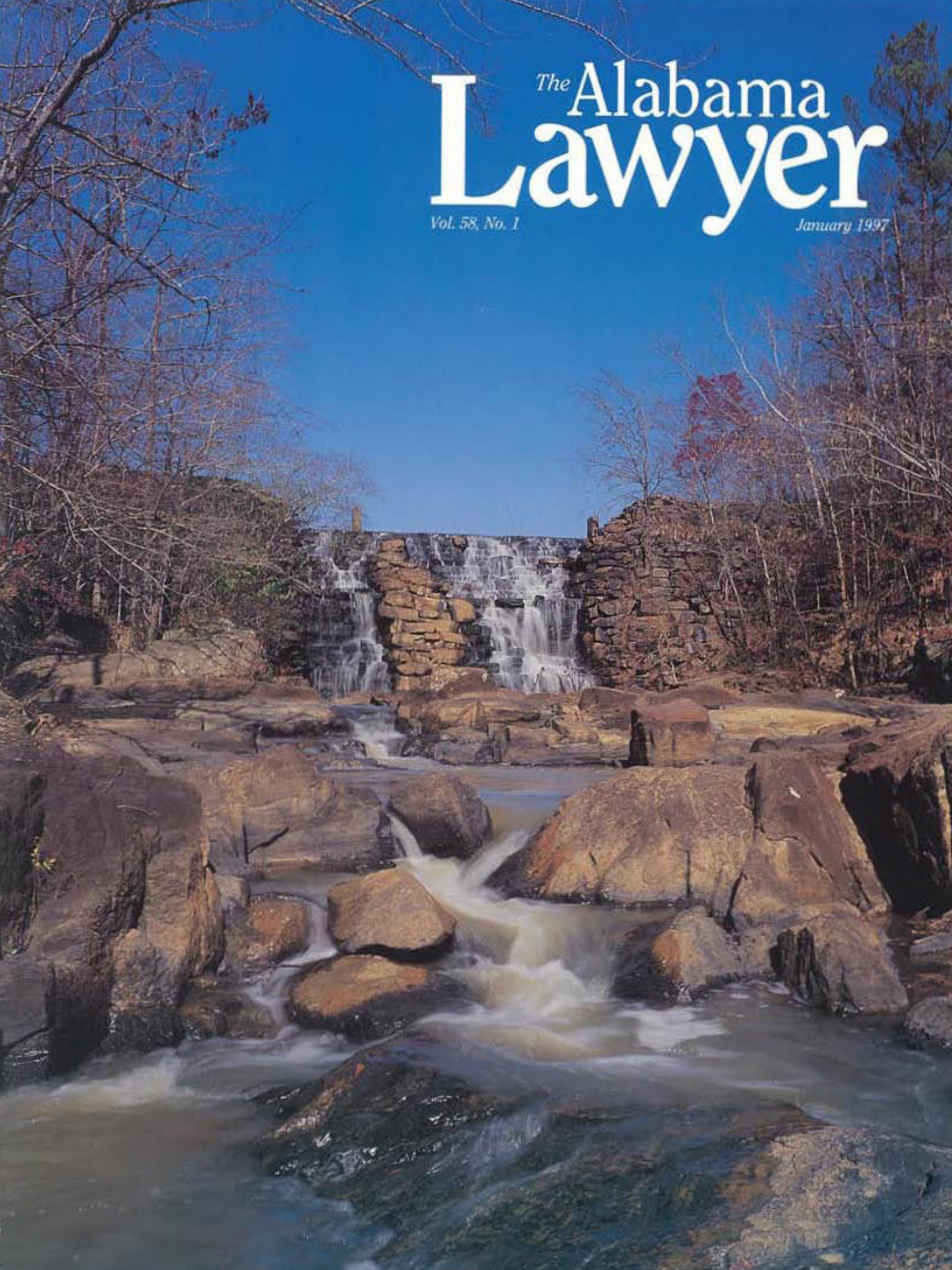

The Alabama Lawyer

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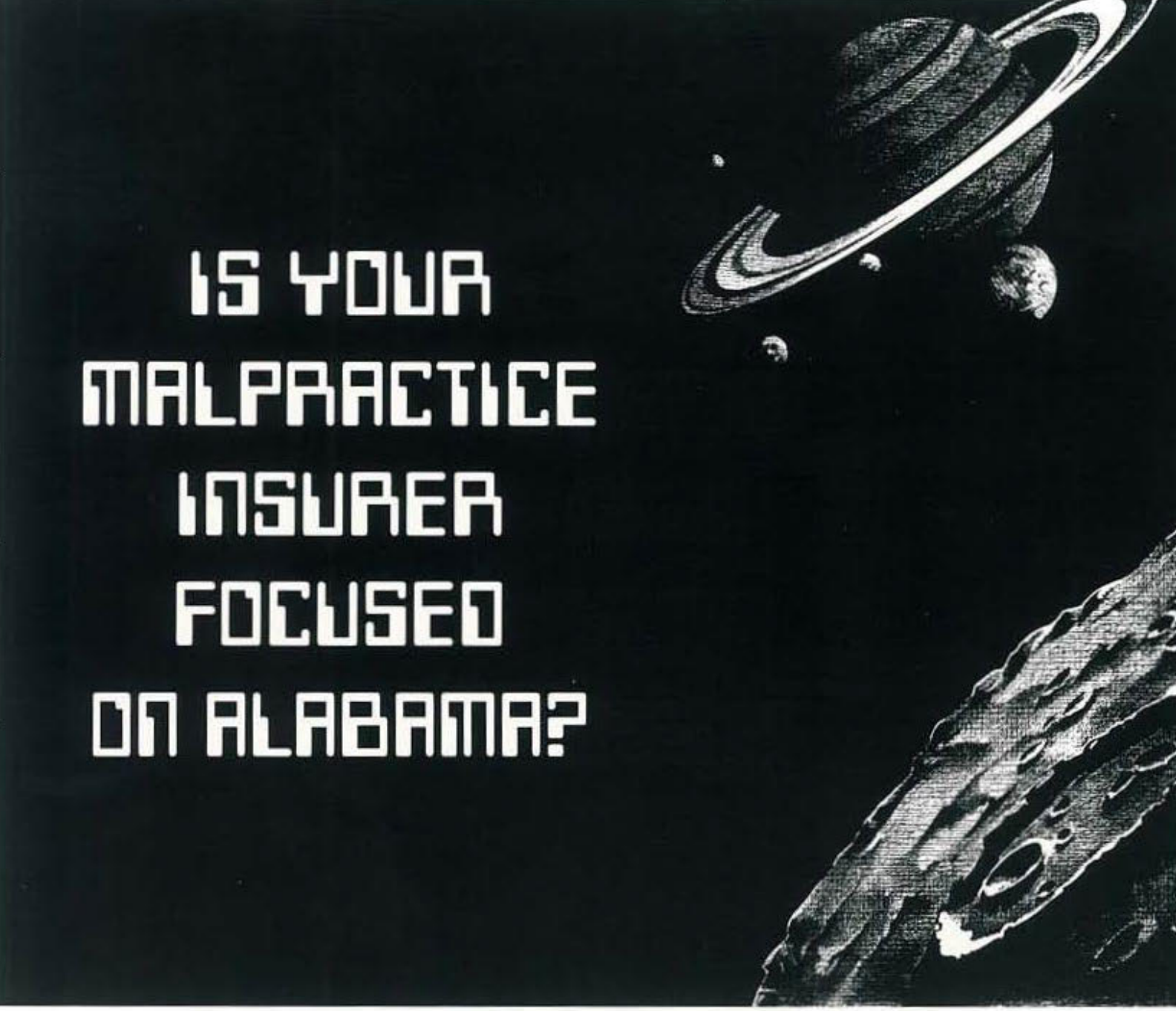

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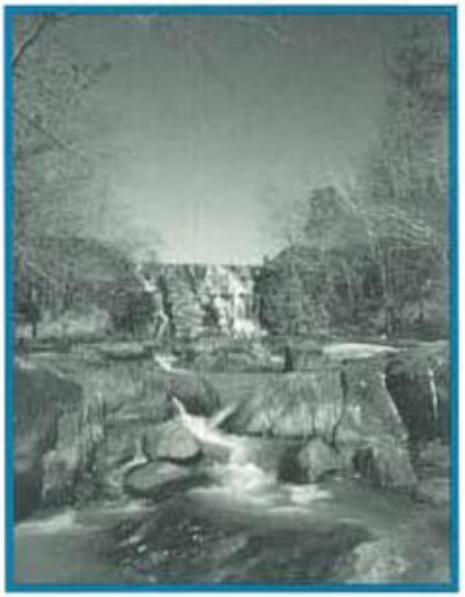

The Alabama Lawyer

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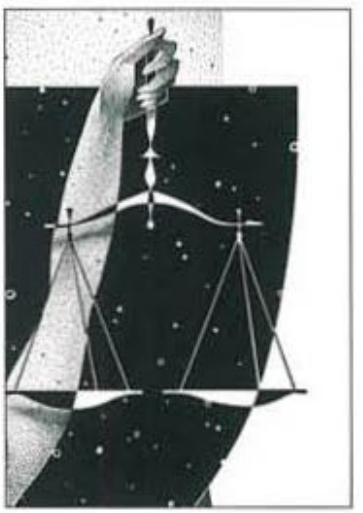
On the Cover

Waterfall at Chewacla State Park, near Auburn, Alabama. Chewacla State Park is comprised of 696 acres lying on the geographical fault line separating the Piedmont Plateau from the Lower Coastal Plain. Unique rock formations and a variety of trees, flowers and wildlife can be found throughout the park.

—Photo by Paul Crawford, JD, CLU

In This Issue



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DEPARTMENTS

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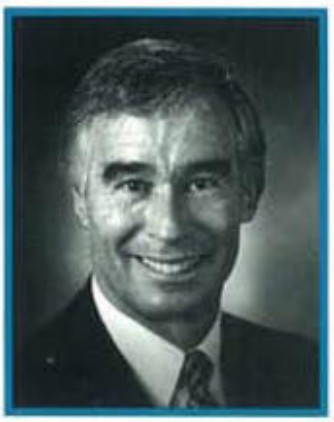
President's Page

By Warren B. Lightfoot

To Whom Much Is Given . . .



Warren B. Lightfoot

This is my third President's Page message and my second one on selection of judges. I write this in the aftermath of the most bitterly contested judicial race any of us can remember. And I write this to implore all of us, plaintiff and defense, business and consumer, to join together to institute a new system to prevent campaigns like that one. All of us have much more in common than we do that separates us, and all of us want a better Alabama for our children and our grandchildren. Together, we can work to make a difference for this beleaguered state of ours. We owe it to ourselves, to the public and to our profession to try.

The method of selecting judges I outlined in my last message may not be perfect, but we should adopt it and try it, if for no other reason, than simply because under this method, extraordinarily expensive, low-level campaigns like we have just suffered through will not occur. Our judiciary must be above reproach and above the kind of campaigns that have become all too common in other political contests. Simply put, for those of you who did not read my last message, a statewide judicial commission (comprising persons designated by established entities, assuring a politically acceptable and diverse group) would nominate three persons to fill any appellate vacancy. The governor would appoint from those three nominees and the new judge would serve a short term, (say, two years) at the conclusion of which he or she would stand for a retention election: "should Judge Jane Doe be retained?" The public would thus retain its right to vote and if elected, Judge Doe would serve a full six-year term. If defeated, the process would begin anew, with Judge Doe eligible for renomination by the commission.

The timetable we are hoping to implement is as follows. The board of bar commissioners would vote on the concept on December 6, 1996, and if it is approved, authorize the appointment of a committee of plaintiffs' and defense lawyers to work out the details of the concept. That committee would make its recommendations to the board of bar commissioners sometime during 1997 and if the board approves the proposal, it would be submitted to the general session of the legislature in January 1998. Some public relations work would be conducted with respect to informing the public, and the constitutional amendment would be on the ballot in November 1998.

I exhort all of you to keep an open mind as we move along this road to a different method. I ask, really, for more than that; I ask for your support. We have a wonderful state, richly blessed in terms of natural resources, natural beauty, a combination of seacoast and the foothills of the Appalachian Mountains. We have good people, who look to us for leadership in the area of the judiciary, and who expect the lawyers to find a solution to problems like this. There is a passage in the "Book of Luke" that cuts across all creeds; it says that to whom much is given, much is required. We, the members of this bar, have been given much in terms of ability and opportunity, and I believe that we owe a corresponding obligation to serve the public in working our way out of the present system. By the time you read this, I hope that the board of bar commissioners will have approved a resolution saying that the concept is worthy of further study and authorizing the appointment of a drafting committee. I think that we will find a ground swell of support from the members of the public. I urge you to help us in this important effort. ■

DID YOU KNOW!!!

The Alabama Court Reporters Association has adopted the Code of Ethics of the National Court Reporters Association as follows:

CODE OF PROFESSIONAL ETHICS

A Member Shall:

1. Be fair and impartial toward each participant in all aspects of reported proceedings.
2. Be alert to situations that are conflicts of interest or that may give the appearance of a conflict of interest. If a conflict or a potential conflict arises, the Member shall disclose that conflict or potential conflict.
3. Guard against not only the fact but the appearance of impropriety.
4. Preserve the confidentiality and ensure the security of information, oral or written, entrusted to the Member by any of the parties in a proceeding.
5. Be truthful and accurate when making public statements or when advertising the Member's qualifications or the services provided.
6. Refrain, as an official reporter, from freelance reporting activities that interfere with official duties and obligations.
7. Determine fees independently, except when established by statute or court order, entering into no unlawful agreements with other reporters on the fees to any user.
8. Refrain from giving, directly or indirectly, any gift, incentive, reward or anything of value, to attorneys, clients, witnesses, insurance companies or any other persons or entities associated with the litigation, or to the representatives or agents of any of the foregoing, except for items that do not exceed $100 in the aggregate per recipient each year.
9. Maintain the integrity of the reporting profession.

NCRA CONTRACTING DISCLOSURE POLICY

1. A court reporter shall always disclose to all parties present at a deposition the existence of any direct or indirect contracting relationship with any attorney or party to the case, so that the other parties may exercise their rights under Rules 28(c), 29 and 32(d) (2) of the Federal Rules of Civil Procedure, and comparable state and local laws, to object to the taking of the deposition because of the possible disqualification of the court reporter. This disclosure shall include the identity of all principals and agents involved in the contracting group as well as a description of all services being performed by such court reporter, his or her employer, or any principal or agent of the contracting group. It is the court reporter's obligation to make reasonable inquiries and ascertain this information before accepting any assignment.
2. A court reporter shall always offer to provide comparable services to all parties in a case. However, nothing in this policy is intended to allow court reporters to directly or indirectly exchange information with competitors about the prices they charge, or to discourage in any other way competition in the services offered or prices charged by court reporters.
3. A court reporter shall not, in act or appearance, indicate that the court reporter is participating as part of an advocacy support team for any one of the parties.
4. A court reporter shall always comply with federal, state and local laws and rules that govern the conduct of court reporters (such as those that deal with certification, confidentiality and custody of transcripts, and contracting).

EXECUTIVE DIRECTOR'S REPORT

By Keith B. Norman

MAD: Mutual Assured Destruction

Keith B. Norman

I am sure you are wondering what **MAD** has to do with our profession. I am writing this only days after several judicial campaigns reached a new low in campaign conduct. On an emotional level, I am *mad* because they lacked the dignity that judicial campaigns are supposed to possess. On a professional basis, I am concerned because the campaign tactics that we have experienced in this year's election and the 1994 election are endangering the public's respect for the judiciary. If the type of campaign conduct that we have witnessed in the last two elections continues in future judicial elections, we may experience the *mutual assured destruction* of our judicial branch of government.

For many the acronym **MAD** is a hauntingly familiar reminder of the Cold War era. Coined by defense strategists in the 1960s, *mutual assured destruction* refers to the policy of nuclear deterrence that guided policymakers until the adoption of strategic arms limitation agreements between the United States and the USSR and the subsequent collapse of the USSR. Simply stated, the doctrine of mutual assured destruction made the first launch of nuclear weapons by either the U.S. or the USSR a zero sum outcome.

This policy maintained stability between the two super powers during the Cold War, but it touched off an arms race between the U.S. and USSR as a consequence. In order to maintain the stability of this nuclear deterrence, defense planners for both sides continued to advocate the buildup of each side's nuclear arsenal. This expansion of nuclear arsenals continued out of fear that the other side might gain a strategic edge, despite the recognition by both sides that each possessed sufficient nuclear weapons to destroy the entire world many times over.

Recent judicial elections and the **MAD** doctrine seem to be strikingly similar. For example, one candidate starts by slightly crossing the line of appropriate campaign conduct hoping to gain a small edge in the race. The other candidate, fearing that the opponent might gain the advantage, responds in kind, but more negatively. This conduct is repeated with each side ratcheting up the negative campaign rhetoric each time until the campaign becomes embarrassingly undignified. Essentially, the candidates have destroyed one another—*mutual assured destruction*. In the process, the candidates have lost sight of the harm that is inflicted on the judicial system as a whole. Theirs and their campaign advisers' primary concern is the strategic outcome—winning at any cost.

An astute and candid assessment of the situation with which I happen to agree is by Birmingham Bar Association President **Clay Alspaugh**. In his "Presidents Message" appearing in the summer 1996 issue of the Birmingham Bar Association *Bulletin*, he writes:

"The sad reality in my mind is that we as lawyers have let politics eat its way into our system of justice. While laws obviously are a direct product of 'politics', the administration of same should not be. We as lawyers should have the total right of advocacy within the laws without unjustified criticism of the result of that advocacy so long as that advocacy is within the bounds of the law and our Code of Professional Conduct.

"Likewise, the judiciary should be

able to interpret those laws and call balls and strikes without pressure from the political right or left and without regard to a perception by some that, due to **partisan political affiliation**, that particular party gets the calls on the corners. Please understand that I do not infer, and certainly do not believe this to be the case in practice. But, that perception to those outside the system may exist." [Emphasis in the original]

Judicial campaigns should not be run like ordinary political campaigns. Canon 7 of the Canons of Judicial Ethics requires candidates to "maintain the dignity appropriate to judicial office." We should not only expect that judicial candidates aspire to these higher standards, but require that they actually be followed. Whether this will require a change in the method of electing our judiciary because these standards are no longer pertinent, is not the subject of this article. Nevertheless, we must either change the present system or demand that the conduct of judicial candidates be dignified and not destructive. If we let the madness continue, we have no one else to blame but ourselves. ■

About Members, Among Firms

About Members

Robert G. Saunders announces the relocation of his office to 1700 16th Avenue, South, Irondale, 35210. Phone (205) 592-0505.

Julie A. Palmer announces a change of address to 2068 Valleydale Road, Suite C, Hoover, 35244.

James E. Loris, Jr. announces the relocation of his office to 209 N. Joachim Street, Mobile, 36603-6402. Phone (334) 432-3100.

Joan-Marie Kettell announces the opening of her office at 108 South Side Square, Huntsville, 35801. Phone (205) 534-4557.

Jonathan S. Wesson announces the opening of his office at the Frank Nelson Building, 205 20th Street, North, Suite 310, Birmingham, 35203. Phone (205) 322-3444.

J. Timothy Smith announces the relocation of his office to 1678 Highway 31, South, Suite AA, Hoover, 35216. Phone (205) 823-1650.

Ann M. Koszuth announces her relocation to the Federal Public Defender's Office, Western District of Missouri, Suite 3-104, Corporate Centre, 1949 East Sunshine, Springfield, Missouri 65804. Phone (417) 881-4090.

C. Michele Anders announces a change of address to 4284 Barkley Bridge Road, Hartselle, 35640.

James E. Bridges, III announces the opening of his offices in Auburn and Tuskegee. Phone (334) 887-3434 and (334) 727-3430.

Richard G. Poff, Jr. announces the opening of his office at 205 N. 20th Street, Suite 310, Birmingham, 35203. Phone (205) 322-7050.

Cynthia Cargile McMeans announces the relocation of her office to 132 Cove Avenue, Gulf Shores, 36542. Phone (334) 968-5816. The mailing address is P.O. Box 1322, Gulf Shores, 36547.

L. J. Stein, III announces the opening of his office at the Dauphin Law Center, 150 Government Street, Suite 1004, Mobile, 36602. The mailing address is P.O. Box 1281, 36633. Phone (334) 432-2629.

Kevin K. Hays announces the opening of his office at 200 Canyon Park Drive, Suite 105, Pelham, 35124. Phone (205) 620-5670.

Ben C. Hand announces the relocation of his office to 2006 Executive Park Drive, Opelika, 36801. Phone (334) 741-4077.

Among Firms

Joseph T. Carpenter announces that **Nathan C. Prater** has become an associate. Offices are located at 303 Sterling Centre, 4121 Carmichael Road, Montgomery, 36106. Phone (334) 213-5600.

Douglas J. Fees announces that **Stacey L. Lemley** and **Richard L. Collins** have become associates. Offices are located at 401-403 Madison Street, Huntsville, 35801. Phone (205) 536-1199.

Corley, Moncus & Ward announces that **J. Thomas King, Jr.**, former corporate counsel for Collateral Mortgage and New South Federal Savings Bank, has joined the firm as a partner and that **Annette Talley Phebus** has become an associate. Offices are located at 400 Shades Creek Parkway, Suite 100, Birmingham, 35209. Phone (205) 879-5959.

Richard F. Pate & Associates announce that **Amanda S. Hunter**, former staff attorney to Judge Roger M. Monroe, Alabama Court of Civil Appeals, has become an associate. Offices are located at 56-58 S. Conception Street, Mobile,

36633. Phone (334) 433-0300.

Rives & Peterson announces that **Michael E. Hollingsworth II, C. Andrew Wattleworth** and **Julie M. Collier** have become associates. Offices are located at 1700 Financial Center, 505 N. 20th Street, Birmingham, 35203. Phone (205) 328-8141.

Emond & Vines announces that **Rex Warren Slate** and **David Edwin Rains** have joined the firm as associates. Offices are located at 420 N. 20th Street, 2200 SouthTrust Towers, Birmingham, 35203. Phone (205) 324-4000.

Gillion, Brooks & Hamby announces a change in the firm name to **Brooks & Hamby**. Offices are located at 618 Azalea Road, Mobile, 36609. The mailing address is P.O. Box 161629, 36616-2629. Phone (334) 661-4118.

Sigler, Moore, Clements & Wolfe announces that **Alex W. Zoghby** has joined the firm. The new firm name is **Sigler, Moore, Clements, Wolfe & Zoghby**. Offices are located at 2525 First National Bank Building, 107 Saint Francis Street, Mobile, 36602. Phone (334) 433-7766.

Cherry, Givens, Peters & Lockett announces that **A. Gary Jones** has joined the firm. Offices are located at 163 W. Main Street, Dothan, 36301. Phone (334) 793-1555.

Tom Radney & Associates announce that **Thomas A. Radney** has become a partner. The new firm name is **Radney, Radney & Brown.** Offices are located at 56 Court Square, Alex City, 35010. Phone (205) 234-2547.

Spain & Gillon announces that **Gary Parker** has become a partner, and that **Karen Johns, Peter Wright, Stacey L. McDuffa, Frederic L. Smith, Jr.,** and **Kerry Lahey** have become associates. Offices are located in The Zinszer Building, 2117 Second Avenue, North, Birmingham, 35208. Phone (205) 328-4100.

King, Ivey & Junkin announces that **Windy Hillman, Kathy Lepper** and **Allison Shelley** have become associates. Offices are located at 315 W. 19th Street, Jasper, 35501. Phone (205) 221-4640. **Ken Hairston** has become an associate in the Birmingham office. Phone (205) 327-5223.

Durward & Cromer announces the relocation of its offices to 2015 Second Avenue, North, Suite 100, Birmingham, 35203. Phone (205) 324-6654.

Ball, Ball, Matthews & Novak announces that **Michael L. White** has become an associate. Offices are located at 60 Commerce Street, Suite 1100, Montgomery, 36102-2148. The mailing address is P.O. Drawer 2148. Phone (334) 834-7680.

Cabaniss, Johnston, Gardner, Dumas & O'Neal announces that **Joseph V. Musso, Rebecca D. Parks, Ian D. Rosenthal**, and **Lisa M. Shannon** have become associates. Offices are located at Park Place Tower, 2001 Park Place, North, Suite 700, Birmingham, 35203. Phone (205) 252-8800.

Najjar Denaburg announces that **Joseph L. Cowan, II** and **Jeffrey D. Dyess**, former clerk to the honorable William M. Acker, Jr., United States District Judge for the Northern District of Alabama, have become associates. Offices are located at 2125 Morris Avenue, Birmingham, 35203. Phone (205) 250-8400.

Harris, Cleckler, Berg & Rogers announces that **Jeffrey K. Hollis** has become a member, **Stephen J. Bumgarner** and **Blake D. Andrews** have become associates and that the new firm name is **Harris, Cleckler, Berg, Rogers & Hollis.** Offices are located at Historic 2007 Building, 2007 Third Avenue, North, Birmingham, 35203. Phone (205) 328-2366.

Robert P. Reynolds announces that **Jackson E. Duncan, III** has become an associate. Offices are located at 1308 Greensboro Avenue, Tuscaloosa, 35403. Phone (205) 391-0073.

Murchison & Sutley announces that **Lisa G. Gunter** has become an associate. Offices are located at 1600 N. McKenzie Street, Foley, 36535. Phone (334) 943-1579.

Robison & Belser announces that **Martha Ann Miller** has become a partner, and **Charles B. Haigler, III** has become an associate and **Julia J. Weller** has joined the firm as a shareholder. Offices are located at 210 Commerce Street, Second Floor, Montgomery, 36104. Phone (334) 834-7000.

Wallace, Jordan, Ratliff & Brandt

(Continued from page 330)

announces that **Thomas M. Eden, III** has joined the firm. Offices are located at 2000A SouthBridge Parkway, Suite 525, Birmingham, 35209. Phone (205) 870-0555.

Boardman & Tyra announces that **Jason P. Tortorici** has become an associate. Offices are located at 104 Inverness Center Place, Suite 325, Birmingham, 35242-4870. Phone (205) 980-6000.

Pittman, Pittman & Carwie announces that **Kathy Parden Sherman** has become an associate and **T.A. Harding Fendley** has joined *of counsel*. Offices are located at 1111 Dauphin Street, Mobile, 36640-0278. Phone (334) 433-8383.

Hartman, Springfield & Beckham announces that **Charlie M. Shah** has joined the firm as an associate. Offices are located at 2700 Highway 280 South, Suite 360 East, Mountain Brook Center, Birmingham, 35223. Phone (205) 879-0500.

Michael P. Windom and **Desmond V. Tobias** announces the formation of **Windom & Tobias.** Offices are located at 1203 Dauphin Street, Mobile, 36604. Phone (334) 432-5001.

Richard W. Pectol & Associates announces that **Clinton C. Carter** has joined the firm. Offices are located at 202 E. Unaka Avenue, Johnson City, Tennessee 37601. Phone (423) 928-6106.

Ronald W. Wise and **William M. Bowen, Jr.**, former presiding judge of the Alabama Court of Criminal Appeals, announce the formation of **Wise & Bowen**. Offices are located at 2000 Interstate Park Drive, Suite 105, Montgomery, 36109. Phone (334) 260-0003.

Dillard, Goozee & King announces that **Richard F. Horsley** has become a partner and that **Todd A. Delcambre** has joined the firm as an associate. Offices are located at the Massey Building, Suite 600, 290 21st Street, North, Birmingham, 35203. Phone (205) 251-2823.

Ralph D. Gaines, III, Daniel S. Wolter and **Kyle L. Kinney** announce the formation of **Gaines, Wolter & Kinney**. Offices are located at 22 Inverness Center Parkway, Suite 300, Birmingham, 35242. Phone (205) 980-5888.

Pitts, Pitts & Thompson announces that **Rickman Edgar Williams, III** has become an associate. Offices are located at AmSouth Bank Building, 9 Broad Street, Suite 201, Selma. The mailing address is P. O. Drawer 537, 36702-0537.

Carr, Alford, Clausen & McDonald announces that **Pamela A. Moore, A. Edwin Stuardi, III** and **W. Benjamin Broadwater** have become associates. Offices are located at Suite 5000, One St. Louis Centre, Mobile, 36602. The mailing address is P.O. Drawer C, 36601. Phone (334) 432-1600.

Pruett, Brown, Turner & Horsley announces that **Dianna Smith**, formerly of Coopers & Lybrand, has become an associate. Offices are located in Birmingham and Gadsden Alabama. Phone (205) 871-1714 and (205) 546-9666.

Walston, Stabler, Wells, Anderson & Bains announces that **Elizabeth Holland Hutchins** has joined the firm, and that **Barry A. Brock, Elizabeth Mehaffey Davis** and **Leland L. Price** have become associates. Offices are located at 500 Financial Center, 505 20th Street, North, Birmingham, 35203. Phone (205) 251-9600.

Bradley P. Ryder and **Teresa N. Ryder** announce the formation of **Ryder & Ryder**. Offices are located at 100 Jefferson Street, Suite 300, Huntsville, 35801. Phone (205) 534-3288. The mailing address is P.O. Box 18095, 35804.

Hand Arendall announces that **Gregory R. Jones** has joined the firm. **Frederick G. Helmsing, Jr.** has joined the firm as an associate in the Mobile office and **Jerry J. Crook, II** is an associate in Birmingham. Phone (205) 324-4400 and (334) 432-5511.

Adams & Reese announces that **W. David Watkins** has joined as a partner with the firm. Offices are located at the Motel Centre, Suite 900, 200 S. Lamar Street, P.O. Box 24297, Jackson, Mississippi 39225-4297. Phone (601) 353-3234.

William M. Hammond, Daniel B. Feldman and **Daniel P. LeHane** announce the formation of **Hammond, Feldman & LeHane**. Offices are located at 205 20th Street, North, Suite 615, Birmingham, 35203. Phone (205) 322-2260. ■

BAR BRIEFS

• In August, **Kendall W. Maddox** of Birmingham was awarded the LL.M. in Taxation by the University of Alabama School of Law. He is a 1988 admittee to the Alabama State Bar.

• **Bibb Allen**, a senior partner in the Birmingham firm of Rives & Peterson, recently had published his comprehensive source on liability insurance law, *Alabama Liability Insurance Handbook*.

Allen is a graduate of the University of Alabama School of Law and is a professor at the Birmingham School of Law. He is a member of the Federation of Insurance Counsel, the International Association of Defense Counsel, the International Academy of Trial Lawyers, the Alabama Defense Lawyers Association, and the American Board of Trial Advocates. He is also a Fellow of the American Bar Foundation and the American College of Trial Lawyers.

• **Eleanor I. Brooks**, district attorney for Montgomery County, was recently elected third vice-president of the National Board of Directors of Girl Scouts of the USA during the Girl Scouts' National Council Session, October 11-14.

Brooks is the first woman elected as district attorney and recently became a Fellow of the American College of Prosecuting Attorneys.

She has served the national Girl Scout organization as a member of its board of directors since 1990. She also is a recipient of the Thanks Badge, Girl Scouting's highest adult recognition.

• **Alison Alford**, an associate with Ball, Ball, Matthews & Novak of Montgomery, has been selected as one of two 1997 recipients of the Pegasus Scholarship Trust for Young Lawyers.

This trust, whose patron is HRH The Prince Philip, Duke of Edinburgh of Great Britain, selects the recipients of this scholarship. Awarded annually, the Pegasus enables Americans to study with English barristers in the Courts of London for the months of February, March and April. Based on her application through the Montgomery Inn of Court and her strong letters of recommendation, Alford was chosen along with Jan Michelsen of Indianapolis.

Alford will be an observer in various courts, including the House of Lords, Privy Council and the Lord Chancellor; the Commercial Judges and Queens Bench Masters at the Royal Courts of Justice; the Old Bailey; Marylebon Magistrates Court; the Inns of Court School of Law; the Faculty of Advocates in Edinburgh, Scotland; and the Lord Chief Justice, High Court and Crown Court in Belfast, Ireland. She may also take part in a residential weekend at Windsor Great Park and a week's marshalling on circuit with a high court judge.

• **Michael Chambers**, a partner in the Mobile firm of McRight, Jackson, Dorman, Myrick & Moore, L.L.C., was recently awarded a doctorate from the international law section of the Graduate Institute of International Studies at the University of Geneva in Geneva, Switzerland. The doctorate was awarded by Professors Lucius Caflisch and Philippe Cahier of the University of Geneva, and Professor Michael Reisman of the Yale University School of Law.

• **Bruce P. Ely**, a member of the firm of Tanner & Guin, has been elected a Fellow of the American College of Tax Counsel. Criteria for membership include at least 15 years in the practice of law with the principal part of the time devoted to tax and tax-related matters, commitment to the practice of law through active involvement in the work of the Tax Section of the American Bar Association, by planning and speaking in tax seminars and programs across the country, by holding office in tax committees or sections of regional, state or local bar associations, through significant legal writing or teaching in the field of taxation, or by holding a high level tax administration position with the federal government.

He is past chair of the Tax Section and Communications Law Section of the Alabama State Bar and presently serves as vice-chair of the Tax & Fiscal Policy Committee of the Business Council of Alabama and as Alabama editor of State Tax Notes and Southeastern Tax Alert. He is also a member of the advisory board of Vanderbilt University's Paul J. Hartman State & Local Tax Forum and the Board of Directors of the Public Affairs Research Council of Alabama.

Ely is one of the principal authors of the recently-enacted Alabama Limited Liability Partnership Act of 1996 and co-authored the ABA's Model S Corporation Income Tax Act (1988), the 1992 Taxpayers' Bill of Rights, and the Alabama Limited Liability Company Act of 1993.

He received his undergraduate and law degrees from the University of Alabama and his LL.M. in Taxation from New York University School of Law. ■

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BUILDING ALABAMA'S COURTHOUSES

By Samuel A. Rumore, Jr.

Lowndes County

Established: 1830

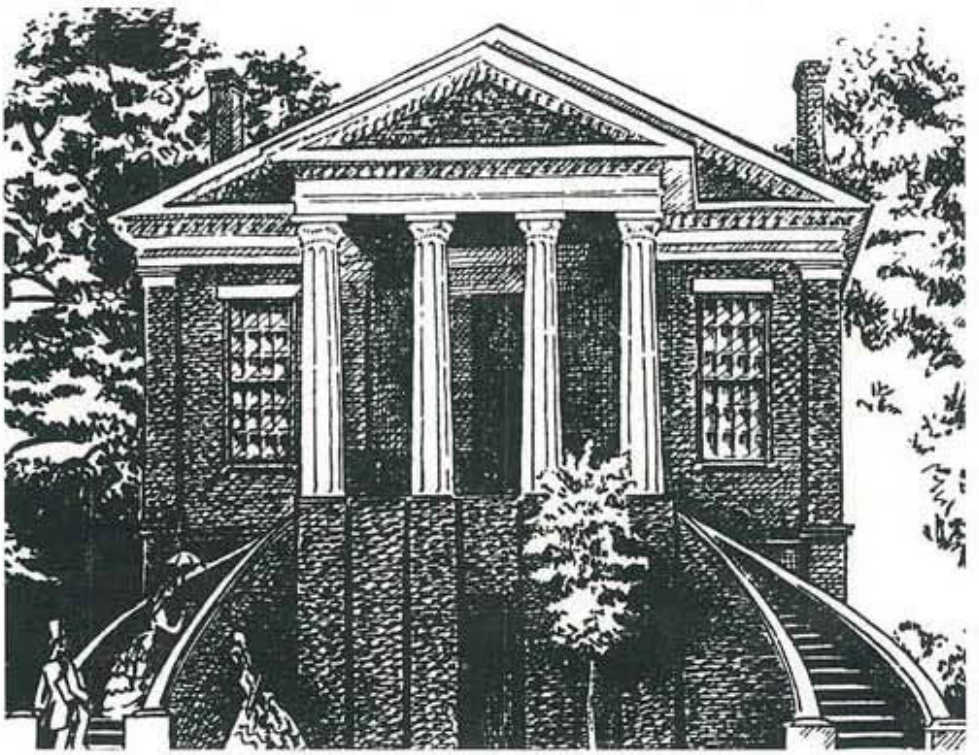
The following continues a history of Alabama's county courthouses—their origins and some of the people who contributed to their growth. If you have any photographs of early or present courthouses, please forward them to: Samuel A. Rumore, Jr., Miglionico & Rumore, 1230 Brown Marx Tower, Birmingham, Alabama 35203.

Lowndes County

Lowndes County, in south central Alabama, is the site of a well-known story involving one of Alabama's most famous and colorful Indian chiefs, Red Eagle. Red Eagle was a half-breed, having a Scottish father and a Creek Indian mother. He was known as William Weatherford to the white settlers who knew his father. His leadership role in the massacre of white settlers at Fort Mims in Baldwin County on August 30, 1813 was the precursor of the military encounter in Lowndes County from which the story arose. The encounter took place at a site called the Holy Ground, or Ikanatchaka in the Creek Indian language.

After Fort Mims, Red Eagle's warriors gathered at the Holy Ground, a high bluff on the Alabama River which the Indians believed was impregnable because it was surrounded by creeks, swamps, thickets and the river. They were followed there by troops sent from St. Stephens under the leadership of Brigadier General Ferdinand L. Claiborne, the brother of Louisiana Governor William Claiborne. One of the supply points General Claiborne established during this campaign was Fort Deposit, the name of a thriving Lowndes County town to this day. On December 23, 1813, Claiborne's troops and Indian allies attacked the Holy Ground. They completely routed the Creeks and burned the village the Creeks had established there. Claiborne's men drove the Creeks out of central Alabama.

Red Eagle's escape from the Holy Ground is the basis of the story, part legend and part fact, which is still told about him. When the battle was lost and the Indians began escaping across the river in



Original Lowndes County Courthouse

boats or by swimming, Red Eagle on his horse, Arrow, defiantly opposed Claiborne's forces. Seeing that his only escape from capture and death was a leap into the river, the story goes that he raced his horse to the edge of the bluff and dove on horseback into the Alabama River. Some accounts say the bluff was 20 feet high, others 50, and others higher still. Surviving the dive, Red Eagle escaped in a hail of bullets to fight again at Horseshoe Bend.

Lowndes County Courthouse before 1980's renovation

Following the ultimate defeat of the Creeks in 1814, many settlers from South Carolina moved into the territory that would become Lowndes County. McGill's Hill, a village named for early residents and later called Lowndesboro, was settled around 1815. In 1818, the Alabama Company of South Carolina acquired between 60,000 and 70,000 acres of land in Alabama at the Cahawba Land Office. The territory purchased was then in Montgomery County. Most of the land was south and west of a place called Big Swamp, aptly named because of the swampy, damp nature of the surroundings through which Big Swamp Creek meandered.

In 1820 a wagon train of settlers from South Carolina arrived at Big Swamp. They camped near a grove of hickory, oak and walnut trees. Until they built homes, these early settlers lived in tents. They kept the name Big Swamp for their settlement. Years later this descriptive name would take on significance when architects working on a courthouse renovation there learned about the structure's moisture problem called "rising damp."

Lowndes County was the only new county created in Alabama in 1830. The legislature took land from Butler, Dallas, Montgomery, Pike, and Wilcox counties to form this new governmental unit in the south central portion of the state. Since most of the early residents came from South Carolina, the legislature chose a name to honor a popular South Carolinian of the day, William Jones Lowndes.

Lowndes was born in Colleton County, South Carolina, on February 11, 1782. He was educated in England and in private schools in South Carolina. In 1802 he married Elizabeth Pinckney, a daughter of Thomas Pinckney, the former governor of South Carolina. Lowndes practiced law for a few years and then devoted his energy to his plantation.

In 1806, Lowndes began his public life. He served in the state assembly from 1806 to 1810. He served 12 years in Congress, from 1810 to 1822. The key issues that interested him during his terms in Congress were the Missouri Compromise and the Second Bank of the United States.

Lowndes, even though he was over six feet six inches tall, had been in poor health since he was a child. He resigned from Congress on May 8, 1822. Seeking to improve his health he left on a voyage, but died and was buried at sea on October 27, 1822.

The most fitting epitaph to Lowndes was penned by his Congressional colleague, Henry Clay, who said, "I think the wisest man I ever knew was William Lowndes." The Alabama legislature honored Lowndes by creating Lowndes County on January 20, 1830.

In the legislation establishing Lowndes County, the sheriff of Montgomery County was directed to hold an election on the first Monday in March 1830 for the selection of county commissioners and other officers. Then the newly elected officials were directed to hold an election to choose the permanent seat of justice for the county. However, until a permanent choice could be made, "Fisher's store" was designated as the temporary courthouse. It is interesting to note that the sheriff of Montgomery County was paid $25 from Montgomery County's treasury to conduct the Lowndes County election.

In Volume I of the Lowndes County Commission minutes, it is recorded that William P. Fisher and John P. Nall were appointed commissioners to superintend the laying out of a town at the site selected for the county seat. They were authorized to employ the county surveyor or any other person duly qualified to lay out the town. Also, they were to erect a courthouse, jail and other public structures.

In the ensuing county seat election, Big Swamp won. An early post office guide, dating from October 1, 1830, lists a new name for the village. Sometime in 1830, it became known as Lowndes Court House. In a supplement to the post office directory, 11 listings in Alabama had name changes between October 1, 1830 and April 1, 1831. One of the 11 changes was Lowndes Court House to Haynesville. At a later date the "s" was dropped and the name became Hayneville. It is appropriate that the county seat of a county named for a famous South Carolinian should be named for an even more famous South Carolinian—Robert Young Hayne.

Like Lowndes, Hayne was born in the Colleton District of South Carolina. His date of birth was November 10, 1791. Hayne was born on a rice plantation, studied in a law office, and was admitted to practice law at the age of 21. Also, he married into the same prominent political family Lowndes had entered. His first wife

was Frances Henrietta Pinckney, who died at an early age.

Hayne was elected to the South Carolina legislature in 1814 and became speaker in 1818. He served as South Carolina Attorney General for two years. In December 1822, he was elected to the United States Senate and re-elected in 1828. Following his service in the Senate, Hayne became governor of South Carolina, then mayor of the city of Charleston for one year. After his government service ended, he became president of a railroad in 1836. Hayne died on September 24, 1839.

Hayne is remembered in American political history for his opposition to a protective tariff and for being a champion of states' rights. He had a series of famous debates with Daniel Webster on these subjects from January 19 to January 27, 1830. As an aside, it is interesting to note that Lowndes County was created during the same week as the famous debate.

Hayne's position was that a state had the right to nullify a federal law. The argument for this "doctrine of nullification" was that since the states had created the Constitution, they could therefore limit the powers given to their creation, the federal government. Webster argued that the Union was superior to any individual state's interests.

In 1831, Hayne, along with several other South Carolinians, purchased a large portion of land in Alabama. Shortly thereafter, the county seat of Lowndes County was named for Senator Hayne.

The first Lowndes County Courthouse was built on the town square in Hayneville, the site of the present memorial to the Confederate dead. The building was 50 feet long, 40 feet wide and two stories tall. It was constructed of handmade brick with two-feet thick walls on the first story and 20-inch thick walls on the second story. The upper story contained six rooms. The cost of this first courthouse was $500.

This courthouse served the county for over 20 years, but in 1854 the building was declared unsafe. Courts were again held at Fisher's Store, then called the W. & J. Fisher General Store and later renamed J. P. Streety & Co. This store was located west of the town square.

Construction on the new and present Lowndes County Courthouse began in 1855 and was completed in 1858. This building is one of only four antebellum structures built as courthouses which are still being used today. The others are found in St. Clair County at Ashville, Perry County at Marion, and Coosa County at Rockford.

Antebellum Lowndes County was a rich and prosperous plantation land. Befitting the wealth of the county at this time, its courthouse was built in the Greek Revival style. The building was 56 feet by 67 feet with a raised portico on the front approximately 29 feet wide and projecting from the building 13 feet. The second floor was reached by a pair of curving stairways on each side of the podium base. Four fluted Doric columns fronted the portico and supported the triangular pediment. Cast iron railings enclosed the porch. The raised portico and curving steps on this building were patterned after the 1854 courthouse in Montgomery.

The courthouse faces west overlooking the court square. It is a two-story structure built of load-bearing brick. It is built on grade, with no steps up to the first level, with brick footings used for the foundation. The upper floor and roof are of wood frame construction. The exterior walls are made of stucco and the interior walls and ceilings are plastered, with the exception of the ceiling in the main courtroom, which is made of stamped metal tiles. The courtroom ceiling is 19 feet high.

The Hayneville courthouse served Lowndes County during the tumultuous period of the Civil War and the ensuing Reconstruction era. While the residents of Lowndes County would never regain the per capita wealth of the antebellum years, the population of the county reached its historical zenith in 1900 when over 35,000 people called Lowndes County home. By that time the courthouse needed significant repairs.

In 1905 the county entered into contracts for the repair and enlargement of the 1858 structure. The front portico with curving staircases was replaced. The stairway was now placed inside the building. When the front and rear doors were opened, the central hall formed a breezeway reminiscent of the old "dog trot" architecture used in early cabins. For additional space, two flanking two-story office wings were attached to the original building. As the crowning touch, the

Lowndes County Courthouse after 1980's renovation

Lowndes County Courthouse, rear annex

builders placed a domed cupola on the courthouse roof.

The work completed in 1906 added 26 feet by 44 feet of office space on two levels on each side of the old building. The new entrance structure had a roof with a steeper pitch than the main building and pilasters containing Ionic capitals. Both the entrance structure and the side wings had smaller windows than the original building.

The base of the courthouse dome is approximately ten feet square. At each corner are double disengaged columns placed on diagonal lines. A cornice divides the base from the dome. On each of the four sides, the builders reserved space for clocks to be added, but no clocks have ever been installed. The ribbed dome is topped by a finial and stands over 20 feet above the roof.

The Lowndes County Courthouse received national attention following the 1965 shooting death of a civil rights worker, Viola Liuzzo, during the Selma to Montgomery March. Liuzzo died in Lowndes County and the trial of the alleged Klansmen defendants took place in the 1906 version of the courthouse.

In recognition of its historical significance, the Lowndes County Courthouse was named to the National Register of Historic Places on June 24, 1971. This courthouse had been the scene of speeches leading up to the Civil War in the 1860s as well as trials involving the civil rights movement in the 1960s. Also, a relic from the past is still in place at the courthouse. The main courtroom contains a small triangular holding cell in the rear southwest corner. There are no other cells visible in any other courtroom in the state of Alabama. This cell is no longer used because of its prejudicial effect on a jury.

Over the years the courthouse fell into disrepair due to a lack of money for maintenance. The roof leaked and the floors rotted. In 1978 court could no longer be held in the building. Hearings were moved to the basement of a building across the street. In a 1981 article in *The Birmingham Post-Herald*, Hayneville attorney Jerry Thornton told of the primitive conditions at the old courthouse. Bees, wasps and birds frequently attacked the jurors in the courtroom. He stated that he would rather try cases outdoors on the court square under the trees than in the courthouse.

Finally, the county found funding for a needed renovation project. It received a grant from the Economic Development Administration and a loan from the Farmer's Home Administration. The new project, under the direction of Montgomery architect Bill Wible, brought the courthouse closer to its original 1850's appearance. The two side wings which had been completed in 1906 were removed. These were replaced by a two-story annex built behind the courthouse. The front entrance returned to a close resemblance of its 1850's appearance with a raised portico and paired curving stairs.

Wible had some difficulty in getting his plans approved by the National Register advisory council. The problem was the new annex. The council had a guideline which stated that an addition to a historic building should reflect the time when it was built. In other words, it should be a product of its own time. Fortunately, Wible later found another guideline which says that any addition should be harmonious with the surrounding architecture. The annex, as constructed, reflected traditional antebellum styling.

While completing the renovations, Wible discovered many interesting features in the courthouse. The wood used in its construction consisted of hand-hewn trusses connected with pegs. The bricks were handmade. The first floor ceilings were of vaulted brick. The supporting brick walls were 30 inches thick.

Wible also encountered persistent problems with moisture in the walls. The courthouse was constructed with a brick foundation on ground level in a place that had been a big swamp. Brick, and particularly hand-made brick, is quite porous. Moisture in the ground tends to spread upward through porous building materials. And, with modern improvements in water-proofing, any moisture in the walls would travel higher in order to escape. The condition encountered in the court house is called "rising damp". The plaster and stucco had difficulty in drying. Walls had to be repainted. There has been a constant battle in the building with moisture-related problems, and the battle continues today. There is little doubt that the site of the courthouse was appropriately named when originally called "Big Swamp".

The courthouse renovation of the 1980s cost approximately $1 million. The building was made handicapped assessible, needed restroom facilities were added, and more usable work space for the county was provided. However, maintenance remains the major problem now. Moisture and mildew have caused yellow-green blemishes on the exterior walls. And, in 1993, a newspaper article reported that court proceedings had to be halted and the main courtroom closed because of bats hanging from the ceiling. Such problems can be expected in a historic structure located in a rural setting.

Lowndes County is not as prosperous as in the antebellum days. More people lived in Lowndes County in 1840 than today. Still, the citizens of the county have a unique government building in their courthouse. They should take all steps necessary to preserve the third oldest courthouse in the state of Alabama. ■

Sources: *Lowndes Court House, A Chronicle of Hayneville, an Alabama Black Belt Village, 1820—1900*, Mildred Brewer Russell, 1951; "The Courthouses of Lowndes County, Alabama," *The Alabama Lawyer*, January 1971, pages 74-77; *Historic Assets—Lowndes County, Alabama*, South Central Alabama Development Commission, 1975; *McIntosh and Weatherford, Creek Indian Leaders*, Benjamin W. Griffith, Jr., 1988; Interview with architect Bill Wible of Parsons, Wible, Brummal, Alkire Architects, Montgomery, Alabama; Article, *Birmingham Post-Herald*, Tuesday, April 28, 1981, page A9; National Register of Historic Places—Nomination Form, Lowndes County Courthouse, 1971.

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, and is a member of *The Alabama Lawyer* Editorial Board.

LEGISLATIVE WRAP-UP

The Alabama Law Institute is expected to introduce four major revisions. These are: Multiple Party Accounts; Uniform Family Support Act (see November 1996 *Alabama Lawyer*); Revised Limited Partnership Act; and Legal Separation.

Revised Limited Partnership Act

Alabama passed its current Limited Partnership Act in 1983 but followed the 1976 Uniform Limited Partnership Act. In 1985, amendments were made to the Uniform Act but Alabama has not addressed these changes.

It has further been pointed out by practitioners that the Limited Partnership Act, as now in effect, makes it difficult to use limited partnerships to maximum advantage for estate planning purposes. This is because the Internal Revenue Code and the Treasury Regulations provide that restrictions in the limited partnership agreement regarding liquidation will be disregarded if the transferor (or family members) control the limited partnership before the transfer. In that situation, the right to withdraw will be determined under the general rules of state law, here Ala. Code §10-9A-102, which provides that a limited partner may withdraw upon six months notice.

Furthermore, the provisions of merger of limited partners with other legal entities need to be revised due to the passage of the Limited Liability Company and Limited Liability Partnership laws and the revisions of the Business Corporation Act and Partnership Act.

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.

The revisions to the Limited Partnership law are all technical in nature. The Committee is chaired by attorney Bob Denniston from Mobile, and Professor Howard Walthall of Cumberland School of Law serves as reporter.

Legal Separation

This bill is designed to allow couples who are facing marital discord to have a viable alternative to immediately obtaining a divorce. It has been drafted to provide flexibility so that it can be utilized by couples who hope for a brief period of legal separation while they attempt to reconcile or it can be used by couples who anticipate a long, perhaps even permanent, separation but do not want to obtain a divorce for religious or other reasons.

Under subsection (a), the court shall enter a legal separation if requested by one or both of the parties, provided that the jurisdictional requirements for a dissolution of a marriage have been met. In so doing, the court must comply with Rule 32 relating to the mandatory child support guidelines, if the couple has children.

Subsection (b) reiterates that a decree of legal separation does not terminate the marital status of the parties. Subsection (c) specifies that the terms of a legal separation can be modified or dissolved only by written consent by both parties and ratification by the court or by court order upon proof of a material change of circumstances. Moreover, the existence of a legal separation does not bar a party from later instituting an action for dissolution of a marriage.

Subsection (d) contemplates that the terms relating to alimony or a property settlement in the legal separation will not generally be incorporated into a final divorce decree absent agreement by the parties. This section recognizes that in many instances the parties hope to reconcile and therefore have not attempted to equitably divide their property during what is hoped will be only a brief period of separation. However, this section does provide the flexibility of allowing the couple to agree that if a reconciliation does not occur that the division of property and the alimony provision will be continued in a final decree.

Subsection (e) provides that "the best interest of the child" standard shall apply if the parties to the legal separation later file for dissolution of their marriage.

Subsection (f) provides that if both parties consent, property acquired by each party subsequent to the legal separation will be deemed the sole party of the person acquiring the property. Likewise, if both parties consent, each spouse may waive all rights of inheritance subsequent to the legal separation. This section has been included to provide flexibility to those parties who desire more economic certainty when a legal separation is anticipated to extend for a long period of time or when the parties prefer to have those matters settled by consent prior to the entry of the legal separation.

Subsection (g) provides that the cost for legal separation is the same as if a dissolution of the marriage was requested.

Sections 30-2-30 and -31 relating to divorce from bed and board have been repealed.

The Act has a delayed effective date to January 1, 1998 to enable the bench and bar to be informed of the new law.

In addition to these four laws it is expected that during the session, Institute committees will complete the revision of UCC Article 5 "Letters of Credit", Uniform Principal and Income Act and Uniform Custodial Trust Act. If these revisions are completed and approved by the Institute early in the session, they, too, will be presented to the Legislature.

New Laws Effective January 1, 1997

The Legislature passed the following new laws which became effective January 1, 1997.

Uniform Partnership with Limited Liability Partnership which is found in the 1996 Cumulative Supplement Pocket Parts—The Partnership Act begins in Alabama Code §10-8A-101, and the Limited Liability Provisions begin in §10-8A-1001.

Uniform Commercial Code Article 8 "Investment Securities", as well as the repeal of UCC Article 6 "Bulk Transfers"—These, of course, are found in Title 7 which is the Uniform Commercial Code.

Finally, **Joint Custody of Children** is found in Alabama Code § 30-3-150.

Anyone wishing any other or further information concerning the Institute or any of its projects may contact Bob McCurley, director, Alabama Law Institute, P.O. Box 861425, Tuscaloosa, Alabama 35486-0013, fax (205) 348-8411, phone (205) 348-8411. The Institute's home page can be found on the Internet at http://www.law.ua.edu/ali. ■

State Bar Members Labor at Summer Olympics

By Susan Cullen Anderson

Two members of the Alabama State Bar took leave from practicing law last summer to work for the 1996 Summer Olympics in Atlanta. Huntsville litigator Steve Shaw left his insurance defense practice for a month to manage water polo competition results, and Bryan Morgan left the Enterprise district attorney's office for an eight-month tour of duty with the National Guard Olympic Task Force.

Steve Shaw

For the 43-year-old Shaw, a lifelong water polo competitor and enthusiast, the Games meant 18-hour days at the pool managing 30 people assigned to computer stations and monitoring four computers himself. With 56,000 pages of water polo data produced each day of the competition, Shaw saw little of his sport. "I saw ten minutes worth of water polo in 48 games, " he said. Shaw slept at the pool some nights because he had only a few hours until he had to be back to work. "It was definitely not a vacation," he said.

Shaw, a 1989 graduate of the University of Alabama School of Law, is no stranger to hard work. A former schoolteacher, he was a full-time warrant magistrate in Tuscaloosa during law school, seeing his wife Cindy and four children in Huntsville only on the weekends. They returned to his native California briefly after law school and he passed the California bar exam, but the family returned to Alabama after a few months. He is a partner with Grace and Shaw in Huntsville.

Shaw took up water polo in California as a child to add some life to his sometimes monotonous competitive swimming career. "You get really bored following that little black line at the bottom of the pool," Shaw said. He went through college on a water polo scholarship, and has continued to play the sport even in Alabama, where water polo is an oddity, to say the least. He stumbled upon the Madison Water Polo Club in Huntsville after he began practicing law there. The club plays teams from clubs in other Southern cities.

For the uninitiated, water polo is much like soccer or hockey, with some elements of basketball thrown in, Shaw said. Each team has a goalie and six field players, and the game is played in deep water. They run plays similar to power plays in hockey, Shaw said. Players cannot touch the ball with two hands. "It's very physically demanding, " he said.

Because water polo does not exactly rank up there with college football as a Southern sport, officials were scrambling when Atlanta was chosen as the site for the 1996 Summer Olympics. "There was no one in the South who knew anything about water polo," Shaw said. "They needed someone close." Consequently, Shaw found himself responsible for compiling the results for the sport at the Games. With six games played each day for eight days of competition, his hands were full.

"The first day was horrible," Shaw confessed. The scoreboard, which was part of his responsibility, listed the wrong teams, and he found it impossible to meet the five-minute deadlines for producing data to the media and other interested parties. "After that, it got much, much smoother," he said. Still, he would not take on the job again.

"I would be a ball boy," Shaw said.

One bright note was the support and cooperation Shaw received from Huntsville lawyers and judges in rearranging his schedule for July, he said. "Of course, they slammed me in August and September," he added.

Bryan E. Morgan

Morgan, 42, helped to coordinate National Guard security support for the Games, beginning his tour in February 1996. The task force was a 12-member group based in Washington, D.C., and their role was to be "additional eyes and ears" for law enforcement at the Games.

A 1981 Cumberland Law School graduate, Morgan had worked briefly in private practice before spending four years as an assistant legal adviser to Alabama Gov. George Wallace and an additional five years as executive director of the Office of Prosecution Services in Montgomery. He had been an assistant district attorney in Enterprise for more than three years when

he heeded the call from the Olympic Task Force.

Morgan spent about half of his time in Atlanta and half in Washington, D.C. during the eight-month tour of duty, he said. He helped to coordinate the work of guard members from 42 states who assisted in security at the Games. Guard members trained in their home states first, then received additional training once they arrived in Atlanta, Morgan said. They searched vehicles and furnished perimeter security and observation, he said.

After the Centennial Park bombing, guard members provided crowd control, emergency first aid and additional security to the area, he said. Most of the guard members in the area at the time were Air Guard, and most were civilian police officers, Morgan said. None were hurt in the bombing, he said.

One guardsman was killed at the Olympics, however, while walking with another guardsman back to the Doraville, Georgia high school where they were housed. Both men were shot as they walked through an unlit area early one morning, Morgan said. The young man who died was shot in the heart, while the other was shot in the head, he said. That man has since recovered, Morgan said. The pair was scheduled to go home later that day. "That was the only unfortunate incident," he said.

After his tour with the task force was completed, Morgan was offered a position with the Office of Judge Advocate General in Washington, D.C. Essentially, he is in-house counsel for the National Guard, Morgan said. He travels home to Alabama fairly often, though, and may return when his current tour of duty is completed in the spring, he said.

Morgan said he enjoyed working with law enforcement at the Summer Olympics. The Guard provided an additional security presence for the Games which made a real difference, he said.

"The Guard was the added extra that made the Games safe, " Morgan said. ■

Susan Cullen Anderson
Susan Cullen Anderson is a graduate of the University of Alabama and the University's School of Law. She practices with the Evans Law Firm in Birmingham. She is a former reporter for *The Birmingham News*.

ALABAMA BENCH & BAR ANNUAL MID-WINTER CONFERENCE

Thursday, January 23, 1997

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9:15-10:45 a.m.	The Living Constitution
10:45-11:00 a.m.	Break
11:00-Noon	Ethics and the Judicial Inquiry Commission
Noon-1:30 p.m.	Lunch
1:30-3:00 p.m.	Track I—Class Action Lawsuits
	Track II—Family Law Issues and Acts
3:00-3:15 p.m.	Break
3:15-5:00 p.m.	Common Problems with New Rules of Evidence
6:00 p.m.	Reception

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☐ I will have a guest(s) at $15.00 each
☐ Total amount of check* enclosed
☐ I will attend the 6 pm reception
☐ I will not attend the reception

*** Make check payable to AJCFA**

Mail this form and check by January 15, 1997 to:

The Alabama Judicial College, 300 Dexter Avenue, Montgomery, AL 36104

Fall 1996 Admittees

STATISTICS OF INTEREST

Number sitting for exam	577
Number certified to Supreme Court of Alabama	378
Certification rate	66 percent

Certification Percentages:

University of Alabama School of Law	90 percent
Cumberland School of Law	87 percent
Birmingham School of Law	34 percent
Jones School of Law	37 percent
Miles College of Law	8 percent

Lawyers In The Family

Leslee G. French ('96) and Michael B. French ('89)
admittee and brother

Bryan K. Prescott ('96), Judge Bill Speaks ('84) and Chris Speaks ('90)
admittee, uncle and uncle

David S. Snoddy ('96) and Thomas E. Snoddy ('55)
admittee and father

Jeffry N. Gale ('96) and Norman J. Gale, Jr. ('78)
admittee and father

Katharine Williams Coxwell ('96) and John M. Coxwell, Jr. ('74)
admittee and husband

Marlee Hendrix Dailey ('96) and Willis Hallman Hendrix ('59)
admittee and father

Philip Stephen Gidiere, III ('96) and Philip Stephen Gidiere, Jr. ('72)
admittee and father

Anne Sikes Hornsby ('96), Gordon Griffin Sikes ('48), Gordon Griffin Sikes, Jr. ('74), Joseph Allen Hornsby, IV ('79), Charles Robert Land ('75), and Joel E. Dillard ('75)
admittee, father, brother, husband, brother-in-law, and brother-in-law

Charles Woodruff ('96) and Tommy Woodruff ('61)
admittee and father

Bingham D. Edwards, Jr. ('96) and Bingham D. Edwards, Sr. ('68)
admittee and father

Richard Collins ('96) and Larry Collins ('85)
admittee and father

James H. Sinnott ('96) and Amy W. Sinnott ('95)
admittee and wife

Tina Albritton Burgett ('96) and Thomas W. Burgett ('95)
admittee and husband

Christine Melucci Green ('96) and Gary L. Green ('96)
wife and husband admittees

Betty Shinn ('96) and Rodger Bass ('93)
admittee and son

Robert D. Rives ('96), Ashley Hale Rives ('94) and Oscar H. Hale, Jr. ('78)
admittee, wife and father-in-law

Angus N. McFadden ('96), F. Hampton McFadden, Jr. ('89) and Frank H. McFadden ('59)
admittee, brother and father

John Bradley Felton ('96) and Vonda B. Felton ('91)
admittee and wife

Keith Medley ('96) and Carole Coil Medley ('96)
admittee and wife

Mitchel Hampton Boles ('96) and H. Hampton Boles ('67)
admittee and father

John H. England, III ('96) and Judge John H. England, Jr. ('74)
admittee and father

Frederick G. Helmsing, Jr. ('96) and Frederick G. Helmsing ('65)
admittee and father

Evan Austill, Jr. ('96) and Evan Austill ('59)
admittee and father

James A. Patton, Jr. ('96) and James A. Patton ('65)
admittee and father

David Edwin Rains ('96) and Hon. David Albert Rains ('70) admittee and father

Mark Anderson, IV ('96) and Mark Anderson, III ('62) admittee and father

Susan Haygood ('96) and James Haygood ('57) admittee and father

Casey Pipes ('96) and Wesley Pipes ('66) admittee and father

Caroline Smith ('96), Hilda Trapp Smith ('93) and Judge Larry Mack Smith ('79) admittee, mother and father

Brian Oakes ('96) and Amy Hayes ('96) co-admittees (cousins)

Jeffrey G. Tickal ('96) and Judge James T. Gullage ('60) admittee and father-in-law

Tracy Taylor Sproule ('96), Leah O. Taylor ('83) and Ted Taylor ('66) admittee, stepmother and father

Stephanie Woodham Kemmer ('96) and Richard M. Kemmer, Jr. ('84) admittee and husband

Daryl A. Atchison ('96) and Jim Atchison ('68) admittee and father

Charles M. Ingram. ('67) and Charles M. Ingram, Jr. ('96) father and admittee

Rudolph W. Slate ('67) and Rex W. Slate ('96) father and admittee

Mary Margaret Relfe ('96), J. Massey Relfe, Jr. ('71) and C. Perry Relfe ('75) admittee, father and uncle

Thomas A. Radney ('96) and Tom Radney ('55) admittee and father

John W. Donaldson, III ('96), Hugh A. Locke, Jr. ('50) and Robert Fleenor ('54) admittee, uncle and uncle

ALABAMA STATE BAR FALL 1996 ADMITTEES

Abernathy, *James Austin II*
Ahlstrand, *Edward William*
Akens, *Lauryn Gayle*
Allison, *Margaret Smith*
Anderson, *David Richard*
Anderson, *Walter Mark IV*
Andrews, *Blake Donald*
Anthony, *Mary Elizabeth*
Armer, *Tristan Russell*
Atchison, *Daryl Alsabrook*
Austill, *Evan Jr.*
Bachuss, *Douglas Ray Jr.*
Bain, *Charles Mark*
Baker-Selesky, *Joyce Kate*
Ballard, *Patrick James*
Barnes, *Matthew Warren*
Barnes, *Richard Lee*
Barrett, *Charles Michael*
Baswell, *Cheryl Ann*
Batson, *Pamela Britt*
Baymiller, *Douglas Alan*
Bazemore, *Thomas Edwin III*
Bearden, *Richard Allen*
Beck, *Jill Roselle*
Becker, *Stephen Jeffrey*
Belcher, *Barbara Ashley*
Belcher, *Debra Lynn Smith*
Belt, *Keith Thomson*
Bennett, *Alicia Fritz*
Bentley, *Mary Emily*
Berdy, *Christopher Sean*
Bevill, *Donald Herman*
Blackman, *Marianne Clark*
Blackstock, *Thomas Andrew Jr.*
Blake, *Richard Vincent*
Bledsoe, *Amy Marie Newsome*
Bloomston, *Brett Michael*
Blount, *David Russell*
Boles, *Mitchel Hampton*
Bone, *Dani Victor*
Bostick, *Brian Roberts*
Bottcher, *Christopher Allen*
Bowling, *John Michael*
Brannon, *Barry Neal*
Bridgeman, *Cynthia Jane*
Bridges, *Charles Wesley II*
Brock, *Barry Addis*
Brown, *Sarah*
Brown, *Stephen Parmly*
Buckalew, *Constance Janie Taylor*
Burgett, *Tina Louise Albritton*
Burkhart, *Charles Alan*
Burnstein, *Matthew Robert*
Calametti, *Kimberly Jane*
Calhoun, *John Carroll Jr.*
Callihan, *Brent Loave*
Capps, *Deborah Goodson*
Capron, *Mark Gregory*
Carter, *Matthew Cleveland*
Cash, *Prudence Alane*
Cashion, *Phillip Danny*
Cavadel, *Marc Elliot*
Chambless, *Ricky Thomas*
Chapman, *Lewis Peyton III*
Clanton, *Lee Tyson*
Coale, *Harwell Ellis III*
Cobb, *Kathleen Tomlinson*
Coleman, *Charles Stevens II*
Collier, *Julie Montgomery*
Collins, *Richard Larry*
Colwick, *Elizabeth Faxon*
Conner, *David Jackson*
Connery, *Lynne Kathryn Reckterwald*
Cooley, *Angela Jill*
Coons, *Brittney Leigh*
Cope, *Allen Derrick*
Cowan, *Joseph Lamar II*
Coxwell, *Katharine Ann Williams*
Dailey, *Marlee Janell Hendrix*
David, *Lori Ann*
Davis, *Elizabeth Mehaffey*
DiBene, *Kathleen Kauffman*
Dickens, *Joel Scott*
Dietz, *Shirley Guynneth*
Dodd, *Michael Clark*
Donaldson, *John Webb III*
Dow, *Patsy Sue Busby*
Drennan, *James Derek*
Dummier, *Jeffery Louis*
Duncan, *Jackson Emmett III*
Duncan, *Mal Stanley*
Dunson, *Kendall Cornelius*
Dutia, *Anahita Adi*
Earnhardt, *John Aaron*
Edwards, *Bingham David Jr.*
Edwards, *Winston Whitehead*
Ellis, *Carrie Susan*
England, *John Henry III*
Evans, *Kenneth Eugene Jr.*
Feagin, *William Heath*

Fall 1996 Admittees

Felton, John Bradley
Fischer, Erby Johnson II
Fowler, Robert Phillip
French, Leslee Grayce
Fullerton, Fredric Lynn II
Gabel, Michael Edwin
Gale, Jeffry Norman
Garrett, Steven Dodd
Gibson, Miriam Denise
Gidiere, Philip Stephen III
Gifford, Mary Liles
Gillihan, David Ashley
Glaze, Catherine Reeves
Glenn, James Stephen
Graham, Robert Clemons
Graham, Roderick Dale
Graham, Stanley Eugene
Greenway, Paula Suzann Coleman
Grimes, Dana Jo
Grubbs, Janice Darlene Rice
Haggard, Stephania Lee
Hagood, Joseph Herrin III
Haines, Jennifer Lynn
Hall, Daruana
Harden, Lisa Lee Mancini
Harper, James Robison Jr.
Harrington, Freddie Neal Jr.
Harris, Robert Huel Jr.
Hart, James Edward III
Hart, Miles Matthew
Hassler, Carl Austin
Hayes, Amy Johnelle
Haygood, Susan Caroline
Hearn, Tarrow Leigh
Heilman, Terry Patrick
Helmsing, Frederick George Jr.
Hensley, Guy Wayne
Herman, Donald Lee Jr.
Hinkle, Jamison Hall
Hitson, Brent David
Hitson, Tona Lane McDowell
Hodges, Lucian Brown
Holliday, Shannon Lynn
Hollingsworth, Michael Edward II
Homan, Charlotte Melissa
Hornsby, Elizabeth Anne Sikes
Hornsey, Michele Lee Jutting
Howard, John Justin
Hudson, Mary Leah
Hudson, Regina Rose
Hudson, Shijuana Bianca'
Huff, James Brian
Jackson, Brandon Drew
Jackson, Richard Paul
Jackson, Robert Moore
Jenkins, Julie Lorrainne
Jenkins, Thomas Fain McCall
Jent, Kevin Wade
Johnson, Carolyn Raquel
Johnson, Clifton Wade
Johnson, Donald Eugene
Johnson, Stephen Patrick
Jones, John David
Jones, Larry Dale Jr.
Jones, Wilbert
Junkin, Tammy Marie
Kantack, Keith Curtis
Karrh, Paula Regina
Kemmer, Stephanie Dawn Woodham
Kent, Ronald Harold Jr.
Khalaf, Raja Custandi
Kitchens, Carrie Dawn Thornburgh
Kolaczek, Karen Gurley
Koplan, Andrew Bennet
Kowalski, Kirsten Andrea Hunt
Kubiszyn, Margaret Smith
Lahey, Kerry Ann
Lamar, Polli Camille
Lanning, Margaret Annette
Lard, Bradley Wayne
Lawrence, William McCall
Lee, Barry Andrew
Lee, David Curt
Lee, John Merrill
Lee, Spence Chadwick
Legg, J. Stephen
Lein, Lorelei Agar
Lemley, Stacey Lynn
Lepper, Kathryn Ann
Lewis, Arlan David
Lewis, Caroline Wilson
Lewis, Jerry Craig
Lewis, Robert Scott
Lindsay, Heather Fisher
Lloyd, Scott Christopher
Lockwood, Robert Carter
Loegler, Ronald Link
Loftis, Kristen Lee Miller
Logan, Stanley Wade
Love, Catherine Cooper
Lowe, Hayes Alton Jr.
Lunsford, Kallie Ophelia Chambers
Manning, Johann Ray Jr.
Marlow, Ronnie Dale
Martin, Gregory Scott
Mason, Angela Joy
Mattingly, Rosalyn Henderson
May, Alaric Olaf
McCaleb, Kelly Sue
McCool, Timothy Benson
McCrary, Jean Marie Trant
McFadden, Angus Nabers
McFall, Leslie Elizabeth
McLaughlin, Robert Briggs Watson
McLemore, Jay Richard
McMillan, Donald Lloyd Jr.
McMullan, James Michael
Melton, Mollye B. Walker
Melucci, Christine
Metheny, Kristin Bryance
Michael, Renee Dennice
Miller, Patrick O'Neal
Mitchell, Gordon Robert
Mitchell, Harlan Duane
Moller, Johann Georg
Montgomery, Michael Andrew
Montoya, Barbara McBrayer
Moore, Jonathan Richard
Moore, Neal DeWitt III
Morgan, Melinda Ann
Morris, Anna Clark
Morris, Gregory Lee
Morris, Sara Dyan
Morrison, Mariellen
Morrow, Gypsy Lynn
Morrow, William Harris
Murphy, Brandy Jayne
Nelson, Katherine Parks
Nikolakis, Peggy Ray
Nix, Wendy Michele
Nottingham, Prescott Lane
Nunn, Jimmy Lee
Oakes, Brian Austin
Palughi, Peter Joseph Jr.
Panayiotou, Leah Emily
Parker, Rodney Stephen
Parks, Joel Rebecca Donelson
Patton, James Arthur Jr.
Payne, David Thomas
Penn, Carmella Johnson
Petersen, Kathryn Wilburn
Phillips, Christy Le Anne
Phillips, Sherrie Lynn
Pierce, Jason Rupert
Pipes, John Casey
Poff, Richard Glynn Jr.
Polisky, Robert Aaron
Poore, Charles Robert III
Pope, Kathryn Angela
Porter, Cheairs Mayes
Powell, Jon Bradley
Powell, Leland Templeton Jr.
Powell, Lynneice Olive
Powell, Wayman III
Prater, Nathan Craig
Prescott, Bryan Keith
Pressgrove, Lewis Wayne Jr.
Price, Christopher Adam
Price, Leland Lawson
Radney, Thomas Anderson
Rains, David Edwin
Rains, Ramona Carol Claburn
Read, Lisa Ann
Reeves, Martha Mallory
Relfe, Mary Margaret
Rhines, LaTanya Demetrius
Ridings, Melody Marie
Ringelstein, David Bennet II
Ritondo, John Thomas Jr.
Rives, Robert Daniel
Roberts, Mary Kathryn
Roberts, William Post II
Robertson, Russell Brown
Robinson, Mindi Cherese
Robinson, Tsopei Tandeka
Rockefeller, Calvin Seely III
Rosenstiel, Bryan Paul
Rosenthal, Ian David
Salmon, Joseph Anthony
Salvagio, Charles
Sampson, Karen Lenee'
Scarborough, Tommy Ray
Scharfenberg, Stephen Andrew Jr.
Scott, Martha D. Parrish
Searight, Vanessa Ann
Sefton, Patrick Ladd Wheeler
Seltzer, Ariel Carlita
Shah, Chirayu Madhu
Shannon, Lisa Michelle
Shebutt, Patrick Scott
Shelson, James William
Shelton, Kathryn Lynn Ridgeway
Sherman, Kathy Parden
Shimer, Scott Christopher
Shinn, Betty Joan
Shoemaker, Karl Blaine
Silcox, Donna Lynn
Simpson, David Boyce
Sinclair, Leah Cullifer
Singer, Joshua Desta Shambie
Singleterry, Leslie D'Ann
Sinnott, James Howard
Slate, Rex Warren
Smith, Allison Paige
Smith, Caroline Alyce Elizabeth
Smith, Catharine Marie
Smith, Deborah Kaye Whiddon
Smith, Frederic Lee Jr.
Smith, Johnathan Maxwell
Smith, Steven Sean
Smyth, John Albert III
Snoddy, David Samuel
Snow, Eric Shane
Spray, Vann Allan
Sproule, Robert Gordon Jr.
Sproule, Tracy Elizabeth Taylor
St. John, James Andrew
Staggs, Shannon Clay
Stallcup, Stephen Wayne
Starr, Angela Colette
Steelman, David Walker
Steen, Ronald Gene Jr.
Stephenson, Cynthia Forrester
Stewart, Lee Hale
Stock, Ruth Anne
Stubbs, Luisa Livia Belluomini
Sullivan, Gary Edward
Tabereaux, Michele Renee
Tarle, Lora Ann
Taylor, Heather Suzanne
Taylor, Juliana
Taylor, Spencer McCartney
Thai, Rebecca Barbara Rable
Thornhill, Angela Faye
Thornton, Thomas Spruill III
Tickal, Jeffrey Gerald
Tortorici, Jason Patrick
Turner, Michael Elliott
Turner, Terry David Jr.
Turnipseed, James Robert
Vella, Traci Jean Owen
Waggoner, Jon Garrett
Walker, David Frederick
Walker, Stanley Patrick
Ward, Michelle Lee Stout
Ward, Robert Cameron
Waters, Zondra Taylor Hutto
Wattleworth, Charles Andrew
Webb, Cynthia Rena
Wesson, Jonathan Scott
Whitaker, John Edward
White, David Thurston III
White, Michael Log
Wiley, David Turner
Wilkinson, Jennifer Newell Houston
Williams, Donald Merle Jr.
Williams, Paul Christopher
Williams, Rickman Edgar III
Williamson, Adam Thomas
Williamson, Christopher Cody Duane
Willis, Christopher Johnson
Wilson, Benjamin Collier
Wilson, Eric Marshall
Wilson, James Herbert
Wood, Patricia Joyce Kimbrell
Wood, Tonya Lynn
Woodroof, Charles Chadwick
Wright, Allison Marshall
Wyatt, Steven Mark
Yarbrough, Kenneth Edward

MEMORIALS

The Honorable Joseph D. Phelps: Judge, Peacemaker And Friend

In June, Alabama lost one of its most staunch supporters of alternative dispute resolution (ADR) when Judge Joseph Phelps, recently retired after 20 years as a circuit court judge in Montgomery County, was killed in an automobile accident.

While still on the bench, Judge Phelps became a promoter of mediation, suggesting to parties before him that they get together to work it out win-win style with their attorneys and a mediator. He learned the value of mediation to the courts at the National Symposium on Court Connected Mediation, and returned to work with the clerk's office to make sure attorneys were aware of alternatives prior to trial. The judge also learned to be a mediator, attending Harvard Law School to participate in their 50-hour mediation workshop, and spoke at many seminars on ADR around the state of Alabama.

Of particular interest to him was Christian conciliation and peacemaking, an approach to conflict resolution using Biblical principals. Joe became the catalyst for a small group of Christian dispute resolution professionals in Montgomery, conducting breakfast and lunch meetings for us on the importance of this type of conflict resolution. It was this small group that supported Christian conflict resolution training in Montgomery through the Institute for Christian Conciliation.

Shortly after he retired from the bench, Judge Phelps set up his office on Carmichael Road in Montgomery, and quickly became a sought-after mediator. I should know, as I was always sending his State Court Mediator Roster application to attorneys for review. Joe really enjoyed mediation, and was quick to be a mentor to newly trained mediators, letting them observe his mediations and sharing techniques. He served on the Alabama Supreme Court Commission on Dispute Resolution, as its newly elected secretary-treasurer, and on the Alabama State Bar's Committee on Alternative Methods of Dispute Resolution. Mediation and conciliation were just two of the judge's many interests and projects. Ask anyone in Montgomery, and they will tell you volumes about his many years of community service.

When I came to Montgomery, Alabama from the Washington, D.C. area, Judge Phelps was one of the first persons in the legal community I met. Shortly thereafter, I had introductions to local attorneys he respected and the Alabama State Bar. Before I knew it, I was directing the *new* Alabama Center for Dispute Resolution. The judge was always a presence at the Center, calling to see how things were going if he had not heard from me in a week. And his presence remains: ADR materials from his office now reside in the Center's library, a gift from his family

Through the hard work of many attorneys and judges, the use of alternative dispute resolution in Alabama is continuing to evolve and flourish. Cooperative problem solving fosters more satisfaction with the legal system, and a more positive image for lawyers—something we all want. Judge Joseph Phelps, peacemaker and friend, will be cheering us on.

—Judith M. Keegan, esq., Alabama Center for Dispute Resolution

(Originally appeared in the fall issue of *Alabama ADR*, a publication of the Mediation Corporation)

Roger Carlisle Suttle

Whereas, Roger Carlisle Suttle, a distinguished member of the Etowah County Bar Association, died on October 11, 1996, at the age of 86, and

Whereas, this Association desires to honor his name and to recognize his contributions to the legal profession and to his community;

Now, therefore, be it remembered,

Roger Carlisle Suttle was born in Suttle, Perry County, Alabama in 1910. Upon his graduation from the University of Alabama School of Law in 1930, he was admitted to the Alabama State Bar at the age of 20. Known as "Dick" to his family and friends, he moved to Gadsden and entered the practice of law. Dick soon met and married Dorothy Stallings Suttle, who proceded him in death by three weeks.

He is survived by his two sons, Dr. Roger C. Suttle, Jr., of Gadsden, and W. Gary Suttle, of Phoenix, Arizona. He is also survived by three granddaughters, Merrill Suttle McCullough of Birmingham, Elizabeth Suttle of Homer, Alaska, and Emily Suttle of Seattle, Washington, and by his great-granddaughter and namesake, Carlisle McCullough.

Dick remained in private practice throughout his career, primarily in litigation. He was known and respected by his fellow lawyers as a skillful and determined advocate, vigorous and tough on behalf of his clients, but always within the framework of ethics and propriety. He loved the law. At the time of his death he was *of counsel* to Inzer, Stivender, Haney & Johnson, the successor to his original firm. Though frail, Dick remained active until two weeks prior to his death, appearing at the law firm office for short periods of time on an almost-daily basis. He was an avid golfer. He was devoted to his church and to his community but most of all to his family. He will be missed and remembered.

Now, therefore, be it resolved that the Etowah County Bar Association acknowledges the many accomplishments of Roger Carlisle Suttle during his long life and mourns his passing.

—W. Roscoe Johnson, III
Etowah County Bar Association

Ralph Bolen

Whereas, H. Ralph Bolen, a member of the Birmingham Bar Association was admitted to practice law in the State of Alabama on February 2, 1952 and on July 7, 1996, after a long and distinguished career, Mr. Bolen passed away; and,

Whereas, H. Ralph Bolen was born and raised in Jackson, Alabama. He served in the United States Army wherein he distinguished himself by serving as General Omar Bradley's aide in charge of USO entertainment in Europe during World War II; and,

Whereas, on his discharge from the military, he moved to Tuscaloosa, Alabama, where he opened a restaurant which he operated while attending undergraduate school, and subsequently, law school, at the University of Alabama; and,

Whereas, upon graduation from law school, he and his wife, Vera, moved to Birmingham where he opened his law practice and he practiced with the Honorable George R. Reynolds and W.L. Longshore, Jr.; and,

Whereas, his two sons, Ralph J. Bolen and Randall H. Bolen, now practice law in Birmingham as members of the Birmingham Bar Association; and,

Whereas, to those who knew H. Ralph Bolen, he was a gentleman who could be trusted in all things, verbal and written, while at the same time being a loyal advocate for his clients. H. Ralph Bolen possessed the ability to get to the heart of matters practically for his clients' benefit. His directness in legal matters and his wit in all things will be missed; and,

Whereas, H. Ralph Bolen practiced law and lived his life in an honorable and forthright way.

Now, therefore, be it hereby resolved, that the members of the Birmingham Bar Association are sorrowed by the passing of H. Ralph Bolen and this Resolution is offered as a memorial to his family.

—M. Clay Alspaugh
President, Birmingham Bar Association

Horace Ralph Bolen
Birmingham
Admitted: 1952
Died: July 7, 1996

William Gray Espy
Montgomery
Admitted: 1938
Died: August 5, 1996

Michael Anthony Figures
Mobile
Admitted: 1972
Died: September 13, 1996

Willis E. Issac
Montgomery
Admitted: 1978
Died: November 8, 1996

David Eugene Loe
Montgomery
Admitted: 1926
Died: October 13, 1996

John Terry Reynolds, Jr.
Mobile
Admitted: 1936
Died: July 4, 1996

Thomas E. Skinner
Tequesta, Florida
Admitted: 1931
Died: October 19, 1996

Hardy Bolton Smith
Mobile
Admitted: 1958
Died: August 1, 1996

Matthew D. Thomason, III
Huntsville
Admitted: 1975
Died: August 4, 1996

Paul W. Brock

Whereas, Paul W. Brock was born on February 23, 1928 in Mobile, Alabama, the son of Glenn Porter Brock, Sr. and Esther Goodwin Brock. He was educated at University Military School, graduating in 1944 and excelling as a student and as an athlete and demonstrating even then the qualities of perserverance, dedication and leadership that would mark his entire life. He attended the University of Alabama, where he received a B.S. degree in 1948 and a J.D. degree in 1950. He was elected to ODK and Jasons, and received the Balfour Award as the outstanding undergraduate member of Sigma Chi fraternity in the nation.

He was admitted to the Alabama State Bar in 1950. He served in the U.S. Air Force in 1952 and 1953, and then returned to Mobile and entered the practice of law with the Hand, Arendall law firm, where he would practice for 43 years. He had a highly distinguished legal career: He was a Fellow of the American College of Trial Lawyers and a Member of the International Association of Defense Counsel, the Association of Defense Trial Attorneys, the Alabama Defense Lawyers Association (which he served as president), the Defense Research Institute (which he also served as president), the Federation of Insurance and Corporate Counsel, the National Association of Railroad Trial Counsel, the Product Liability Advisory Council, the Alabama State Bar Grievance Committee (which he served as chair), the Judicial Inquiry Commission of the State of Alabama, the Mobile American Inns of Court (which he was instrumental in founding and twice served as president), and the American Bar Foundation.

He was an outstanding lawyer who faithfully and ably represented his clients. To say that he was hardworking, well prepared, intensely competitive, and the worthiest of opponents is an understatement. He was at the same time a man of the highest integrity, whose word was his bond, who never sacrificed his integrity at the alter of expediency or for personal gain or unfair advantage. In personal dealings, he was kind and considerate. He was a gentleman in the timeless and very best meaning of that word.

Whereas, Paul W. Brock died on April 14, 1996. He is survived by a large and loving family, consisting of his wife, Louise Shearer Brock, his children, Paul Brock, Jr., Bette Rutan, Valerie Capps, Sherry McGowin, and Richard Brock, six grandchildren, and his brother and partner, Porter Brock.

Now, therefore, be it resolved by the Mobile Bar Association that Paul W. Brock's unique and irreplaceable presence, character and example will be missed by his friends and colleagues in the association, that the members of the Association celebrate his life and mourn his death, and that the members of the association extend their sympathy and condolences to his family.

—William A. Kimbrough, Jr.
President, Mobile Bar Association

James R. Cooley, Jr.

Whereas, the Mobile Bar Association wishes to honor the memory of James Ralph Cooley, Jr., a distinguished member of this association, who died on May 15, 1996, and the association desiring to remember his name and recognize his contributions to our profession and to this community; Now, therefore be it remembered:

James Ralph Cooley, Jr., known to all as "James," was born in Birmingham, Alabama and attended elementary and high schools in the Mobile area, played football at Davidson High School and was an avid Alabama football fan.

James graduated from the University of South Alabama in 1975 and Cumberland School of Law of Samford University in 1978, when he entered the private practice of law.

James was a member of the Bankruptcy and Commercial Law Section of the Alabama State Bar and the Mobile Bar Bankruptcy Committee.

James' law practice was focused in the domestic relations area and in assisting persons who had financial difficulties and who were viewed as being "down on their luck."

James represented his clients in an exemplary manner and treated his clients and fellow lawyers with dignity and courtesy.

James was known as an even-tempered person who was a strong and capable advocate for his clients.

James was a devoted father and family man, leaving surviving him his wife, Patricia A. Cooley of Daphne, Alabama; two stepdaughters, Mrs. Kim Hamilton and Mrs. Kelly Bell of Mobile; two grandchildren, Tyler and Ashley Hamilton of Mobile; mother, Mrs. Tomasina Werner of Daphne; father, Dr. J.R. Cooley, Sr. of Semmes and other relatives.

Now, therefore be it resolved, by the Mobile Bar Association on this 20th day of September 1996, that the association mourns the passing of James Ralph Cooley, Jr.

—William A. Kimbrough, Jr.
President, Mobile Bar Association

Honorable Robert Edward Hodnette, Jr.

Whereas, the Honorable Robert Edward Hodnette, Jr., a long-time and distinguished member of the Mobile Bar Association, died on April 30, 1996, and the Mobile Bar Association desires to remember his name and recognize his contributions, both to our profession and to this community;

Whereas, the Honorable Robert Edward Hodnette, Jr., was born on May 13, 1913, in Fort Deposit, Alabama;

Whereas, Judge Hodnette attended Auburn University from 1930 to 1932, and received his law degree from the University of Alabama in 1935;

Whereas, Judge Hodnette was admitted to practice law in the State of Alabama in 1935, and practiced law in Atmore from 1935 through 1938, thereafter practicing law in Mobile;

Whereas, Judge Hodnette's practice of law was interrupted by World War II, where he served as a Captain in the United States Infantry, as the result of which service he received both the Bronze Star and the Purple Heart;

Whereas, after his honorable discharge from the United States Army, Judge Hodnette was awarded a Master of Laws degree from the University of Chicago;

Whereas, Judge Hodnette thereafter returned to the private practice law in Mobile, leaving the private practice to serve as Assistant United States Attorney for the Southern District of Alabama, from 1950 to 1952;

Whereas, after leaving the United States Attorney's Office, Judge Hodnette resumed the private practice of law in Mobile, ultimately becoming a partner in the firm of Holberg, Tully & Hodnette;

Whereas, Judge Hodnette was elected to the Circuit Court of Mobile County in 1970, after which time he served capably and honorably as a circuit judge, until he was elected presiding judge of the Circuit Court of Mobile County in 1981;

Whereas, Judge Hodnette was elected president of the Alabama Association of Circuit Judges in 1983;

Whereas, Judge Hodnette served as presiding judge of the Circuit Court of Mobile County during a particularly crucial time for that institution, and will be long remembered for his devotion to his duty, strength of character and honor;

Whereas, Judge Hodnette was a man with strong devotion to his family, and is survived by his wife, Agnes Nowling Hodnette, his daughter, Martha Hodnette McNeil, his stepson, William Melvin Haas, III, of Macon, Georgia; five grandchildren; and numerous other relatives; and

Now, therefore, be it resolved, by the members of the Mobile Bar Association, in this meeting assembled on the 20th day of September 1996, that the Association mourns the passing of the Honorable Robert Edward Hodnette, Jr., and does hereby honor the memory of our friend and fellow member, who exemplified throughout his long career the highest professional principles to which the members of this Association aspire.

—William A. Kimbrough, Jr.
President, Mobile Bar Association

Oliver Wiley Brantley

Oliver Wiley "Pi" Brantley, outstanding trial lawyer, leader in the Alabama State Bar, and past president of the University of Alabama Law School Foundation, died on July 15, 1996 at the age of 80. The Foundation, at its 1996 annual meeting, notes his passing with great sadness and respect.

He was descended from Thomas Kirven Brantley, pioneer of southeast Alabama for whom the town of Brantley was named, and from James McCaleb Wiley, who came into Alabama in 1818, serving as a physcian, a major general of the Alabama Militia, and an eminent circuit judge in Pike County. James Wiley also was elected to Congress in 1866, but not seated. Pi was born in Troy on October 30, 1915, the son of James Thomas and Julia Wiley Brantley. His father had a hardware store and other business interests in Troy. One brother, Dr. Jack Brantley, a revered Troy physician, was one year older. A younger living brother, Robert M. Brantley, now lives in Tuscaloosa. Pi attended Troy schools, Staunton Military Academy, Riverside Military Academy, the University of Alabama, and the University's Law School, graduating in 1939.

At the University, he was a member of the DKE Fraternity and business manager of the *Rammer-Jammer*, the college humor magazine. At the law school, he was a member of the Phi Delta Phi law fraternity and the Farrah Order of Jurisprudence, indicating that he was in the upper five percent of his class academically.

After graduation, Pi joined the Birmingham firm of Lange, Simpson, Brantley & Robinson, which included his older cousin, William H. Brantley, Jr., a prominent Birmingham attorney and historian who influenced his legal career. After a brief period, he decided to return to Troy, practicing alone until he was called into the U.S. Navy during World War II. He served on board the destroyer Daly in the South Pacific, participating in the Battle of Leyte Gulf, the battle which broke the back of the Japanese Navy. Pi left the Navy at the end of the war as a lieutenant (J.G.), USNR.

Returning to practice in Troy, Pi served as Pike County Solicitor from 1947-1974, a part-time position which allowed him to maintain a law practice. Pi was associated early in his career with Brantley Wiley and later with Richard Calhoun. For 20 years beginning in 1955, he practiced alone, serving as attorney for Pike County, the cities of Troy and Brundidge, and the city and county boards of education. He also served as local counsel for more than 20 insurance companies, three railroads, the Greyhound Company, and Southern Bell Telephone Co. He was a Fellow of the American College of Trial Lawyers and the American College of Probate Counsel and a member of the National Association of Railroad Trial Counsel.

Former Probate Judge and close friend John W. (Billy) Gibson remembers him as being outstanding in every phase of law practice and a person of unblemished character. He said that Pi was one of 12 men in Troy over a number of years who quietly and anonymously made generous gifts to needy individuals in the community. After the building in which he practiced became vacant, he made a gift of the building and contents to Pike County in honor of Judge Gibson.

Pi was very active in the Alabama State Bar, serving on its board of commissioners from 1952 to 1979, a 27-year period of continuous leadership. According to Reggie Hamner, longtime bar leader,

this tenure has never been surpassed and only equaled by T.B. Hill, Jr. of Montgomery. He served on the Alabama Judicial Commission from 1972-74, serving the last year as chairman, and the following year he served as first chairman of the Judicial Inquiry Commission. His classmate, Frank J. Tipler of Andalusia, a former state bar president, lauded his close friend, Pi Brantley, whom he faced in court on numerous occasions, as "the best trial lawyer I have ever seen."

Pi was a loyal alumnus of his law school, serving as a member of the law school Foundation from 1966 to 1980, and as the Foundation's president during 1972-73. His leadership was invaluable during the Foundation's early years as the law school's support from the Foundation was greatly strengthened by his service.

Pi was married in 1937, while in law school, to Betty Jane Gaston of Birmingham, who predeceased him. The had four children: Michael, who has two degrees from the University and is now with the North Carolina Museum of Art in Raleigh; Betsy of Birmingham, who has a degree in sociology and is married to William M. Gresham; and Tina, who is married to William G. Anderson, president of Anderson Oil and Gas Co. of Shreveport, Louisiana. The Andersons, both UA alumni, have a son, W. Brantley Anderson, a 1992 graduate of the school of law. Pi Brantley's other son, Pat, died in 1974 from a tragic hunting accident after his second year of law school.

For all of the above, the University of Alabama Law School Foundation, during its 1996 annual meeting, expresses its sadness at the passing of their friend and colleague, Oliver Wiley Brantley, and takes this occasion to recognize and pay tribute to his life and career as a talented and forceful lawyer, devoted leader in bar activities, loyal alumnus of the school of law, leader of this Foundation, and a private person in many respects but a responsible and caring person in his community and among his many clients and friends.

The Foundation extends its condolence to his family members named herein and directs that copies of this tribute to sent to each of them.

—J. Rufus Bealle
Tuscaloosa

Judicial Award of Merit Nominations Due

The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the state bar's Judicial Award of Merit through May 15, 1997. Nominations should be prepared and mailed to:

Keith B. Norman, Secretary
Board of Bar Commissioners
Alabama State Bar
P.O. Box 671
Montgomery, Alabama 36101

The Judicial Award of Merit was established in 1987. The 1996 recipient was the Honorable Ralph Cook, associate justice, Supreme Court of Alabama.

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

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

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

DISCIPLINARY NOTICE

Reinstatement

•Effective August 5, 1996, Birmingham attorney **James N. Brown, III** was reinstated to the practice of law. Brown was suspended July 29, 1996 from the practice of law for noncompliance with the Mandatory Continuing Legal Education Rules of the Alabama State Bar. [CLE No. 96-06]

•Effective September 25, 1996, Mobile attorney **Charles T. Koch** was reinstated to the practice of law. Koch was suspended on July 26, 1996 from the practice of law for noncompliance with the Mandatory Continuing Legal Education Rules of the Alabama State Bar. [CLE No. 96-32]

Disbarments

•On August 15, 1996, the Disciplinary Commission disbarred Jackson attorney **Franklin Delano Lee** under Rule 22 of the Rules of Disciplinary Procedure. Lee had previously pleaded guilty in Baldwin County to the crime of possession of a forged instrument, which is a felony. Lee had prepared a counterfeit will for a woman who had actually died intestate. He had her signature forged to the document. Lee's "client" then inherited all the property, and paid Lee $15,000 for his work in perpetrating the fraud. Suspension or disbarment is mandatory when a lawyer's conviction of a felony becomes final. [Rule 22(a); Pet. No. 96-006]

•Mobile attorney **William Grover Jones, III** was disbarred from the practice of law in the State of Alabama by order of the Supreme Court of Alabama effective August 23, 1996. Jones failed to respond to formal charges which had been filed against him by the Alabama State Bar. A default judgment was entered on the charges, with the facts alleged in the charges having been deemed admitted. Thereafter, Jones failed to appear at a hearing which was scheduled for the issue of discipline alone. The Disciplinary Board thereupon directed and entered an order that Jones be disbarred from the practice of law in the State of Alabama.

The formal charges alleged that Jones undertook to represent an individual to pursue a collections case. Judgment was obtained by Jones on behalf of his client in the amount of $1,400 plus $66 in costs. Jones subsequently filed a garnishment action against the judgment debtor. Thereafter, four separate checks were forwarded to Jones as counsel for the judgment creditor which monies had been received by the clerk's office pursuant to the garnishment action. However, Jones failed to properly preserve these monies on behalf of his client, and also failed to promptly remit these monies to his client.

The client filed a complaint against Jones. However, Jones failed to submit any written response to the complaint even though requested to do so on numerous occasions. Jones was found to have violated Rule 1.15, A.R.P.C., for failing to properly preserve client funds, and for failing to promptly deliver said funds to his client. Jones was also found guilty of violating Rule 8.1(b), A.R.P.C., for failing to respond to a lawful demand for information from a disciplinary authority. The board further found that Jones violated Rule 8.4(c), A.R.P.C., in that he engaged in conduct involving dishonesty, fraud, deceit or misrepresentation. [ASB No. 95-178]

•On November 13, 1996 the Alabama Supreme Court entered an order disbarring Andalusia attorney **William Bartlett Taylor** from the further practice of law effective 12:01 A.M., November 13, 1996. Taylor had previously pleaded guilty to a felony in the U.S. District Court for the Middle District of Alabama. Taylor then consented to disbarment with the Alabama State Bar. [ASB No. 96-241 (A)]

Suspensions

•Effective September 9, 1996, Prattville attorney **Karla Ann Shivers** was suspended from the practice of law in the State of Alabama for failure to comply with the Alabama State Bar Client Security Fund Rules for calendar year 1996. [CSF No. 96-14]

•Effective October 16, 1996, Tuscaloosa attorney **Roger Shayne Roland** was suspended from the practice of law for noncompliance with the Mandatory Continuing Legal Education Rules of the Alabama State Bar. Effective October 25, 1996, Roland was reinstated to the practice of law. [CLE No. 96-53]

•On November 13, 1996, the Alabama Supreme Court entered an order suspending Alabaster attorney **Nickey J. Rudd, Jr.** from the practice of law for a period of 91 days. This suspension was entered in accordance with a plea agreement that Rudd made with the Alabama State Bar regarding grievances pending against him. [ASB No. 94-147 (A), *et al.*]

Public Reprimands

•On September 27, 1996, Birmingham attorney **Michael Stephen Herring** received a public reprimand without general publication. The reprimand was the result of a conditional guilty plea that Herring entered into with the Alabama State Bar. Herring was ostensibly handling a medical malpractice case for a client of the firm where he worked as an associate. The client was assured by other employees of the firm that Herring was going to be representing her. After several months, Herring wrote the client

and advised that he would not be representing her because she had waited too long to initiate legal action. The client obtained her file, and it was noted that nothing in the way of investigation had been done on her case. Herring was found to have violated Rule 1.3 of the Rules of Professional Conduct. [ASB No. 95-284]

•Huntsville attorney **Clement J. Cartron, III** received a public reprimand without general publication on September 27, 1996. In January of 1993 Cartron obtained a copy of a prenuptial agreement executed by his ex-wife in anticipation of remarriage. The prenuptial agreement had been sent by facsimile transmission to an attorney who represented Mr. Cartron's ex-wife and with whom Cartron shared a fax machine. Although the prenuptial agreement was obviously not intended to be received by Cartron he made a copy of it and retained a copy in his possession. Cartron represented his parents as creditors of his ex-wife in a Chapter 13 Bankruptcy proceeding filed by his ex-wife. Cartron used the prenuptial agreement to challenge or contest certain financial representations made by his wife in her bankruptcy petition. Cartron's actions violated the following Rules of Professional Conduct of the Alabama State Bar: Rule 4.4, Rule 8.4(e) and Rule 8.4(g). [ASB No. 93-149]

•Montgomery attorney **Keith Ausborn** received a public reprimand without general publication for violating Rules 1.5(b) and 8.4(d), Alabama Rules of Professional Conduct, in connection with a dispute with his client regarding the scope of his representation of the client and the compensation to be received in exchange for that representation. Ausborn and a client entered into an "attorney-client agreement", which Ausborn completed. The agreement, as completed by Ausborn, contained numerous illegible and unintelligible handwritten notations and corrections. The agreement was misleading and ambiguous and failed to communicate with reasonable clarity the basis or rate of the fee to be charged and the scope of the representation. [ASB No. 95-222]

•On September 27, 1996, Birmingham attorney **Sean Edward McLaughlin** received a public reprimand without general publication. During the course of litigation, McLaughlin sent several intemperate and offensive letters to opposing counsel. In two of the letters, the Disciplinary Commission determined that McLaughlin had violated Rule 3.10 of the Rules of Professional Conduct by threatening criminal prosecution solely to gain an advantage in a civil proceeding. McLaughlin's reprimand was the result of a conditional guilty plea he made with the bar. [ASB No. 96-006] ■

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 1997 to assume the presidency of the bar in July 1998. Any candidate must be a member in good standing on March 1, 1997. 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, 1997. Any candidate for this office must also 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 15, 1997**.

Commissioners

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits: 2nd; 4th; 6th, place no. 2; 9th; 10th, places no. 1, 2, 5, 8, and 9; 12th; 13th, place no. 2; 15th, place no. 2; 16th; 20th; 23rd, place no. 2; 24th; 27th; 29th; 38th; and 39th. Additional commissioners will be elected in these circuits for each 300 members of the state bar with principal offices herein. The new commissioner positions will be determined by a census on March 1, 1997 and vacancies certified by the secretary on March 15, 1997.

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 25, 1997).

Ballots will be prepared and mailed to members between May 15 and June 1, 1997. Ballots must be voted and returned by 5 p.m. on the second Tuesday in June (June 10, 1997) to state bar headquarters.

Delinquent Notice Licensing/Special Membership Dues 1996-97

All Alabama Attorneys:

The dual invoice for licenses or special memberships was mailed in mid-September and was to be paid between October 1 and October 31. If you have not purchased an occupational license or paid special membership dues, you are now delinquent!

In Active Private Practice:

Any attorney who engages in the active private practice of law in Alabama is required to purchase an occupational license. The practice of law is defined in Section 34-3-6, *Code of Alabama*, 1975, as amended. (Act #92-600 was passed by the Alabama Legislature and amended Section 40-12-49, *Code of Alabama*, 1975, effective October 1, 1992.)

Occupational License: $287.50 (includes automatic 15 percent late penalty)

Not in Active Private Practice:

An attorney not engaged in the active private practice of law in Alabama may pay the special membership fee to be a member in good standing. Judges, attorneys general, United States attorneys, district attorneys, etc., who are exempt from licensing by virtue of a position held, qualify for special membership. (Sections 34-3-17 & 18, *Code of Alabama,* 1975, as amended)

Special Membership Dues: $125 (penalty not applicable)

Direct any questions to:

Diane Weldon, membership services director, at 1-800-354-6154 (in-state WATS), (334) 269-1515, or e-mail: ***ms@alabar.org*** *immediately!*

Opening of Courts

October 7, 1996

May it please the courts, Mr. Chief Justice Hooper, justices of the supreme court, judges of the courts of appeals, members of the clergy, members of the Alabama State Bar, and honored guests:

It is my honor and privilege that you allow me to address you today. The first Monday in October has long been the traditional day for the formal opening of the appellate courts in Alabama. At another time it marked the return of the courts from their summer recess to begin a new term. Today the term is 364 days a year, which is necessitated by the huge case load of most of the courts in Alabama. However, in my opinion, we should continue to observe this "opening of courts" to review the past and to anticipate the new. It is also a time when we can pause to remember and honor the memory of our 67 colleagues who departed this life since the last opening of court ceremony.

On October 2, 1995, the opening of court remarks were made by the Honorable Justice Richard L. Jones, who has since departed this life. I was not there, but I would bet that Judge Joseph D. Phelps, who has also departed this life, was in attendance to hear "Red's" remarks. And, since that time, two circuit judges in my circuit, Judge William D. Bolling and Judge Robert E. Hodnett, Jr., have passed away. These four judges, like the other 63 attorneys, one of whom was Senator Michael A. Figures, have served their profession with honor and distinction in many ways, and I am sure they are now in a much higher court, but they all will be sorely missed.

Socrates once said, "The only good is knowledge and the only evil is ignorance." I realize only too clearly where my detractors place me, but being totally honest with you and myself, I know that I do not possess the intellectual ability or eloquence of the late Justice Jones, so I will not try.

I have asked, how do we adequately remember and honor our fallen comrades? As simplistic as it may seem, I think by always remembering what they stood for and worked so hard to achieve, and that is an independent judiciary with equal justice for all. These are mere words, but this is the legacy of our friends and departed co-workers.

Therefore, we should never forget or let others forget that our forefathers, such as Jefferson, Madison, Hamilton and almost all the framers of our federal Constitution, were endowed with infinite wisdom to agree on and form a new government, with three separate and distinct branches of government, and to leave a blueprint of the powers and duties of each, staggers the imagination. And, if one would just glance at the "Federalist Papers", you would quickly see the ratification of the Constitution and new government was not easily accomplished. To coin a present-day phrase, "Just do it", well, they just did it.

Now, I would ask you, did not most of our fallen members possess wisdom not common to all men? Did they not sacrifice for the rest of us? And did they not leave a blueprint for us to follow? On all counts, the answer is a resounding **"yes"**.

A wise man whose name was Carnegie once said, "As I grow older, I pay less attention to what men say, I just watch what they do."

Since I have grown older and I have watched, I can report to you I liked what I saw. I, like you, can shut my eyes and see many of our fallen, and if we but listen we can actually hear what they said. In addition, I'm sure if Webster's *Dictionary* had pictures next to each word, words such as lady, gentlemen, jurist, intelligent, fair, and compassionate, excellent husband, wife, Christian, etc., you would certainly see the picture of many of our fallen next to each word.

The three branches of our Government are all, as they should be, entirely different. Our main concern should be the same, and that is to serve the citizens of this great state and country, for it belongs to them. I have said it many, many

times, that our court system does not belong to attorneys and judges, but to all the people we serve. We, the justices, judges and attorneys, simply occupy a place in the courthouse, and, yes, for a relatively short period of time, and we attempt to keep peace and tranquillity in our society by resolving disputes, because we are a nation of laws, not men.

The winds of change are constantly blowing, and this is not always bad. But, I would caution you justices and judges, do not allow a hurricane to go through our legal system, one way or the other. It is our duty to question and reason why! Common sense dictates that we steer the course, in an even-handed manner, maintaining our system and the rights guaranteed to us.

We all know that as citizens we have a "bundle of rights" guaranteed to us under the United States and Alabama constitutions, but none, in my opinion, is more precious than the right to a trial by a jury of your peers, if you have a cause of action. It is written, if you have ears to hear, then listen. There are those in these "changing winds" who would like to dispense with this fundamental right of a trial by jury. That is, take it away from you. You and I must never allow this to happen, for the public is the conscience of our legal system. We must always remember that as long as we have this and the other rights guaranteed to us in our constitutions, we will continue to be a nation of laws, not men. Particularly men who would like to dictate what rights they think we citizens should have. It is absolutely essential for everyone to remember that our only hope for a continued free society rests with education and an independent judiciary. This question of an independent judiciary should have been laid to rest in 1803, or 193 years ago in the case of *Marbury v. Madison*, but yet there are those today who think by legislation the judiciary can be tinkered with; it cannot. Our departed brothers and sisters of the law surely did not allow this to happen and neither can we.

As I looked over the names of those who have departed that I have not mentioned, and thought about what I might say, I was overwhelmed with the tremendous loss we have suffered in just one year. Of this 67 we know their personalities were different, their individual tastes were different, likes and dislikes of different subjects were different. The one thing I know that was equal among all was their love of the legal profession. And, to have a love of the law, in my opinion, you must have love and respect for your fellow man. I have no doubt that in all those times when they had a doubt, they simply did what was right.

Those who have fallen have taught us by example what the late Edward R. Morrow said, addressing a group of journalists: "To be persuasive, we must be believable. To be believable, we must be credible. To be credible, we must be truthful."

I learned from those before me, like you did, but in every jury trial I have, criminal or civil, I tell the jury:

"The trial of this case or any case should be like your daily life, and that is a search for the truth."

We should never have any problem in determining the truth for it is one of God's gifts to each of us and we instinctively know it.

I sincerely believe that those who have predeceased us would like for us to learn from their successes, as well as from their failures. That is, to keep in proper perspective all of our duties. Dean Farrah, once the dean of the University of Alabama School of Law, said: "The goal of the lawyer's ambition can be reached only by work, hard work. Oratory cannot bring you to it, neither can birth nor family distinction. It can be reached by merit and by merit alone."

Again, I believe our departed would have me to remind you to keep everything in its proper perspective. What I mean, I can best illustrate with a personal occurrence, but I will share it with you. One night, long after others in the courthouse had retired for the day, I was still working. My colleague and [now] departed friend, Judge Michael E. Zoghby, came back to the courthouse and found me working. He said, "Ferrill, go home and be with your family, for this work will be here long after you are dead."

He also said, "I have never visited a dying friend who said he wished he had spent more time at work."

This is a lesson we can all appreciate and follow. I also know that many of our departed colleagues would quickly tell you to look at a dollar bill, for it says, "In God We Trust"; make this a reality, not empty words, and you will honor our departed.

For the immediate family and close personal friends of our departed, I would remind you as we should remind ourselves daily, and that is that almighty God, in his infinite wisdom and grace, will help us, if we will only seek his help. I am convinced that sincere pleas of repentance and for guidance are answered by the all-encompassing embrace of God's mercy.

I would ask each of you:

Who is wise?

The man who can learn something from every man.

Who is strong?

The man who overcomes his passion.

Who is rich?

The man who is content with his fate.

Whom do we honor?

The man who honors his fellow man.

These questions and answers come from "Saying of the Father". I feel reasonably sure that our departed brothers and sisters were, according to these definitions, wise, strong, rich and honorable and we should all emulate and follow their example daily.

I started by saying I could never express in words as easily and eloquently as Justice Richard "Red" Jones did, so in closing I will quote from his remarks last year about our departed friends, because I do not believe it can be said better:

"Their lives will continue to influence the living for generations yet to come. As one who knew them all, I will conclude by offering this summary of who they *were*. Many of you will recognize this description as a paraphrased composite of several legal classics:

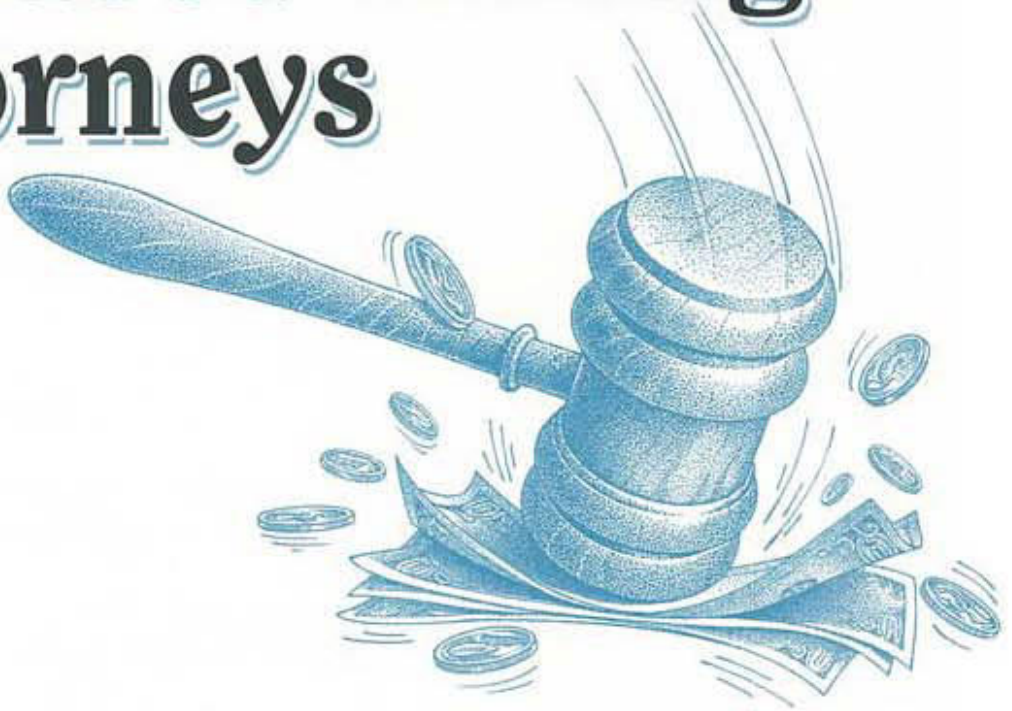
"I had rather eat with them, drink with them, argue with them, laugh with them and cry with them, work with them and play with them, win with them and lose with them, than with any group of people I have ever known. As judges, as public officials, and as law teachers, they left their marks. As lawyers, they represented banks, private and public institutions, corporate and unincorporated businesses; they represented newspapers, radio and television stations, governments and public officials. They represented the rich, the poor, the injured, the criminally accused, the powerless, the infamous, the hated, the homeless, and the dispossessed. And, they did it all with dignity, with honor and with mutual respect.

"They accepted and absorbed the wrath of the community so that the guarantees of the Constitution were made secure for all of us. This was their victory, their unashamed and unapologetic contribution to the legal system, to the rule of law, to the civility of their community, and to the ideals of our cherished liberties.

For the sake of *our* lives, may we long perpetuate and honor the memory of *theirs*."

Judge Ferrill D. McRae
Thirteenth Judicial Circuit
Mobile, Alabama

The Ethics of Time-Based Billing By Attorneys



By William G. Ross

Concealed for too long as a taboo subject, unethical and illegal billing by attorneys has recently emerged as a subject of widespread discussion among lawyers, clients, judges and commentators. Originally hailed for its objectivity and efficiency, hourly billing is now widely assailed for encouraging wasteful work and fraud. Virtually non-existent a decade ago, disbarments and criminal prosecutions for fraudulent billing have become almost commonplace.

The billing procedures used by most law firms practically invite attorneys to pad bills. As Professor Geoffrey Hazard has observed, "The notion of padding undoubtedly crosses the mind of almost anyone who has kept a time sheet."[1] Since bill padding is so hard to prove, dishonest billing might be called "the perfect crime." Both empirical and anecdotal evidence suggests that it is not uncommon. In reviewing bills in statutory fee cases, some courts have uncovered oddities such as time billed to a client before a file is opened. Legal audit firms report similarly bizarre occurrences, such as billing by phantom attorneys of whom the firm has no record of employment, and a surprising incidence of billings far in excess of 24 hours per day. And the recent spate of criminal prosecutions of attorneys for fraudulent billing suggests that illegal billing practices may be more common than even pessimists have feared.

Two-thirds of the attorneys that I polled in a survey in 1991 were personally aware of at least some instances of billing fraud, although relatively few believed that it was a frequent practice.[2] In a survey that I conducted during 1994-95, more than half of the attorneys said that they believe that at least five percent of the time billed by attorneys in this country is padded.[3] This figure is consistent with the experience of audit firms, which report that five to ten percent of the bills that they examine are fraudulent.[4] If this figure is accurate, then lawyers are bilking clients out of literally billions of dollars every year.

But while billing fraud is all too widespread, it is probably the exception rather than the rule. A much more troubling—and costly—problem is that many customary billing practices are legal but unethical and that many outside attorneys are so blinded by self-interest that they do not perceive any ethical difficulty. The most common billing abuse is excessive zeal in representing clients. Time-based billing creates an inherent conflict of interest between the client's interest in the efficient disposition of its business and the attorney's interest in racking up hours. Spurred on by a fervent desire to prove their skill and dedication and to avoid malpractice suits by

leaving no stone unturned in their representation of clients, all too many attorneys have deluded themselves into believing that no amount of work is too much. Willfully ignorant of the law of diminishing returns, countless attorneys will milk a file to death, billing time long after any marginal utility to the client has vanished. In an ironic twist, other attorneys overbill their clients in order to avoid exposure for malpractice claims for not doing enough work.

The problem of overbilling is exacerbated by the tendency of many firms to evaluate attorneys, particularly associates, in terms of the quantity rather than the quality of their work and to place more and more pressure on attorneys to bill herculean hours. Tallies of 3,000 hours, which require either iron stamina or unethical billing practices, are not uncommon. During my years in practice, I rarely heard a fellow lawyer boast about the quality of their work or its service to the client or to society. Instead, all too many attorneys seemed to evaluate their accomplishments almost solely in terms of sheer hours. The credibility of billing in excess of 2,000 hours is particularly suspect if one assumes that an attorney normally must spend three hours in the office for every two billable hours. Using this formula, a lawyer who bills 2,200 hours would need to spend 3,300 hours in the office—an average of more than nine hours per day for every day of the year.

In my 1994-95 survey, more than one-third of outside counsel admitted that the prospect of billing additional hours has at least sometimes influenced their decisions to proceed with work that they otherwise would not have performed.[5] And half the outside counsel and two-thirds of the inside counsel estimated that at least ten percent of the work that is done by attorneys is motivated more by a desire to inflate hours than by a desire to serve the real needs of the client.[6]

When questioned about specific tasks, attorneys are even more jaundiced about the utility of specific billing activities. For example, one-third of outside counsel and half of inside counsel who responded to my 1994-95 survey thought that at least 15 percent of all time billed for research is unnecessary.[7] Respondents to my survey were likewise highly skeptical about the utility of much of the time billed for such tasks as attending depositions and internal conferences.[8] Inside counsel were more inclined than outside counsel in both of my surveys to believe that unethical billing is widespread. The disparity is not great, however. Inside counsel can't be too soured on hourly billing or else they would replace it with another system. More than 90 percent of the outside counsel who responded to my 1994-95 survey indicated that hourly billing remained their principal form of billing.[9]

In addition to churning files, many attorneys have increased their hours by engaging in two much-criticized practices—multiple billing of clients for work performed at the same time ("double billing") and time-based billing for recycled work. The American Bar Association strongly condemned both practices in its 1993 opinion on billing ethics,[10] which the Disciplinary Committee of the Alabama Bar Association officially adopted in 1994.[11] Since an attorney who bills for hours that he has not actually expended is engaging in blatantly illegal conduct, billing on an hourly rather than a value-added basis for work previously performed is blatantly fraudulent. Double billing is more ethically ambiguous, since an attorney who bills Client A for writing a brief at the same time that he bills Client B for travel has actually expended time for both clients and provided value to both. Although double billing is thus not fraudulent, it is questionable insofar as most clients would not approve of it. Only one-tenth of the outside counsel who responded to my survey last year indicated that double billing is an ethical practice when the client is not informed of it.[12] Two-thirds of the inside counsel said that outside counsel employed by their companies sometimes engage in double billing, although most said that the practice was relatively rare.[13]

This is consistent with the survey of outside counsel; three-quarters of whom said in my 1994-95 survey that they never engage in double billing.[14] This percentage was down significantly from my 1991 survey, when only half said that they had never engaged in double billing.[15] There was a corresponding increase in the percentage of outside counsel who contended that double billing is unethical.[16]

Billing for recycled work also seems to be waning. Although more than one-third of the outside counsel admitted to having done this, the percentage who believed that it is an ethical practice even if the client was not informed of it fell from one-fifth in the 1991 survey[17] to less than one-tenth in my 1994-95 survey.[18] Although more than three-quarters of the outside counsel knew of instances in which outside counsel had billed their company by the hour for work that was originally generated for another client, only six percent regarded this as an ethical practice in the absence of client consent.[19]

Some attorneys blame the codes of professional responsibility for failing to provide guidance as to what constitutes ethical billing practices. The Alabama Rules of Professional Conduct, for example, offer only very general guidance on billing issues, enjoining "clearly excessive" fees,[20] requiring attorneys to communicate the basis of fees to new clients,[21] and suggesting the need for informed consent of the client to work performed by the attorney.[22] No rules, however, can adequately anticipate the myriad ethical situations in which an attorney might herself in billing time. Much better than codes and rules are common sense and a good conscience. But even the most honest lawyers can find ways to justify ethically dubious practices and reasonable attorneys can differ about constitutes ethical behavior. Inside counsel therefore need to vigilantly monitor the billing practices of outside counsel.

The best way to start monitoring fee practices is up front—with billing guidelines that spell out the boundaries of proper billing practices and squash opportunities for outside counsel to claim after the fact that questionable billing practices were in the client's interest. Since almost any billing practice is ethical if the client consents to it, a fee agreement helps to choke off many of the inevitable ethical ambiguities that inevitably arise in the context of time-based billing. Most companies that have billing guidelines prohibit the practices of double billing and billing for re-cycled work. In-house counsel can also insist that attorneys bill their time in six-minute increments. The use of ten-minute or 15-minute units provides attorneys with an opportunity to round up the time of insignificant tasks. The ABA Opinion seems to allow attorneys to round up time periods to the minimum billing increment—in other words, an attorney could bill 15 minutes for a one-minute phone call if her firm used 15-minute increments. The combination of large billing increments and liberal rounding techniques costs clients untold millions of dollars very year. If, for example, an attorney who bills at the rate of $180 per hour records ten one-minute phone calls in 15-minute increments, he has billed the client $450 in billings for $30 worth of work. The use of six-minute increments reduces the likelihood of such mischief.

Corporations also might wish to insist that paralegals who bill by the hour have bona fide paraprofessional credentials and are not merely glorified clerks. Although there are no officially defined credentials for paralegals, the major paralegal organizations and the ABA define a paralegal as someone who has formal paralegal training or significant experience. In a recent audit of a major firm, the Legalgard group found that only 13 of the 22 persons whose work had been billed at paralegal rates over a period of years fell within this definition.[23] The most outstanding credential of one "paralegal" who was billed at $135 per hour was her job as a summer assistant manager at a cookie store.[24] Since firms have also been known to bill secretaries, messengers and other clerical personnel at hourly rates, a fee agreement should also make clear that only attorneys and genuine paralegals should be billed at hourly rates.

Likewise, inside counsel should make clear in the fee agreement and through the monitoring of bills that attorneys cannot normally bill time for clerical tasks. Although there are some instances, of course, in which it may be more efficient for an attorney to perform an essentially clerical task, all too many associates in large firms spend the bulk of their time engaged in tasks that could be performed by paralegals or non-legal staff. One legal auditor, for example, recently found an entry for six and a half hours, at a rate of $245, for "preparing closing room." Upon inquiry, she found that the attorney had billed the time for placing documents on the table, checking the availability of pencils and coffee, and other similar tasks.[25] In my most recent survey, more than half of the inside counsel and more than a third of outside counsel said that at least ten percent of the work that is presently performed by attorneys ought to be delegated to paralegals or clerical staff.

Some corporations have established guidelines regarding the number of attorneys that a firm can send to court or to depositions without prior client approval. Others have insisted that the firm obtain client approval before undertaking any staffing change. And all corporations should insist that attorneys refrain from undertaking any major project—for example, a motion to compel discovery—without obtaining prior client approval. Only half of the outside counsel who responded to my 1991 survey reported that they consult their client before undertaking a project that will take more than ten hours of billable time. Although the extent to which attorneys will need prior approval will depend upon the size and culture of the company and the trustworthiness of the outside counsel, clients should encourage frequent communications.

Corporations also are insisting on more detailed bills. Gone forever are the days of summary bills demanding payments "for services rendered." In particular, inside counsel

should discourage "block billing" and demand specific detail for each discrete activity by an attorney.

Clients also need to demand that their outside counsel take maximum advantage of the latest time-saving technologies. The use of such wonders as word processing and document retrieval programs already has done much to reduce the labor intensiveness of law firm services. Various studies have demonstrated, however, that there is a big gap between having modern technology and using it effectively. Many associates are inept in using electronic research and actually may be wasting more time on the computer than formerly was wasted in the library.[26] Inside counsel should insist that law firms offer training programs for new—and old—technologies and should scrutinize bills to make sure that they are really using it to the best advantage.

Lawyers also might foster greater integrity in billing if they were more willing to "blow the whistle" on outside counsel who have engaged in illegal or unethical billing practices. We are all naturally reluctant to impugn the integrity of our brothers and sisters at the bar and we ought be afraid of making hasty or unfounded accusations that will damage a lawyer's reputation. And many inside counsel are understandably inclined to exercise charity and to try to avoid litigation when they catch outside counsel engaging in improper billing practices. But Rule 8.3 of the Alabama Rules of Professional Conduct requires a lawyer to report a violation of the rules "to a tribunal or other authority empowered to investigate or act upon such violation."[27] Notwithstanding this rule, many inside counsel have preferred to sweep unethical or illegal billing under the rug. A few more disciplinary proceedings, criminal prosecutions and civil suits involving the more flagrant cases should encourage greater integrity by attorneys.

Despite their misgivings about the costs of time-based billing, inside counsel do not tend to believe that alternative forms of billing would improve the quality of legal services. Three-fifths of the respondents to my latest survey said that alternative forms would have no impact, and more than one-fifth believed that it would tend to decrease the quality of legal services. The opinion of outside counsel was substantially the same.[28]

Although an increasing number of attorneys are experimenting with alternative fee arrangements, most agree that other types of billing can create their own abuses. Contingent fees, for example, create conflicts of interest between an attorney and a client by giving the attorney a direct financial stake in the outcome, while flat fees for projects or cases create an incentive for an attorney to do too little work rather than too much. "If you can think of a better system, please let me know!," a partner in a Florida law firm scrawled on the survey that he returned to me.

Whatever billing system they may choose, in-house counsel need to provide outside counsel with incentives to abandon their delusion that their busy-beaver mentality is designed to serve the real needs of the client rather than to boost their own hours and to become more accountable to their clients. The abandonment of billing bacchanalia in favor of more sober practices would help to restore faith in the legal profession, assist corporations in their on-going efforts to make themselves more competitive, and reduce costs for consumers, who are the ultimate victims of excessive attorney billing.

It would be unfortunate, however, if stricter monitoring of attorney billing discouraged attorneys from performing work that actually needed to be done and thereby encouraged a shoddy quality of work product. We should never lose sight of the fact that quality legal work *does* take time—a lot of time. The tremendous care with which legal documents—contracts, briefs, motion papers and the like—are prepared in the United States contributes toward making the American legal system the envy of the world. Surely there is a correlation between careful and thoughtful legal work and a high quality of justice. Attorneys need to continue to produce a highly burnished work product. The challenge is to distinguish the grain from the chaff. ■

1. Stephanie B. Goldberg, *The Ethics of Billing: A Roundtable*, *ABA J.*, Mar. 1991, at 57 (remarks of Geoffrey C. Hazard, Jr.)
2. William G. Ross, "The Ethics of Hourly Billing By Attorneys", 44 *RUTGERS L. REV.* 1, 93 (1991).
3. William G. Ross, "The Honest Hour: The Ethics of Time-Based Billing By Attorneys" 265-66 (1996).
4. Darlene Ricker, "Greed, Ignorance and Overbilling", *ABA J.*, Aug. 1994, at 63.
5. "The Honest Hour", *supra*, at 265.
6. *Id.*, at 265, 269.
7. *Id.* at 266, 270.
8. *Id.*
9. *Id.* at 265.
10. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-379 (1993), (*Billing for Professional Fees, Disbursements and Other Expenses*).
11. RO-94-02 (1/19/94). See Robert W. Norris, "Opinions of the General Counsel", *ALA. LAWYER*, May 1994, at 190-93.
12. "The Honest Hour", *supra*, at 267.
13. *Id.* at 270.
14. *Id.*
15. "The Ethics of Hourly Billing By Attorneys", *supra*, at 92.
16. "The Honest Hour", *supra*.
17. "The Ethics of Hourly Billing By Attorneys", *supra*, at 93.
18. "The Honest Hour", *supra*, at 267.
19. *Id.* at 271.
20. ALA. RULES PROF. CONDUCT 1.5.
21. Rule 1.5(b) provides that "[w]hen the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation."

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RECENT DECISIONS

By David B. Byrne

United States Supreme Court—Criminal

Sentencing Guidelines and Downward Departures

Melendez v. United States, ____U.S.____, 64 U.S.L.W. 4525 (1996). Does a federal prosecutor's request that a cooperating defendant be given the minimum of the applicable guideline sentencing range permit a federal judge to depart below a lower statutory minimum sentence, i.e., a downward departure? The Supreme Court, split seven-to-two, answered no.

In an opinion authored by Justice Thomas, the Court held that a prison sentence cannot go below the statutory minimum without a specific request by government prosecutors. Justices Souter and Stevens wrote concurring opinions. Justice Breyer, joined Justice O'Connor, filed a strong dissent from the judgment.

Practice Point: It is important for defense counsel, who represent cooperating co-defendants, to incorporate in the terms of any plea agreement not only the applicable guideline sentencing range, but a commitment on the part of the U.S. to permit the sentencing judge to depart below the statutory minimum based upon "all the attendant facts and circumstances."

This case clearly underscores the role of an Assistant U.S. Attorney in the sentencing process to the extent that downward departures under Rule 5.1 are left to the discretion and integrity of the prosecutor.

David B. Byrne, Jr.
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Beware, the Clock is Running

Carlisle v. United States, ____U.S.____, 64 U.S.L.W. 4293 (1996). Do federal trial judges have the authority or discretion, after conviction, to grant a motion for judgment of acquittal if the motion is filed beyond the seven-day deadline provided for in the Federal Rules of Criminal Procedure, Rule 29(c)?

The Court, again split by a seven-to-two margin, answered no.

Justice Scalia, writing for the Court, held that judges may not stretch the deadline for the filing of a motion for judgment of acquittal by even one day. "There is simply no room...for the granting of an untimely post-verdict motion for judgment of acquittal, regardless of whether the motion is accompanied by a claim of actual innocence."

Justice Stevens, joined by Justice Kennedy in dissent, strongly disagreed. Justice Stevens said, "...Congress would not likely have intended to require a district court to enter a judgment of conviction against a defendant whom it knows to be innocent." The dissent strongly suggests that justice is subverted by the rules when an untimely filing of a post-judgment motion results in an innocent person's conviction.

Can Ingestion of Alcohol Be Used to Negate Specific Intent?

Montana v. Egelhoff, ____U.S.____, 64 U.S.L.W. 4500 (1996). Can the State of Montana bar a criminal defendant from using drunkenness as evidence that they did not act deliberately? The Supreme Court, in a sharply divided five-to-four vote, answered yes.

Justice Scalia, writing for the majority, held that "defendants do not have a constitutional right to have all relevant evidence introduced in court. The rule comports with society's moral perception that one who has voluntarily impaired his own faculties should be responsible for the consequences."

Justice Sandra Day O'Connor wrote a stinging dissenting opinion that was joined by Justices Stevens, Souter and Breyer. Justice O'Connor observed that the Montana law at issue violated due process because "it frees the prosecution...from having to prove beyond a reasonable doubt that the defendant...possessed the required mental state."

Practice Point: Notwithstanding the majority opinion in *Montana v. Egelhoff*, counsel needs to continue to assert significant alcohol ingestion as a basis to negate specific intent. Whether a person with the requisite *mens rea* can only be adjudicated in light of the totality of the circumstances surrounding the purported criminal conduct.

Standard of Appellate Review on Fourth Amendment Questions

Ornelas v. United States, ____U.S.____, 64 U.S.L.W. 4373 (1996). In reviewing a trial judge's

findings that a police search conducted without a warrant was based upon probable cause, should an appellate court use a *de novo* standard? Chief Justice Rehnquist, writing for the majority, said yes.

The Chief Justice reasoned that the less stringent "clear error" standard of review should be confined to those cases in which a judicially authorized search warrant was obtained before the police conducted a search.

"The Fourth Amendment demonstrates a strong preference for searches conducted pursuant to a warrant...Were we to eliminate this distinction, we would eliminate the incentive for obtaining a warrant."

Justice Scalia dessented and suggested that law enforcement officers would still have ample incentive to proceed by warrant even if appellate courts showed greater deference to trial judges' rulings in warrantless search cases.

In-Custody Determination Involves a Mixed Question of Law and Fact

Thompson v. Keohane, ____U.S.____, 64 U.S.L.W. 4027 (1996). Is the question of whether a criminal suspect was "in custody" when interrogated by the police a question of fact so that a state court's determination of such is entitled to great deference by a federal judge? The Supreme Court, in a seven-to-two decision, answered no.

Justice Ginsburg, writing for the majority, held that whether a suspect was in custody is a "mixed question of law and fact...and the presumption of correctness therefore does not apply."

The Court's opinion instructed federal judges to undertake an "independent review" of the "in custody" question.

Justice Thomas wrote a dissent in which the Chief Justice joined. ■

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Problems Applying the *Life of Georgia v. Johnson* Case in the Product Liability Setting: WHERE DO WE GO WITH PUNITIVE DAMAGES AFTER *BMW v. GORE*?

By Andrew C. Clausen and Annette M. Carwie

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Introduction

On April 26, 1996, the Alabama Supreme Court issued an opinion in the case of *Life Insurance Co. of Georgia v. Daisey Johnson*, 1996 WL 202543 (Ala.), which significantly changed both evidentiary rules and trial procedure for assessing punitive damages in Alabama. While *Life of Georgia* was on appeal to the U.S. Supreme Court, that Court issued an opinion identifying constitutional guidelines for the assessment of punitive damages in a case entitled *BMW of North America, Inc. v. Gore*, 1996 WL 262429 (U.S.). The Supreme Court then remanded *Life of Georgia* for reconsideration in light of its opinion in *BMW*. Although these cases involved fraud claims, their rulings have a direct impact on product liability cases as well. This article will discuss both cases as they would apply in product cases, point out problems that may result and suggest some alternative approaches to reducing the risk of unconstitutional punitive damage verdicts.

Discussion of *Johnson v. Life of Georgia* and *BMW v. Gore*

Daisey Johnson sued Life of Georgia alleging fraud in the sale of a Medicare supplement insurance policy that was of no benefit to her because she was eligible for Medicaid. A jury verdict was returned in favor of Ms. Johnson in the amount of $250,000 in compensatory and $15 million in punitive damages. The trial court remitted the punitive award to $12.5 million. Life of Georgia appealed. Justice Shores delivered the opinion for the court which affirmed the compensatory award and further reduced the punitive award to $5 million.

Life of Georgia argued in the Alabama Supreme Court that the punitive award was grossly excessive and violative of due process. The Alabama court seized the opportunity to change the trial procedure in punitive damage cases in an effort to better satisfy the due process requirements of the 14th Amendment. The court had previously adopted a procedure whereby the trial judge must conduct a post-trial review in punitive damage cases and analyze the verdict using several factors set forth in *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989) and *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986). However, the court concluded in *Life of Georgia* that this procedure had proved inadequate, lamenting that "in most cases, it could be argued that the jury has incomplete information from which to determine with certainty the amount that is appropriate to serve the ends for which punitive damages were intended." *Life of Georgia* at 7.

To resolve these issues, the court introduced some dramatic changes. The first is a bifurcated trial procedure wherein the jury determines whether there is punitive liability in the first phase. If they do, the trial resumes for determination of an appropriate punitive award. The second change is that in determining the amount of punitive damages, the jury will now hear evidence regarding all of the factors previously considered only by the judge during post-trial review of the punitive verdict. Several of these factors will be discussed below.

The court was also concerned that punitive damage verdicts are perceived as an unfair windfall to plaintiffs. To remedy this problem, the *Life of Georgia* decision held that part of the punitive damage awards should be paid into the state general fund. After post-verdict and appellate review, the amount of the judgment pertaining to punitive damages will be paid into the trial court. All costs and attorneys' fees will be paid. The clerk of court will then divide the remaining amount equally between the plaintiff and the state. *Life of Georgia* at 10-14.

The much publicized *BMW v. Gore* case involved a jury verdict of $4,000 in compensatory damages and $4 million in punitive damages returned against a car manufacturer for fraud in not disclosing pre-sale damage repairs to consumers that amounted to less than three percent of the car's suggested retail price. After reviewing the verdict according to the *Green Oil* and *Hammond* factors the Alabama Supreme Court remitted the $4 million punitive damage award to $2 million, also noting that evidence of sales of other refinished vehicles sold as new in other states was inappropriately considered by the jury. The case was appealed to the U.S. Supreme Court which reversed and remanded.

The *BMW* opinion identified three "guideposts" for determining fairness of a punitive award: 1) reprehensibility of defendant's conduct; 2) the ratio of actual harm to the punitive award; and 3) the difference between the punitive award and other criminal sanctions that may have been imposed. The Supreme Court considered the wrongful conduct of BMW in light of these criteria and found the imposition of $2 million in punitive damages was grossly excessive and, thus, violative of the Due Process Clause of the 14th Amendment.

Regarding the first guidepost, the U.S. Supreme Court concluded that BMW's conduct was not so reprehensible as to justify the punitive judgment rendered. The Court agreed with the Alabama court that the jury had improperly computed the amount of punitive damages by multiplying compensatory damages by the number of similar sales in other jurisdictions. *BMW* at 4. Since an Alabama jury may only punish conduct that impacts Alabama consumers, the "scope of the interest in punishment and deterrence must necessarily be limited." *BMW* at 7. Further, since BMW's conduct inflicted purely economic harm, evinced no indifference to or reckless disregard for the health and safety of others, and BMW made no deliberate false statements, its conduct could not be said to "establish the high degree of culpability that warrants a substantial punitive damage award." *BMW* at 10.

The $2 million award was also not justified after consideration of the second guidepost, the ratio of the amount of the award to actual harm. The court acknowledged there is no mathematical formula to calculate the constitutionality of damages, but, in this case, a 500-to-1 ratio was unreasonable.

After considering the third guidepost, a comparison to criminal sanctions for comparable conduct, the Court decided that BMW did not receive fair notice that it may be subject to a multimillion dollar penalty for conduct that under the Deceptive Trade Practices Act would merit a minimal penalty. That BMW is a large corporation rather than an impecunious individual "does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business." *BMW* at 12.

The concurring opinion by Justice Breyer in which Justices O'Connor and Souter joined, suggested that not only was the award in *Gore* excessive, but the *Green Oil* and *Hammond* factors offer no significant constraints or protection against arbitrary results. Justice Breyer wrote that although the vagueness of these factors does not, by itself, violate due process, citing *Pacific Mut. Ins. Co. v. Haslip*, 499 U.S. 1 (1991), the factors are so open-ended they risk arbitrary results. These Justices believed that if the Alabama court had offered some other standard, "that either directly, or indirectly as background, might have supplied the

constraining legal force that the statute and *Green Oil* standards (as interpreted here) lack" their decision might have "counseled more deferential review by this Court." *BMW* at 15-16.

Applying the *Green Oil* Factors in Product Liability Cases

In light of the U.S. Supreme Court's decision in *BMW*, this article will now examine how the decision in *Life of Georgia* to give juries evidence regarding the *Green Oil* factors may have an impact on the determination of punitive damages in products liability cases.

1. Does the punitive damages award bear a reasonable relationship to the harm likely to occur from the defendant's conduct?

The problem arises when a jury considers how "the harm likely to occur from the defendant's conduct" should be defined. Unlike the *Gore* case, where the wrongful conduct involved only a small percentage of all BMW's sold, the typical products liability case will include allegations of defective design and defective warnings, which implicate every unit of the subject product the manufacturer has ever produced. In an imperfect world no product is perfectly safe. Even if a product is extremely safe, when a manufacturer mass produces millions of them, the product will be associated with some accidents and injuries. Alabama clearly recognizes that a manufacturer is not required to produce a product that is accident-proof, but only one that is reasonably safe for its normal uses. See Alabama Pattern Jury Instruction 32.01.

In a products case, the plaintiff will focus on the knowledge of the manufacturer that a number of accidents and injuries have happened and argue the manufacturer wantonly continued to sell the product despite this knowledge. The plaintiff will emphasize how serious the resulting injuries are. The problem with this *Green Oil* factor is that several dozen serious injuries will often persuade juries that a manufacturer is wanton regardless of uncontroverted evidence that millions of people have safely used it for years.

A typical example of this problem arose in *Hardy v. General Motors Corp.*, which was recently tried in Lowndes County. In an illustration of excellent advocacy, Jere Beasley introduced evidence of 211 side-door ejection accidents at trial and then argued GM management knowingly sold dangerous door latches. However, GM had sold some *30 million* cars with these latches, which represents an infinitesimal failure rate of .0007 percent. One might ask whether a manufacturer could *reasonably* believe that a product which functions properly 99.9993 percent of the time is safe, but the jury in *Hardy* found liability and awarded $2.5 million in economic damages, $47.5 million for mental anguish and loss of consortium and $100 million in punitive damages. Max Boot, *In the Land of Lawsuits*, Wall St. J., Oct. 30, 1996.

The *Gore* decision's admonition that punitive damages must be determined with respect to harm that occurred solely within Alabama gives support for a motion to exclude evidence of all accidents except those occurring within the state. However, a skillful plaintiff attorney will argue that evidence of accidents nationwide is relevant to the issue of the defect as well as notice thereof to the defendant. Citing the *Life of Georgia* case, he or she can further argue that a limiting instruction to the jury will prevent improper consideration of non-Alabama injuries in determining the amount of punitive damages because, as Justice Shores states in that opinion: "There is no reason to assume that a jury would disregard the trial court's instructions." *Life of Georgia* at 7.

2. The degree of reprehensibility of defendant's conduct

The challenge faced by the product manufacturer under this factor is created by evidence which is proffered in virtually every case that the alleged defect could have been eliminated by some design change which would have increased the cost of the product. The argument follows that the decision not to make the "safety design" change is evidence of the manufacturer's reprehensibility in choosing greater profits instead.

The manufacturer's dilemma is that when attempting to make a product increasingly safer, eventually the point of diminishing returns is reached. Ultimately, every manufacturer must wrestle with the question of how safe is safe enough, knowing, again, that no product will ever be perfectly safe.

Regardless of how high the manufacturer sets the design safety standard, when an accident does occur, the plaintiff's lawyer will have an expert to testify the product could have been made safer, and the injury prevented, if the manufacturer had just been willing to spend some additional money. As a result, an argument for reprehensibility can be supported in virtually every case.

The *BMW* majority clearly validates the use of this factor, describing it as "[p]erhaps the most important indicium" of whether a punitive award is reasonable. However, the concurring opinion by Justices O'Connor, Souter and Breyer observes that this, along with the other *Green Oil* factors, has "provided no significant constraints or protection against arbitrary results." *BMW* at 14. The basic problem is that, while consideration of this factor is appropriate, no guidance is provided to a jury as to how it should be applied. Analysis suggests this may be particularly true in the context of product liability cases. Consider the sub-parts of this factor as set forth on page 9 of the *Life of Georgia* opinion:

(a) the duration of the conduct

Product manufacturers typically build the same types of products for a long time. The product is usually improved and refined as time goes by, but the basic concept for it does not change. As noted above, virtually all product liability suits allege design and warning defects which are applicable to all products of the same type the manufacturer has previously sold. As a result, almost all products claims will involve conduct which is of long duration.

(b) the degree of defendant's awareness of any hazard which this conduct has caused or is likely to cause

Under Alabama strict liability products law the manufacturer is

conclusively presumed to have knowledge of any hazards associated with his or her products. Beyond this, most manufacturers are aware of the design aspect alleged to be defective; however, they believe their product is reasonably safe and defend the product on the basis that the design aspect at issue does not constitute a defect. Thus, the manufacturer's awareness of the alleged defect can seldom be effectively challenged.

(c) any concealment or cover-up of the hazard

A hazard which is open and obvious does not constitute a defect under Alabama law. Therefore, by definition, any time a jury concludes a product is defective, there is a risk the jury will also conclude the hazard at issue was concealed. This is because of the inherent difficulty in distinguishing between a latent defect and a concealed defect where it is undisputed that the manufacturer made the product and thus, is deemed to have superior knowledge thereof.

(d) existence and frequency of similar past conduct

As noted above, in the typical case, the product at issue has been mass produced for years. If the jury is instructed that punitive damages should be increased based on the frequency of similar past conduct, the verdict will be increased in virtually every case.

Given the unique context of products liability design defect cases, none of these sub-factors give the jury real guidance about how to judge whether a manufacturer's conduct was reprehensible, and will simply tend to increase the punitive verdict in every case.

3. Punitive damages should remove the profitability of the wrongful conduct

Again, the difficulty in applying this factor is most clear in the defective design case. As noted above, the typical case involves opinion evidence introduced through the plaintiff's expert that, for only a small additional cost, say $15 per unit, the manufacturer could have added a safety guard or made a design change which would have prevented the accident as well as the plaintiff's needless suffering. The plaintiff's attorney will then introduce evidence that during the last decade the defendant has sold five million units of the defective product during the last ten years in Alabama. Under this *Green Oil* factor, the minimum appropriate punitive award in this scenario would be $75 million.

Such an approach completely ignores the reality that profits from a manufacturing operation do not accumulate in the company's bank account for years on end. They get reinvested in new technology, plant and equipment, get used to retire debt and ultimately are distributed as employee salaries, bonuses and dividends to the shareholders. The result is that a punitive verdict calculated to remove a manufacturer's profits from years past will inevitably result in excessive punishment, and can drastically affect a company's financial ability to survive.

4. Defendant's financial condition

This may be the most complex and interesting of the *Green Oil* factors. In his dissent, Chief Justice Hooper notes that: "Evidence of a defendant's wealth or financial standing has never been admissible in a jury trial." *Life of Georgia*, at p.19. For 140 years, prior jurisprudence was well settled that evidence of the wealth or poverty of the parties to litigation should not be admissible because of the risk the jury will be improperly influenced by the relative economic positions of the parties. The chief justice correctly notes in the 1987 "Tort Reform Act," Ala. Code § 6-11-23(b), the legislature codified this common law, thus evidencing its position on the issue. *Id.*

In the products liability setting, having the jury consider the defendant's financial condition will almost always serve to increase an award. This is because in a typical case, even if a company is struggling to survive financially and has posted losses in recent years, on cross examination the plaintiff's attorney will introduce gross sales numbers into evidence, many times in millions or tens of millions of dollars when accumulated over several years. Couple this with the jury's preexisting determination that the defendant needs to be punished, along with the jury charge admonishing that a punitive award should "sting," and it is submitted that the jury's consideration of this factor will seldom operate to constrain improper passion or prejudice.

Another interesting dilemma arises in the common situa-

tion where a manufacturer has a high self-insured retention or, less commonly, is totally self-insured. In order to self-insure, whether partially or totally, a company will have to draw up contingent reserves which serve the same exact purpose as a primary insurance policy. Under this *Green Oil* factor, the astute plaintiff attorney will argue the reserve monies relate to the financial condition of the defendant and should be disclosed to the jury as evidence supporting a larger punitive award. On the other hand, the defendant will argue the reserves serve the same purpose as insurance and should be inadmissible. It is submitted that it is irrational to subject a defendant to differing punitive damage exposures based solely on whether the company chooses to structure its insurance coverage with a large or small deductible amount.

5. The cost of the litigation to the plaintiff

Instructing the jury to add the plaintiff's legal fees to their punitive verdict may result in plaintiffs agreeing to contingency fees which are unfair. Over the years, the average contingency fee agreement has increased from the traditional one-third to 40 percent of any recovery. In most product liability cases lawyers now charge fees of 50 percent or higher, exclusive of litigation costs. If the jury will be instructed to add attorneys fees to the punitive damage verdict, the plaintiff may be willing to agree to 60 percent or maybe even 70 percent fee rates for punitive damage awards, thinking that if they lose, nothing is owed, and if they win, the defendant is going to have to pay their attorney's fees anyway.

6. Criminal sanctions should be considered in mitigation

The *Life of Georgia* opinion instructs that the jury should be informed if a defendant has been convicted of a crime related to the behavior which is the subject of the civil suit. This is so the jury can consider the criminal conviction *in mitigation* of the punitive damages that will be awarded. In practice, it is difficult to understand how the application of this factor will serve to constrain a jury or reduce the risk of an excessive or arbitrary award. The problem is simply that for many jurors, having already decided a defendant's behavior was such that civil punitive damages should be awarded, being told that the defendant was also the subject of a related criminal conviction may well inspire an increased verdict instead.

7. Other civil actions based on the same conduct should be taken into account in mitigation of punitive damages

From the product manufacturer's perspective, this factor may be the most troubling of all. Evidence of other verdicts is supposed to be considered by the jury as a mitigating factor, but as with prior criminal convictions, many jurors may see this as a reason to increase the verdict instead. This will be particularly true where a skillful lawyer argues that management knew about the alleged defect and knew about the injuries, but concluded it would be cheaper to keep selling the product even though it cost millions to pay off the lawsuits.

Moreover, the plaintiff can argue that, even after paying millions in damages, the defendant is undeterred, and will still keep selling the defective product to thousands of unsuspecting consumers unless the punitive award in this case is big enough to send them the message they haven't learned from all the prior damages combined. Again, it is difficult to feel confident

that letting the jury consider such evidence will have the constraining effect on punitive awards contemplated in the *Gore v. BMW* decision.

Life of Georgia's Provision Allocating Damages to the State Will Not Work as Intended

Considering the foregoing analysis, it is submitted that having the jury consider the *Green Oil* factors in determining a punitive damage award is not likely to reduce the risk of arbitrary or excessive verdicts in product liability cases. In fact, the result may be increasing numbers of ever larger punitive verdicts, possibly influenced by the juries' belief that half of the punitive damages will go to the state.

Ironically, however, it is virtually guaranteed that, regardless of the jury's intent as to allocation of a punitive award, the State will never receive any of it. This is because *Life of Georgia* is quite explicit that the State has no vested interest in any punitive award, and has "no right to intervene or participate in such cases." The parties "continue to have full authority to settle cases without the participation or consent of the State," and "[i]n the case of settlement, the parties need not designate any part of the settlement proceeds as punitive damages and no part of the settlement shall be paid into the general fund." *Life of Georgia* at p. 30.

Given this context, after a punitive verdict is rendered, the plaintiff has an incentive to settle for any amount less than the total judgment that would reduce the share which would otherwise go to the state, thereby increasing the total money going to the plaintiff. This also eliminates the income tax liability that would have otherwise existed as to the punitive portion of the verdict. Of course, the dollars are all the same to the defendant. Unless completely confident of reversal on appeal, the defendant will see settlement as an opportunity to reduce the punitive judgment by up to one-half, and maybe more, depending on the tax implications to the plaintiff.

Because There Is No Double Jeopardy Protection In Civil Suits, Punitive Damages Inevitably Result

Perhaps the most frustrating aspect of trying to defend punitive damage claims from a manufacturer's perspective is that lawyers can file multiple, identical lawsuits, until a punitive award is eventually obtained. The fact that a prior jury finds a defendant innocent of punitive conduct in one case creates no double jeopardy protection in a civil setting, although, this rule might change if a portion of the punitive verdict is paid to the state. *Life of Georgia* at 20-21. (Maddox, J., concurring in part; dissenting in part). Ironically, just a few months before the *Gore* case went to trial, another case was tried against BMW based on an identical claim. *Yates v. BMW of North America, Inc.* , 642 So.2d 937 (Ala. 1993), was tried by the same plaintiffs lawyers against the same defense lawyers in the same venue involving the same facts. The *Yates* jury awarded a comparable amount of compensatory damages but refused to award punitive damages.

During discovery, however, the plaintiff's lawyers obtained the names and addresses of other BMW owners who had purchased

similarly refinished cars, and filed suits on behalf of 24 of them, too. Rather than consolidating all of the cases for trial, the plaintiffs recognized they could get multiple bites at the punitive damages apple by trying each case separately. The lawyers were free to sue BMW over and over until they improved their trial presentation or perhaps just got lucky.

Conclusion

In conclusion, jury awards of punitive damages in Alabama have dramatically increased in the past 15 years. It is hard to see how the changes set forth in the *Life of Georgia* opinion will reduce the risk of arbitrary, inconsistent, grossly excessive or otherwise unconstitutional punitive damage verdicts. Maybe it is time to go back to basics and reconsider the goals and reasons for having punitive damages in the first place: "Vindication of the public interest and deterrence to the defendant and others who might commit similar wrongs in the future." *Life of Georgia* at 10. The method for determining such punishment should be designed solely to achieve these societal purposes. The focus in punitive damage assessment should be on determining what is the minimal amount that will fairly but effectively punish and deter the particular conduct in question. *Wilson v. Dukona Corp., N.V.*, 547 So.2d 70 (Ala. 1989). The Alabama Supreme Court is correct that there is no individual constitutional right to have a jury determine punitive damages in a civil case. *Life of Georgia* at 11; *Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So.2d 414, 431 (Ala. 1991) (Houston, J., dissenting).

Trial judges routinely determine criminal punishment. Given the fact that, as a practical matter, punitive awards in Alabama are currently being determined by trial and appellate judges anyway, maybe we should consider having judges make the determination in the first place. Evidence regarding the *Green Oil* and *Hammond* factors was never intended to be considered by juries. *Life of Georgia* at 19 (Hooper, C.J., concurring in the result in part and dissenting in part). Training and experience helps a judge to avoid the prejudice that could infect a jury's verdict as a result of considering such evidence. Moreover, the judge has the benefit of knowledge regarding other punitive verdicts previously rendered in similar cases. The judge could still consider the reprehensibility of the defendant's conduct, *BMW* at 8, and compare the punitive damage award with any civil or criminal penalties that could be imposed by the legislature for comparable misconduct. This would also address the U.S. Supreme Court's concern that a defendant receive fair notice of the severity of the penalty that may be imposed. See *BMW* at 10-14.

As an alternative, the legislature might consider enacting a statute which limits the recovery of any punitive award to twice the amount of the compensatory award or $250,000, whichever is greater. This is the recommendation of the American College of Trial Lawyers in their *Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice*, March 3, 1989. "This approach provides for flexibility. The plaintiff that suffers amounts of compensatory harm below $125,000 as a result of outrageous conduct by the defendant would be permitted to recover a substantial punitive award, but the limit of $250,000 would prevent an excessive award. On the other hand, where the compensatory harm exceeds $125,000 the ceiling on any punitive award would rise commensurately with the compensatory harm. There would be no limit in the serious injury cases except for the trebling effect provided by the formula." *Id.* at 15. For many years treble damages have been considered appropriate punishment under federal law for violations of anti-trust laws and illegal conduct under RICO. *See* 15 U.S.C.A. §15 *and* 18 U.S.C.A. §1964 (1996).

If a fixed multiplier is not acceptable, a range of multipliers could be provided. In addition, or perhaps alternatively, a hybrid approach is possible wherein the jury could provide a recommendation which the judge could consider in making his or her own independent assessment. This procedure was proposed by the governor when he called a special legislative session in 1986 to consider tort reform. These suggested approaches would clearly comply with the criteria set forth by the U.S. Supreme Court in the *BMW* decision, reduce the risk of excessive verdicts yet and still provide necessary flexibility in determining punitive damages. ■

OPINIONS OF THE GENERAL COUNSEL

By J. Anthony McLain, general counsel

Advertising

J. Anthony McLain

Direct Mail Solicitation

Question One:

Rule 7.3(b)(2)(v) of the Rules of Professional Conduct requires a lawyer who is sending out a direct mail letter to a prospective client to put the word "Advertisement" in 14-point red ink in the lower left hand corner of the envelope. If this aspect of the rule is complied with, is it permissible to put other words or terms on the envelope as well?

Question Two:

Rule 7.3(b)(2)(i) requires a lawyer to send to the General Counsel's Office a list of names and addresses of those persons to whom a direct mail solicitation letter has been sent. Can this requirement be satisfied by sending in a computer disk on which that information is contained?

Answer, Question One:

According to the Comment of new Rule 7.3, the purpose of requiring the word "Advertisement" on the envelope of a direct mail solicitation letter is to avoid the perception that the letter must be opened merely because it is from a lawyer, when it only contains a solicitation for legal business. It is the Commission's opinion that the addition of other words or terms on the envelope are nothing but attempts to subvert the recipient's option of disregarding a legal advertisement. Direct mail envelopes that contain extraneous terms are not permissible and would be in violation of Rule 7.3(b)(2)(v) of the Rules of Professional Conduct.

Answer, Question Two:

The submission of computer disks containing the names and addresses of persons to whom direct mail letters have been sent does not comply with the filing requirement of Rule 7.3(b)(2)(i). The Commission interprets the term "list" as used in this rule to mean a written or printed series of names. The acceptance of computer disks creates storage problems, and more importantly, the risk of infecting the state bar's computer system with a virus. The only way to access the information from a disk is to run it on a computer. The information on a printed list is immediately self-evident.

[RO-96-05]

Advertising on the Internet

Question:

Do the Alabama Rules of Professional Conduct apply to lawyer advertising on the Internet or private on-line services?

Answer:

The number of options available for disseminating lawyer advertising has grown rapidly and will continue to grow over time. However, the advertising and solicitation rules found within the Rules of Professional Conduct focus on content of advertising and not on the means used to advertise. It is the Disciplinary Commission's opinion that any information made available to the public about a lawyer or a lawyer's services on the Internet or private on-line services is subject to regulation under the rules on advertising and solicitation. It makes no difference whether it is done through a web page, a bulletin board, or via unsolicited electronic mail. Any advertising or promotional activity transmitted through the use of a computer is subject to regulation like any other form of lawyer advertising. [RO-96-07] ■

RESPECTING THE RULES:
The *Lowe-Edgar* Aberration Endangers the Integrity of Rules 18(c), 20, 21, and 42(b)

By Jerome A. Hoffman

Respecting Each Other

I am about to say some critical things about three opinions by the Alabama Supreme Court, including an opinion written by one of my all-time favorites on the court. That makes this an appropriate occasion to restate something I said to the court years ago about the partnership of judge and commentator. J. Hoffman, *The Scintilla Rule and Other Topics*, 43 ALA. LAW. 259, 259 (April 1982). I enjoy the great luxury (as well as the responsibility) of earning my keep by thinking about civil procedure for many of my waking hours. Judges, on the other hand, are among the great surviving generalists in a society of increasingly narrow specialists. We expect them to render informed decisions across great expanses of the *corpus juris*. And yet, when judges solve procedure problems, I review their solutions as if they had nothing to do but think about civil procedure. And some other commentator lurks in virtually every specialty of the law, second-guessing judicial decisions as if judges had only that specialty to think about. If it were a game, it would be mightily unfair. But neither judges, commentators, lawyers, nor onlookers ought to view it as some gaming exercise in one-upmanship. It's not a game we're engaged in, but a collective enterprise which strives toward making Alabama jurisprudence the kind of national model that the Alabama court system became with the reforms of the '70s. In that spirit, as in the past and future, I offer the suggestions that appear here.

Respecting the Rules: Rule 18(c) and Others Under Siege

Rule 18(c) does not prevent a plaintiff from joining, under Rule 20, a conditional claim against his own un- or underinsured motorist insurer with his claim against a motorist-tortfeasor. Rule 18(c) only forbids "a *jury trial* of a liability insurance coverage question jointly with the *trial* of a related damage claim against an insured." ALA. R. CIV. P. 18(c) (emphasis added). It does not require severance, nor does it forbid joint management of the claims during the pleading and discovery stages. The trial court must, however, upon appropriate motion, order separate trials of the two claims under Rule 42(b). In a series of cases, the Alabama Supreme Court has ignored these straightforward propositions and procedures, clearly contemplated by the Alabama Rules of Civil Procedure, in favor of an extraordinary "opt-out" procedure, apparently administered outside the Rules.

Although others might, I do not here suggest that a court exceeds its authority by entertaining motions for procedural dispositions not expressly authorized by formally adopted and published Rules. At least for present purposes, I suggest only that a court does not act judiciously by supplanting its own formally adopted and published Rules with other rules derived in some less public way. At the very least, it does not do so without acknowledging the existence of the general rules it honors in the breach and without explaining why it chooses not to follow them.

The court introduced its extra-Rules "opt-out" rationale in *Lowe v. Nationwide Insurance Company*, 521 So. 2d 1309 (Ala. 1988). "A plaintiff," the court began,

> is allowed *either* to join as a party defendant his own liability insurer in a suit against the underinsured motorist *or* merely to give it notice of the filing of the action against the motorist and of the possibility of a claim under the underinsured motorist coverage at the conclusion of the trial.

Id. at 1310 (emphasis in original). Therein, the court stated nothing new, but merely restated the effect of superimposing modern Rule 20 upon common law joinder practice, including the doctrine of voucher to warranty. "If," the court continued,

> the insurer is named as a party, it would have the right, within a reasonable time after service of process, to elect *either* to participate **in the trial** (in which case its identity and the reason for its being involved are proper information for the jury), *or* not to participate **in the trial** (in which case no mention of it or its potential involvement is permitted by the trial court).

Id. (italicized emphasis in original; boldfaced emphasis added). The key words "in the trial" suggest the regular procedure for separate trials provided by Rule 42(b). The court did not, however, cite Rule 42(b) at this point or, indeed, anywhere in its opinion. (In his special concurrence, Justice Maddox did cite Rules 18(c) and 42. *Id.* at 1310-11.) "Under either election," the court went on, "the insurer would be bound by the fact finder's decisions on the issues of liability and damages." *Id.* It would not be bound, however, on issues relevant to coverage. By this passage, the court merely recognized that the implications of the old common law voucher to warranty doctrine apply to separate trials under the modern rules of procedure just as they applied to separate actions under common law procedure. Next, the court said, "If the insurer is not joined but merely is given notice of the filing of the action, it can decide *either* to intervene *or* to stay out of the case." *Id.* (emphasis in original). Here also, the court stated nothing new, but merely restated without explicit reference the effect of superimposing modern Rule 24 (the intervention rule) upon common law joinder practice, including the doctrine of voucher to warranty. "The results of either choice," the court concluded, "parallel those set out above—where the insurer *is* joined as a party defendant." *Id.* (emphasis in original). Once again, this stated nothing new.

In retrospect, the court's mistake, and a mistake it now seems to have been, lay in saying anything at all in a case in which the parties had already resolved the issue they had brought before the court. That issue was whether Rule 18(c) had to be read so broadly as to restrict the salutary operation of Rule 20. That is, did Rule 18(c) prevent the plaintiff from joining the

insurance company as a co-defendant in her complaint? In their brief on appeal, counsel for the insurer conceded that Rule 18(c) did not require so much. Notwithstanding counsel's invitation to elaborate, the court should have let it go at that. Or, if not, the court should, at least, have cited the general, formally promulgated authority, that is, Rules 18(c), 20, 21, and 42(b), supporting its dictum.

It was counsel for the insurer in the next case, *Ex parte Edgar*, 543 So. 2d 682 (Ala. 1989), who took what could have remained just another harmless error of inclusion (saying more than the disposition of the appeal required) or exclusion (failing to cite controlling Rules) and gave the court the opportunity to turn it into a mistake of consequence. Instead of going back to basics, that is, to the text of the Rules, counsel took what they perceived to be the court's new gospel according to *Lowe* and invented a non-Rules "Notice of Election Not to Participate in Plaintiff's Action." Precisely because it has no expressed roots in any Rule, the style of this motion leaves the reader in doubt, and must have left the trial court in doubt, as to what counsel really wanted it to do. If counsel wanted merely a separate trial, they should have invoked Rule 42(b). If they wanted the action against the insurer severed, they should have invoked Rule 21, sentence 3, which provides that "[a]ny claim against a party may be severed and proceeded with separately." If they wanted the insured dismissed from the plaintiff's action, the *Lowe* decision stood there, in its convoluted way, to remind them they were not entitled to dismissal under the Rules.

In the body of their "Notice of Election Not to Participate in Plaintiff's Action," counsel became more specific, although perhaps not entirely consistent, about what they wanted. First, "Defendant ALFA elects not to participate in the trial of this action." *Ex parte Edgar*, 543 So. 2d at 683, n.1. Even standing alone, this first request dramatizes the unfortunate confusion caused by the *Lowe* dictum. The request fell easily within the purview of Rule 42(b)'s motion for a separate trial. So far, counsel had asked neither for dismissal nor for separate management of the claims during the pleading and discovery stages. Second, "Defendant ALFA reserves the right to *join this action* and...reserve[s] the right to *join the litigation of this action*." *Id.* (emphasis added). Oops. Does this mean that counsel really wanted dismissal or severance coupled with prospective permission to change their minds? Probably not, considering the request in the context of the whole motion. Third, "An order ...without prejudice to ALFA returning *as a party [to] this action* and participating *in the trial* of this case." *Id.* (emphasis added). The first part of this request suggests that counsel wanted the claim against their insurer dismissed or severed; the second that they asked only for separate trials. Fourth,

> An order staying the prosecution of this action against Defendant ALFA and prohibiting execution upon the policy of insurance of Plaintiff...and Defendant...until such time as an evidentiary hearing is conducted to demonstrate Plaintiff has received a judgment against Defendant...in excess of all bodily injury liability insurance limits providing insurance protection for Defendant ALFA.

Id. This request was clearly consistent with a motion for severance under Rule 21 and possibly consistent with a motion for separate trials under Rule 42(b). Fifth, "An order approving Defendant ALFA participating in discovery of this action..." *Id.* This request was consistent with a motion for separate trials under Rule 42(b). Indeed, reading the insurer's motion as a whole, it seems the insurer asked only for separate trials under Rule 42(b), although it relied, for aught that appears in the report, solely on the authority of the *Lowe* dictum and did not cite Rule 42(b) or, for that matter, any Rule at all.* Ordinarily implicit in an order granting separate trials is an understanding that the court will, unless otherwise specifically stated, con-

tinue to manage the claims jointly during the pleading and discovery stages. Thus, had the insurer clearly moved for a separate trial under Rule 42(b), it could have participated in discovery without asking.

The Alabama Supreme Court should have so *held* and should have made clear the simple bit of Rules reasoning supporting this holding. Perhaps it would have done so had counsel stuck to the Rules, instead of invoking the *Lowe* dictum. Unfortunately, however, the court now followed the lead of counsel, who thought they were following the court's lead. That is, the court decided the case not upon the authority of the Alabama Rules of Civil Procedure concerning joinder of parties and claims, of which they cited none, **but upon the authority of the *Lowe* dictum. For the insurer, the result was not a happy one. By denying the insurer's petition for a writ of mandamus, the court confirmed the circuit court's denial of the insurer's "request to withdraw," *Id.* at 684 ("request to withdraw"); *Id.* at 685 (denial of mandamus), reasoning as follows:

> Alfa had the right under *Lowe* to withdraw from the present case at the time that it filed its motion on May 2, 1988. However, Alfa sought permission in that motion to continue to participate in discovery and, in addition, sought in its...amended motion to reserve the right to intervene, if it determined that it would be in its best interest to later reenter the case. *This is just the opposite of the procedure that was sanctioned in Lowe*...The clear import of Alfa's motion, as amended, is that Alfa wanted out of the case, but only if it could monitor the progression of the case through the discovery process and then intervene if it deemed it necessary in order to protect its interest. *Construing Alfa's motion in this manner, the trial court had no authority to grant it.* Therefore, having failed to prove that it made a proper election to withdraw from the case, Alfa has shown no error on the trial court's part.

Id. at 685 (emphasis added). The court compounded its error in reaching the wrong result by misreading its dictum in *Lowe* to afford an insurer the option "of being dismissed as a party to the case." *Id.* at 684. This is just the opposite of the actual holding in *Lowe*. There, the appellee-insurer conceded on appeal that it was not entitled to dismissal from the case, *Lowe v. Nationwide Ins. Co.*, 521 So. 2d at 1309-10, and the court "accept[ed] counsel's confession of error." *Id.* at 1310.

So what was the practicing bar to make of *Ex parte Edgar*? Would the court, if properly approached, limit *Lowe* and *Edgar* to their facts, as courts have, time out of mind, euphemistically repudiated their former mistakes? Or had the court really meant to establish a new non-Rules ground for dismissal to the detriment of the salutary operation of Rule 20?

The ghost of *Lowe-Edgar* appeared again in *Driver v. National Security Fire & Casualty Company*, 658 So. 2d 390 (Ala. 1995). Once again, the *Lowe* dictum had as little to do with the proper disposition of the appeal as it had had in *Edgar* and in *Lowe* itself. *Driver* presented the question whether an uninsured motorist insurer could properly provide legal counsel for the uninsured motorist in the underlying action. That question could arise whether the plaintiff had not joined the insurer at all, or whether the insurer had been dismissed under *Lowe-Edgar* (if, indeed, that is what *Lowe-Edgar* stands for), severed under Rule 21, or separated under Rule 42(b). The answer to the question should not, it would seem, turn upon the question's association with one or another of these possible procedural postures.

Nevertheless, on appeal, the plaintiff-appellant stated, and the supreme court accepted, the following characterization of the question presented: Do *Lowe* and *Edgar* stand "for the proposition that if an insurance company opts out of the trial in an uninsured motorist case it cannot 'participate' in the trial by hiring an attorney for the uninsured defendant motorist[.]"? *Id.* at 394. No, *held* the court, "once the carrier opts out **of the trial** under *Lowe*, it

may, in its discretion, hire an attorney to represent the uninsured motorist defendant." *Id.* at 395 (boldfaced emphasis added). Justice Maddox again concurred specially, saying: "This case graphically points out why I did not favor the 'opt out' procedures adopted by this Court in *Lowe...*". *Id.*

Whether the court's holding creates or perpetuates good law may depend upon one's views concerning the common-law offense of maintenance, that is,"[a]n officious intermeddling in a lawsuit by a non-party by maintaining, supporting or assisting either party, with money or otherwise, to prosecute or defend the litigation." *Black's Law Dictionary* (6th ed. 1990). It depends not at all upon *Lowe, Edgar*, Rule 18(c), or any other of the modern joinder rules.

The court twice said that the insurer had opted out. The words "opted out" are not official Rules words. The court did not speak in the official Rules vocabulary of dismissal, severance and separate trial. Thus, without going to the record on appeal, we do not know whether the insurer actually obtained a *Lowe-Edgar* dismissal, or only a Rule 21 severance or a Rule 42(b) separation. We must await further appeals to learn whether there really is such a thing as a *Lowe-Edgar* dismissal. And, if so, why there should be. ■

*According to the report, counsel for the insurer had apparently invoked Rules 18(c) and 42(b) with regard to an earlier motion. *Ex parte Edgar*, 543 So. 2d at 683. For aught that appears in the report, however, counsel relied solely on *Lowe* in support of its later amended "Notice of Election Not to Participate in Plaintiff's Action against Defendants Edgar & ALFA."

**In its opinion, the court did mention Rules 42(b) and 18(c) by name as part of its recitation of the procedural history of the case. Ex parte *Edgar*, 543 So. 2d at 683. For aught that appears in the report, however, the court relied solely on *Lowe* in support of its decision.

Jerome A. Hoffman
Professor Hoffman received his A.B. Degree in 1962 and his J.D. in 1965 from the University of Nebraska, where he graduated Order of the Coif and served as editor-in-chief of the *Nebraska Law Review*. He was in private practice in California with the firm of McCutchen, Black, Verleger, & Shea (1965-68). Prior to coming to The University of Alabama, , he was assistant professor of law at the University of New Mexico (1968-71). Professor Hoffman came to the School of Law as an associate professor in 1971 and has been a professor of law at the University of Missouri-Columbia during the fall semester of the 1983 - 84 academic year. He teaches civil procedure and evidence, and is the Elton D. Stephens Professor of Law.

Elder Law Section

To better serve the needs of Alabama attorneys practicing in the area of elder law, the state bar has formed the Elder Law Task Force. The task force will identify if there is sufficient interest to support this new section.

If interested, please fax a statement expressing interest in the section. Your expressed interest does not obligate you to join the section when formed nor are you obligated to commit to any work.

Please mail or fax your statement by February 15, 1997 to **Lynn Campisi, chair, Alabama Elder Law Task Force, 3008 Pump House Road, Birmingham, Alabama 35243; fax (205) 967-9724; phone (205) 967-1010.**

YOUNG LAWYERS' SECTION

By Andy D. Birchfield, Jr.

ON A MISSION

Andy D. Birchfield, Jr.

What is our mission?

Two key objectives of the Young Lawyers' Section of the Alabama State Bar are:

(1) "To provide a program of activity designed to be attractive to the membership and helpful to the legal profession"; and

(2) "To encourage and foster the organization of local Young Lawyers' Sections and to promote a closer relationship between said local organization and this section."

In other words, the YLS should be about helping young lawyers in their professional lives and, also, helping local groups with their projects. Toward the first goal, our section sponsors a number of activities, such as the Young Lawyers' Seminar in Sandestin each May (go ahead and mark your calendar for the Sandestin Seminar—May 23-25, 1997), the Youth Judicial Program, the Admissions Ceremony and Luncheon, and the Minority High School Pre-Law Conference. This year we are undertaking two additional projects in this regard. First, Executive Committee Member **Clark Cooper** is spearheading our effort to implement a **Mentoring Program** for young lawyers. Second, Executive Committee Member and District Representative **Michael Freeman** is directing our efforts to set up **Children's Waiting Rooms** in our state courthouses. This is a program strongly promoted by the ABA/YLD and has been successful across the nation.

Toward the second goal of helping local affiliates, we, as a section, have not devoted an organized effort in the past. That is changing this year. We are sponsoring an **Affiliate Outreach Program Conference** in Birmingham on March 14 and 15, 1997. Executive Committee Member **Cole Portis** is organizing this conference aimed at providing assistance to local affiliate leaders. This conference will provide instruction for organizing and increasing membership involvement for local young lawyer organizations, ideas for service projects, and nuts and bolts information for carrying out projects. If your area does not have a local Young Lawyers' Section, or if you would like additional information, please call Cole Portis.

Our profession is one of service. The mission of the YLS is to serve its members and to help members serve others. I encourage each of you to be involved in the activities of your local affiliate. Working together we can be successful "Young Lawyers" in our mission of service. ■

Notice and Opportunity for Comment

Pursuant to 28 U.S.C.§2071(e), notice is hereby given that the U.S. Court of Appeals for the Eleventh Circuit has amended Eleventh Circuit Rule 22-3, *"Habeas Corpus Death Penalty Cases,"* by adding a new subsection which provides:

Motion for Order Authorizing Second or Successive Habeas Corpus Application.

A motion in the court of appeals for an order authorizing the district court to consider a second or successive habeas corpus application shall be assigned to the panel constituted under section (a)(4) of this Rule to consider habeas corpus appeals, petitions or other related matters with respect to the same petitioner.

Comments concerning this amendment may be submitted in writing to the clerk by January 31, 1997, at Office of the Clerk, U.S. Court of Appeals for the Eleventh Circuit, 56 Forsyth Street, NW, Atlanta, Georgia 30303.

CLE REMINDER

All CLE credits must have been ***earned*** by December 31, 1996

All CLE transcripts must be ***received*** by January 31, 1997

NEW IOLTA PARTICIPANTS

September

Charles Petty Hunter, Jr., Birmingham
K. Anderson Nelms, Montgomery
L. Michael Barret, Birmingham
Philip E. Gable, Birmingham
James C. Brakefield, Jasper
Cheryl D. Eubanks, Fairhope
Middlemas & Whatley, Birmingham
Davyne Ryals, Montgomery
H. Jerome Thompson, Moulton
Lee & Rousseau, Geneva

October

Lila V. Cleveland, Mobile
Charles Salvagio, Vestavia
Roger Lee Lucas, Birmingham
Michael Patrick Hanle, Birmingham
Robert E. Long, Jr., Decatur
Stuart J. Roth, Mobile
Finis A. Royal, Scottsboro
Kenneth W. Quattlebaum, Ozark
Cervera & Ralph, Troy
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CLE Opportunities

The following in-state programs have been approved for credit by the Alabama Mandatory CLE Commission. However, information is available free of charge on over 4,500 approved programs nationwide identified by location date or specialty area. Contact the MCLE Commission office at (334) 269-1515, or 1-800-354-6154, and a complete CLE calendar will be mailed to you.

JANUARY

14 Tuesday
ALABAMA PROBATE: BEYOND THE BASICS
Birmingham
Holiday Inn Redmont
National Business Institute
CLE credits: 8.0 Cost: $149
(715) 835-8525

22-24 Wednesday-Friday
CIRCUIT AND DISTRICT JUDGES MID-WINTER CONFERENCE
Montgomery
Alabama Judicial College
CLE credits: 11.6
(334) 242-0300

23 Thursday
JOINT MEETING OF THE BENCH AND BAR
Montgomery
Alabama Judical College
CLE credits: 5.8
(334) 242-0300

23-25 Thursday-Saturday
MEDIATION PROCESS AND THE SKILLS OF CONFLICT RESOLUTION
Montgomery
Mediation Corporation
CLE credits: 21.0 Cost: $700
(800) 237-3476

24 Friday
NINTH ANNUAL NURSING HOME LAW SEMINAR
Birmingham
Cumberland Institute for CLE
CLE credits: 6.0
(800) 888-7454

29 Wednesday
TRYING THE AUTOMOBILE INJURY CASE IN ALABAMA
Birmingham
National Business Institute
CLE credits: 6.0 Cost: $149
(715) 835-8525

FEBRUARY

7 Friday
NEGOTIATION: REACHING AGREEMENT ON YOUR TERMS
Birmingham
Cumberland Institute for CLE
CLE credits: 6.0
(800) 888-7454

12 Wednesday
MANAGED CARE: THE FUTURE OF HEALTH CARE
Birmingham
Lorman Business Center, Inc.
CLE credits: 3.8 Cost: $135
(715) 833-3940

13-15 Thursday-Saturday
MEDIATION PROCESS AND THE SKILLS OF CONFLICT RESOLUTION
Birmingham
Mediation Corporation
CLE credits: 21.0 Cost: $700
(800) 237-3476

14 Friday
COMPUTERS AND TECHNOLOGY IN THE LEGAL PROFESSION
Birmingham
Medical Forum Building
Alabama Bar Institute for CLE
CLE credits: 6.0 Cost: $165
(205) 348-6230

20 Thursday
DEFENDING WRONGFUL DISCHARGED CLAIMS UNDER ALABAMA LAW
Montgomery
National Business Institute
CLE credits: 6.0 Cost: $149
(715) 835-8525

21 Friday
WORKERS' COMPENSATION IN ALABAMA
Birmingham
Lorman Business Center, Inc.
CLE credits: 6.0 Cost: $155
(715) 833-3940

21 Friday
ADVANCED FAMILY LAW
Birmingham
Cumberland Institute for CLE
CLE credits: 6.0
(800) 888-7454

26 Wednesday
DEFENDING WRONGFUL DISCHARGED CLAIMS UNDER ALABAMA LAW
Mobile
National Business Institute
CLE credits: 6.0 Cost: $149
(715) 835-8525

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