bar admissions ceremony which was held October 25, 1994. Thanks to the hard work of **Tom Albritton** and **Bryan Horsley**, I can report that the ceremony was a huge success. Over 1,000 people attended the ceremony in which all of the Alabama appellate courts convened at once to admit 357 applicants to the practice of law in the courts of the State of Alabama. Judge Harold Albritton was also present and admitted most of these same applicants to practice in the federal district court of the Middle District of Alabama. This new feature, which allows admittees to be admitted to both state and federal courts at the same time, has been well received. After the ceremony, the new admittees and their guests attended a luncheon in their honor.

Annual Sandestin seminar

Also discussed were the results of last year's Sandestin Seminar which was an even bigger success than the year before and far exceeded everyone's expectations. Last year approximately 280 lawyers registered for the seminar. Plans for this year's seminar are already underway and it is expected to be even better. The seminar again will be held at the Sandestin Beach Resort on the third weekend in May (May 19-21) and you may now make reservations at the resort by calling 1-800-277-0800. The seminar is an excellent opportunity for young lawyers to further their continuing legal education and meet other young lawyers from across the state. Registration materials for the seminar will be sent out in early February and again in March.



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Youth Judicial Program

The Executive Committee also discussed preparations for the upcoming Youth Judicial Program. In cooperation with the YMCA, the Section co-sponsors a mock trial competition for high school students. **Charlie Anderson** has chaired this committee for a number of years and is to be commended for his tireless efforts in organizing this program. Last year over 350 high school students participated, and even more participants are expected this year. Young lawyers can participate by serving as coaches and organizing teams to participate in the competition. The program gives high school students an excellent opportunity to learn more about our judicial system and how it operates.

Minority Participation Conference

The Section began the Minority Participation Conference last year. The conference provides a forum for minority high school students to meet with minority judges and lawyers to learn more about the opportunities of a legal career. **Fred Gray** worked hard to organize the conference and approximately 75 high school students participated. The Executive Committee concluded that the conference was a resounding success and should be continued on an annual basis. Several ways of expanding the conference to reach more minority students and increase participation were also discussed.

These are highlights of a few projects in which young lawyers are involved and are examples of projects in which young lawyers are serving their community and their profession. I take this opportunity to encourage young lawyers to become even more involved in serving their communities and their profession. Lawyers have acquired a bad reputation with the general public and one way to improve our reputation is through community service. In order to increase participation by young lawyers, the Executive Committee is considering undertaking a number of new projects in the upcoming year. If you have an idea for a good project or would like to participate in these or other projects, please contact someone on the Executive Committee.

Although the need for young lawyers to become more involved in community service is great, before becoming involved, we as young lawyers should evaluate the time and resources that will be necessary to fulfill the commitment.

Needless to say, the community service of lawyers often goes overlooked; however, unfulfilled commitments only further the poor public perception of lawyers in general. Other people are often relying on our commitments and can be less than sympathetic to the pressures of work and family. However, once becoming involved you will find the experience of community service to be as rewarding as any in your practice.

The members of the 1994 Executive Committee and the firms at which they practice are as follows:

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President-elect
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• M·E·M·O·R·I·A·L·S •

Gene Roberts Caton
Huntsville
Admitted: 1979
Died: July 31, 1994

Alfred George Hecht
Collinsville
Admitted: 1951
Died: October 24, 1994

Earl Davis McNeal
Huntsville
Admitted: 1976
Died: October 12, 1994

Robert Clifford Fulford
Birmingham
Admitted: 1942
Died: October 29, 1994

Knox McGee Ide
Anniston
Admitted: 1926
Died: July 4, 1994

Thomas Gillespie Steele
Athens
Admitted: 1938
Died: July 31, 1994

Claude Harris, Jr.
Tuscaloosa
Admitted: 1965
Died: October 2, 1994

John Bartley Loftin
Gadsden
Admitted: 1948
Died: August 23, 1994

Kenneth Wayne Turney
Baltimore, MD
Admitted: 1976
Died: October 9, 1994

• M·E·M·O·R·I·A·L·S •

Charles L. Howard, Jr.

WHEREAS, Charles L. Howard, Jr., who was engaged in the active practice of law in Birmingham for more than 45 years, died at the age of 71 on September 12, 1994; and,

WHEREAS, Charles L. Howard, Jr. was born in Ft. Smith, Arkansas, the son of Charles L. Howard and Beulah Montine Jeffrey Howard, and resided thereafter in Rogers, Arkansas, where he received his secondary education, following which he commenced undergraduate work at what is now Memphis State University in Memphis, Tennessee; and,

WHEREAS, Howard's undergraduate education was interrupted by his enlistment in the United States Army during World War II, where he served in the Army Intelligence Corps until his release from active duty, following which he continued with his undergraduate education at the University of Alabama; and,

WHEREAS, Charles L. Howard, Jr. enrolled in the School of Law at the University of Alabama in September 1946 and graduated therefrom in January 1949, with a degree of Bachelor of Laws, now Juris Doctor, and during the period of his matriculation distinguished himself academically, standing at the top of his class and being elected into membership in Farrah Order of Jurisprudence and Phi Alpha Delta legal fraternity. He was appointed associate editor of volume 1, issue 1, *Alabama Law Review*, which was published in 1948. At the law school, he earned an enviable reputation among his peers for his academic achievements, intellectual aptitude and hard work; and,

WHEREAS, Charles L. Howard, Jr. entered the private practice of law with George Rogers from 1949 until the formation of the firm ultimately known as Rogers, Howard, Redden & Mills, in 1952, with which he practiced as a partner until 1979, at which time he and his son, Charles L. Howard, III, formed the firm of Howard & Howard, with which he practiced until 1986. From that time until the time of his death, Mr. Howard was a solo practitioner. He tried cases in both the state and federal courts, and in many counties other than Jefferson, notably Blount, St. Clair and Shelby. During his practice, he earned a reputation at the bar as an able, fearless and indefatigable advocate. With his clients, no cause was too small to merit his attention and best effort; he dedicated his time to them selflessly, always subordinating his personal interest to his professional service for them. He never undertook to judge them or others, while his introspective nature made him his own harshest judge and critic; and,

WHEREAS, Charles Howard was an active and supportive member of the Alabama State Bar and the Birmingham Bar Association throughout the years of his practice, serving where asked and never seeking self-aggrandizement, leaving a legacy of dedication of service to others of which we as fellow attorneys, and his children as his progeny, may well be proud.

William N. Clark
President
Birmingham Bar Association

Earl Davis McNeal

WHEREAS, Earl Davis McNeal has suddenly and tragically been taken from our midst, and

WHEREAS, Earl Davis McNeal was the son of Mr. and Mrs. Richard McNeal and was a lifelong resident of Huntsville, Madison County, and a graduate from Lee High School, and

WHEREAS, he was graduated from Auburn University and the University of Alabama School of Law, and thereafter returned to Huntsville to establish his practice of law, and

WHEREAS, Earl was the loving husband of Mary Catherine McNeal and was the devoted father of Davis Milner McNeal, Rebecca Connolly Wells and Mary Isabelle Wells, and

WHEREAS, Earl was a member of the Huntsville-Madison County Bar Association, Alabama State Bar, the Alabama Trial Lawyers Association, and president of the Madison County Criminal Defense Association, and

WHEREAS, he was admitted to practice in the courts of the State of Alabama, all United States District Courts situated in the State of Alabama, the Fifth United States Circuit Court of Appeals, and the Eleventh United States Circuit Court of Appeals, and

WHEREAS, Earl was a member of Phi Alpha Delta Legal Fraternity and the Farrah Law Society of the University of Alabama, had served as president of Circle K at Auburn University, was a member of the College of Young Democrats, had been a member of the Auburn University Alumni Association, the University of Alabama Alumni Association, and had served on the Board of Directors of the Friends of the Public Radio in Huntsville, Alabama. Additionally, Earl was a veteran of service in the United States Army, and

WHEREAS, Earl was loved by his family, beloved by his fellows at the Bench and the Bar and respected throughout the community for his professional and civic accomplishments, and

WHEREAS, Earl Davis McNeal was a tireless advocate, a respected counselor, and a good and competent lawyer, and

WHEREAS, he accomplished all of these with such grace and humor as to make him a cherished friend to us all and he will be sorely missed.

NOW THEREFORE, BE IT RESOLVED by the Huntsville-Madison County Bar Association that our bar and our community have suffered a great loss in the passing of our brother lawyer, Earl Davis McNeal, and that we sympathetically join with his parents, Mr. and Mrs. Richard McNeal; his wife, Mary Catherine McNeal; their children, Davis Milner McNeal, Rececca Connolly Wells, and Mary Isabelle Wells; his brother Terry Richard McNeal; and other members of his family and loved ones in mourning his passing while honoring his name, and by this Resolution, we in some small way extend to his family our sincere and heartfelt sympathy, compassion and condolence.

Benjamin Rice
President
Huntsville-Madison County Bar Association

• M·E·M·O·R·I·A·L·S •

Joseph Charles Sullivan, Sr.

WHEREAS, Joseph Charles Sullivan, Sr., a distinguished member of this association passed away on May 5, 1994; and,

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

NOW, THEREFORE, BE IT RESOLVED THAT, "Mr. Joe," as he was affectionately known to many members of the bar, was born in Mobile where he attended parochial schools and received degrees from both Springhill College and Loyola University. He practiced law in Mobile with Sullivan & Cameron and later as a partner with the firm of Hamilton, Butler, Riddick, Tarlton & Sullivan.

He was elected to the House of Representatives, State of Alabama in 1942, re-elected in 1946 and served in that capacity until 1950. He also served on the War Emergency Council created in 1943. He co-authored a poll tax exemption bill for World War II veterans and introduced the first bill for expansion for the Alabama State Docks in the 1945 session. His civic and professional activities and accomplishments included serving as president of the Mobile Bar Association in 1957, and as a member of the boards of the First National Bank of Mobile, the Mobile Area Chamber of Commerce and the United Fund. He also was co-founder of Citizens Bank in Mobile in 1957. He practiced law in Mobile more than 60 years and was recognized by the state and local bar association for his long and meritorious service to our profession.

Mr. Joe tended to specialize in real property law and was recognized and admired by his fellow lawyers as being very skilled and able in this and other areas of the practice of law. He had that mischievous twinkle in his eye; he always had a good word for everyone and was loved and respected by one and all.

He was a devoted father and family man, leaving surviving him two daughters, Ruth Austill and Sallie Connell, both of Mobile; three sons, Joseph C. Sullivan Jr., Richard C. Sullivan and Patrick M. Sullivan, all of Mobile; one sister, Isabel Sullivan; and numerous grandchildren. Joe, Jr. is a partner in the Hamilton, Butler firm.

Richard Bounds
President
Mobile Bar Association

James G. Gann, Jr.

WHEREAS, James G. Gann, Jr. was a member of the Birmingham Bar Association until the time of his death on September 14, 1994; and,

WHEREAS, James G. Gann, Jr. was a member of the American Bar Association, the Alabama State Bar and numerous other organizations throughout the city and state; and,

WHEREAS, James G. Gann, Jr. graduated from the University of Alabama School of Engineering and School of Law; and,

WHEREAS, he was in fraternal kinship with brothers and sisters of the fraternities and organizations of Alpha Pi Mu, Pi Tau Chi, and PHILOS while matriculating; and,

WHEREAS, he honorably served his country in World War II as a member of the United States Navy, and faithful to his comrades helped organize the 50th Anniversary of the V12 Navy program of Samford University held in 1992; and,

WHEREAS, James G. Gann, Jr. was a dedicated and valued member of the Highland United Methodist Church, serving as chairman of the board. He was a loyal and active member of the Downtown Birmingham YMCA, being in particular an avid practitioner of the sport of handball. He proudly promoted the activities of Vestavia High School by membership in the Booster Club and by providing commentary on the seminal home football games. He also participated in civic organizations with distinction, including the vice-presidency of the Birmingham Young Republicans Club; and,

WHEREAS, he is survived by his wife of over 43 years, Mary S. Gann; four sons, James G. Gann, III, M. Keith Gann, Timothy C. Gann, and David W. Gann; and also by beloved grandchildren, Mary Paige Gann, Michael K. Gann, Stephen P. Gann, and Walker J. Gann; and

WHEREAS, James G. Gann served over 30 years with distinction as counsel for South Central Bell and AT&T before entering upon 12 years in the private practice of communications law; and,

WHEREAS, he was distinguished as a dedicated, vigorous and tenacious advocate on behalf of all citizens enlisting his representation; and,

WHEREAS, we desire to express our deep regret and sense of loss at the passing of our colleague from our honorable profession, from the world of business, and from the congress of society.

William N. Clark
President
Birmingham Bar Association

Please Help Us

The Alabama Lawyer "Memorials" section is designed to provide members of the bar with information about the death of their colleagues. The Alabama State Bar and the Editorial Board have no way of knowing when one of our members is deceased unless we are notified. Please take the time to provide us with that information. If you wish to write something about the individual's life and professional accomplishments for publication in the magazine, please limit your comments to 250 words and send us a picture if possible. We reserve the right to edit all information submitted for the "Memorials" section. Please send notification information to the following address: **Margaret L. Murphy, *The Alabama Lawyer*, P.O. Box 4156, Montgomery, AL 36101.**

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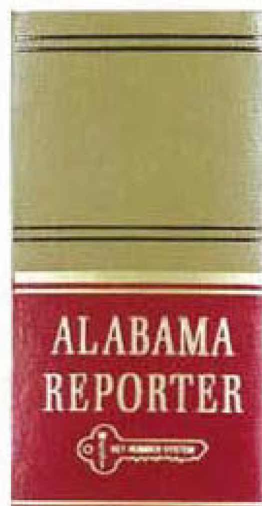

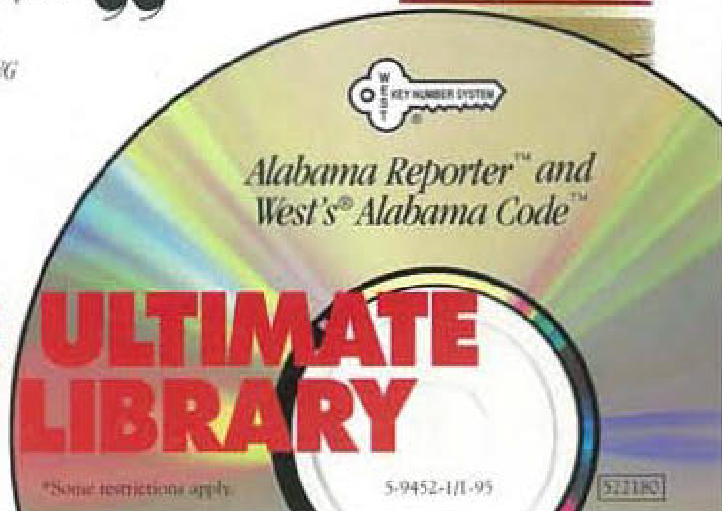

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