The Alabama Lawyer

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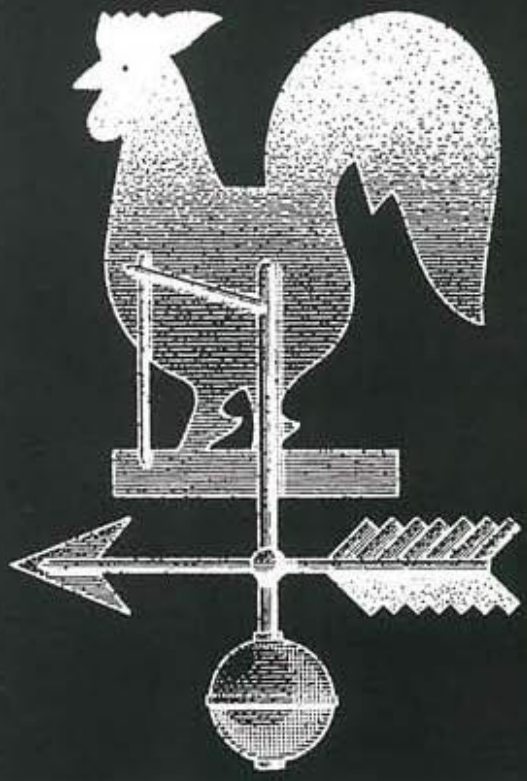

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IN BRIEF

March 1992 Volume 53, Number 2

ON THE COVER: Dogwoods in bloom in Montgomery County signal that spring will soon arrive.

Photo by Butch Guier, Montgomery

INSIDE THIS ISSUE:

Legal Services Corporation of Alabama Continues its Efforts to Provide Quality Legal Services to Needy Persons
By Penny Weaver 100

Litigating Minority Shareholder Rights and the New Tort of Oppression
By Andrew P. Campbell 108

Smart Moves to Beat the Recession: How Your Legal Support Staff Can Make a Difference
By Mary Jo Dennis 120

The Rule on Exclusion of Witnesses-Beyond the Courtroom
By J. Lister Hubbard 126

President's Page 92
Executive Director's Report 94
Riding the Circuits 95
Bar Briefs 96
Young Lawyers' Section 99
Legislative Wrap-Up 102
Building Alabama's Courthouses 104
About Members, Among Firms 116
Building Fund Honor Roll 129
CLE Opportunities 124
Volunteer Lawyers Program 129
Disciplinary Report 131
Opinions of the General Counsel 132
Recent Decisions 134
Consultant's Corner 140
Major Legislation of Interest 142
Memorials 156
Classified Notices 159

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The Alabama Lawyer

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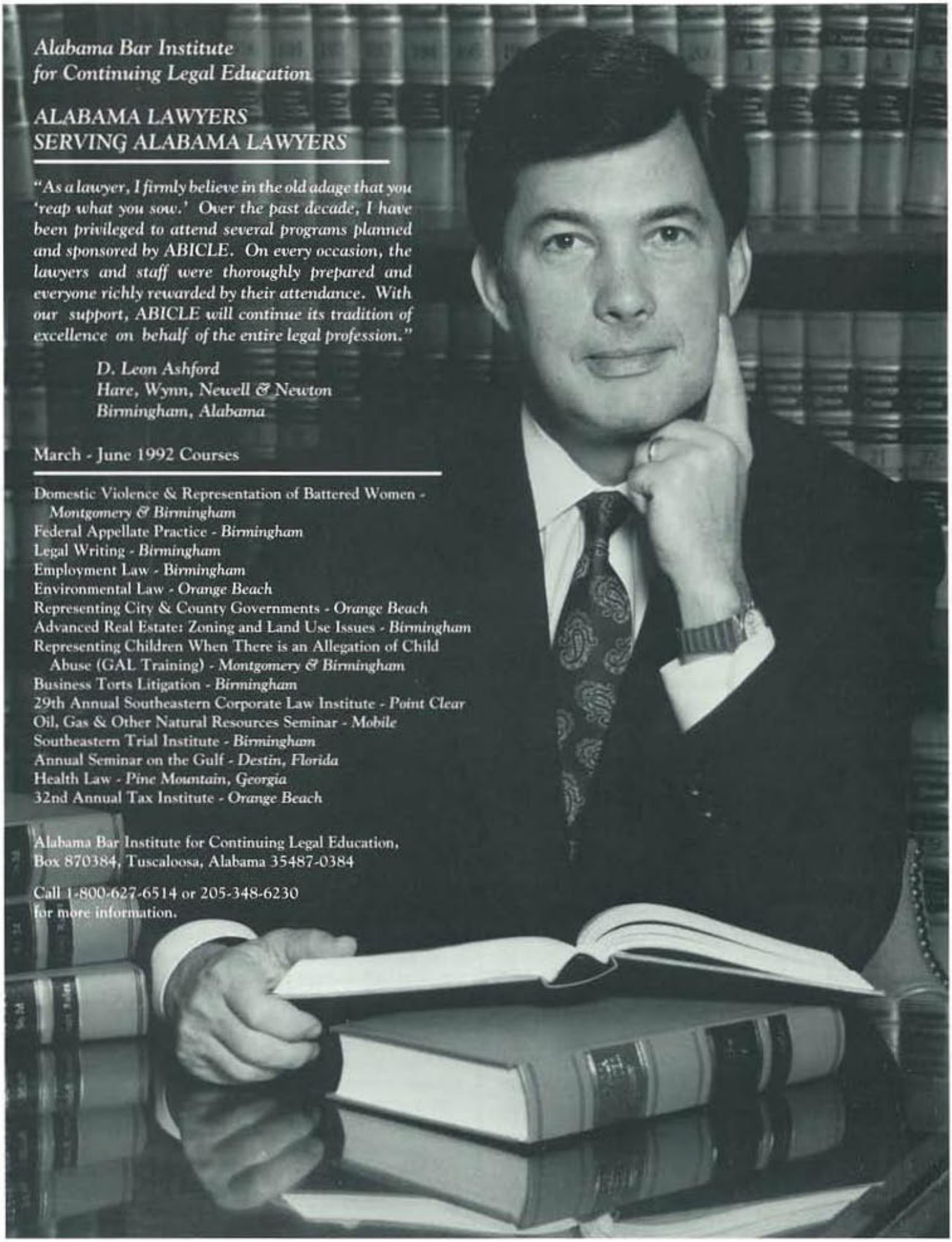

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Annual Seminar on the Gulf - *Destin, Florida*
Health Law - *Pine Mountain, Georgia*
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PRESIDENT'S PAGE

Where is the justice system going in Alabama? When our unified court system was established in the mid-1970s, it became a national model for the modern, efficient administration of justice. I am told that the Alabama model has been copied in whole or in part by many of our sister states. The Alabama unified judicial system has been something in which we lawyers, as officers of the court, have taken great pride.

The past two years have been times of great monetary and budgetary crises in our state. We have experienced significant proration in most areas of state government, including the judicial system. In fiscal year 1991, after its budget had been approved by the Legislature, our judicial system was required to accept about a 2.6 percent cut in funding because of proration.

This year, Alabama Supreme Court Chief Justice Sonny Hornsby, as head of our system, has been advised that an additional 5 percent reduction in the appropriation for fiscal year 1993 will be forthcoming for our court system. I submit to you that we, as lawyers, cannot silently stand by and allow Alabama's system of justice to fall victim to the politician's knife.

Phillip E. Adams, Jr.

The Constitution of Alabama clearly mandates that this branch of government shall be one of three separate and co-equal branches of government. Unfortunately, I am afraid that the justice system in our state is misperceived by the executive branch and by many within the legislative branch as another "agency" of state government. If we, as lawyers, allow this misperception to continue I fear that the third critical branch of government will not be able to operate effectively, thus causing the entire governmental system to be out of balance and at risk of grinding to a halt.

Chief Justice Hornsby recently told a gathering of circuit and district judges that projected cuts will involve laying off between 200-300 people in the 74 county courthouses in our state. Chief Justice Hornsby, I think, appropriately pointed out that the Constitution of Alabama requires that justice be administered without delay and accurately observed that this constitutional requirement was bigger than any individual. Chief Justice Hornsby stated that all Alabamians must work to insure that the justice system receive adequate and reasonable funding from the legislature.

Ask yourself these questions: Is it acceptable to you as an officer of the court that Alabama's version of democracy might require district attorneys to have to furlough employees or have to make a "deal" in all but the most extreme circumstances in order to stay ahead of the ever-present avalanche of criminal cases? Is it acceptable to you to have a civil system so backlogged that civil litigants must wait several years before their cases can be heard?

I submit the answer to both questions is "no". If the court system in Alabama cannot continue to operate in an efficient, effective manner, I fear that we will have, on the criminal side, increased lawlessness, and on the civil side, cynicism and contempt for the judicial process and all of us who are involved in the process.

Judicial funding currently comprises only about 1 percent of the total tax revenues received by our state and about 12 percent of the revenues received by the general fund.

Alabama's judicial system annually involves a huge segment of our population. Last year, over 77,000 Alabamians served on jury duty. Our circuit courts disposed of 162,000 cases during 1991. Last year, 93 percent of the total monies expended in the operation of the judicial system went for personnel costs and juror costs. Our system simply does not have a whole lot of fat to trim. I believe that continued cuts will necessarily have an effect on the administration of justice.

I submit that a reasonable approach to funding the three branches of our government would be as follows: (1) fund the legislative branch so that it might effectively and efficiently carry out its constitutional functions; (2) fund the judicial branch so that the needs of the system of justice in our state would be met; and (3) appropriate all remaining monies to the executive branch to use in funding its different departments and agencies. If this approach was followed, in 1992 the executive branch would receive about 86 percent of the general fund revenue for its purposes. I believe that lawyers must take the lead in convincing the public and our policy-makers that this type of funding is a politically significant issue.

My function, as I see it, is to alert you to this crisis and tell you that only through a concerted effort by all lawyers in our state are we likely to achieve any significant results.

I urge each of you to take whatever action you deem appropriate to help influence the decision-makers in our state to act responsibly. This might include writing or calling your senator or representative and explaining why Alabama should not reverse the positive direction of our judicial branch of government by reducing the already small portion of state revenues it receives.

We all took an oath to support the Constitution of our state. That document mandates adequate funding for the judicial branch of government.

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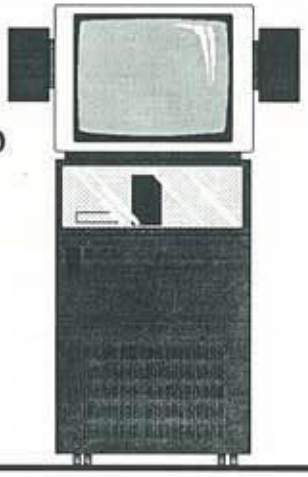

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EXECUTIVE DIRECTOR'S REPORT

"I get by with a little help from my friends."

—John Lennon and Paul McCartney

This column quite possibly will strike you as characteristically unlike most that I have written for *The Alabama Lawyer*. I write it in a mood that I do not usually allow myself to fall into—namely, pessimism and bewilderment.

For several years, I have read and heard discussed the decline of legal professionalism, the laments of lawyers decrying a downward spiral in the quality of their lifestyle due to professional pressures, and overt criticism of the justice system of which we are all a part.

One means by which some bar associations have sought to address these issues is through the adoption of a Code of Practice (for lack of a better description). The common denominator of all such efforts is a return to courtesy, civility, caring and just plain good manners. "Commitment" is another suggested trait sorely needed.

I have served this association long enough to have witnessed firsthand the changes in attitude in the Alabama State Bar. Only recently did I discover my predecessor, John Scott, wrote in an early *Alabama State Bar Foundation Bulletin* about the profession's loss of collegiality and expressed his concerns at that time almost 30 years ago. He was noting that in an earlier time when a lawyer died, the whole bench and bar in the circuit would attend the funeral. But, even then, as he wrote in the mid-60s, such was a declining practice.

I discovered Judge's comments while reviewing his earlier efforts to encourage the members of the bar to assist in the initial fundraising effort that led to our first bar headquarters building. My concerns with the non-participation by over 80 percent of our bar in our present effort to expand our headquarters has me searching for whatever "magic" it takes to reach a respectable participation level. I never expected 100 percent participation, but I never dreamed, a year into the project, we would have less than 20 percent of the bar membership pledge and contribute to this effort.

Reginald T. Hamner

If this association did not serve its members daily in meeting their personal and professional needs or if the membership surveys had not indicated 98 percent-plus satisfaction with our bar services, I could understand the low participation. I know our state's and nation's economies are in a recession but not to the extent that 80 percent of our members cannot contribute to this professional effort.

Maybe Zona Hostetler, chair of the American Bar Association's Special Coordinating Committee on Professionalism, identified our problem in the January 1992 *ABA Journal*. In her perceptive piece, she noted, "Bar organizations are no longer the center of professional life." I commend her entire comment to your reading. If you do not receive the *ABA Journal*, write me and I will send you a copy of her essay. It is headed "Too Many Lawyers?" with the subtitle "Restoring Our Sense of Community".

You may not view the Alabama State Bar as the center of your professional life and, therefore, feel no obligation to financially support its undertakings. Fortunately for you, those who preceded you shared a different view. Today, you practice in one of the nation's finest constituted court systems with more opportunities for professional growth and fulfillment than those whose visions made these things possible could have ever dreamed. Let us hope those lawyers in the next century do not have to look back to those giants of 1879, 1923, 1964 and 1971 to find role models.

To restore a sense of community, we need to rekindle old and build new and meaningful friendships and relationships with one another.

My colleague, Elisa M. Myers, CAE, wrote about a "friendly discovery" in her "footnotes" column in the December 1991 *Association Management Magazine*. She reflected on "how long it had been since I slowed down long enough to focus on the warm and wonderful qualities of the many people I have the privilege of coming into contact with." I do this often when I become down and feel sorry for myself. I have done this as I have written this column. I hope you too will do this with a particular emphasis on your professional friends. Maybe you will think of your association as a special friend? It needs your friendship and support. ■

RIDING THE CIRCUITS

Mobile Bar Association

The following are the 1992 officers of the Mobile Bar Association:

President:.....Jerry A. McDowell
President-elect:.....Thomas E. Bryant, Jr.
Vice-president:.....D. Richard Bounds
Secretary:.....Frank Woodson, Jr.
Treasurer:.....M. Kathleen Miller

The following are the new officers of the MBA Young Lawyers' Section for 1992:

President:.....Mark C. Wolfe
Vice-president:.....Judson W. Wells
Secretary/treasurer:.....Jeffrey L. Luther

— BAR — DIRECTORIES

Bar directories came out last month.
Extra copies are $15 each.
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Alabama Bar Directory
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BAR BRIEFS

Noojin installed as president of Birmingham Bar Association

Ray O. Noojin, Jr. was installed recently as president of the Birmingham Bar Association. Noojin, a partner in the firm of Hare, Wynn, Newell & Newton, graduated from the University of Alabama in 1967. He earned his law degree from the University's School of Law in 1970.

Noojin has served on the Executive Committee, the Nominating Committee and the Grievance Committee.

He has served on the board of governors of the Alabama Trial Lawyers Association since 1979 and is a member of the American Trial Lawyers Association and the American Judicature Society, and he was chairperson of the Task Force on Legal Services to the Poor.

Since 1980, Noojin has served on the Executive Committee of the Jefferson County Chapter of the University of Alabama Alumni Association, where he was president in 1986. He has also served on numerous other committees and boards in Birmingham.

Announcements from West Publishing

West provides complete U.S. Supreme Court Coverage

West's Supreme Court Reporter advance sheets, published by West Publishing Company, now record cases which the U.S. Supreme Court has agreed to review. These cases are included in the Cumulative Cases Affected Table to assist attorneys in weighing the impact of future cases on their practice and preparing them for possible outcomes.

West's Supreme Court Reporter advance sheets also provide attorneys with the text, case synopses and Key Number headnotes to recently released U.S. Supreme Court decisions.

Insurance material added to WESTLAW

A new database, Handbook on Insurance Coverage Disputes, will be added soon to WESTLAW, the computer-assisted legal research service from West. The database is provided through an agreement between West Publishing Company and Prentice Hall Law & Business, Inc.

The handbook will be found in the ICD database and contain the full text of

the treatise, second edition, by Barry R. Ostrager and Thomas R. Newman. It includes all treatise sections, the preface/acknowledgement and the main table of contents.

For more information, call 1-800-937-8529.

Text and periodicals research capabilities expanded on WESTLAW

West recently expanded capabilities on WESTLAW. The databases cover a range of law reviews and periodicals in the following subject areas:

business law
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food and drug law
franchise law
international and comparative law
law and feminism
law and health
law and medicine
law and technology
legal ethics
military law
public policy

Background information on each new database is included in the attached summary. For more information, call 1-800-937-8529.

Addition of statutes completes WESTLAW coverage of all 50 states

Statutes for all 50 states, plus four United States territories, are now available on WESTLAW with the recent addition of the Montana and North Dakota statutes. The four territories include the District of Columbia, Guam, Puerto Rico and the Virgin Islands.

For more information, call 1-800-937-8529.

McCormick on Evidence, 4th now available

West announces the release of *McCormick on Evidence*, 4th. Written by seven of the country's authorities on the law of evidence, this two-volume edition has been revised and expanded to comprehensively cover the rapidly changing area of evidence.

"The Hearsay Rules and Its Exceptions" section has been reorganized to conform with the Federal Rules of Evidence pattern. Chapter 15, "The Privilege Concerning Improperly Obtained Evidence", has been substantially revised to focus on the exclusionary remedy of what constitutes illegality in obtaining evidence.

Residual hearsay exceptions coverage has been substantially expanded and new sections have been added on the use of excited utterances and other hearsay exceptions in sexual abuse cases and impeachment of a hearsay declarant.

For more information, call 1-800-328-9352.

Stutts selected president of ADLA

The Alabama Defense Lawyers Association announced recently that Birmingham attorney Eugene P. Stutts was chosen to serve as president during the term 1991-92. The association is made up of trial lawyers who are engaged in civil litigation, primarily on the side of the defendant, representing corporations, businesses and insurance companies.

Stutts is a graduate of the University of Alabama and has practiced in Birmingham since 1969. He is a partner in the firm of Spain, Gillon, Grooms, Blan & Nettles, and is a member of the American Bar Association, Alabama State Bar and the Birmingham Bar Association.

President-elect of the association is Davis Carr of Mobile, and Richard S. Manley of Demopolis is the new secretary-treasurer.

Thagard admitted to ACTL

Thomas W. Thagard, Jr., a partner in the Montgomery office of Balch & Bingham, has become a Fellow of the American College of Trial Lawyers. The college is a national association of 4,500 Fellows in the United States and Canada. Its purpose is to improve the standards of trial practice, the administration of justice and the ethics of the profession. Thagard was inducted at the recent annual meeting in Boston. A former Fulbright Scholar, Thagard received his B.A. degree from the University of the South and his LL.B. degree from the University of Virginia School of Law.

NOTICE

1991-92 Occupational License or Special Membership Dues Were Due October 1, 1991

This is a reminder that all 1991-92 Alabama attorney's occupational license and special memberships **EXPIRED** September 30, 1991.

Sections 40-12-49, 34-3-17 and 34-3-18, *Code of Alabama*, 1975, as amended, set forth the statutory requirements for licensing and membership in the Alabama State Bar. Licenses or special membership dues are payable between October 1 and October 31, without penalty. These dues include a $15 annual subscription to *The Alabama Lawyer*.

The occupational license (for those engaged in the active practice of law and not exempt from licensing by virtue of a position held, i.e., judgeships, attorneys general, U.S. attorneys, district attorneys, etc.) should be purchased from the probate judge or revenue commissioner in the city or town in which the lawyer has his or her principal office. The cost of this license is $150 plus the nominal county issuance fees.

Special membership dues (for those not engaged in the active practice of law but desiring to maintain an active membership status) should be remitted directly to the Alabama State Bar in the amount of $75. The special membership does not entitle you to practice law.

If you have any questions regarding membership status or dues payment, **please contact Alice Jo Hendrix at (205) 269-1515 or 1-800-392-5660 (in-state WATS).**

Organization set up to serve deaf and hearing-impaired

The passage of the Americans with Disabilities Act, (ADA) P.L. 101-336, has opened new legal avenues for deaf and hearing-impaired people throughout the country. A group of attorneys, including deaf, hearing-impaired and hearing attorneys wishing to serve the deaf and hearing-impaired population, is setting up a new national legal nonprofit organization.

Some of the initial goals of this new organization include, but are not limited to:

1. Providing information relating to deaf issues of ADA and related fields for attorneys and judges wishing to know more about these areas.

2. Providing a national referral list of attorneys able to serve the deaf and hearing-impaired populace. Any organization serving the deaf or hearing-impaired community may use this referral list for its members.

3. Meeting at least annually to learn how to better serve the deaf and hearing-impaired community.

Deaf and hearing-impaired attorneys (i.e., government, private law firms, corporations or law students, etc.) are wanted. Hearing attorneys with the ability to communicate with deaf or hearing-impaired persons and those attorneys whose offices are accessible to deaf and hearing-impaired clients are also strongly encouraged to join.

A national meeting is tentatively being planned for late June 1992 in Denver. For more information contact Leonard Hall at (913) 782-2600 V/TDD. The organization's mailing address is P.O. Box 106, Olathe, Kansas 66061-0106.

Scholarship fund established by circuit judges

The Alabama Association of Circuit Judges recently established a scholarship fund to promote the education of deserving students and honor the memory of deceased Alabama circuit judges.

The fund was created initially by a gift from the Alabama Association of Circuit Judges, and all interest and income earned by the fund will be used to award scholarships to students pursuing law school studies.

Any member of the bar or community may contribute to the fund in memory of deceased judges. Additionally, upon the death of a circuit judge, the Association of Alabama Circuit Judges will contribute $1,000 to the fund in memory of the deceased judge.

The recipient of the scholarship will be selected by the scholarship board of trustees who are appointed by the president of the Alabama Association of Circuit Judges. Students who are Alabama residents will be awarded the scholarship based upon academic ability and need. At least one scholarship will be awarded beginning with the 1992-93 academic year.

For more information, contact Judge Inge Johnson at P.O. Box 191, Tuscumbia, Alabama 35674.

December 1991 admittees

Francis Gilbert Davis, Jr.
Dallas, Texas
Russell Lee Irby, III
Eufaula, Alabama
Elliott Britton Monroe
Los Angeles, California
James Lynn Perry
Pascagoula, Mississippi
Jean Marguerite Powers
Atlanta, Georgia
Heath Fitzgerald Trousdale
Florence, Alabama

October 1991 admittee omitted

John Andrew Caddell (1933), John Bell Caddell (1991) and Thomas A. Caddell (1960) (grandfather, admittee and uncle)

Oops!

In the January 1992 *Alabama Lawyer*, Kellie Nabors Mulherin was accidentally left off the list of new admittees to the bar. The editors regret any inconvenience or embarrassment this may have caused. ■

YOUNG LAWYERS' SECTION

By KEITH B. NORMAN, president

Committee Focus — Disaster Response

An important committee of the Young Lawyers' Section is the Disaster Response Committee chaired by Judson Wells of Mobile. While it is the committee which we hope is never called to action, the purpose of the Disaster Response Committee is to assist victims of natural disasters, including floods, hurricanes or tornados. The current YLS committee is an integral part of the Alabama State Bar's Disaster Response Plan which was designed by the bar's Task Force on Disaster Response and recommended to the board of bar commissioners for implementation. The plan that was recommended by the bar's task force was approved last October by the board.

Keith B. Norman

Multi-faceted approach

The Alabama State Bar's Task Force on Disaster Response, chaired by Richard F. Allen of Montgomery, developed a comprehensive plan to respond in the event of a disaster. The plan incorporates three plans which are: (1) a network to provide legal assistance to victims; (2) a parachute lawyer plan; and (3) reconstitutional of local bar and local judiciary. The YLS participation involves the first prong of this plan — the network to provide legal assistance to victims.

The plan that is conceived by the state bar's task force anticipates that the bar will be notified by the Alabama Emergency Management Agency (AEMA) immediately upon the occurrence of a disaster. The AEMA contacts the office of the attorney general and the Alabama National Guard, which have been designated for on-site damage assessment in coordination with assistance. On appropriate determination, volunteer lawyers will maintain a desk at the disaster assistance center in the locale affected. Volunteer lawyers will be provided in cooperation with the YLS, in addition to those who volunteer for service. For the purpose of this plan, the state has been divided into four geographic regions, and a YLS volunteer coordinator has been assigned for each region. It is conceived under the plan that the coordinator identifies lawyers who are willing to participate and puts them in touch with the person at the disaster location who schedules the services for volunteer lawyers. Once on the scene, a volunteer lawyer would provide legal advice to disaster victims on topics ranging from landlord tenant matters to insurance claims.

The state bar's Disaster Response Plan divides the state into four areas which include north Alabama, central Alabama, east Alabama and south Alabama. YLS Executive Committee member Denise Ferguson of Huntsville is the north Alabama coordinator; Denise Landreth of Birmingham is the central Alabama coordinator; YLS Executive Committee member Trip Walton of Opelika is the east Alabama coordinator; and committee chair Judson Wells of Mobile serves as the south Alabama coordinator.

Our state's efforts coincide with the efforts of the Young Lawyers Division of the American Bar Association. The YLD's Disaster Legal Assistance Committee has been working with state affiliates throughout the nation and the Federal Emergency Management Agency to provide a national network of legal assistance in the event of a disaster. Presently, we are one of 11 state young lawyer affiliates which have a disaster response committee and plan in place. Of all the established state plans, I believe the Alabama network to provide legal assistance to disaster victims to be the model and best plan of them all. This is something of which we can be truly proud.

As previously mentioned, the Disaster Response Committee is one committee that we hope never has to function. Yet, we all know that a disaster can strike at any moment, so we must be prepared when it does. The ability of this committee to successfully carry out its mission depends on the willingness of YLS members, when called on, to volunteer and participate. If you would like to have your name included on a list of lawyers who will volunteer to provide legal assistance to disaster victims, contact me or the YLS coordinator for your area. You may also volunteer for service in this regard by having your name included through the Alabama State Bar Volunteer Lawyers Program. To be included through the VLP, contact the program's director, Melinda Waters, at the state bar headquarters.

Remember that disaster can strike at any time. We need your help, so volunteer to be a part of the network to provide legal assistance to disaster victims. ■

LEGAL SERVICES CORPORATION OF ALABAMA

Continues Its Efforts to Provide Quality Legal Services to Needy Persons

By PENNY WEAVER

The Legal Services Corporation of Alabama is a private, non-profit organization funded by Congress to provide free legal assistance to poor people in civil matters. Through 17 offices located in seven regions—Dothan, Florence, Gadsden, Mobile, Montgomery, Selma, and Tuscaloosa—it serves clients in 60 of Alabama's 67 counties. Two other federally funded programs, Legal Services of Metro Birmingham and Legal Services of North Central Alabama, based in Huntsville, serve the remaining seven counties. A fourth program, the Alabama Consortium of Legal Services Programs, provides training and other support for the three field programs. Legal Services lawyers handle only civil cases and are prohibited from representing clients in fee-generating cases. LSCA will receive $5,385,693 this year from the Legal Services Corporation.

In writing the Legal Services Corporation Act in 1974, Congress declared that "there is a need to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances." To accomplish this most basic promise of our free society—equal justice under law—Congress went on to commit itself to providing a basic level of free legal services for the poor in every county in America. But, with the inauguration of the Reagan Administration in 1982, the original noble goal of LSC became a day-to-day battle to merely survive.

LSCA's new director faces many challenges, with the need for increasing funding sources at the top of the list. The lack of adequate legal services to poor people in Alabama was well documented in the state bar's 1989 legal needs survey, a study jointly funded by LSCA and the Alabama Law Foundation. (See the three-part series in *The Alabama Lawyer*, Volume 51, numbers 2, 3 and 6, "Assessing the Legal Needs of the Poor: Building an Agenda for the 1990s".) The LSC grantees in the state have not begun to be able to keep pace with this need. These programs employ one lawyer for every 11,000 poor per-

Penny Weaver
Penny Weaver is communications coordinator for the Alabama Consortium of Legal Services Programs. She has previously served as a freelance photographer and writer, as the director of information for the Southern Poverty Law Center, as the assistant director of the Alabama Community Relations Program of the Southeastern Public Education Program, American Friends Service Committee, and as a reporter and photographer in Mississippi.

sons in the state, while the overall ratio of Alabama lawyers to its general population is one to 400. The American Bar Association estimates that each year one poor person in four will need legal help in a civil matter.

Incorporated in 1976, LSCA was founded by lawyers from across the state who saw the unmet legal needs of poor Alabamians. It received an operating grant from the Legal Services Corporation and began service to clients in 1978. The program rapidly expanded in 1979 and 1980 to reach clients in its 60-county service area. In 1982, a 25 percent cut in program funding, coupled with a new requirement to spend 12.5 percent of its grant money for the involvement of private attorneys in service delivery, forced LSCA to drastically reduce its legal staff. Although there have been small increases in LSC appropriations in the last decade, the program has never been able to regain the number of staff members it had in its early days. The program's 1991 funding from LSC was some $300,000 less than its funding ten years ago in 1981. In 1981, LSCA employed 92 lawyers; in 1991, it employed 52 with its LSC funding.

LSCA closed 20,406 cases in 1991. The vast majority of these cases involved access to public benefits, consumer issues, housing problems and domestic relations.

In 1991, LSCA was able to establish special domestic violence projects in five of its regions with a $200,000 IOLTA grant from the Alabama Law Foundation. Each of these projects funds a lawyer who provides direct service to clients as well as general advocacy and education around domestic violence issues. These projects are located in LSCA's Florence, Tuscaloosa, Montgomery, Selma, and Mobile regions.

The IOLTA grants enabled LSCA to provide an additional service to its low-income clients, but because the money is earmarked for these projects, IOLTA funding has not helped Legal Services staff in their struggle to meet the day-to-day legal needs of poor Alabamians. An increase in general funding will be necessary to do this.

Looking toward expanding revenue sources, the three LSC-funded programs in Alabama have jointly undertaken a development project. Directing this effort is Hilary Luks Chiz, a Birmingham native with a background in raising funds on behalf of legal issues. One focus of Legal Services' fundraising will be an effort to receive a greater portion of IOLTA funding. The Alabama Law Foundation currently awards 37.8 percent of its IOLTA money to the "Legal Aid to the Poor" category. In other states, that amount averages 75 percent.

LSCA is governed by a 15-member board of directors. The Alabama State Bar appoints eight of these, the Alabama Lawyers Association appoints one, and the rest are client-eligible appointees of various community organizations. The board members are Inez J. Baskin, Montgomery; Celia J. Collins, Mobile; Earnest Doyle, Selma; Scott Hedeen, Dothan; Lucille Jenkins, Montgomery; Walter E. McGowan, Tuskegee; Lizzie Pullom, Tuscaloosa; R.L. Raney, Florence; Robert D. Segall, Montgomery; Kathleen Thomas, Chunchula; Bryant A. Whitmire, Birmingham; Al L. Vreeland, Tuscaloosa; McGowin Williamson, Greenville; and Fred Wood, Hamilton. ■

Ludgood named director of LSCA

Merceria Ludgood

Mobile lawyer Merceria Ludgood has assumed the leadership of Alabama's largest Legal Services program, the Legal Services Corporation of Alabama. Ludgood, an Alabama Lawyers Association-appointee to the LSCA board of directors since 1982, was selected as the program's new director at a special board meeting. The board, acting on the recommendation of its selection committee, voted unanimously to offer Ludgood the position. The selection committee interviewed 11 applicants for the directorship.

Ludgood, a native of Mobile, earned both her B.A. and M.A. degrees in education from the University of Alabama. In 1978, she entered Antioch School of Law in Washington, D.C. Ludgood participated in a special program offered by Antioch at that time. It was geared toward older students with activist backgrounds. Under this program, a law student began actually serving clients in the second semester of their first year.

While in law school, Ludgood worked for Neighborhood Legal Services in Washington, and also clerked for Senator Howell Heflin on the Senate Judiciary Committee's Subcommittee on Jurisprudence and Governmental Relations.

In 1981, she finished law school and returned to Mobile to enter private practice with Vernon Crawford, Michael Figures and Sam Irby. She remained with that firm until 1988 when she went out on her own as a sole practitioner.

Ludgood is currently on the Mobile Bar Association's Executive Committee and in the past has served on its Continuing Legal Education Committee and its Pro Bono Project Committee. She has been a participating lawyer in the Mobile Pro Bono Project since its inception. Since 1985, she has been an assistant county attorney for Mobile County, and since 1990, assistant attorney for the Mobile County Personnel Board. Recently, she was appointed a special district judge and probate judge in Mobile County. ■

LEGISLATIVE WRAP-UP

By ROBERT L. McCURLEY, JR.

UCC Article 4A — "Funds Transfer"

The Alabama Law Institute has approved and presented to the Legislature a new article to the Uniform Commercial Code. Attorney Larry Vincent chaired the committee with the following lawyers serving on the committee: John Andrews, professor Don Baker, Burton Barnes, Hamp Boles, Richard Carmody, Robert Couch, Bill Hairston, III, Palmer Hamilton, Ronald L. Sims, Judge James Sledge, and Joe Stewart.

Proposed Article 4A of the UCC was developed to fill a void in the law relating to a type of payment made through the banking system called a "funds transfer". Generally, a funds transfer is a large, rapid money transfer between commercial entities. For example, the average transfer involves $5,000,000. Consumer transactions such as credit cards, debit cards, automated teller machine transfers and checks are governed by the Electronic Funds Transfer Act, not by this article.

Although there is no comprehensive law governing commercial funds transfers, Regulation J (federal law) covers the interbank part of any commercial funds transfer by the Federal Reserve

network. Article 4A and Regulation J are compatible, embodying the same concepts. Thus, even though a majority of the funds transfers occurring in Alabama are covered under Regulation J, many transactions occur with no comprehensive rules and no readily ascertainable established law governing those transactions, hence, the need for a comprehensive set of rules to govern these transactions.

Article 4A is designed to establish rules covering the rights and obligations connected with funds transfers. The article balances the interest of banks, commercial users of this payment method and the public concerning such problems as authorized payment orders, improper execution of payment orders, fraud and insolvency of participating banks. The article specifies who takes the risk of loss, who will be liable and what damages may be assessed.

Uniformity with Regulation J, and with 32 states who have enacted 4A, is important to maintain a speedy and inexpensive system to transfer funds as Alabama expands into other national and international markets. A lack of uniformity could result in an inexperienced business person or entity inadvertently incurring excessive liability.

Part 1 — Subject Matter and Definitions

In addition to providing definitions, this part establishes which transfers of funds are covered by this article and which are excluded. Consumer transactions are governed by federal law and, therefore, are excluded (§108). The time of receipt of a payment order is governed by Section 106.

Robert L. McCurley, Jr.
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Part 2 — Issue and Acceptance of Payment Order

This part covers the security procedure (§201) established between the customer and receiving bank and authorizations of payment orders (§202). It also addresses problems and liabilities under such situations as erroneous payment orders (§205), misdescription of beneficiaries (§207) or banks (§208), and unaccepted payment orders (§212).

Part 3 — Execution of Sender's Payment Order by Receiving Bank

Part 3 establishes the execution date (§301) and the obligation of the receiving bank in execution of the payment order (§302). The effect of erroneous execution of a payment order (§302) and the liability for a late or improper execution or failure to execute the payment order (§305) is also covered. The responsibilities of the sender to report an erroneously executed payment order are set out in Section 304.

Part 4 — Payment

This part establishes the payment date (§401) as well as the obligations of the sender (§402) and beneficiary bank (§404) to make payment. Payment by the sender (§403), by the beneficiary's bank (§405) and by the originator (§406) are covered. Discharge of the underlying obligation (§406) is included.

Part 5 — Miscellaneous Provisions

Generally, the parties may alter their rights and obligations (§501). Creditor process and setoffs (§502), injunctions and restraining orders (§503) and rate of interest (§506) are covered. The order in which payment orders may be charged to an account (§504) is included among the miscellaneous provisions. Finally, Section 505 essentially establishes a one-year rule of repose.

Institute bills before the Legislature

UCC Article 4A — "Funds Transfers"

Senate bill 66 sponsored by Senator Steve Windom from Mobile; House bill 97 sponsored by Representative Mary Zoghby.

UCC Article 2A — "Leases"

Senate bill 113 sponsored by Senator Jack Floyd, Gadsden; House bill 135 sponsored by Representative Mike Box, Mobile. *See Alabama Lawyer*, May 1991.

Constitutional amendments to the Business Corporation Act

Senate bill 119 sponsored by Senator Pat Lindsey, Butler; House bill 108 sponsored by Representative Jim Campbell, Anniston. This proposed amendment is to §§232, 233, 234, and 237 of the Constitution of Alabama of 1901, relating to corporations to authorize the Legislature to define activities that do or do not constitute the doing of business in Alabama of foreign corporations. It also permits domestic corporations to engage in certain business not expressly authorized by its charter and removes certain restrictions on the issuance of stock and bonds by domestic corporations. The amendment will also permit domestic corporations to issue preferred stock as authorized by state statutes.

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

BUILDING ALABAMA'S COURTHOUSES

LAMAR COUNTY COURTHOUSE

By SAMUEL A. RUMORE, JR.

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

Lamar County Courthouse

Lamar County

Lamar County, in northwest Alabama, has two interesting distinctions. It is one of only three counties in Alabama, the other two being Colbert and Etowah, to have been created, abolished and then re-established. And it is the only county in Alabama to have had three different names—Jones, Sanford and Lamar.

If any one person could be called the "Father of Lamar County" it must be John Hollis Bankhead, the patriarch of the family which produced such eminent Alabamians as Senator John H. Bankhead, Jr., Speaker of the House William B. Bankhead and actress Tallulah Bankhead. Bankhead's forebears were early Alabama pioneers who settled in the area near present-day Sulligent around 1816. He served as a captain in the Confederate Army and began his long career of public service in 1865 by winning a seat in the Alabama Legislature from Marion County. His political career continued until his death in 1920 when Bankhead was serving as a United States Senator from Alabama. He was the last Confederate veteran to serve in the United States Senate.

On January 21, 1867, the young and ambitious representative proposed the creation of a new county. The northern part of the county would be taken from Bankhead's own Marion County, and the southern part would be carved from Fayette County. He proposed that the new county be named "Stonewall" in honor of the Confederate hero, Stonewall Jackson. All went well until the third reading of the bill. Many "carpetbag" and "scalawag" members of this Reconstruction-era Legislature found the name Stonewall to be unacceptable, and so Bankhead's bill failed to receive the required two-thirds majority vote.

A few days later, Bankhead resubmitted his proposal. This time, however, the word "Stonewall" was deleted. In its place he substituted the name "Jones". Elliot P. Jones of Fayette County was a prominent and influential member of the Legislature at the time whose support Bankhead needed. Bankhead was a master politician even from his earliest days, and he knew how to maneuver in order to obtain his goals. If the name he chose the first time hurt his efforts, then the name he chose the second time would ensure his success. On February 4, 1867 Jones County, Alabama was established.

By March 1867, Congress had passed the Reconstruction Act which ended Presidential Reconstruction and began the Congressional version. The civilian government of Alabama was now subject

to Congressional Reconstruction policies. The actions of the newly created Jones County had to be approved by the Freedmen's Bureau and the military authorities, similar to Justice Department pre-clearance of political changes in Alabama today under the 1965 Voting Rights Act.

On April 29, 1867 Jones County received approval from Wager Swayne, a commissioner of the Freedmen's Bureau, to conduct an election to determine the site of a county seat. Major General Swayne instructed the county that no person should be denied the right to vote in this election because of race or color.

The site chosen for the county seat was a 30-acre tract of land centrally located within the county. The government of the county began its business on August 26, 1867. One of the first orders of business was the selection of a name for the county seat town. The name chosen was Swayne in honor of Wager Swayne, who by July 1867 had been appointed the military governor of the State of Alabama.

General Swayne was an educated man from a prominent Ohio family and a distinguished member of the United States Army. He graduated from Yale in 1856 and the Cincinnati Law School in 1859, and practiced law with his father in Columbus, Ohio prior to the outbreak of war. His father, Noah H. Swayne, served on the United States Supreme Court from 1862 to 1881.

The younger Swayne entered the Army on August 31, 1861 with the rank of major. He suffered the loss of a leg during the war and was awarded the Medal of Honor for bravery. Swayne completed his military career as the military governor of Alabama from July 1867 to July 1868, and as commander of the Alabama Freedmen's Bureau until January 1869. He retired as a major general and returned to the practice of law. He died in New York December 18, 1902.

By September 1867 the town of Swayne was surveyed, the future location of a permanent courthouse was chosen, and the construction of a temporary courthouse was authorized. Fifty lots were sold to individuals at a public auction to raise funds. And, on October 3, 1867, the first county tax was levied for courthouse and jail construction.

Despite the progress Jones County had made, a movement arose in north Alabama to undo the action which created the county. On November 5, 1867, a Constitutional Convention convened. At the convention, a delegate from Winston County introduced an ordinance to abolish the county of Jones. The proposal was referred to a committee on counties and municipal organizations. The committee decided to return all political boundaries of Alabama to those existing on January 10, 1861, the day before Alabama adopted its Ordinance of Secession. However, an exception was made to the policy of returning to the pre-war boundaries. Counties which had purchased property for the construction of public buildings and had already assumed a contractual public indebtedness were exempt. Jones County did not fit into the exemption.

On November 13, 1867, Ordinance No. 1 of the Constitutional Convention of 1867 abolished Jones County and returned its territory to Marion and Fayette counties. General Swayne did not favorably view this action of the radical Constitutional Convention. On December 11, 1867 he sent a letter to the probate judge of Jones County informing the judge that he had attempted to use his influence to save Jones County, but was unsuccessful. He stated that he would try to get the county re-established when the Legislature met again, and suggested that the county should continue its business as if it had never been abolished.

The year 1868 was an interesting time

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in the life of the then non-existent Jones County. In May of that year, the state superintendent of registration sent instructions to the sheriff on how to draw jurors in the county. In July, the probate judge remitted to the state the county taxes he had collected. In August, the tax collector of the non-existent county received instructions from the state auditor on conducting his job. And, during the year, the county government let contracts for a courthouse and jail.

To further complicate matters, after the first Jones County was abolished in north Alabama, a second Jones County was created by the Alabama Legislature in south Alabama. On August 6, 1868, the name of Covington County was officially changed to Jones County in honor of Josiah Jones, a local political leader and former legislator. Jones, however, did not want the county named for him. Therefore, in 1868 Alabama had a non-existent Jones County in north Alabama which was functioning and seeking to be recreated, and an existing Jones County in south Alabama that its namesake wished to disavow. To end the confusion, Jones County in north Alabama was re-established on October 8, 1868, but was renamed Sanford County, while on October 10, 1868, Jones County in south Alabama again became Covington County. The Reconstruction Era was certainly an unsettling time in Alabama history!

The new Sanford County was named for Henry C. Sanford. He was a native of the Greenville District in South Carolina, a pioneering settler in Cherokee County, Alabama, a minister and a teacher. But, the most important apparent reason for the selection of his name for the new county was that he was a sitting member of the Alabama Senate in 1868. The Alabama Legislature at that time had a particular propensity for honoring its own.

With the county getting a new name, it was decided that the county seat town should also have a name change. On November 10, 1868 the name of the town of Swayne was changed to Vernon. The county commissioners had met to choose a new name when one of the local residents, Edmon Vernon of Vernon, England, asked that they name the town for him and his native city. The commissioners agreed and the town today remains Vernon.

The first courts in the county convened in a log house belonging to Daniel J. Molloy until a temporary structure was built. The county paid L.H. Jackson and Thomas W. Finch $300 for the temporary courthouse. The first permanent courthouse was designed to be located on the public square at Vernon. Daniel J. Molloy and Jesse Little Taylor established a brickyard at Vernon for making the courthouse construction materials. The courthouse and jail were completed by 1870, and the total cost was approximately $14,000.

The Reconstruction Era ended with the election of President Rutherford B. Hayes in 1876. John Hollis Bankhead was not in the Alabama Legislature at that time, but he was a person of tremendous political influence. Bankhead never quite forgot the compromise he had to make concerning the name of the county he helped to create. In 1877, he decided to exert his influence to let the world know his personal sentiments as well as the sentiments of his country concerning the Confederacy and the post-war period. With his urging and support, on February 8, 1877 the Alabama Legislature changed the name of Sanford County to Lamar County. This action was to honor Lucius Quintus Cincinnatus Lamar of Mississippi.

Lamar was a native of Georgia who moved to Mississippi to seek greater opportunity. His father-in-law was president of the University of Mississippi, and Lamar taught mathematics at the Oxford school while establishing a law practice. He was elected to Congress prior to the Civil War but left to join the Confederate cause. He served in the Confederate Army and was also a Confederate diplomat to Russia. After the end of the war, he again taught at the University of Mississippi and by 1872 was in Congress again. His actions in Congress helped bridge the political divisions between North and South. A congressional tribute which he delivered for the late Senator Charles Sumner, a Massachusetts abolitionist, won him national recognition. In many minds he represented the healing process required to make the country whole

again. By choosing his name, Bankhead and the Alabama Legislature symbolically indicated that a period of political bitterness was drawing to a close.

The illustrious career of Lamar continued after the county on the western border of Alabama was named for him. He became a United States Senator in 1877, secretary of the interior under President Cleveland in 1885, and served on the U.S. Supreme Court from 1888 until his death in 1893. Lamar was indeed a worthy recipient of the honor suggested for him by John Hollis Bankhead.

The 1870 courthouse in Sanford (later Lamar) County did not serve the county well. Almost from its completion complaints were made that it was too small. For over 20 years dissatisfaction simmered. Several towns in the county called for the removal of the courthouse. By 1894, the problem became even more acute because the structure had developed leaks and cracks.

In April 1894 bids were sought for a courthouse renovation project. D.S. McClanahan of Columbus, Mississippi submitted the low bid of approximately $2,300. He added four rooms, remodeled the older part of the building, and then was authorized to make other improvements. The cost overruns required the county to issue bonds to complete the project.

By the early 1900s, Sulligent in north Lamar and Millport in south Lamar vied to become the county seat and take the courthouse from Vernon. However, Sulligent soon became the only rival in a petition for a courthouse election that was circulated in the county. A counterpetition opposing an election was also circulated. Both petitions were submitted to Governor B.B. Comer who appointed the state examiner of public accounts to certify the signatures of the qualified electors. Those who supported Sulligent wanted an election and those who supported Vernon opposed an election. Millport residents sided with Vernon to keep the courthouse from being moved to Sulligent. The result was that more qualified electors opposed an election than requested one, and so the issue of courthouse removal was closed.

In 1909, a new courthouse was built in Vernon. This courthouse was of Classical design with four large columns, a pedimented portico and an impressive dome. The architect for this structure was Chamberlain and Company of Birmingham and the builder was B.C. Bynum Construction Company, also of Birmingham.

In 1948, this courthouse was modernized. The classic dome and columns were removed and a third floor was added to the structure. The architect for this project was William I. Rosamond, and Daniel Construction Company was the contractor. The renovated 1909 courthouse serves Lamar County to this day. ■

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 in 1992 to assume the presidency of the bar in July 1993. Any candidate must be a member in good standing on March 1, 1992. 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, 1992. Any candidate for this office also must submit with the nominating petition a black and white photograph and biographical data to be published in the May *Alabama Lawyer.*

Ballots will be mailed between May 15 and June 1 and must be received at state bar headquarters by 5 p.m. on July 14, 1992.

COMMISSIONERS

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits: 1st, 3rd, 5th, 6th, place no. 1; 7th; 10th, places no. 3 and 6; 13th, place no. 3 and 4; 14th; 15th, places no. 1, 3 and 4; 25th; 26th; 28th; 32nd; and 37th. Additional commissioners will be elected in these circuits for each 300 members of the state bar with principal offices therein. The new commissioner positions will be determined by a census on March 1, 1992 and vacancies certified by the secretary on March 15, 1992.

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 24, 1992).

Ballots will be prepared and mailed to members between May 15 and June 1, 1992. Ballots must be voted and returned by 5 p.m. on the second Tuesday in June (June 9, 1992) to state bar headquarters.

LITIGATING MINORITY SHAREHOLDER RIGHTS AND THE NEW TORT OF OPPRESSION

By ANDREW P. CAMPBELL

THE HISTORICAL TRADITION

Savorers of political fare recall with glee the tale of two brothers: one who went off to sea, the other who became vice-president of the United States, and neither was ever heard of again. If there had been a third sibling of this dubious duo who suffered the same fate, it could only be because he was a minority shareholder in a closely held Alabama corporation. Traditionally, minority shareholders in this state were consigned to a peculiar oblivion offering few rights and fewer remedies to control their destiny and no right to receive a present return on their investment.

The history of control of close corporations has been democracy with a vengeance. Under the principle of majority control as entrenched further by the Business Judgment Rule (discussed hereafter), the majority, as long as it acted lawfully and consistent with the Articles of Incorporation and By-Laws, had the unbridled privilege to manage the corporation as it saw fit. As the Alabama Supreme Court held in the case of *Phinizy v. Anniston City Land Co.*, 195 Ala. 656, 71 So. 469, 471 (1916):

> Those who embark in a corporate enterprise as stockholders do so under an implied agreement that the business shall be controlled and directed by a majority of the stockholders . . . .
> When the question is one of mere discretion in the management of the business or of doubtful event in the undertaking in which the concern has embarked, a remedy cannot be sought in a court of equity.

And no Bill of Rights protected the minority from majority domination. The majority was free to utterly deprive and squeeze out the minority of the two vestiges of stock ownership: (1) the tangible right to a present return on its capital in the form of salary, bonuses and dividends; and (2) the intangible privilege to participate in operating the company and setting its management course.

This separation of ownership of capital from corporate control inevitably impaired the value of the minority's shares in the marketplace. Simply put, no buyer in his right mind would pay cash for paper stock carrying no rights, including the right to income thereon. Left to the whims of a majority shareholder, who could starve him out by firing him and cutting him off from a livelihood, the minority shareholder had two choices: (1) hold his stock in perpetuity while receiving no earnings thereon, or (2) sell out at an unreasonably low price to the majority shareholder.

In many cases, the majority saw no reason to purchase the minority's shares when it had the free use of the minority's capital for its own purposes. One commentator made this salient point succinctly:

> All the majority can gain by purchasing the minority's interest is that portion of the earnings attributable to the minority's investment that the majority is unable to capture by legally permissible manipulation of its control position, plus whatever value the majority attaches to freedom from potential harassment or inconvenience due to the opposition or mere presence of the minority

> interest. Indeed, the majority has substantial discentives to purchase the minority's investment because it functions as a long term, low (and flexible) interest loan without a maturity date. The majority is thus able to use the minority's capital to leverage its own investment without incurring the risks associated with a loan. It will be willing to purchase only at a price that is less than the cost of obtaining capital elsewhere.

Hetherton and Dooley, *Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem*, 63 Va. L. Rev. 1, 5-6 (1977).

This state of affairs was utterly at odds with the notion that the majority should act fairly and attempt to fulfill the reasonable expectations of all shareholders. For one owns stock in a close corporation not simply to hold paper, but to achieve (1) capital appreciation, (2) income on that capital in the form of a proportionate share of the profits, (3) some role in management of corporate affairs, and in many cases, (4) a secure livelihood through employment and its benefits.

Unfettered majority autocracy undermined these goals and placed the minority in a position of solely an unwilling lender of capital. And then the law changed . . . .

TORT OF OPPRESSION: CREATION OF THE RIGHT

The first significant movement toward recognition of a tort of oppression of minority shareholders in Alabama came in *Burt v. Burt Boiler Works, Inc.*, 360 So.2d 327 (Ala. 1978). Speaking for the court, Justice Janie Shores stated that majority stockholders owed a duty to "act fairly to minority interests" and that "the majority cannot avoid that duty merely because the action taken is legally authorized." *Id.* at 331. In so holding, the court summarily rejected the traditional Alabama dogma that the majority "may always regulate and control the lawful exercises of corporate powers." *Id.* Substituted in its place was a principle that if the majority acted unfairly in a monetary sense it was guilty of breach of a fiduciary duty owed to the minority even though its conduct was otherwise lawful. *Id.*

The court did not flesh out this new right to corporate fundamental fairness, but it did quote with approval the following section from Professor O'Neal's *Close Corporations*, § 8.07 which seemingly redefined the relationship between majority and minority as akin to that of partners:

> In the past, some courts have permitted majority shareholders to exercise, without any restriction other than good faith, whatever powers they had as controlling shareholders under the statutes and the corporation's charter and bylaws; and further, they have treated the fiduciary duties of the directors as running only in favor of the corporation, not to the minority shareholders. This view that the controlling shareholders and the directors do not owe fiduciary duties to minority shareholders appears outmoded, at least as applied to . . . attempts to eliminate minority shareholders or to deprive them of their proportionate rights and powers without a just equivalent. *Where several owners carry on an enterprise together (as they usually do in a close corporation), their relationship should be considered a fiduciary one similar to the relationship among partners.* The fact that the enterprise is incorporated should not substantially change the picture. When businessmen organize a corporation, they enter into their relationship against a background of corporation statutes and common law doctrine which vest in the directors the power to manage the corporation's affairs and in the directors and certain percentages of the shareholders' power to affect fundamental changes in the corporation.... But this does not mean that the directors or the majority shareholders should be permitted to exercise their powers arbitrarily or without regard to the legitimate expectations of the minority shareholders; and many of the older decisions and practically all of the recent ones indicate that controlling shareholders, in some circumstances at least, owe fiduciary duties to minority shareholders, and that the *courts will require them (whether they act in their capacity as shareholders or through directors or officers whom they control); to observe accepted standards of business ethics in transactions affecting rights of minority shareholders.*

Id. at 331-32 (quoting O'Neal, *Close Corporations* § 8.07)(emphasis added).

The court affirmed the trial court's ruling that the majority had acquired control without the use of any oppression against the minority's interests. *Id.* at 331-32. The opinion added, arguably in dicta, words that indicated that the minority's rights to fairness would encompass an economic right to equitable participation in corporate profits:

> The majority now controls the corporate management. Should they, acting through the board and corporate officers, which they control, deprive the minority stockholders of *their just share of corporate gains, such would, of course, be actionable.* Among the techniques described by O'Neal and Derwin (Expulsion or Oppression of Business Associates: "Squeeze Outs" in Small Enterprises, (1961) *to oppress minority shareholders: withholding of dividends and siphoning off earnings by paying high compensation to majority shareholders or their relatives.*

Id. at 332 (emphasis added).

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While not fully realized at the time by the bench and bar, the court, for the first time, extended the majority fiduciary duty owed by the majority to the minority to require equity in distributions of earnings from the corporation. Most importantly, this novel holding sanctioned judicial intrusion into a realm of corporate management previously committed to the independent discretion of the majority shareholder.

Spoken of in *Burt*, this new right of the minority to fairness and to its "just share of corporate gains" was again embraced in *Galbreath v. Scott*, 433 So.2d 454 (Ala. 1983). Again, however, the court did not set parameters on the tort.

In *Galbreath*, the plaintiff brought an individual action for corporate waste of assets by controlling stockholders. *Id.* at 454-55. The issue was one of standing: whether conversion or waste of corporate assets by the majority was primarily an injury to the corporation, limiting standing to derivative stockholders suing on behalf of the corporation, or whether it was primarily an injury to individual stockholders. *Id.* at 456. The court found that for such corporate misconduct, the right was solely derivative, belonging to the corporation and not to individual shareholders. *Id.* at 456-57. (See discussion below.)

In its discussion, the *Galbreath* Court cited the *Burt* decision as creating a new cause of action for tortious oppression.

> [M]ajority stockholders owe a duty to at least act fairly to the minority interests. . . 360 So.2d at 331. We recognized a cause of action where majority shareholders, "acting through the board and corporate officers, which they control, deprive the minority stockholders of their just share of corporate gains . . . " 360 So.2d at 332.

Id. at 457 (quoting *Burt*, 360 So.2d at 331, 332).

In reaffirming the court's adoption of a tort of oppression, the *Galbreath* court again cited O'Neal for the premise that a closely held corporation takes on the fiduciary attributes of a partnership with overlapping directors, shareholders and employees, as opposed to the classic publicly-held corporation with its division between capital ownership and management. *Id.* at 457 (citing 1 O'Neal, *Close Corporations*, §§ 1.07, 1.10, and 1.12 (2d ed. 1971)). In a partnership, the minority cannot be deprived of its share of partnership distributions paid out through draws. Rather, there is a fundamental right to equality of treatment based on proportionate ownership.

This right to fairness and "just share of corporate gains" takes on real meaning only when the corporate form is discarded and the close corporation is viewed in this context as a partnership of individuals who share the functions of ownership and management. Each having made a capital contribution to the business, rough justice requires that each receive a just share of income therefrom based on his ownership percentage. In blunt terminology, the court, in *Galbreath*, categorized the majority's denial of this right to such gains of the close corporation as a "squeeze-out."

In addition to giving teeth to the minority's rights, *Galbreath* is significant because the court indicated that the tort of oppression presents a jury question. The court held that whether the majority had acted in good faith to "further the legitimate interests of [the corporation]" or engaged in self dealing was for the jury to decide. *Id.* at 457; see also *Finance Investment & Rediscount Co. v. Wells*, 409 So.2d 1341 (Ala. 1982) (the right to a jury trial exists on derivative claims seeking damages.)

EX PARTE BROWN: THE TORT'S COMING OF AGE

The embryonic right against oppression and to a share of just gains was brought to fruition in *Ex Parte Brown*, 562 So.2d 485 (Ala. 1990). In this, the second "Greentrack" case, the minority faced a unique defense: a substantial increase in the value of the stock of the excluded minority shareholder. The issue presented was how can a stockholder claim that he is oppressed when the value of his stock has increased ten-fold or 20-fold through the majority's successful management efforts?

Underlying the decision in *Ex Parte Brown* were the philosophical issues of what reasonable basic expectations of a stockholder accruing from ownership should be enforced and to what extent should the judiciary interfere with management policies that meet some expectations but not others. Are the legitimate expectations of outside/passive stockholders simply capital appreciation with no right to present income thereon as the defendants argued, or do they extend to participation in profits as they were produced or to liquidity in investment? In other words, as in the partnership analysis used in *Galbreath*, do the rights of passive minority investors include a right against majority discrimination in the distribution of profits and participation in a proportional share of the profits therein paid to the majority insiders through director's fees, salaries, bonuses, and corporate "perks?"

In *Ex Parte Brown*, the court held that a dramatic increase in value of his stock was not all that the minority was entitled to and would not serve as a defense against otherwise oppressive conduct.

> The fact, however, that the [minority's] stock has increased in value is no answer to the charge of systematic squeezeout of the minority.

Ex Parte Brown, 562 So.2d at 493.

This decision was correct. Capital appreciation is of no benefit to a minority if the majority can borrow and use that capital for free for its own purposes. Again, a shareholder's legitimate

expectations in a close corporation include some proportionate share of earnings (assuming there are earnings) from his capital. This is particularly true since there is no secondary market for sale of the stock.

Taking a step beyond *Burt* and *Galbreath*, the court defined specific elements of the tort of oppression. Quoting *O'Neal*, the court cited "squeeze-out techniques" that would prove oppression—even in the face of large increases in the value of the minority's stock.

> § 3.02 *Squeeze techniques in general* . . . [H]olders of a majority of the voting shares in a corporation, through their ability to elect and control a majority of the directors and to determine the outcome of shareholders' votes on other matters, have tremendous power to use a great variety of devices or modes of operation to benefit themselves at the expense of minority shareholders.
>
> Here are a few illustrations. The squeezers may refuse to declare dividends; they may drain off the corporation's earnings by exorbitant salaries and bonuses to the majority shareholder-officers and perhaps to their relatives, by high rental agreements for property the corporation leases from majority shareholders, or by unreasonable payments under contracts between the corporation and majority shareholders; they may deprive minority shareholders of corporate offices and of employment by the company; they may cause the corporation to sell its assets at an inadequate price to the majority shareholders or to companies in which the majority are interested; they may organize a new company in which the minority will have no interest, transfer the corporation's assets or business to it, and perhaps then dissolve the old corporation; or they may bring about the merger or consolidation of the corporation under a plan unfair to the minority. As indicated, the techniques listed here merely illustrate the techniques which resourceful squeezers may utilize.

Id. at 492 (quoting F.H. O'Neal and R. Thompson, *O'Neal's Oppression of Minority Shareholders*, § 3:02 (2d ed. 1985)).

Applying these principles, the court held that the minority had proven substantial evidence of a systematic squeeze-out by offering into evidence the following facts:

(1) failure to pay adequate dividends;
(2) payment of large salaries for controlling shareholders;
(3) removal of minority shareholders from positions as officers and directors;
(4) elimination of preemptive rights;
(5) elimination of cumulative voting;
(6) misappropriation of corporate opportunities including Macon County dog track; and
(7) preclusion of minority's use of corporate recreational facilities.

Id. at 493-94.

The *Ex Parte Brown* court held that the continued failure to pay dividends to the minority and the corresponding payment of large salaries to the majority was *prima facie* evidence of oppression. *Id.* In other words, such evidence would get the case by summary judgment to the fact-finder for decision. The court then remanded the case to the trial court (as fact finder) for a determination of whether the majority "has acted in the best interest of all the stockholders," or whether its decisions were made for the purpose of squeezing out the minority, as the bare facts seem to suggest." *Id.* at 494.

The court added that:

> If the trial judge determines that the rights and interests of minority stockholders have been prejudiced by the actions of the majority shareholders, he shall determine and fix an amount necessary to compensate the minority for this breach of duty owed them by the majority."

Id. at 494 (citing F.H. O'Neal and R. Thompson, *Close Corporations*, § 9:30 (3rd ed.).

Interestingly, the original, unpublished opinion by the court required the trial court to determine if "squeeze-out was the objective of the majority." Unpublished Slip Opinion at 14. After the minority filed a petition for rehearing, the court replaced that language with the above-quoted directive requiring a determination of prejudice to the rights of the minority.

The clear emphasis on prejudice to the minority and a requirement of utilitarian fairness to all shareholders seemingly removes as the determinative factor the issue of the majority's subjective intent. Rather, the standard for the trier

of fact is an objective one, based on overall fairness; that is, whether the acts of the majority's were in the best interests of *all* shareholders as opposed to the majority. Again, under *Galbreath*, this is a jury question. This test affords a jury great flexibility in resolving the fairness or unfairness of the majority's conduct of the corporation.

This test also shifts a tremendous burden of proof to the majority. If the minority proves a failure to pay proportionate profits to the minority, the majority must show somehow this discriminatory treatment benefitted all shareholders of the corporation. This will be impossible in the extreme situation where the majority is taking out large amounts of money from the corporation in salary and bonuses while the minority is receiving comparably little or no income. The tougher case will be when a minority shareholder is receiving economic benefits from the company but less than his proportionate value of his stock. The wise majority shareholder will attempt to defeat an oppression claim by paying the minority something more than a token compensation (compared to the majority's income) in dividends, salary or perhaps director or consulting fees.

MICHAUD V. MORRIS: FLOWERING OF THE TORT

The potent reach of an oppression claim suggested in *Ex Parte Brown* was established in the recent decision of *Michaud v. Morris*, 25 ABR 32 at 6495. In an odd approach to appellate judging consisting of ruling without reasoning, the Court affirmed summarily without opinion jury verdicts on oppression and derivative claims. Reacting to this curious disposal of a close case by cold fiat, Justice Maddox wrote an excellent analysis of the facts and the law. What was clear from his opinion and Justice Houston's dissent was that the majority had found that termination of a minority shareholder's employment *alone* established an oppression claim.

In *Michaud*, plaintiff Morris was a 25 percent shareholder in a corporation that operated a restaurant in Huntsville. Morris operated the restaurant as general manager until February 1988, when the majority terminated him as general manager of the restaurant. *Id.* at 6496-97. Morris brought both an individual oppression claim and a derivative claim for damages to the corporation. *Id.* at 6496-97. But, unlike the typical derivative claim, he sought damages to be awarded to himself, not to the corporation under the majority's control. *Id.* The jury awarded Morris compensatory damages on the derivative claim for injury to the corporation in an amount of $150,000.00 and both compensatory and punitive damages on the oppression claim. *Id.*

In his well-reasoned opinion, Justice Maddox concurred in the summary affirmance of the oppression claim, but dissented on the derivative verdict (see discussion below) on grounds that no breach of fiduciary duty to the corporation was shown in light of the business judgment rule and that this claim for damages duplicated the oppression claim. *Id.* at 6498-507. Citing *Ex Parte Brown*, Justice Maddox indicated that the firing of Morris as opposed to the pursuit of "alternatives that would have allowed him, as an experienced manager, to remain as an employee of the restaurant", made out a *prima facie* claim of oppression. *Id.* at 6503. At the same time, Justice Maddox conceded that "the action taken by the majority does not rise to the magnitude of that taken in *Ex Parte Brown*". *Id.* at 6506.

Justice Houston disagreed, arguing that termination of an at-will employee alone does not make out a stockholder oppression claim. *Id.* at 6508-09. With some justification, Justice Houston pointed out that the court had adopted, over his dissent in *Ex Parte Brown*, Professor O'Neal's squeeze-out techniques as indicia of oppression. *Id.* at 6508. Now the court was disregarding these collective requirements in favor of simply one, termination of employment, a step which the majority indisputably had the legal right to take.

How far is the court willing to take this oppression claim? From *Michaud*, it is evident the court will find a *prima facie* case if a minority shareholder is cut off from (1) income from or (2) employment from the corporation. Under *Michaud*, if a minority shareholder is fired, the employment at-will doctrine will no longer protect an employer/majority shareholder unless the minority shareholder is receiving an income on his investment somewhat commensurate with his expectations and investment. As noted above, it is absolutely critical for the majority to treat the minority fairly with respect to payment of benefits to the minority. Otherwise, upon occurrence of a dispute, an oppression claim will surely follow.

AVAILABLE REMEDIES FOR OPPRESSION

Assume you bring suit for the minority for oppression. What relief is available? Under *Ex Parte Brown*, *Michaud* and other cases, the minority shareholder has a breach of fiduciary claim against the majority shareholders for a judgment to recover his proportionate share of distributions paid to them during the period of oppression.

This claim has great leverage: it is directed against the majority shareholders individually and not the corporation. At trial, the minority shareholder would compute all income (in whatever form) received by the majority from the corporation during the period of the squeeze-out and request a verdict based on his percentage of ownership in the corporation. For example, if an 80 percent shareholder has received a million dollars in distribution during the period of oppression and a 20 percent shareholder has received nothing, the minority shareholder seemingly would be entitled to a verdict of $200,000. What must be determined by the court in future decisions is whether the majority is entitled to a credit or disproportionate share of earnings for operating the corporation on a day-to-day basis while the minority may not be so employed and may have devoted his energies to other endeavors. Since the majority may have prevented the minority from employment and has engaged in oppression, does he forfeit any credit under the Faithless Servant Doctrine? Determining oppression and fairness in this "gray" case will be substantially more difficult than the "black and white" setting of a total deprivation of benefits to the minority.

A second potent remedy is the right, under Ala. Code § 10-2A-195(a)(1)(b), to dissolution of the corporation if the majority's actions are "illegal, oppressive or fraudulent". *See, Belcher v. BTNB*, 348 F. Supp. 61 (N.D. Ala. 1968). Simply put, if the majority oppressed the minority, the minority shareholder is

entitled under this provision to have the corporate assets liquidated, and his share of the net assets paid to him.

The Alabama Supreme Court, in *Abel v. Forrest Realty*, 484 So.2d 1069, 1072 (Ala. 1986), held that dissolution is an extreme remedy to be granted only upon a clear showing of entitlement. At the same time, the court, in *Altoona Warehouse Co. v. Bynum*, 242 Ala. 40, 7 So.2d 497 (1942) recognized that corporate dissolution is appropriate where the majority has failed to manage the corporation in accordance with the interests of all shareholders. There is an increasing trend throughout the United States to enforce this dissolution remedy in some form where oppression is proven.

For example, in *Matter of Kemp & Beatley, Inc.*, 64 N.Y. 2d 63, 484 N.Y.S. 2d 799, 473 N.E.2d 1173 (1984), the New York Court of Appeals, upon a finding of oppression, held that dissolution was the only appropriate remedy, subject to an opportunity for the majority to purchase the minority's shares. Like the Alabama Supreme Court, the court of appeals defined oppression as the elimination of the minority's "reasonable expectations" including a job in the corporation, a share of its earnings, and a role in management. *Matter of Kemp & Beatley*, 484 N.Y. S.2d at 805. Defeating these expectations creates a claim for oppression and the remedy of dissolution. *Id.* at 805-06.

Accordingly, a minority's claim for its just share should be joined with a claim for dissolution. As dissolution is an equitable claim, in a jury trial this remedy can be imposed by the court if the jury decides the factual issues of oppression in favor of the plaintiff.

Because of the draconian impact of a dissolution, and possible extreme tax consequences thereof, a trial judge will be reluctant to order dissolution. Thus, a litigator should plead alternatives encompassed within this equity jurisdiction.

As a chancery court, the court's equitable powers in this situation are enormous. The supreme court has recognized the power of equity courts in Alabama to fashion appropriate remedies:

> When a court of equity acquires jurisdiction of a cause for any purpose, it will retain it and do complete justice between the parties, enforcing, if necessary, legal rights and applying legal remedies to accomplish that end . . . .

Billingsley v. Billingsley, 285 Ala. 239, 242, 231 So.2d 111 (1970).

The important case of *Belcher v. BTNB*, 348 F. Supp. 61 (N.D. Ala. 1968), illustrates the importance of a flexible approach to remedies for oppression. In *Belcher*, Judge Grooms held that defendants had breached their fiduciary duty thereby creating a right to dissolution under the statute. *Id.* at 152. The court, however, declined to use dissolution because it would cause the loss of 300 jobs and would result in extreme tax consequences. *Id.* Instead, the court directed that the majority redeem the minority through a like kind exchange of corporate assets equal to the value of their shares. Other courts have required the majority, upon pain of dissolution, to purchase the minority's shares. *Balvik v. Sylvester*, 411 N.W.2d 383 (N.D. 1987).

In *Alaska Plastics, Inc. v. Coppock*, 621 P.2d 270 (Alaska 1980), the Supreme Court of Alaska held that the remedy of forced buyout was available to a minority shareholder in a close corporation. Alaska Plastics, Inc. consisted of three shareholders, all of whom were active in the corporation. Upon the divorce of one of the shareholders, one-half of his stock was awarded to his ex-wife. The ex-wife, who was not active in the business and did not receive a salary, received several offers from the majority to purchase her stock, all of which she felt were inadequate. Finally, she brought an action claiming stockholder abuse and squeeze-out. *Alaska Plastics, Inc.*, 621 P.2d at 272-73. The trial court ordered the majority to purchase her shares, but the Supreme Court of Alaska reversed and remanded for a determination of whether a more appropriate remedy was available. *Id.* at 272. The court specifically held that Alaska statutes, like Alabama, allowed dissolution as an extreme remedy to a minority where the acts of the majority were "illegal, oppressive or fraudulent". Further, the court held that upon such a showing by the ex-wife, on remand, the trial court's order to purchase the shares could be justified "as an equitable remedy less drastic than liquidation." *Id.* at 275.

It is this author's view that if the oppression is intentional, systematic and continues over a sustained period of time, as opposed to a brief period, the Alabama Supreme Court should and will recognize a required buyout of the minority as a legitimate alternative remedy to a dissolution. This is particularly true since a minority shareholder often will receive more for his shares in a buyout than from a forced liquidation, which will disrupt the lives of employees, lower the value of the corporation's assets and may create grave tax liability. Another possible remedy is appointment of a receiver to sell the corporation to a third party at the highest possible value. Another less intrusive remedy would be keeping the corporation intact, but appointing a receiver to determine appropriate compensation for shareholders. This remedy would be more appropriate where the oppression has been short term, and less extensive adjustments can be made to return the parties to equity.

Obviously, the remedies chosen should fairly meet the length, nature and degree of the oppression in order that the court achieve the legitimate expectations of the minority and preserve the majority's rights of management and continuation of the corporation's life. In most cases, the best approach will be to fashion remedies, as in *Belcher*, toward the majority's buyout, at fair market value, of the minority so that the company may continue.

INTERPLAY OF INDIVIDUAL OPPRESSION AND DERIVATIVE CLAIMS

Galbreath is an excellent example of what can happen when counsel does not understand the difference between derivative claims for injuries to the corporation and the tort of oppression committed against shareholders. Derivative claims are governed by Alabama Rules of Civil Procedure 23.1 and are based on the majority's breach of his fiduciary duty owed to the corporation. This duty was succinctly defined in *Holcomb v. Forsyth*, 216 Ala. 486, 490, 113 So. 516 (1927):

> "While directors of a corporation may not be in the strict sense trustees, it is well established that they occupy a quasi fiduciary relation to the corporation and its shareholders . . . They are required to act in the utmost good faith and in accepting the office, they impliedly undertake to give the enterprise the benefit of their best care and judgment, and to exercise the power conferred solely in the interest of the corporation. . . Equity [will hold] them liable as trustees."

Holcomb v. Forsyth, 216 Ala. at 490 (quoting 7 R.C.L. 456 § 441 (other citations omitted)).

This duty of good faith is now codified at Ala. Code § 10-2A-74. This statute requires the director to act "in good faith, in a manner he reasonably believes to be in the best interests of the corporation and with such care as an ordinarily prudent person in a like position would use under similar circumstances."

This breach of fiduciary duty owed to the corporation should be distinguished from the tort of oppression which is an individual claim for the majority's breach of fiduciary duty owed directly to the individual minority shareholders. As shown in *Michaud*, derivative claims may also be available to the corporation in an action of oppression. The most common example is theft of corporate opportunity. Under the fiduciary duty owed the corporation, the majority shareholders may not "divert to their own favor, or for the benefit of competitive corporations, business which should properly belong to the company which they represent, . . ." *Banks v. Bryant*, 497 So.2d 460, 463 (Ala. 1986) (quoting 19 C.J.S. *Corporations*, § 784 (1940)); *Morad v. Coupounas*, 361 So.2d 6 (Ala. 1978). This rule may apply even though the corporation will have difficulty financing the transaction and as a result, the majority has rejected the opportunity. The remedy for the corporation is a constructive trust to be imposed on its behalf over the net profits or property resulting from the corporate opportunity. *Coupounas, supra* at 8. At the same time, the dissolution remedy is also available in a derivative action under Ala. Code § 10-2A-195. Section 10-2A-195(a)(1)(d) permits involuntary dissolution when "the corporate assets are being misapplied or wasted . . . ."

As explained in *Galbreath*, the primary difference between derivative and individual claims is one of standing, and standing is determined by the directness of the injury. If the wrong directly damages the corporation and its assets from waste, conversion and intentional mismanagement, the claim is the corporation's. *Hardy v. Hardy*, 507 So.2d 409 (Ala. 1987); *Shelton v. Thompson*, 544 So.2d 845 (Ala. 1989). A consequential decrease in the value of the shareholder's shares does not vest in him an individual claim. *Green v. Bradley Construction, Inc.*, 431 So.2d 1226 (Ala. 1983); *Stevens v. Lowder*, 643 F.2d 1078 (5th Cir. 1981). But if the wrong is committed directly against the shareholder and his interests, such as oppression or fraud, so that his injury is unique, he will have standing to assert individual claims. *McDonald v. U.S. Die Casting & Dev. Co.*, 451 So.2d 1064 (Ala. 1989). As the supreme court noted in *Ex Parte Brown*, misappropriation of corporate opportunities and other misconduct giving rise to derivative claims may also be evidence of a pattern of oppression against the minority. The bottom line of this confusing overlap is, *when in doubt*, a litigator should allege the claims both *derivatively and individually*.

It is important to note that derivative claims offer two advantages over individual claims. First, the derivative plaintiff conveys a benefit on the corporation, thereby entitling the plaintiff to recover attorney fees. Absent fraud, attorney fees will not be available on individual claims for oppression. In *Ex Parte Brown*, 562 So.2d at 496, the supreme court endorsed a fee based on a percentage of monies recovered for the corporation. The court chose this "common fund" approach over the lodestar doctrine (hours devoted plus a multiplier) commonly applied by federal courts. In doing so, the court approved a 20 percent fee. *Id.*

The second advantage is that limited defenses based on plaintiff's culpability are available in a derivative action. Estoppel, waiver and contributory negligence may bar an individual claim, particularly if plaintiff benefitted or participated in the illegal acts, *Goldman v. Jameson*, 290 Ala. 160, 275 So.2d 108 (1973); *Hardy v. Hardy*, 507 So.2d at 409. But they will not bar derivative claims brought by the corporation unless the individuals participated in the misconduct. They may, however, disqualify the tainted minority shareholder as an adequate derivative plaintiff under Rule 23.1.

While Alabama courts have traditionally held that damages recovered on behalf of the corporation in a derivative action go to the corporation, the court recently in *Michaud, supra*, affirmed a judgment for damages on a derivative claim to the minority shareholder. As noted above, the majority opinion offered no reasoning for this holding, but Justice Maddox, in his concurrence, noted that courts in other states reasoned that awarding damages to the corporation would benefit only the wrongdoers who are in control. Hence, the award should be paid to the minority shareholder.

The clear lesson from *Michaud* is that derivative claims for damages to the corporation should be sought for the individual shareholder, particularly if the majority is in control. As shown in that case, the oppression and individual claims may be based on the same set of facts.

BUSINESS JUDGMENT RULE

There can be no doubt that the tort of oppression has hastened the erosion of and perhaps eventual demise of the business judgment rule in its traditional form. While the rule historically afforded insiders free rein to manage the corpora-

tion free of constraints, other than fraudulent conduct, in its present form, it still shields management from simple negligence, incompetence or poor business judgment, but not from intentional misconduct or perhaps even grossly negligent decisions. The Supreme Court defined the rule this in *Jones v. Ellis*, 551 So.2d 396, 400-01 (Ala. 1989):

> *[W]e start with the proposition that this Court generally will not interfere with the internal business management of a corporation.* However, we recognize that this rule does not apply in cases of fraud or maladministration that is destructive or injurious to a corporation (citations omitted). Furthermore, this Court has recognized that a director is liable for losses to the corporation resulting from his intentional departure from duty, fraudulent breaches of trust, gross negligence or *ultra vires* acts (citations omitted). Absent such circumstances, however, a director is not liable for losses suffered by the corporation if he has acted in good faith. This is referred to as the "good business judgment rule" (citations omitted).
>
> Furthermore, a director is entitled to a presumption of good faith, but this presumption will be overcome by the presence of factors sufficient to influence him to do otherwise.

This presumption of good faith separates the insider from a trustee which suffers the fate of a higher standard of care under the prudent investor rule. While a trustee may be liable for imprudent investments, or negligent management of trust assets, the majority's presumption of good faith immunizes him from imprudent management of corporate assets, absent some wrongful scienter or fraud. *Jones v. Ellis*, 551 So. 2d at 402; *First Alabama Bank of Huntsville, N.A. v. Spragins*, 515 So.2d 962 (Ala. 1987). Thus, if a minority shareholder alleges a breach of fiduciary duty based on poor or incompetent business decisions, he or she must overcome the presumption of good faith imposed by the rule. Absent proof of intentional misconduct or gross negligence, this burden will be too great.

The business judgment rule retains a special vitality with respect to derivative claims. Rule 23.1 of the Alabama Rules of Civil Procedure requires that prior to suit the plaintiff make demand on the board of directors for relief unless the corporation is under the wrongdoer's control thus making the demand futile. *Goldman v. Jameson*, 290 Ala. 160, 275 So.2d 108 (1973). The demand requirement can be a trap. Indeed, a plaintiff who makes demand first may never get his derivative action off the ground. The reason is the business judgment rule. Under *Roberts v. Alabama Power Co.*, 404 So.2d 629 (Ala. 1981), the majority, upon receipt of a demand, may refer it to a committee of "disinterested" directors. If the directors decide that the litigation is not in the corporation's best interest and this decision is clothed with good faith, the business judgment rule applies, barring the litigation and judicial reversal of this decision. *Roberts*, 404 So.2d at 632.

The capable attorney fortunate to receive such a demand prior to suit should immediately respond by having a disinterested committee appointed to investigate the claims. Better yet, such a practice should be placed in the corporation's by-laws as an express policy. Speedy corporate action in this fashion may "nip in the bud" pesky derivative claims or at least delay them for months. For plaintiff's counsel, if there is any reasonable chance of showing futility (and there usually is in a close corporation), he must skip the demand and file suit.

RIGHTS OF DISSENT AND APPRAISAL

No discussion of minority shareholder rights would be complete without passing mention of the statutory rights of dissent and appraisal. Governed by *Ala. Code* § 10-2A-162, a minority shareholder has a right to dissent from a merger or consolidation of the corporation or a sale or exchange of its assets outside the ordinary course of its business. Upon a dissent, he has a right to a judicial appraisal of his shares and to be bought out at fair market value. The circuit courts may use any number of accepted methods in valuing the stock. In most cases, attorney fees and expenses may be assessed against the corporation, except the court may assess all or a portion of them against dissenting shareholders who arbitrarily refuse a reasonable buyout offer. The critical battle in an appraisal action usually will be over "fair value", a term of art always susceptible to different interpretations in a closely held corporation. However, if the merger is part of a course of oppression to squeeze out the minority, the court may grant other relief, including an award of a percentage of disproportionate distributions to the majority or factoring them in as corporate assets in a determination of value.

CONCLUSION

With the clash of competing policies of majority control and the minority's right to a just share of corporate distributions, the tort of oppression will frequently be litigated over the next several years. Refinement of this area of the law is dependent upon a proper understanding of the distinct, but overlapping, nature of these claims with the derivative rights of the corporation. The courts should and will continue to fashion shareholder rights and remedies based on the reasonable expectations of the minority shareholder to ownership of capital with meaningful value and liquidity, some voice in management, and in many cases, employment. At the same time, the bench and bar must develop meaningful parameters so that the majority's rights to set policy and reasonably manage the corporation will be protected from unjustified interference.

An amorphous tort with no bright lines or clear rules (e.g. interference with business relations) benefits no one as it yields no prediction as to what will be found to be proper or improper business conduct. In developing the tort of oppression, there are, in the words of Robert Frost, miles to go before we sleep. While achieving clarity will be difficult, particularly in the many "gray" areas of intracorporate relationships, shareholders, jurors and trial judges deserve nothing less. ■

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The Law Firm of Janice M. Bellucci announces that **O. Kevin Vincent**, formerly of Cabannis, Johnston, Gardner, Dumas & O'Neal and formerly of the office of general counsel, Department of the Air Force, has joined the firm as an associate. Offices are located at 51 Monroe Street, Suite 1500, Rockville, Maryland 20850. Phone (301) 424-8673.

Robison & Belser announces that **Charles B. Paterson** and **Robert F. Northcutt** have joined the firm as members and **Scott R. Talkington**, formerly associated with the firm, has become a member. Offices are located at 210 Commerce Street, Montgomery, Alabama 36104, and the mailing address is P.O. Drawer 1470, Montgomery 36102. Phone (205) 834-7000.

Burr & Forman announces that **H. Graham Beene, Deborah P. Fisher, Richard A. Freese, Gail Livingston Mills**, and **John C. Morrow** have become partners in the firm, and **Christopher W. Weller, E. Britton Monroe, John M. Rolfe, Jr., Warren C. Matthews, Peter H. Burke, Brian M. Clark, Gerald P. Gillespy, G. Bartley Loftin, III, Timothy M. Lupinacci,** and **Edwin O. Rogers** have become associated with the firm. The firm has offices in Birmingham and Huntsville, Alabama.

Beasley, Wilson, Allen, Mendelsohn, Jemison & James announces that **James Allen Main** and **Michael J. Crow** have become members of the firm. Offices are located at 207 Montgomery Street, 10th Floor, Bell Building, Montgomery, Alabama. The mailing address is P.O. Box 4160, Montgomery 36103-4160. Phone (205) 269-2343.

Pittman & Pittman announces the relocation of its Mobile office to 1111 Dauphin Street, Mobile, Alabama 36604 and the association of **Richard Fuquay** with the firm. The mailing address is P.O. Box 40278, Mobile 36640-0278. Phone (205) 433-8383.

Balch & Bingham announces that **Karl R. Moor** has relocated from the Birmingham office to Washington, DC. His office will be located at 1667 K Street, NW, Washington 20006. Phone (202) 296-0387.

Sirote & Permutt announces that **Sheryll D. Cashin, Albert L. Vreeland** and **James Sarven Williams**

have become associates in the firm's Birmingham office, that **Fred L. Coffey, Jr.** and **J. Jeffery Rich** have become associates in the Huntsville office, and that **M. Frederick Simpler** has become associated with the Montgomery office.

Davis & Neal announces that **Linda G. Smith**, former law clerk to U.S. Circuit Judge Joel F. Dubina and Alabama Supreme Court Justice Kenneth F. Ingram, has become associated with the firm. The Montgomery office is located at 4144 Carmichael Road, Montgomery, and the mailing address is P.O. Box 4008, Montgomery 36103-4008. Phone (205) 244-2097. The firm also announces the relocation of its Opelika office to 2210 Hamilton Road, Suite C, P.O. Drawer 711, Opelika, Alabama 36803-0711. Phone (205) 745-2779.

J. Fletcher Jones announces that **Charles A. Short**, former law clerk to Alabama Court of Criminal Appeals Judge John M. Patterson, and **John Fletcher Jones, Jr.**, former staff attorney to Alabama Supreme Court justices Hugh Maddox, Richard L. Jones and Kenneth F. Ingram, have formed **Jones & Short, P.C.** Offices are located at 109 O'Neal Building, P.O. Drawer 1128, Andalusia, Alabama 36420-1128. Phone (205) 222-3161.

Powell, Goldstein, Frazer & Murphy announces that **James McAlpin** has become a member of the firm, effective January 1, 1992. The firm has offices in Atlanta and Washington, DC.

Parisian, Inc. announces that **Walter F. Scott, III** has joined its legal department. Offices are located at 750 Lakeshore Parkway, Birmingham, Alabama 35211. Phone (205) 940-4398.

Lentz, Nelson, Whitmire & House announces that **R. Scott Anderson** has become associated with the firm. Offices are located in the First Federal Savings Bank Building, Suite 201, Decatur, Alabama. The mailing address is P.O. Box 1049, Decatur 35602. Phone (205) 353-8171.

Barnett & Driskill announces that **Robert R. Hembree** has become associated with the firm. Offices are located at 431 Gunter Avenue, P.O. Box 93, Guntersville, Alabama 35976. Phone (205) 582-0133.

Johnston, Barton, Proctor, Swedlaw & Naff announces that **Robert S. Vance, Jr.** and **Richard J. Brockman** have become partners in the firm. The office is located at 1100 Park Place Tower, Birmingham, Alabama 35203. Phone (205) 322-0616.

Rosen, Cook, Sledge, Davis, Carroll, Jones & Adcox announces that **M. Bradley Almond,** formerly of Eyster, Key, Tubb, Weaver & Roth, has become associated with the firm, effective January 13, 1992. The mailing address is P.O. Box 2727, Tuscaloosa, Alabama 35403. Phone (205) 345-5440.

Raymond Douglas Burns, Jr. and **Jonathan L. Tindle** announce the opening of their office, effective January 6, 1992. Offices are located at 1724 3rd Avenue, North, Bessemer, Alabama 35020. Phone (205) 424-1188, 1186.

Gearhiser, Peters & Horton of Chattanooga, Tennessee announces that **Michael A. Anderson**, formerly of Skinner & Anderson in Birmingham, has become a partner in the firm. The firm's address is 320 McCallie Avenue, Chattanooga 37402. Phone (615) 756-5171.

S. Wayne Fuller and Dan J. Willingham announce the formation of their

new partnership to be known as **Fuller & Willingham**, 413 1st Avenue, SW, Cullman, Alabama 35055. Phone (205) 734-2023, 9411.

Mantiply & Associates announces that **Lynn C. Miller,** former vice-president and general counsel for Samco Investments, Inc., and **A. Evans Crowe**, former staff attorney to H. Mark Kennedy and law clerk to J. Gorman Houston, Jr., have become associated with the firm. The mailing address is P.O. Box 898, Mobile, Alabama 36601. Phone (205) 433-3544.

Evans, Jones & Reynolds announces the relocation of its offices to 1810 Dominion Tower, 150 Fourth Avenue, North, Nashville, Tennessee 37219. Phone (615) 259-4685.

Rosen, Harwood, Cook & Sledge, P.A. announces the withdrawal of **Robert B. Harwood, Jr.** from the firm, effective October 9, 1991 upon his appointment as circuit judge of Tuscaloosa County. The firm also announces that **Ronald L. Davis** became a member of the firm November 1, 1991 and that the firm name has been changed to **Rosen, Cook, Sledge, Davis, Carroll, Jones & Adcox, P.A.** Offices are located at 1020 Lurleen Wallace Boulevard, North, Tuscaloosa, Alabama. The mailing address is P.O. Box 2727, Tuscaloosa 35403. Phone (205) 345-5440.

Thorington & Gregory announces that **Pamela L. Mable**, former law clerk to Chief Justice Sonny Hornsby, Jr., has become associated with the firm. Offices are located at 504 South Perry Street, Montgomery, Alabama. The mailing address is P.O. Drawer 1748, Montgomery 36102. Phone (205) 834-6222.

Quinn, Arndt & Manning announces that **Franklin Grady Shuler, Jr.**, formerly a partner with Cooper, Mitch, Crawford, Kuykendall & Whatley in Birmingham, has joined the firm. The mailing address is P.O. Box 73, Columbia, South Carolina 29202. Phone (803) 779-6365.

Foster & Curenton announces the association of **James M. Orr, Jr.** The firm has offices in Montrose, Foley and Bay Minette, Alabama.

Balch & Bingham announces that **Suzanne Alldredge, Debra A. Carter, Gregory C. Cook, Marcel L. Debruge, David L. Denson, Lyle D. Larson, Colin Luke, and Phillip A. Nichols** have become associated with the firm's Birmingham office, and **Leslie M. Allen** and **James E. Bridges, III** have become associated with the Montgomery office.

Ritchie & Rediker announces that **Steve P. Gregory** has joined the firm as an associate. The mailing address is P.O. Box 11683, Birmingham, Alabama 35202-1683. Phone (205) 251-1288.

As of November 11, 1991, **Robison & Livingston** has been dissolved. **Robert Robison's** mailing address will continue to be P.O. Box 86, Newton, Alabama 36352, and **Anthony Livingston's** new mailing address is P.O. Box 445, Daleville, Alabama 36322.

Lange, Simpson, Robinson & Somerville announces that **Kathryn S. Carver** has become a member of the firm at its Birmingham office, located at 1700 First Alabama Bank Building, Birmingham, Alabama 35203. Phone (205) 250-5000.

Smith, Spires & Peddy announces that **Teresa Tanner Pulliam** and **James L. Stirling, Jr.** have become associates. Offices are located at 650 Financial Center, 505 North 20th Street, Birmingham, Alabama 35203-2662. Phone (205) 251-5885.

Webb, Crumpton, McGregor, Davis & Alley announces that **Craig S. Dillard** and **Daryl L. Masters** have become members and **E. Wray Smith, Bart Harmon, Mary E. Pilcher** and **Roy Wylie Granger, III** have become associates. Offices are located in the Colonial Financial Center, One Commerce Street, Suite 700, Montgomery, Alabama 36101-0238. Phone (205) 834-3176.

Potts & Young announces that **Debra Hendry Coble**, former law clerk to James Duke Cameron of the Arizona Supreme Court, has become associated with the firm. Offices are located at 107 East College Street, Florence, Alabama 35631. Phone (205) 764-7142.

N. John Rudd, Jr. and **Rick Griffin** announce the opening of their offices, located at Brown Marx Tower, 2000 1st Avenue, North, Suite 725, Birmingham, Alabama 35203. Phone (205) 328-2606. ■

ALABAMA STATE BAR HONOR ROLL BUILDING FUND

Between December 14, 1991 and January 31, 1992 the following attorneys made pledges to the Alabama State Bar Building Fund. Their names will be included on a wall in the portion of the building listing all contributors. Their pledges are acknowledged with grateful appreciation. (For a list of those making pledges prior to November 2, please see previous issues of The Alabama Lawyer.)

James Thomas Baxter, III

Robert A. Beckerle

Ollie L. Blan, Jr.

Delores R. Boyd

Joseph Barris Brogden

Ronald Lee Davis

Joseph L. Dean, Jr.

Jeffery C. Duffey

Edgar M. Elliott, III

Cherie Diane Feenker

Denise Ann Ferguson

John Robert Fleenor

Michael Dewitt Godwin

William Allen Grocholski

Robert Martin Harper

Curtis McLarty Holder

Michael Wayne Jackson

Francis M. James, III

William L. Lee, III

Loyd H. Little, Jr.

Victor H. Lott, Jr.

Dawn Ilene McDonald

Peter Allen McInish

Crawford S. Melton

Thomas S. Melton

Lisa Gessow Michelson

Louis Poe Moore

Ernest Luther Potter

William Larry Ray

James H. Reid, Jr.

Rhea, Boyd & Rhea

Bert W. Rice

Thomas Reed Robinson

William Stanley Rodgers

Robert Wayne Ruth

Gene M. Sellers

Clifton Eddie Slaten

Stuart Edwin Smith

James G. Speake

James B. Sprayberry

Jerrilee P. Sutherlin

Thad Yancey, Jr.

Between December 14, 1991 and January 31, 1992 the following firms made pledges to the building fund. Their names will also be included on a wall in the new building listing all contributors. Their pledges are acknowledged with grateful appreciation. (Please see previous issues of ***The Alabama Lawyer*** *for listings of those making contributions prior to December 14.)*

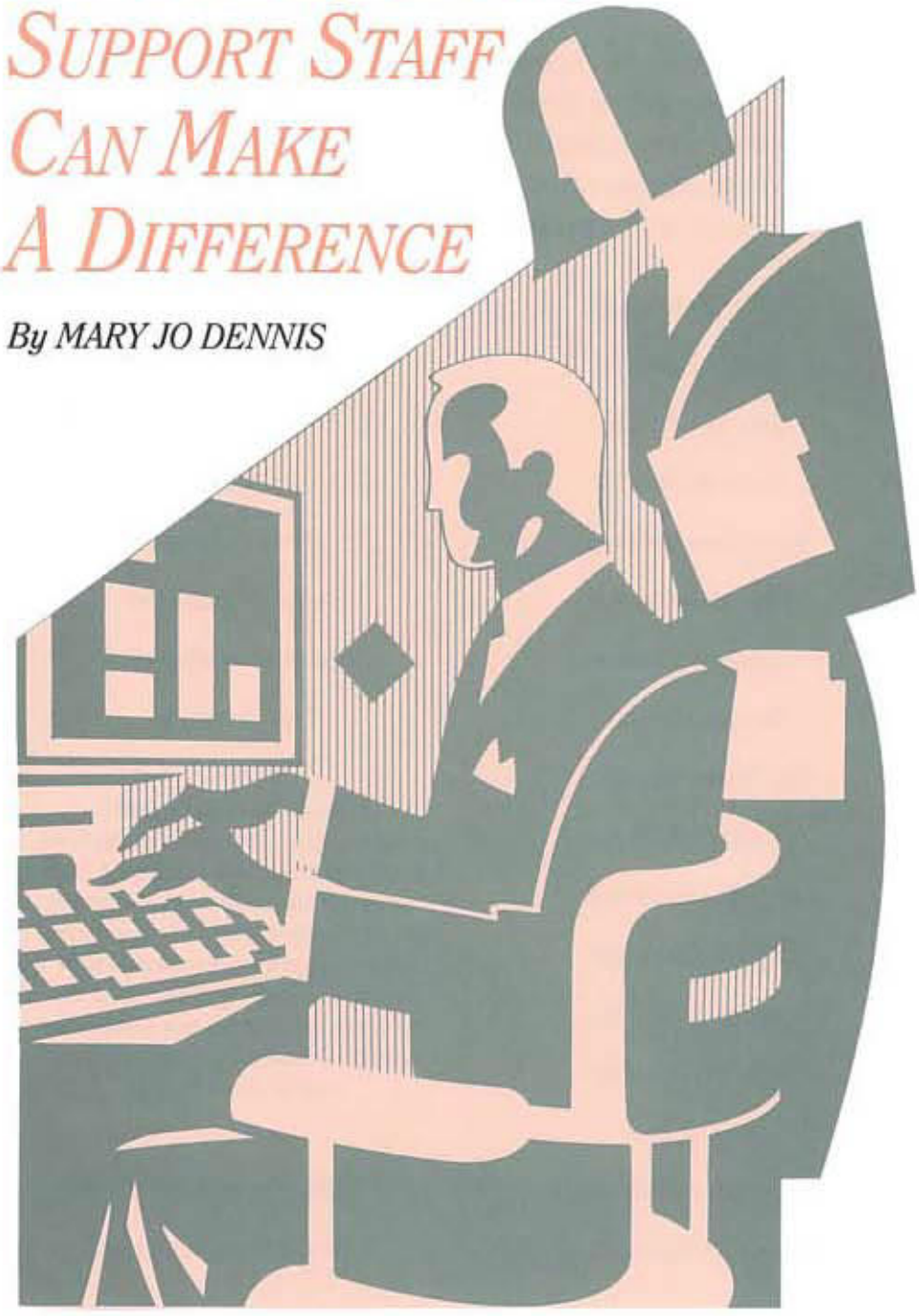
Bradley, Arant, Rose & White

Owens, Benton & Simpson

SMART MOVES TO BEAT THE RECESSION

How Your Legal Support Staff Can Make A Difference

By MARY JO DENNIS



Between July 1990 and June 1991, 1.8 million people lost their jobs. Consumers are comparing the 1990s with the 1930s and the Great Depression. There may not be people standing on the corners selling apples, but the signs of hard times — people standing at intersections with signs saying they will work for food— are growing. The drive to squeeze costs and improve profits is resulting in cost-cutting, job freezes, layoffs, consolidations, and takeovers. Bankruptcies continue to skyrocket. Consumer confidence in the economy has fallen beneath the lowest level recorded during the 1982 recession. Even though the federal government cut interest rates to the lowest in 24 years, many businesses and consumers have "maxed out" on debt. In simple language: job growth in the '90s will probably be the slowest since the 1950s.

The downsizing that occurred in the manufacturing sector has hit the service sector in full force. Law firms are affected both internally and externally. They now face the same problems that businesses have been facing for the last five years (or ten, depending upon geographical propensities). Clients have less work to offer, increasing competition among law firms. Yet the clients still expect excellence, not just quality. They still expect commitment and dedication to their cause by all involved. They expect us to have access to the latest information and to get to it quickly. Most still expect law firms to provide a host of extras — business counseling, legislative updates, even executive forums and referrals to the law firm's other clients.

They want more cost-effective legal service. They want specific prices, and they want deals. Expecting more does not mean increased fees. Market pressures have driven down prices of some legal work by as much as 20 percent. Some corporations, such as General Motors, are even tracking legal costs by using computers to compare costs of one legal firm against another.

"There's a major difference in the lawyer/client relationship today that colors the entire process of delivering legal advice," said Sandra Yost, PLS, presi-

dent of the National Association of Legal Secretaries. "Clients have become more sophisticated. They've seen how law firms work on television, and however skewed that image may be, it has certainly changed the public's perception of the legal profession."

Law firms are beginning to use a host of ways of getting the business and servicing the client. They are growing more used to such tactics as volume discounts, flat fees and pre-established prices, competitive bidding, blended rates, modified contingency fees, and hourly rate discounts. They are also growing more comfortable with marketing and expanding marketing efforts, knowing full well that clients will be more difficult to reach. They are beginning to think more globally. Solo practices are popping up everywhere as more people become entrepreneurs when they can find no other options.

Inside the firm, technology has changed the way the work is handled. Layoffs have cut down the labor overhead. There are now fewer people but not necessarily less work. Many firms are down to the point where they can no longer lay off without endangering their ability to produce the work. This means that everyone in the firm must be dedicated to providing the best possible services and to enhancing the lawyer-client relationship. All individuals in the firm must work smarter. And there is a way. By expanding the traditional role of the legal secretary and the legal support staff, the law firm can maximize productivity and minimize costs.

Mary Jo Dennis
Mary Jo Dennis has been a legal secretary for 22 years and currently serves as president of the Alabama Association of Legal Secretaries. She was certified as a professional legal secretary in 1985, and has served on various committees, including the National Association of Legal Secretaries on Young Members Forum, Legal Secretary of the Year Committee and the NALS Continuing Education Council. In addition, she has held many offices as a member of the Birmingham Legal Secretaries Association.
She has been employed by the Birmingham firm of Maynard, Cooper, Frierson & Gale, P.C. since 1984.

An endangered species

Finding a good legal secretary if you do not already have one can be a problem. They are getting to be an endangered species. The demand has not kept up with the supply, and the growth of law firms into the next century will exacerbate the current shortage. There are plenty of reasons. A 1991 survey by the National Association of Legal Secretaries showed that younger people moving into the field have less formal training than they did five years ago. The "baby boom" has passed and there are fewer candidates. Also, many young people believe they can earn more and do less work in other professions. The legal secretarial position is often not thought of as a profession, just a dead-end job with neither psychological nor monetary rewards, a good job for someone incapable of higher intellectual pursuits. Salaries often reflect these misconceptions. (Salaries across the nation vary substantially by geography, but Alabama is typically on the low end of the salary scale.)

But it need not be any of those things. A skilled legal secretary can make the law office operate more smoothly and efficiently. Expanding her role can be an effective element in a firm's cost-cutting equation. She can become a para-professional who handles computerized litigation,billing, document assembly and computerized on-line research. She can free an attorney up to practice more law, streamline the administrative process, and provide direction to receptionists, secretaries and other office workers. And some of those tasks can turn into billable time.

Most legal secretaries choose the field because they are interested or intrigued by the law but lack the time, dollars or opportunity to attend law school. Many women have families and need to be free at night. Most support staff want to be part of the team and are willing to do what it takes to deliver a quality product to clients. But how can you find the rough-cut diamond in the coal bucket? And how can you polish that diamond until it shines?

In-house training

In-house training is too often a neglected part of a firm's administration. Employees are often submitted to baptism by fire in the busy law firm. On-the-job training can be intensive, intimidating and overwhelming. Most lawyers lack the patience (and often time) to build an effective team. They often expect immediate results from a new secretary on her first day. Although this is not realistic, it may well be the norm.

In-house training for legal support staff is a developing trend. The trend has already blossomed in the business world, where such movements usually surface before they do in law firms. About 58 percent of the Fortune 500 companies implemented such training two or three years ago, according to a survey commissioned by *Working Woman* magazine. More than 90 percent of Fortune 500 companies will offer such training within a year or two. The NALS Member Survey showed that 11 percent of the members worked for firms that offered formal in-house training. The NALS Top 500 Law Firm Survey showed that 25 percent of the respondents offered formal in-house training.

"Attorneys are beginning to understand the importance of continuing legal education for their staff," said Gale Round, president of Gale Round & Associates, Phoenix. Round was a legal secretary for 25 years before she began a company that provides in-house training in law firms.

Round feels that training for staff is imperative. "It's difficult for lawyers to service clients away from the office if the staff members don't know what they're doing. If the staff can run the office smoothly and make some decisions, the attorney is free to do more. When the staff is knowledgeable, the attorney can market, attend educational programs, get more clients and ultimately show more profit. If the attorney is overseeing everything the staff does, he is missing the point."

In the past, many lawyers have hesi-

tated "investing" in their staff since they believed turnover to be high. But that is a misconception. The NALS survey indicated that 52 percent have been in the profession more than ten years, and another 24 percent have been in the field six-ten years.

Some lawyers believe that legal support staff are not particularly interested in education. However, the NALS survey showed that 32 percent of those who work for law firms have two-year community/junior college degrees. Another 22 percent have business school training. Nine percent have bachelor's degrees and another six percent have post-graduate degrees.

Keys to successful training program

Setting up a training program is not easy. Scheduling is often difficult for lawyers as well as support staff. Persistence is important and the program must be continuous.

Implementing such a program involves three key elements:

- Orientation — to acquaint new employees with practices and procedures of the firm;
- Concentration in a substantive law area — to sharpen the skills of current employees in an area of specialty and to introduce new employees to certain areas of practice; and
- Enrichment — to make employees feel important, knowledgeable and necessary to effective operation of the firm.

Positive side effects

In-house training for staff by managers and lawyers can reduce turnover and save the firm money, according to the *New Jersey Law Journal*. Depending on the firm's location, turnover costs for legal secretaries can run between $10,000 and $25,000. Keeping good support staff should be every firm's goal, particularly when turnover costs are high and replacement difficult.

Firms that have in-house training programs find that recruitment becomes easier. Qualified legal secretaries will be beating down the door. When other support staff see the knowledge others have gained, the trust that is placed in them, and the teamwork that develops, they will want to work for that firm. New law associates will also recognize an atmosphere where people care whether they succeed or fail.

Effective training is an investment in human resources with both immediate and long-range returns, such as:

- Job satisfaction is improved;
- Confidence is increased;
- Better morale is evident;
- A teamwork concept is established;
- Productivity and quality of legal services offered by the firm is improved;
- Leadership develops among staff as well as attorneys;
- Managers learn more through teaching and improve teaching skills;
- Loyalty is instilled; and
- Goals are solidified; strengths and weaknesses are identified.

Continuing Legal Education

For those who lack time or want more than their own expertise to train support staff, they can turn to experts such as Gale Round. "Lawyers may have the expertise to teach the courses, but few of them have the time," she said. "It's hard to justify pulling themselves away from what earns them dollars to conduct courses that might result in increased productivity and, thus, more dollars."

The 1991 NALS member survey showed that a third of the 3,449 who responded worked for firms that offer educational leave, such as paid professional leave or continuing legal education for their support staff, while 47 percent of the firms offer paid continuing legal educational opportunities. A companion survey by NALS of the top 500 law firms showed that 38 percent of the respondents offered paid continuing legal opportunities. Another 16 percent offered additional educational leave, such as paid professional leave.

"A law firm tells me what they need, and we develop a plan based on those needs, determined by the number of people to be trained and the areas of law or skills that need to be taught. The lesson plan is customized for each law firm," said Round. Her services cover a wide variety of topics, such as testing for new employees, as well as training in specific areas on basic, intermediate or advanced curriculum levels, including word processing training. Round's instructors must have at least five years of legal experience in their specific area of instruction.

Professional associations

Another option is education and training through professional associations, such as the National Association of Legal Secretaries. The NALS mission statement clearly shows its commitment to the legal support industry, to the "delivery of quality legal services through continuing education and increased professionalism, promoting a standard for members and recognition in the legal profession through the certification program."

The tri-level association promotes continuing legal education on the local, state and national levels. At a recent annual meeting in Chicago, for example, over 100 hours of education were offered, including such topics as media vs. privacy; trial presentation; automobile personal injury; Chapter 11 bankruptcy; marketing the law firm; rethinking RICO; products liability; support staff contribution to business development; art vs. obscenity; children in the courts; and environmental impact issues, as well as basic skills and technology courses. The Alabama Association of Legal Secretaries is sponsoring five seminars this year, and each of the 12 local chapters offers education at their monthly meetings plus periodic seminars. In addition, NALS provides curriculum for legal training courses for both beginning and advanced legal secretaries, as well as in-house and individual study courses and several educational texts. NALS has authored a number of manuals for administrative purposes as well, including a policy and procedures manual, applicant

skills tests, and guidelines for conducting performance appraisals.

"Dollar for dollar, NALS is one of the best investments you can make in your legal services delivery team," said Don Akins, president of Hildebrandt, Inc., a law office consulting firm. By taking part in meetings and seminars, members learn more about the law and legal procedures. They become more knowledgeable employees, willing to work harder to make a contribution to the firm and the legal profession. They develop pride in their careers, which instills in them the desire to meet the highest standards possible.

Membership in such association promotes group cohesiveness. It makes the members better team players in the office. They show more loyalty to their employers. They maintain a high regard for justice and the administration of the law. They learn life skills through leadership development. Their increased professionalism enhances their employers' law practice. They become their employers' greatest assets.

Certification

The highest ranking for the legal support staff professional is certification. The Certified Professional Legal Secretary (PLS) is offered by NALS. To be eligible, a legal secretary must have worked under the direct supervision of an attorney or judge for at least three years. Individuals must pass a two-day comprehensive exam made up of seven parts. Those who pass clearly identify an executive assistant who:

- Possesses a mastery of office skills and people skills;
- Demonstrates the ability to interact on a professional level with attorneys, clients, other support staff, legal assistants, office administrators, judges, and other court officials;
- Has a working knowledge of procedural law and the law library; and
- Is capable of drafting correspondence, legal documents and court documents with minimal supervision.

Attaining this goal demonstrates dedication to the profession. Even those who do not pass the examination find they have expanded their knowledge in studying for the exam.

This year, NALS is introducing the Accredited Legal Secretary (ALS) for entry-level secretaries. It can be taken by those who have at least one year of legal experience or have successfully completed an accredited secretarial course or the NALS Legal Training Course. The ALS designation will expire five years after the certification date unless it is extended and is generally seen as a stepping stone to the PLS certification.

Just as lawyers continue their education through special courses and seminars, you can help your support staff develop through continuing legal education. "Lawyers who encourage their staff members to increase their knowledge are ultimately the benefactor of their improved skill," said Sandra Yost. "Firms that do not provide professional development in some way should take another look at their productivity levels." The effectively trained staff member is going to make your firm happier and more productive — and increased productivity is going to be the key to financial success in the 1990s. ■

C·L·E OPPORTUNITIES

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

MARCH

20 Friday

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

LITERATURE FOR LAWYERS
Birmingham
Birmingham Bar Association
Credits: 5.9
(205) 251-8006

21-24

NATIONAL LITIGATION CONFERENCE
Orlando, Westin's Walt Disney World
Law Education Institute, Inc.
Credits: 16.0
(414) 961-0323

21-25

FOCUS ON FAMILY LAW
Orlando, Westin's Walt Disney World
Law Education Institute, Inc.
Credits: 23.3
(414) 961-0323

24 Tuesday

BOUNDARY DISPUTES IN ALABAMA
Mobile
National Business Institute, Inc.
Credits: 6.0
(715) 835-8525

25 Wednesday

BOUNDARY DISPUTES IN ALABAMA
Montgomery
National Business Institute, Inc.
Credits: 6.0
(715) 835-8525

26-29

BANKRUPTCY LITIGATION INSTITUTE
Las Vegas, Desert Inn
Norton's Institutes on Bankruptcy Law
Credits: 14.6
(404) 535-7722

27-28

ENVIRONMENTAL LAW
Orange Beach, Perdido Hilton
Alabama Bar Institute for CLE
Credits: 6.0
(205) 348-6230

APRIL

1 Wednesday

BASIC DRAFTING OF WILLS AND TRUSTS IN ALABAMA
Mobile
National Business Institute, Inc.
Credits: 6.0
(715) 835-8525

1-3

MEDICARE & MEDICAID PAYMENT ISSUES
Baltimore, Stouffer Harborplace Hotel
National Health Lawyers Association
(202) 833-1100

2 Thursday

BASIC DRAFTING OF WILLS AND TRUSTS IN ALABAMA
Montgomery
National Business Institute, Inc.
Credits: 6.0
(715) 835-8525

2-4

UNIFORM COMMERCIAL CODE INSTITUTE
Chicago, Drake Hotel
Uniform Commercial Code Institute
Credits: 15.1
(717) 249-6831

3-4

CITY & COUNTY GOVERNMENT
Orange Beach, Perdido Hilton
Alabama Bar Institute for CLE
Credits: 6.0
(205) 348-6230

8 Wednesday

FRAUD LITIGATION IN ALABAMA
Birmingham
National Business Institute, Inc.
Credits: 6.0
(715) 835-8525

9 Thursday

FRAUD LITIGATION IN ALABAMA
Huntsville
National Business Institute, Inc.
Credits: 6.0
(715) 835-8525

10 Friday

ZONING & LAND USE PLANNING
Birmingham
Alabama Bar Institute for CLE
Credits: 6.0
(205) 348-6230

16 Thursday

REPRESENTING CHILDREN IN CHILD ABUSE CASES
Montgomery
Alabama Bar Institute for CLE
Credits: 3.5
(205) 348-6230

17 Friday

BUSINESS TORTS LITIGATION
Birmingham
Alabama Bar Institute for CLE
Credits: 6.0
(205) 348-6230

REPRESENTING CHILDREN IN CHILD ABUSE CASES
Birmingham
Alabama Bar Institute for CLE
Credits: 3.5
(205) 348-6230

23 Thursday

ESTATE PLANNING FOR THE ELDERLY CLIENT IN ALABAMA
Birmingham
National Business Institute, Inc.
Credits: 6.0
(205) 835-8525

23-25

SOUTHEASTERN CORPORATE LAW INSTITUTE
Point Clear, Grand Hotel
Alabama Bar Institute for CLE
Credits: 12.0
(205) 348-6230

24 Friday

ESTATE PLANNING FOR THE ELDERLY CLIENT IN ALABAMA
Huntsville
National Business Institute, Inc.
Credits: 6.0
(715) 835-8525

ANNUAL SEMINAR
Jackson, MS
Mississippi Oil & Gas Institute
Credits: 6.0
(601) 948-6800

28-29

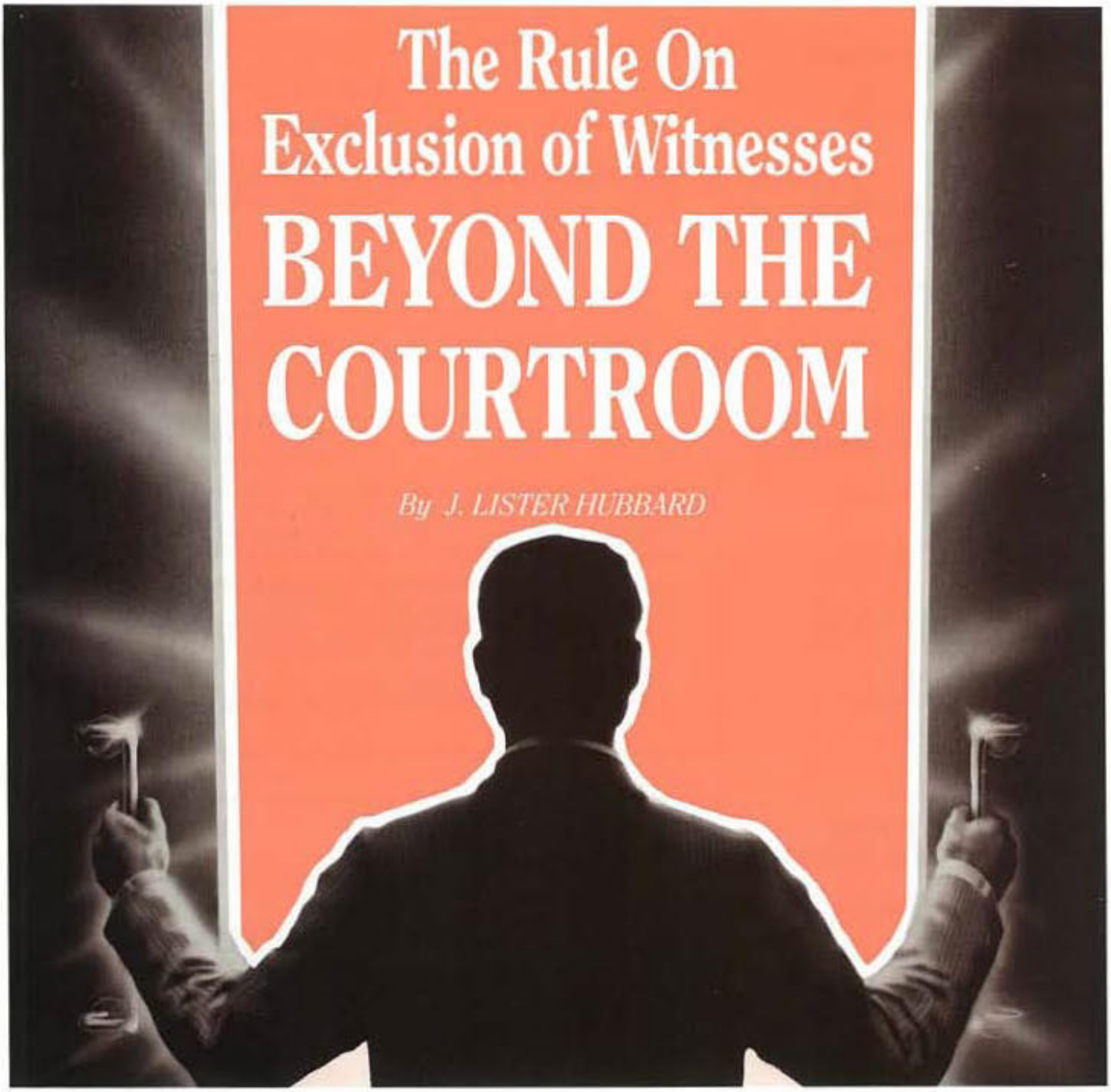
RESOLUTION OF BOUNDARY LAW DISPUTES IN ALABAMA
Birmingham
National Business Institute, Inc.
Credits: 6.0
(715) 835-8525

29 Wednesday

RESOLUTION OF BOUNDARY LAW DISPUTES IN ALABAMA
Huntsville
National Business Institute, Inc.
Credits: 6.0
(715) 835-8525

The Rule On Exclusion of Witnesses BEYOND THE COURTROOM

By J. LISTER HUBBARD



Most Alabama trial lawyers are familiar with the practice of invoking the "rule" to exclude witnesses from the courtroom during trial so they will not overhear the testimony. However, there appears to be confusion, and even disagreement, as to whether the rule's restrictions may extend to the conduct of discussing or sharing testimony outside the courtroom. A close look at the policy behind the rule, the interpreting case law and the wide discretion vested in the trial court on this matter, will reveal that lawyers should be prepared to account for such conduct or run the risk of damage to their case. But, first, for orientation purposes, the origin and general application of the rule will be reviewed.

Origin and general application of the rule

The rule of excluding or sequestering witnesses from the courtroom during trial serves the purpose of preventing witnesses from "tailoring" their testimony to that of earlier witnesses. *See Geders v. United States*, 425 U.S. 80, 47 L.Ed.2d 592, 598, 96 S.Ct. 1330 (1976). One of the more recent explanations of the rule by our supreme court is found in *Ex parte Faircloth*, 471 So.2d 493, 496 (Ala. 1985), to wit: "The purpose of the witness sequestration rule is to prevent any one witness from hearing the testimony of other witnesses and perhaps perceiving the value of his own testimony to one party or the other." In other words, the rule promotes the presentation of independent, untainted testimony with the ultimate goal of arriving at the truth. The rule is a common-law development with English and Germanic origins, deriving from "[t]he judge's power to control the progress and, within the limits of the adversary system, the shape of the trial . . . ." 47 L.Ed.2d at 598. In fact, even to this day,

there is no Alabama rule of procedure or statute providing for the rule in civil practice.

It has been the general rule in Alabama that the invocation and enforcement of the rule lies within the sound discretion of the trial court. *Chatman v. State*, 380 So.2d 351, 353 (Ala. Cr. App. 1980); *see* Gamble, *McElroy's Alabama Evidence* §286.01 (4th Ed. 1991). While the trial court has the authority to invoke the rule on its own motion, it is common for trial counsel to request the invocation of the rule at the beginning of trial. *See McElroy's* §286.01. Excusing particular witnesses from the application of the rule is also left within the discretion of the trial judge. *Camp v. General Motors Corp.*, 454 So.2d 958, 959 (Ala. 1984). For instance, in addition to the right of a party to be present at his own trial, a party's expert witness may be excused from the application of the rule in some cases. *Id.* at 959-960.[1]

While the enforcement of the rule by the trial judge lies within his discretion, several means of enforcement have been recognized by the Alabama appellate courts over the years, to wit: punish the violating witness under the court's contempt powers, exclude the testimony of the violating witness, or permit cross-examination of the violating witness on the subject of his violation for impeachment purposes. The Alabama supreme court has opined that, "The better practice, however, seems to be to permit the witness to testify and punish him for the violation of the rule." *Degg v. State*, 43 So. 484, 486 (Ala. 1907).[2] However, where a party or his attorney is aware of or contributes to a violation, the Alabama appellate courts have not hesitated to affirm the exclusion of testimony. *See Faircloth*, at 497 (where the defendant "failed to see that his witnesses stayed out of the courtroom"); *Chatman*, at 353 (where defense counsel "knew the witness yet failed in his duty to apprise the court of her presence in the courtroom"); *Jeter v. State*, 376 So.2d 808 (Ala. Cr. App. 1979) (where both the defendant and his counsel were aware that a particular witness was sitting in the courtroom and may have relevant testimony for their case); and *Johnson v. State*, 62 So. 450, 452-53 (Ala. App. 1913) (where the defendant failed to identify to the court a potential witness, who thereby sat through the trial). From these cases, it appears that a duty is imposed on the parties and their counsel to see that their witnesses abide by the rule and, to the extent their negligence contributes to a rule violation, they may be penalized by an exclusion of their witness' testimony.

The least harsh of the enforcement mechanisms is to open cross-examination on the subject. The appellate courts have affirmed the allowance of cross-examination concerning a witness' violation of the rule to establish disobedience or bias. *See Birmingham Railway and Electric Co. v. Ellard*, 33 So. 276, 280 (Ala. 1903); *Young v. State*, 416 So.2d 1109 (Ala. Cr. App. 1982).

J. Lister Hubbard

J. Lister Hubbard, a partner in the Montgomery firm of Capell, Howard, Knabe & Cobbs, P.A., received his undergraduate degree, *magna cum laude*, from the University of Georgia and his law degree from the University of Alabama School of Law.

Application of the rule outside the courtroom

In light of the consequences of a rule violation, it is important to understand whether the conduct of witnesses, the parties or their counsel *outside* the courtroom may violate the rule. For instance, if witnesses discussed the case in the witness room or in the courtroom hallways during a recess, would that be a rule violation? Or, if trial counsel met with two or more witnesses during a trial recess to discuss the case, would that be a violation? Plainly, in federal practice, such is the case. The former Fifth Circuit Court of Appeals (binding precedent in the Eleventh Circuit) has held that, once the rule has been invoked, it is a violation of the rule for a party's attorney to meet "with at least eleven prospective witnesses and [discuss] the case in preparation for testimony . . . ". *See Reeves v. IT&T*, 616 F.2d 1342, 1355 (5th Cir. 1980) (affirming the trial court's refusal to allow these witnesses to testify and deeming their conduct a "direct and flagrant violation of a previously entered sequestration and separation order").[3] Furthermore, it appears that Rule 9.3 of the Alabama Rules of Criminal Procedure (effective January 1, 1991) envisions witness conduct outside the courtroom to be within the scope of the rule. In addition to providing that the trial court "may exclude witnesses from the courtroom", Rule 9.3 provides further that the trial court may "direct them not to communicate with each other, or with anyone other than the attorneys in the case, concerning any testimony until all witnesses have been released by the court." This latter prohibition is not limited to the courtroom and, in fact, logically comes into play where witnesses can talk together freely, i.e., outside the courtroom. The exception for communications with attorneys is apparently for "one-on-one" discussions between lawyer and witness that do not run afoul of the prohibition of witnesses communicating "with each other".

Despite the federal practice, Alabama's Rules of criminal procedure, and Alabama's case law on the rule, there appears to be a perception among the Alabama bench and bar that the rule could not apply to witness and lawyer conduct outside the courtroom. For instance, one treatise's discussion of the rule observes, "[o]nce a trial has started and the rule has been invoked . . . the attorney could even talk to the witnesses as a group." McCleod, *Trial Practice and Procedure in Alabama*, p. 208 (1983). The sole authority cited for this proposition is *Vaughan v. State*, 78 So. 378 (Ala. 1918). However, *Vaughan* is not so liberal. Rather, *Vaughan* holds as follows: "We find no error in the action of the court in *permitting* the solicitor to talk to some of the State's witnesses together *before* the trial had begun. These are matters resting within the sound discretion of the court." 78 So. at 381 [emphasis added]. As evident from *Vaughan*, the trial court always has discretion to permit exceptions to the rule. Furthermore, the discussion with the witnesses in that case occurred *before* the trial had begun and, apparently, *before* the rule had even been invoked.

McElroy's Alabama Evidence appropriately interprets *Vaughan* when it cites *Vaughan* for the proposition that, "[t]he trial court, in its discretion, may permit a lawyer to talk to a group of witnesses together". *McElroy's*, §286.01, p. 762. Implicitly, permission (or clarification of the rule) should be obtained before speaking to a group of witnesses. To do otherwise, a lawyer runs the risk of an unfavorable exercise of discretion by the trial court in applying the rule.

In addition, the Alabama Supreme Court has recently suggested that the rule does not apply to the discussion of testimony outside the courtroom, although no definitive holding to that effect has been issued. In *Christiansen v. Hall*, 567 So.2d 1338 (Ala. 1990), the appellant argued that, after the rule had been invoked, it was violated when opposing counsel conferred with his client and a group of potential witnesses during a trial recess. While commenting that this argument "is a tribute to the creativity of our state's Bar," the supreme court's actual analysis of the argument gave credence to the appellant's contention that the rule was violated. *Id.* at 1340. The court's analysis considered that the trial judge has discretion in administering the rule, that the testimony of the witnesses who allegedly violated the rule was largely cumulative, and that their conduct was exposed by cross-examination. After this analysis, the court expressly held: "Based on the foregoing, we hold that the trial court did not abuse its discretion in allowing the testimony of the particular defense witness at issue." 567 So.2d at 1341. Nevertheless, immediately following the holding, the court delivered this dictum: "Indeed, 'the rule' was not violated in the first instance." *Id.* No authority is cited for this dictum. No stated rationale follows. The apparent rationale is the court's earlier observation in its opinion that the witnesses were not "in the courtroom during any testimony", i.e., the rule does not extend beyond the courtroom. Such a rationale runs contrary to Alabama precedent.

In *Birmingham Railway and Electric Co. v. Ellard*, 33 So. 276 (Ala. 1903), the trial court had invoked the rule and, upon cross-examination of the witness, it was revealed that the witness had been discussing the case with other witnesses during the course of the trial. The Alabama Supreme Court held that it was proper for the trial court to allow cross-examination of these facts since they may tend to show the witness' bias and interest in the case, and, furthermore, "may have been to lay a predicate to move to exclude the witness altogether, and it was competent for the court to allow them [the questions] for that purpose". 33 So. at 280. The court also noted that, "The answers had a tendency to show, that after having been put under the rule by the court, the witness violated its instructions not to talk to any one about the case." *Id.* Similarly, the Alabama Court of Criminal Appeals has expressed its opinion that the rule applies to witness conduct outside the courtroom. *See, e.g., McGilberry v. State*, 516 So.2d 907, 912 (Ala. Cr. App. 1987) (where there was evidence that witnesses had been discussing the case in the courtroom hallways after the rule had been invoked, the court referred to such conduct as "a definite appearance of impropriety"). In fact, there are many appellate opinions addressing the argument that communications among trial witnesses outside the courtroom violate the rule, but they do not dismiss the argument for lack of a rule violation. Rather, they merely uphold the trial court's exercise of discretion in enforcing the rule. *See Gautney v. State*, 222 So.2d 175, 178 (Ala. 1969) (noting with approval that the invocation of the rule by the trial court included explicit instructions that witnesses "should not talk among themselves about the case").[4]

Conclusion

For more effective administration of trials in our Alabama courts, the scope of the rule needs to be clarified so that trial counsel, their clients and their witnesses can conduct themselves accordingly and without penalty. The current effort to promulgate the Alabama Rules of Evidence could address these matters, or, if the opportunity arises, the Alabama Supreme Court could expound on the rule. In the meantime, each trial judge already has the power and discretion to administer the rule in such a manner as to avoid these uncertainties. In fact, the trial judge may have a duty to explain to the witnesses their responsibilities under the rule. *See Johnson v. State*, 62 So. 450, 453 (Ala. App. 1913) (referring to the "failure of the presiding judge to see to it that [the witness'] duty under the rule was brought to her attention").

When the rule is invoked at the beginning of trial, the trial judge should announce on the record and in the presence of all witnesses, counsel and parties the scope of the rule and what effect, if any, it would have on conduct outside of the courtroom. In doing so, the trial judge should consider whether the gathering of witnesses outside of the courtroom to discuss the case, whether with or without trial counsel, would result in the same tainting of testimony that their exclusion from the courtroom was designed to prevent. Moreover, the trial lawyer would be wise to request these clarifications or otherwise risk the penalty of misconduct. ■

Endnotes

[1] In the federal practice, these exceptions are spelled out in Federal Rule of Evidence 615.

[2] Moreover, in recognition of the criminally accused's constitutional right to present witnesses on his behalf, it has been held that the accused may not be deprived of a witness' testimony even though that witness has violated the Rule, unless the accused or the accused's counsel was at fault for the violation. *See Faircloth, supra.*

[3] In federal practice, the Rule has been promulgated by Congress as Federal Rule of Evidence 615, to wit: "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion." F.R.E. 615. The only significant distinction between this Rule and the Alabama common law rule is that the federal court must invoke the Rule when requested by a party, whereas its invocation is discretionary in Alabama practice.

[4] Accord *Stinson v. State*, 341 So.2d 185, 186 (Ala. Cr. App. 1977); *Page V. State*, 327 So. 2d 760, 762 (Ala. Cr. App. 1976); *Otinger v. State*, 299 So. 2d 333, 337 (Ala Cr. App. 1974); *Lewis v. State*, 208 So. 2d 228, 231-231 (Ala. App. 1968); *Howton v. State*, 178 So. 2d 566, 567-568 (Ala. App. 1965); *Beddow V. State*, 96 So. 2d 175, 177 (Ala. App. 1956); *Edgil V. State*, 56 So. 2d 677, 679 (Ala. App. 1952).

ALABAMA STATE BAR VOLUNTEER LAWYERS PROGRAM

ACCESS TO JUSTICE - Establishing a Pro Bono Project

By MELINDA M. WATERS

Recently, an article in a Montgomery newspaper focused upon the concerns of a young woman who was behind in her rent, who sometimes plugged an extension cord into a neighbor's electrical outlet to turn on lights in her small apartment, and whose refrigerator, on several occasions, had held only ice. This 30-year-old mother of two young children is one of 33.6 million Americans—13.5 percent of the population—living in poverty, according to statistics released by the United States Census Bureau in the fall of 1991. Her children are numbered among the one-fifth of all our nation's children now classified as poor.

These recently released figures, based on interviews with about 60,000 households, reveal that the number of poor Americans grew by 2.1 million between 1989 and 1990, the first such increase since 1983. (The Census Bureau considers a family of four with total income of less than $13,359 a year to be living in poverty.) Sadly, it is anticipated by forecasters that 1991 poverty figures will be even worse.

As poverty numbers increased significantly nationwide between 1989 and 1990, it is likely that the number of poor Alabamians dramatically increased as well.

In 1989, the Alabama State Bar Board of Commissioners, in conjunction with the Alabama Law Foundation and Legal Services Corporation of Alabama, commissioned a survey to assess legal needs of Alabama's poor. The survey revealed that, by conservative estimates, over 780,000 persons in our state lived, at that time, below the federally established poverty threshold. As poverty numbers increased significantly nationwide between 1989 and 1990, it is likely that the number of poor Alabamians dramatically increased as well.

The legal needs in civil matters of these indigent Alabamians are numerous and include, among others, housing matters, consumer debt problems, domestic issues, income maintenance problems, and health-related concerns. Federally funded legal services programs in our

state do much to help, but budget cuts and understaffing have left these programs unable to provide all the assistance needed. A greater effort on the part of the private bar to help in the delivery of these much-needed pro bono legal services is now underway in Alabama.

To encourage and assist local bar associations with establishing organized pro bono projects and to determine with some degree of accuracy the present level of pro bono activity in Alabama, the board of bar commissioners created the Volunteer Lawyers Program. This project, which is monitored by the Committee on Access to Legal Services of the Alabama State Bar, has now been organized and provides a structured, efficient mechanism through which attorneys may directly volunteer their services to meet the civil legal needs of our low income citizens.

Of course, it has long been the case that many attorneys, especially those in rural areas and smaller cities, give generously of their time and expertise to fellow citizens. Further, Rule 6.1 of the Alabama Rules of Professional Conduct, entitled "Pro Bono Publico Service", directs attorneys to voluntarily render public interest legal service ranging from providing professional services at no fee, or at a reduced fee, to giving financial support to organizations that provide legal services to the poor.

In keeping with the spirit of Rule 6.1, the board of bar commissioners unanimously passed a resolution, the full text of which is reprinted below, in June 1991, encouraging each regular member of the Alabama State Bar to voluntarily accept no less than two civil case referrals, or 20 hours of qualifying legal work, from an organized pro bono project. Special members are encouraged to volunteer no less than 20 hours to a pro bono effort. Under the resolution, qualifying pro bono work includes not only direct representation of indigent clients, but also serving on the governing or managing board of an organization assisting the poor, recruiting attorneys for a pro bono project, instructing at a poverty law seminar, mentoring or serving as co-counsel to other volunteer lawyers, performing intake at a legal services office, or assisting with a legal clinic for the poor.

Information about participating in or organizing a pro bono project for your community, bar association, law firm, or corporate legal department can be obtained by contacting me at P.O. Box 671, Montgomery 36101 or by calling me at (205) 269-1515.

DISCIPLINARY REPORT

Reinstatement

• Former Tuskegee lawyer **Calvin D. Biggers** was reinstated to the practice of law by order of the Supreme Court of Alabama, effective December 9, 1991. (Pet. #90-05)

Disbarment

• On December 9, 1991 the Supreme Court of Alabama issued an order disbarring Birmingham lawyer **William Lee Carroll** from the practice of law effective that date. The disbarment was based upon three felony convictions of the respondent attorney, which are violations of Rule 22(a)(2), Alabama Rules of Disciplinary Procedure (Interim). [Rule 22(a)(2) Pet. #91-04]

Suspensions

• On December 11, 1991 the Disciplinary Commission of the Alabama State Bar temporarily suspended Mobile lawyer **Vader Al Pennington** from the practice of law effective that date. Said suspension was pursuant to Rule 20(a), Rules of Disciplinary Procedure (Interim). [Rule 20(a) Pet. # 91-04]

• On November 15, 1991, after a full hearing, the Disciplinary Board of the Alabama State Bar suspended **Jackson William Stokes** of Elba, Alabama for a period of 91 days, said suspension to become effective January 15, 1992.

Stokes had represented an individual on a federal criminal charge. The fee agreement called for the payment of $2,500. The client could only pay $100. The client fled the state. Later, when the client was returned to Alabama, Stokes was appointed by the United States District Court to represent him. The case was concluded by a guilty plea, and the client was sentenced on February 28, 1989. Stokes submitted a voucher to the Court and was ultimately paid $699.20 for his appointed services.

On April 26, 1989 Stokes settled a worker's compensation claim for the same client who was then in prison. The settlement check was in the amount of $5,546.30. From this amount, Stokes deducted his 15 percent statutory attorney's fee and $2,500 for his fee in the concluded criminal case. He credited the $100 originally paid and the money he was paid by the U.S. The client contended he did not consent to this and did not owe more since Stokes had already been paid by the U.S. for the criminal representation. Stokes' conduct was found in violation of DR 9-102(A)(2); 18 U.S.C. §3006A(f) prohibits appointed counsel in criminal cases from any other source without prior approval of the District Court. [ASB No. 90-233]

• Former Birmingham lawyer **James Stephen Oster** was suspended from the practice of law for six months and ordered to make restitution to a client and to the Client Security Fund of the Alabama State Bar. This suspension was effective December 1, 1991. Oster was previously suspended March 15, 1989 for failing to meet his continuing legal education requirements.

Oster quit his practice and left Birmingham in February 1989. In doing so, he left unfinished legal work which resulted in formal charges being filed against him.

One complaint involved collecting $1,327.23 for a client and not forwarding the collected funds to his client. Oster has since made restitution to this client.

Another complaint involved accepting a $350 retainer to represent a client in a contract dispute. Oster departed the state prior to completing his representation of the client. Oster's former law partner, at a later time, obtained a judgment for the client.

Another complaint involved accepting a $450 fee to obtain an uncontested divorce. Oster prepared the necessary papers but never filed them.

The final complaint involved collecting a sum of $713 for a client and not forwarding the collected amount to his client. The client filed a claim for $713 with the Client Security Fund which was approved and paid.

Oster submitted a conditional guilty plea to the above charges on the condition that he receive a six-month suspension and make restitution of $450 to one client and $713 to the Client Security Fund. The Disciplinary Commission accepted this plea. [ASB Nos. 88-426, 89-186, 89-405, and 91-132] ■

NOTICE

JUDICIAL AWARD OF MERIT NOMINATIONS DUE

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

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

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

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

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

OPINIONS OF THE GENERAL COUNSEL

By ROBERT W. NORRIS, general counsel

Question:

"Is the district attorney and/or assistant district attorney disqualified from prosecution of a case in which:

(1) The alleged victim (and main prosecuting witness) of a crime is also being prosecuted by the district attorney's office as a defendant in another, unrelated matter?

(2) The alleged victim (and main prosecuting witness) of a crime is also being prosecuted by the district attorney's office as a defendant in a different, but related, matter?

(3) The alleged victim (and main prosecuting witness) of a crime is also being prosecuted by the district attorney's office as a defendant for an offense which arises out of the same incident in which the person is a victim?

Problem:

The XYZ County District Attorney's office frequently encounters cases in which we are asked to prosecute a defendant on one case while having to consult with the defendant on another case in which the defendant is the purported victim of a crime.

The most frequent situation involves domestic disputes, nightclub assault cases, and the like, in which there are cross-variants ('A' gets warrant against 'B' who, in turn, gets warrant against 'A'). We have encountered cases in which the two charges are consolidated by the trial court and our office has an assistant district attorney on each side of the case.

In another case, our office is prosecuting 'A' for assault I (shooting a man in the back) and we are being asked to prosecute police officer 'B' for assault III based on 'B's' force used in arresting 'A' on an arrest warrant.

Rules 1.7, 1.9 and 4.2 (among others) of the Rules of Professional Conduct merit special focus. Bear in mind that while prosecutors technically represent the State of Alabama (not victims), practically speaking, the best way to represent the State of Alabama is by representing victims.

Answer:

In the situation described in questions one, two and three, neither the district attorney nor the assistant district attorneys in his office are disqualified, without a showing of some substantial reason related to the proper administration of criminal justice.

Discussion:

In Formal Opinion 342, the American Bar Association Committee on Ethics and Professional Responsibility indicated it did not intend for the imputed disqualification rule to encompass government offices and explained the rationale for distinguishing between those offices and a private law firm, as follows:

"When the disciplinary rules of Canons 4 and 5 mandate the disqualification of a government lawyer who has come from private practice, his governmental department or division cannot practicably be rendered incapable of handling even the specific matter. Clearly, if DR 5-105(D) were so construed, the government's ability to function would be unreasonably impaired. Necessity dictates that government action not be hampered by such a construction of DR 5-105(D). The relationships among lawyers within a government agency are different from those among partners and associates of a law firm. The salaried government employee does not have the financial interest in the success of departmental representation that is inherent in private practice. This important difference in the adversary posture of the government lawyer is recognized by Canon 7: the duty of the public prosecutor to seek justice, not merely to convict, and the duty of all government lawyers to seek just results rather than the result desired by a client. The channeling of advocacy toward a just result as opposed to vindication of a particular claim lessens the temptation to circumvent the disciplinary rules through the action of associates. Accordingly, we construe DR 5-105(D) to be inapplicable to other government lawyers associated with a particular government lawyer who is himself disqualified by reason of DR 4-101, DR 5-105, DR 9-101(B), or similar disciplinary rules. Although vicarious disqualification of a government department is not necessary or wise, the individual lawyer should be screened from any direct or indirect participation in the matter, and discussion with his colleagues concerning the relevant transaction or set of transactions is prohibited by those rules." 62 A.B.A.J. 517, 522 (1976).

This limitation is carried forward in the ABA Model Rules and the Alabama Rules of Professional Conduct which became effective January 1, 1991, in that prosecutors' offices are absent from the definition of a law firm in the Comment to the imputed disqualification rule, Rule 1.10.

Similarly, Rule 1.11 permits a lawyer to move from private practice to government employment as long as he or she does not participate in a matter in which the lawyer participated personally and substantially while in private practice. The comment to this rule includes provisions for screening and specifically does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

It is also in accord with the view of a majority of jurisdictions that an entire prosecutor's office should not be disqualified absent a showing of actual prejudice. *Clausell v. State*, 474 So.2d 1189, 1191 (Fla. 1983); *State v. Fitzpatrick*, 464 So.2d 1185, 1187 (Fla. 1985).

In *People v. Lopez*, a California appeals court emphasized that caution be exercised when the issue is whether an entire prosecutorial office rather

than a single prosecutor should be recused.

"Caution is necessary because when the entire prosecutorial office of the district attorney is recused and the Attorney General is required to undertake the prosecution or employ a special prosecutor, the district attorney is prevented from carrying out the statutory duties of his elected office and, perhaps even more significantly, the residents of the county are deprived of the services of their elected representative in the prosecution of crime in the county. The Attorney General is, of course, an elected state official, but unlike the district attorney, is not accountable at the ballot box exclusively to the electorate of the county. Manifestly, therefore, the entire prosecutorial office of the district attorney should not be recused in the absence of some substantial reason related to the proper administration of criminal justice." (*People ex rel. Younger v. Superior Court* (1978) 86 Cal.App.3d 180, 204, 150 Cal.Rptr. 156).

The court also pointed out that the mere appearance of impropriety is insufficient to disqualify an entire office. *People v. Lopez*, 202 Cal. Rptr. 333, 155 Cal.App.3d 813 (1984).

We adopt the above rationale and favor, rather than disqualifying an entire prosecutor's or public defender's office when one of its members is confronted with a conflict, testing for individual prejudice and the adoption of effective screening procedures to screen the conflicted member.

This, in effect, was the result in *Jackson v. State*, 502 So.2d 858 (Ala.Cr.App. 1986), where the Alabama Court of Criminal Appeals found that a defendant's previous court-appointed attorney's subsequent employment as a parttime assistant district attorney did not constitute a conflict of interest. While the court did not specifically address the question of imputed disqualification or screening, they, in effect, approved these principles when they remanded the case to determine if a conflict actually existed. The court determined that a conflict did not exist because the attorney did not bring any record or file pertaining to the defendant with him to the district attorney's office nor did he consult or discuss the defendant's case with the district attorney or any attorney who prosecuted or participated in the defendant's trial.

In the three questions posed in your request, it is our view that the district attorney and/or assistant district attorney are not per se disqualified from prosecuting a case in which the alleged victim (the main prosecuting witness) of a crime is also being prosecuted by the district attorney's office as a defendant in the same, related or unrelated matter. The question to be answered is whether there is some substantial reason for disqualification related to the proper administration of justice and whether the disqualification may be cured by effective screening procedures.

It is apparent that effective screening procedures could be more easily implemented in a large, compartmentalized district attorney's office. However, size is not the sole determiner. What is key is the effectiveness of the screening procedures established.

In *United States v. Caggiano*, the court refused to disqualify an entire U.S. Attorney's Office when a defendant's former defense counsel joined the office, but swore that he had not discussed the case with his new colleagues (660 F.2d. 184 [6th Cir. 1981], cert. denied 454 U.S. 1149, 102 S.Ct. 1015, 71 L.Ed.2d 303 [1982]). Professor Wolfram, in his hornbook on legal ethics, injects a note of caution by observing that if the rule is applied "without regard to the workability of screening arrangements, the approach probably naively assumes that prosecutors can always avoid the temptation to assist new colleagues with helpful inside information or always avoid inadvertent mention of helpful tips." Wolfram, *Modern Legal Ethics*, West Publishing Co. (1986) pg. 405-406.

In RO-90-91, the Disciplinary Commission held that a three-person prosecutor's office would be disqualified from prosecuting a city commissioner for using equipment and personnel of the city in his private business while, at the same time, prosecuting several worthless check offenses where the commissioner was the victim. The worthless checks had been tendered to the commissioner's business and could have become an evidentiary topic at the commissioner's trial. We noted in RO-90-91 that in some instances simultaneous representation might be deemed permissible but reserved judgment and limited the opinion strictly to the facts presented.

With this opinion we adopt the view that disqualification of one lawyer in a prosecutor's or public defender's office will not be imputed to another member of that office and expressly recognize that the disqualified member may be effectively screened from other lawyers in the office. Extreme care must be exercised to insure that the screening procedures employed are effective.

In RO-85-40, we held that it was improper for the district attorney or an assistant district attorney in the district attorney's office to prosecute a criminal defendant in circuit court while that defendant is the victim and primary prosecuting witness in an assault prosecution in the district court. To the extent that RO-85-40 is inconsistent with this opinion, it is expressly reversed.

[RO-91-44] ■

RECENT DECISIONS

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

SUPREME COURT OF ALABAMA

Improper sentence enhancement may be raised on direct appeal

Madden v. State, 25 ABR 6063 (August 23, 1991). Madden pleaded guilty to and was convicted of one count of burglary, one count of rape and two counts of sodomy, all in the first degree. At the sentencing hearing, the State presented evidence of three prior felony convictions in Georgia. Madden was sentenced under the Habitual Felony Offender Act to life imprisonment without parole.

Madden appealed his sentence to the court of criminal appeals and argued that he had been improperly sentenced under the Habitual Felony Offender Act. Specifically, he argued that the trial court had erroneously enhanced his sentence for having three prior felony convictions, where two of the convictions arose out of the same transaction. Madden argued that those two prior convictions should have been considered as one felony conviction for purposes of sentence enhancement in Alabama.

The court of criminal appeals, in an unpublished memorandum opinion, held that Madden's claim was not properly before the court because Madden should have attacked the validity of the prior conviction by petitioning for post-conviction relief in Georgia.

The court of criminal appeals relied upon its decision in *Johnson v. State*, 541 So.2d 1112, 1115 (Ala.Crim.App. 1989), in holding that it could not review on direct appeal the validity of the prior felony convictions used for purposes of enhancement. The Supreme Court of Alabama reversed based upon its decision in *Ex parte Lockett*, 548 So.2d 1045 (Ala. 1989). In the opinion authored by Justice Kennedy, the supreme court distinguished *Johnson* with the following observation:

> Madden does not argue that his prior felony convictions in Georgia are invalid, but that, for purposes of enhancement under the Habitual Felony Offender Act, the two prior sodomy convictions should be considered as one felony conviction under Alabama law. Thus, we hold, based on *Ex parte Lockett*, that the court of criminal appeals is not precluded from reviewing on direct appeal the question whether the two prior sodomy convictions, which arose from a single transaction, should be considered as one felony conviction for purposes of enhancement of Madden's sentence under the Habitual Felony Offender Act.

How to preserve instructional error

McCall v. State, 26 ABR 110 (October 11, 1991) and *Pettway v. State*, 26 ABR 119 (October 11, 1991). The Supreme Court of Alabama released its decisions in *McCall* and *Pettway* on October 11, 1991. Each of these cases provides a clear insight on how counsel must preserve instructional error for review on appeal.

Justice Maddox's opinions in *McCall* and *Pettway* focus on the following questions:

(a) When is a trial court obligated to give an instruction on a lesser included offense or an affirmative defense?

(b) Is defense counsel obligated under Rule 21.2 to file a written jury instruction in order to preserve instructional error in a criminal case?

(c) Is it appropriate for the appellate court to sue the charge conference colloquy to determine if the instructional error had been preserved for appellate review?

Rule 21.2, Alabama Rules of Criminal Procedure, states that:

> No party may assign as error the court's . . . giving of an erroneous, misleading, incomplete or otherwise improper oral charge, unless he objects thereto before the jury retires to consider its verdict, stating the matter to which he objects and the grounds of his objection.

In both *McCall* and *Pettway*, the State argued that the instructional error had not been preserved for appellate review. The supreme court, speaking through Justice Maddox, reversed both cases.

In order to determine whether the evidence is sufficient to necessitate an instruction and to allow the jury to consider the defense or a lesser included offense, the court must view the testimony most favorable to the defendant. *Shavers v. State*, 361 So. 2d 1106, 1107 (Ala. 1978). If there is the slightest evidence tending to prove a hostile act which could reasonably be interpreted as placing Pettway at the time of the shooting in apparent imminent danger to life or other grievous bodily harm, then the matter of self-defense becomes a question for the jury.

Likewise, the law in Alabama is clear that if a defendant asks for a jury charge on a lesser included offense, he is entitled to such a charge if there is any rational basis or reasonable theory that would support a conviction on the lesser offense.

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In *McCall, supra*, the supreme court reaffirmed its earlier decisions in *Matkins v. State*, 497 So.2d 201 (Ala. 1986) and *Connolly v. State*, 500 So.2d 68 (Ala. 1986). In those cases, the supreme court held that an oral request for a jury instruction was sufficient to preserve error in a criminal case.

In these cases, the supreme court observed the following:

> The better practice, of course, would have been for trial counsel to have presented the court with a written instruction, but the record suggests that trial counsel gave to the trial court copies of the statutes upon which he wanted the jury instructed. Although this procedure is not a substitute for the presentation of a written instruction, we suggest that the trial judge could have insisted on counsel's presenting him with a written instruction that detailed exactly what he desired, so that the record would be complete . . . . To hold that counsel had to request a written instruction in order to preserve his right to have the jury instructed on an affirmative defense would be to elevate form over substance.

Fourth Amendment — informant's tip and *Terry* stop

State v. Carpenter, 25 ABR 6252 (August 30, 1991). Carpenter was indicted for the offense of possession of a controlled substance. Prior to trial, Carpenter filed a motion to suppress evidence confiscated at the time of his arrest; he argued that the evidence had been illegally seized by the arresting police officer.

At the hearing on the motion to suppress, a Fairhope, Alabama police officer testified that he had received a telephone call from an "informant" who advised him that Carpenter would be driving up South Mobile Avenue in Fairhope in his own automobile, and that he would be in possession of a firearm and controlled substances. The officer testified that, before the arrest, he knew Carpenter and that he knew the type car Carpenter drove. He further testified that the identity of the informant was known to him and that the informant was reliable and had given him information which led to the arrest and/or conviction of more than 20 persons.

The officer proceeded to South Mobile Avenue where he observed Carpenter leaving a residential driveway in his automobile. He followed Carpenter for a brief period and then stopped him. After asking Carpenter for his driver's license, the police officer directed Carpenter and his passenger to get out of the car and stand behind it. At that time, the officer observed a pistol protruding from a zippered carrying case. After discovering the pistol, the police officer searched the car. He discovered what he believed were controlled substances, i.e., one valium pill and one methamphetamine. The trial court granted the motion to suppress.

The Alabama Court of Criminal Appeals reversed the trial court's order suppressing the evidence. The supreme court issued the writ of certiorari to determine whether the record supported the court of criminal appeals' reversal of the trial court's order and to examine the informant's tip in light of the Supreme Court of the United States' recent decision in *Alabama v. White*.

In a five-to-four decision authored by Justice Kennedy, the Supreme Court reversed, applying the "totality of the circumstances test" to determine if there was reasonable suspicion to justify a *Terry* stop of Carpenter.

Under *Adams v. Williams*, 407 U.S. 143, 147, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), an informant's tip may carry sufficient "indicia of reliability" to justify a *Terry* stop even though it may be insufficient to support an arrest or search warrant. See also *Walker v. City of Mobile*, 508 So.2d 1209, 1211 (Ala.Crim. App. 1987). All that is required for such a stop is that there be a reasonable suspicion that the person to be stopped is engaged in some type of criminal activity.

Reasonable suspicion is a suspicion for which the offender is able to point to specific inarticulable facts which, taken together with rational inferences from those facts, reasonably warrant the action taken by the officer.

In *Carpenter*, Justice Kennedy carefully analyzed the facts against the Supreme Court of the United States' recent decision in *Alabama v. White*, 110 S.Ct. 2412 (1990). After comparing the facts *sub judice* with the facts in *Alabama v. White*, Justice Kennedy critically noted:

> In this case, Officer Griffis testified that he received a telephone call from a 'reliable' informant and that he was told that Carpenter was driving on South Mobile Street in his car and that he would have a gun and drugs in the car. We hold, based on the totality of the circumstances, that the facts of this case did not create a reasonable suspicion to justify stopping Carpenter on the street. It is clear that Officer Griffis relied solely on the fact that the informant in this case was known to him to be reliable. Absent evidence that the informant had given the police reliable information in the past, there are no specific or particularized facts on which Griffis could have based a reasonable suspicion. The informant said merely that Carpenter would be driving up South Mobile Street. He did not state on what he based his knowledge of that fact. Unlike the facts in *Alabama v. White* and those in Dale, this information concerned Carpenter's present whereabouts, information available to anyone who knew him and was near that location. In *Alabama v. White* and in *Dale v. State*, heavy emphasis was placed on the fact that the infor-

mants were able to state where the defendants would be headed in the future and that the police could independently corroborate the informant's tip. Moreover, in those cases, the informants were able to say what type of controlled substances the defendant would be carrying. In this case, there was no specific or particularized evidence concerning the type of controlled substance that Carpenter was carrying in his car, nor was there evidence, as in *Dale*, that Carpenter had been previously suspected of possessing controlled substances.

. . . This Court is unwilling to say that a police officer, armed with the scant information from a known reliable informant that a person is engaged in criminal activity, has a reasonable suspicion to stop the person suspected of the illegal activity.

Pleading scienter and Alabama Rules of Criminal Procedure

Harper v. State, 25 ABR 6522 (September 27, 1991). The *Harper* case should be read in its entirety by anyone who practices criminal law. It is an excellent review of the impact of Alabama Rules of Criminal Procedure on the necessity of pleading scienter in the indictment. The opinion authored by Justice Maddox substantially affects the precedential value of *Gayden v. State*, 262 Ala. 468, 80 So.2d 501 (Ala. 1955), a leading case of the sufficiency of indictment.

The crucial question raised in *Harper* is whether the indictment sufficiently apprised the defendant with reasonable certainty of the nature of the accusation made against him so that he might prepare his defense and that he might be protected from a subsequent prosecution for the same offense.

Footnote 2 of the Maddox decision points out the impact of the Alabama Rules of Criminal Procedure on *Gayden, supra*, with the following observation:

> A close reading of *Gayden* shows that the court reached the conclusion that it did because Alabama did not provide a procedure at that time, by a bill of particulars, to supplement 'a vague and indefinite indictment so as to afford an accused due process of law'. 262 Ala. at 474, 80 So.2d at 507. Temporary Rule 15.2(e) (now Rule 13.2(e), Ala.R.Crim.P.) provided this defendant, had he requested it before joining issue on the indictment, the right to move for a more definite statement of the charge. Had such a procedure been available in *Gayden*, it appears that the result reached there would have been different.

Since *Gayden* was decided, Alabama appellate courts have liberalized criminal pleadings and provided a method for defendants to obtain a more definite statement of the charges. Temporary Rule 13.2.

On appeal, Harper contended that the indictment was void because it did not contain an allegation that he had knowingly distributed cocaine. The indictment instead charged that he did "unlawfully sell, furnish, give away, manufacture, deliver or distribute a

controlled substance, to-wit: cocaine, in violation of §13A-12-211 of the *Code of Alabama*."

The court's opinion in *Harper* makes clear that most objections to criminal charges must be raised before trial. The exceptions are for objections based upon the lack of subject matter jurisdiction and failure to charge an offense. Those two objections can be raised by the court or by motion of the defendant at any time during the "pendency of the proceeding". "Pendency of the proceeding obviously refers only to the proceedings in the trial court and this interpretation of the Rule is consistent with federal cases interpreting a similar rule of criminal procedure." See *United States v. Pupo*, 841 F.2d 1235 (4th Cir. 1988).

It is important to note that although the supreme court upheld the indictment in *Harper*, it expressly points out the following:

> The court of appeals correctly held in *Stewart* that if a statute requires that the offense be 'knowingly' committed, then the indictment should allege that it was so committed, and if an objection to the indictment is raised by the trial court or the defendant during the pendency of the proceeding, the indictment is defective and would be subject to dismissal, unless otherwise provided for in Rule 13.5(c)(2).

Ultimately, the supreme court in *Harper* held that "based on the foregoing, we are clear to the conclusion that the defendant's constitutional right 'to demand the nature and cause of the accusation' (Art. 1, §6, Const. of Ala. 1901) has been fulfilled in this case. The indictment is not void for failing to allege that the offense was committed 'knowingly' ".

Child witness in sexual abuse case — different rule

Price v. State, 26 ABR 454 (November 15, 1991). The Supreme Court of Alabama refused to review the judgment of the court of criminal appeals, thereby holding that the provisions of §15-25-3(c), *Code of Alabama* (1975), which state that a "child victim of sexual abuse or sexual exploitation" shall be a competent witness, apply only to a case of sexual abuse or exploitation of a child and not to a case of physical abuse of a child.

In its opinion, the court of criminal appeals suggested that the legislature should undertake the amendment of the statute to provide uniformity on the ground that there is no logical reason why a child victim should not be a competent witness in a physical abuse case just as in a case involving sexual abuse or exploitation.

Justice Maddox, in a special concurrence, goes further and suggests that the Supreme Court of Alabama could, without waiting for legislative action, adopt a rule of criminal procedure and effect the change. More specifically, Justice Maddox suggested that Rule 19.2 of the Alabama Rules of Criminal Procedure, which deals with "evidence and witnesses" in criminal cases, could be amended to provide that a child victim would be competent to testify in cases of physical abuse as well as those involving charges of sexual abuse or exploitation.

Batson applies to non-minorities—issue of standing

Mathis v. State, 26 ABR 399 (November 15, 1991). The Alabama Supreme Court granted certiorari to address the issue of whether Mathis, a white male defendant, has standing under the principles of *Batson v. Kentucky*, 476 U.S. 79 (1986), to claim that prosecutor's alleged use of peremptory challenges to

remove black jurors from the trial venire violated his constitutional right.

The court of criminal appeals was prophetic earlier in stating that the *Batson* principle might be broadened because the Supreme Court of the United States, in *Powers v. Ohio*, ____U.S.____, 111 S.Ct. 1364 (1991), did, in fact, broaden the class of defendants who could make a *Batson* claim when it held that a white defendant did have standing to raise a *Batson* issue.

In *Ex parte Bird*, ____So.2d____ (Ala. 1991), the Supreme Court of Alabama adopted *Powers*, thereby deciding that a white defendant has standing to raise a *Batson* challenge.

In *Mathis*, the supreme court affirmatively held that the trial attorney had preserved the standing issue, thereby entitling him to the extension of *Batson* brought about by *Powers v. Ohio*.

In so holding, the Supreme Court of Alabama relied upon the decision in *Griffith v. Kentucky*, 479 U.S. 314 (1987) holding that the effect of *Powers v. Ohio* should be applied retroactively. The court in *Griffith* stated, "We thereby hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final . . . ." *Id.* at 328.

BANKRUPTCY

Supreme Court rules on ordinary course of business exception on regular interest payments to long-term lender

Union Bank v. Herbert Wolas, trustee, U.S. Supreme Court (December 11, 1991). In an opinion delivered by Justice Stevens, the United States Supreme Court held that regular interest payments on an eight-month revolving line of credit constituted an exception to the power given under §547 preference statute of the Bankruptcy Code. This case, in the lower courts, was known as *ZZZZ Best Company, Inc.* The Ninth Circuit Court of Appeals had decided that the ordinary course of business exception to avoidance of preferential transfers could not be used by long-term creditors. The Sixth Circuit had held to the contrary in 1990. In the concluding substantive paragraph, the Supreme Court stated that payments on long-term debt, as well as payments on short-term debt, qualified for the ordinary course of business exception to the trustee's power to avoid preferential transfers. However, the Court further stated that it would not decide whether the particular transaction was incurred in the ordinary course of the debtor's business and the bank's business, whether payments were made in ordinary course of business, or whether made according to ordinary business terms — these questions are still open for the lower court. Thus, the Supreme Court's holding is that even though the long-term interest payments may constitute an exception, it is still a factual question to be determined by the courts.

Definition of business trusts

In re Parade Realty, Inc. (Bankr. D. Hawaii) November 7, 1991 22 B.C.D. 402; ____ B.R. ____. This was a case involving a retirement pension trust. The Court held that there is nothing in the Code defining or explaining the term "business trust" nor is there any legislative history to act as a guide. The bankruptcy judge determined that to qualify as a business trust, the entity not only must be doing business but have some significant attributes of a corporation. The Court stated that it must have been formed primarily for a business purpose, and that to have the attributes of a corporation, there should be transferability of interest.

State bar proceeding is exception to automatic stay; see Bankruptcy Code §362(b)(4)

Gene and Joyzelle I. Wade, 22 B.C.D. 408 ____ F.2d ____(9th Cir., November 8, 1991). The Ninth Circuit held that a state bar proceeding was a regulatory action under 362(b)(4) and, therefore, an exception to the automatic stay. In this case, it was determined that the Arizona Bar, in taking such action, was

an instrumentality of the Arizona State Supreme Court. This holding was justified by reason of a rule promulgated by the Arizona Supreme Court authorizing the bar to provide for regulation and discipline of lawyers. In all probability, the same holding would apply in Alabama.

Compensation to attorney for services rendered prior to appointment

Matter of Interco, Inc., 22 B.C.D. 411, November 13, 1991. The bankruptcy judge held that the attorney for the creditors' committee, under the special circumstances, would be allowed compensation for services entered into prior to approval. The Court stated that it determined factually that it was necessary for the attorneys to act immediately upon the employment but prior to approval of the Court, for, otherwise, the committee which the attorneys represented would not be protected. Further, the Court held that even though the creditors would receive only a small percentage of the amount of the estate, this was no basis for reducing the fees, for to do so would discourage active participation of the creditors' committees. The judge admitted that the Eighth Circuit had said that ordinarily compensation of services rendered prior to approval of employment is denied, but that the Court as a matter of fundamental fairness may exercise its discretion and allow fees for services performed pre-approval.

Severance and vacation pay—administrative priority

In re Golden Distributors, Ltd., et al, 22 B.C.D. 421 (Bankr.S.D.N.Y., November 15, 1991). For anyone with a problem of determining whether severance and vacation pay have administrative priority, this is a good case to read. There were both pre-petition and post-petition wage earners. The Court held that severance pay is an administrative priority as it is earned when termination occurs. If a termination occurs after the bankruptcy is filed, it is an administrative claim. However, vacation pay earned pre-petition is governed by §1113(f) which provides that the collective bargaining agreement controls. Thus, under such section vacation pay has first priority, subject however to the administrative priority of a lender under §364(c)(1) giving a lender a super priority if the collateral is not sufficient to pay the lender in full.

Additionally, this case held that there is a difference between the union claims and that of the nonunion claims, as the nonunion worker is not under a collective bargaining contract. Thus, vacation pay qualifies as an administrative expense only to the extent of services rendered post-petition; for pre-petition services, it is a general unsecured claim with only the amount earned in the 90-day pre-petition period entitled to a priority under §507(a)(3) and subject to the $2,000 limitation. ■

NOTICE

To Members of the Bar and the Public Concerning Public Hearing

Notice is hereby given that a public hearing will be conducted by Chief Judge Gerald Bard Tjoflat, United States Court of Appeals for the Eleventh Circuit, on Tuesday, April 28, 1992 at 9 a.m. in Courtroom 338 of the Tuttle Court of Appeals Building, 56 Forsyth Street, NW, Atlanta, Georgia for the purpose of receiving suggestions, proposals and comments concerning the application or enforcement of Eleventh Circuit Rule 46-1(d)(1) and of Section (d)(2) of the Eleventh Circuit Plan under the Criminal Justice Act (CJA). (These provisions became effective April 1, 1991 after public notice and an opportunity to comment had been given in the fall of 1990 or winter of 1990-91, as required by 28 U.S.C. §2071(b).)

Eleventh Circuit Rule 46-1(d)(1) states:

Appellate Obligations of Retained Counsel — Retained counsel for a criminal defendant has an obligation to continue to represent that defendant until successor counsel either enters an appearance or is appointed under the Criminal Justice Act, and may not abandon or cease representation of a defendant except upon order of the court.

Section (d)(2) of the Circuit's CJA Plan states:

If a party was represented in the district court by counsel appointed under the Act, such counsel shall be mindful of the obligation and responsibility to continue representation on appeal until either successor counsel is appointed under the Act or counsel is relieved by order of this court . . . Retained counsel for a criminal defendant has an obligation to continue to represent that defendant until successor counsel either enters an appearance or is appointed under the Act, and may not abandon or cease representation of a defendant except upon order of this court. Unless approved in advance by this court, the district court is not authorized to appoint counsel on appeal to represent a defendant who was represented in the district court by retained counsel without first conducting an in camera review of the financial circumstances of the defendant and of the fee arrangements between the defendant and retained trial counsel. Appointment of counsel on appeal may be requested in this court by filing an appropriate motion supported by an affidavit which substantially complies with Form 4 in the Appendix to the FRAP Rules.

Members of the several bars within the Eleventh Circuit and concerned citizens are invited to attend this public hearing. Interested persons may also submit written comments to the Clerk, Eleventh Circuit Court of Appeals, 56 Forsyth Street, Atlanta, Georgia 30303.

Consultant's Corner

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

This 24th in our "Consultant's Corner" series. We would like to hear from you, both in critique of the article written and for suggestions of topics for future articles.

(This article originally appeared in the March 1991 issue of ***The Alabama Lawyer****.)*

Telephone charges

Here comes the bill. Upwards of 30 days after you have made a client-chargeable long distance telephone call, your bookkeeper dumps a sheaf of call detail slips on your desk with the reminder, "We can't close out billing for the month until the phone charges are allocated." You turn your attention to the pile of detail slips, beginning a laborious task of matching your time slip notations of long distance calls to an infuriating list of dates, area codes and exchanges. But there is more — what about the call you made from the airport, using your personal credit card; the collect call you accepted at home on a Saturday afternoon; the calls on MCI (this is just the AT&T bill)? Do not change careers; there are alternatives.

Ignore it

This can be tempting. After all, why waste an hour (or more) of a lawyer's time chasing small change? The reason is the same reason you ought to chase copier and postage charges: they can add up to a significant bottom-line profit contribution. Our studies reveal that law firms incur more than $150 per lawyer per month in phone costs that should be recoverable from clients. Ignoring does save the lawyer's time, but it allows more than twice the cost to slip away as missed profit opportunity.

Fold it into our rates

This is done with some overhead factors, such as the cost of word processing. On that basis, you should raise your rates about $1 per hour, clearly an impractical notion. Five dollars would be outrageous and cause you more grief than profit. That aside, clients are not as accepting of rate increases as they once were. In fact, one is hard-pressed to find any client who is not downright resistant to rate increases. On the other hand, telephone charges billed as an adjunct cost of business are traditional and generally acceptable to clients. After all, they make phone calls (and copies and mail packages, etc.).

High-tech it

The key to capturing phone charges with a minimum of effort is to record the entire transaction at the time it occurs. As you place a call to a client you obviously know whom you are calling and on what matter. What you do not know is the long distance charge your long distance carrier is running up for you. Conversely, the telephone company knows the charges but not the client's name or matter number. Enter high tech.

Some telephone switches have a feature called SMDR (station message distribution reporting). The feature accumulates a record of who (which station) placed a long distance call, and how many minutes the call lasted. This listing begins to get together the two pieces of the equation. With a bit of creativity, one can enter client/matter number through a phone instrument prior to dialing the number. The SMDR record produces a monthly list for manual entry into the billing system.

Taking the process a step further, some vendors of legal-specific billing programs offer (for a price) some interface software that dynamically captures SMDR information and automatically updates a client's billing record. This is a technique only for medium and large firms. It requires a digital telephone switch, SMDR, a computer-based billing system and a great deal of discipline. The discipline involves having to dial in client and matter number as a condition of accessing the long distance line. Needless to say, some lawyers find that a bit much.

Low-tech it

If you are not a large firm, nor interested in acquiring a digital telephone switch or a special computer, there is a perfectly sound procedure you can adopt, and it does not cost anything. Assign a fixed cost to long distance telephone calls, and automatically trigger the toll charge as you (habitually) fill out your professional time. A standard cost is simply an average that is easily computed by dividing total long distance charges by the number of calls made. If you are a typical firm, your average cost will be in the $1.50 to $2.50 range and will not be an unfair burden for a client involved with a brief conversation. If you do not habitually charge for time spent on phone calls, there is a quick calculation that should instantly disabuse you of that practice. How much fee income is lost from ignoring 15 minutes per day (at $80 per hour)? Would you believe $5,000 per year?

The single professional time charge you (now) habitually generate pursuant to a client phone conversation becomes two transactions, one for your time and one for a standard long distance charge. It does become necessary to distinguish between these dual transactions and those where the client calls you, or from local calls. Consider a trigger such as "STD LDTC" on your time slip. You have locked in billable long distance charges to your professional timekeeping. ■

Request for Consulting Services

Office Automation Consulting Program

SCHEDULE OF FEES, TERMS AND CONDITIONS

Firm Size*	Duration**	Fee	Avg. Cost/lawyer
1	1 day	$ 500.00	$500.00
2-3	2 days	$1,000.00	$400.00
4-5	3 days	$1,500.00	$333.00
6-7	4 days	$2,000.00	$307.00
8-10	5 days	$2,500.00	$277.00
Over 10			$250.00

*Number of lawyers only (excluding *of counsel*)

**Duration refers to the planned on-premise time and does not include time spent by the consultant in his own office while preparing documentation and recommendations.

REQUEST FOR CONSULTING SERVICES

OFFICE AUTOMATION CONSULTING PROGRAM

Sponsored by Alabama State Bar

THE FIRM

Firm name _____

Address _____

City _____ ZIP _____ Telephone # _____

Contact person _____ Title _____

Number of lawyers _____ paralegals _____ secretaries _____ others _____

Offices in other cities? _____

ITS PRACTICE

Practice Areas (%)

Litigation	_____	Maritime	_____	Corporate	_____
Real Estate	_____	Collections	_____	Estate Planning	_____
Labor	_____	Tax	_____	Banking	_____

Number of clients handled annually _____ Number of matters presently open _____

Number of matters handled annually _____ How often do you bill? _____

EQUIPMENT

Word processing equipment (if any) _____

Data processing equipment (if any) _____

Dictation equipment (if any) _____

Copy equipment (if any) _____

Telephone equipment _____

PROGRAM

% of emphasis desired Admin. Audit _____ WP Needs Analysis _____ DP Needs Analysis _____

Preferred time (1) W/E _____ (2) W/E _____

Mail this request for service to the Alabama State Bar for scheduling.
Send to the attention of Margaret Boone, executive assistant, Alabama State Bar, P.O. Box 671, Montgomery, Alabama 36101.

MAJOR LEGISLATION OF INTEREST TO LAWYERS

102nd CONGRESS—First Session (Jan. 3, 1991 - Nov. 27, 1991)

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(Vol. 28, No. 1 A Legislative Analysis Service January 1 , 1992 of the Governmental Affairs Office)

Administrative Law 142
Antitrust Law 143
Attorneys 143
Civil Rights/Constitutional Law 144
Courts/Judiciary 145
Criminal Justice 146
Elder Law 149
Election Law 149
Family Law 150
International Law 150
Legal Education 152
Legal Services 153
Military Law 153
Patent, Trademark & Copyright Law 153
Real Property, Probate & Trust Law 154
Tax Law 154
Tort and Insurance Law 155

~ ABA testified or submitted statement or letter to Congress
t 1991 ABA legislative priority
Note: The term "enacted" generally refers to the date the president signed the bill into law
* Includes~ legislative issues on which the ABA House of Delegates or Board of Governors has approved association policy

Subject	Description and Status	ABA Position

ADMINISTRATIVE LAW

***Administrative Conference of the U. S. (ACUS)**	P.L. 102-141 (H.R. 2622), fiscal year 1992 appropriations legislation enacted 10/28/91, includes $2.227 million for ACUS. S. 1642 and H.R. 3379 would authorize ACUS to provide assistance in response to requests relating to the improvement of administrative procedures in foreign countries. A Senate Judiciary subcommittee held a hearing on S. 1642. The House passed H.R. 3379.	*Supports adequate ACUS funding and the pending legislation.*
Administrative Law Judges Corps	S. 826 and H.R. 3910 would establish a centralized corps of federal ALJs. There was no action on the measures.	*Supports.*
***Government Ethics Rules**	Section 2635.806 of the proposed "Standards for Ethical Conduct for Employees of the Executive Branch" would severely restrict federal employees from participating in the internal or business affairs of professional membership associations. A House Post Office and Civil Service subcommittee held a hearing on the proposed rule, and the rule is being redrafted by the Office of Government Ethics.	*Opposes rule as proposed.*
Hatch Act	S. 914 and H.R. 20 would amend the Hatch Act to allow federal employees to participate in certain political activities as private citizens. There was no action on the measures.	*Opposes Hatch Act changes in the absence of full and careful study of the potential impact.*

Subject	Description and Status	ABA Position
~Immigration - Employer Sanctions	S. 1734 and H.R. 3366 would repeal employer sanctions provisions in the Immigration Reform and Control Act of 1986 in light of General Accounting Office findings that the sanctions result in discrimination. There was no action on the measures.	*Supports repeal.*
***Immigration - Haitian Refugees**	S. 2026, S. 2091 and H.R. 3844 would assure the protection of Haitians in the United States or in U.S. custody pending resumption of democratic rule in Haiti. A House Judiciary subcommittee held a hearing on the current U.S. handling of Haitians fleeing Haiti. There was no action on the Senate measures.	*Supports appropriate due process for all refugees and supports the legislation.*
Immigration Act of 1990 Amendments	P.L 102-232 (H.R. 3049), enacted 12/12/91, provides technical corrections to a number of provisions in the Immigration Act of 1990 and incorporates additional immigration-related provisions, including clarifying judicial naturalization functions, broadening admissions for foreign entertainers and athletes, and lifting restrictive and burdensome procedures regarding temporary workers.	*Supports certain improvements in the 1990 law.*
Immigration and Naturalization}on Service (INS) Appropriations	P.L 102-140 (H.R. 2608), fiscal year 1992 appropriations legislation enacted 10/28/91, includes $938.241 million for the INS.	*Supports increased funding for immigration enforcement, legalization and anti-discrimination efforts.*
National Endowment for the Arts	H.R. 2686, fiscal year 1992 appropriations legislation as passed by the Senate, would have prohibited the NEA from funding certain types of art. The NEA restrictions were dropped in conference and were not included in P.L. 102-154, the final version of H.R. 2686 enacted 11/13/91.	*Opposes restrictions on NEA grant content or ideas.*

ANTITRUST LAW

***Vertical Price Fixing**	S. 429 and H.R. 1470 would amend the Sherman Act to establish new evidentiary standards applicable in civil cases involving resale price maintenance conspiracy claims. The Senate passed S. 429. The House passed H.R. 1470.	*Opposes.*

ATTORNEYS

***Civil Rights Attorneys' Fee Awards**	P.L. 102-166 (S. 1745), enacted 11/21/91, allows awards to prevailing parties under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. Section 1981 to include reasonable expert fees for testimonial and non-testimonial services.	*Supports.*
Limitations on Attorneys' Fees	S. 133 would limit attorneys' fees under various statutes that permit fees to be awarded to parties prevailing against the government. There was no action on S. 133. There was no comparable House measure.	*Opposes.*

Subject	Description and Status	ABA Position

CIVIL RIGHTS/CONSTITUTIONAL LAW

Abortion Appropriations	H.R. 2699, fiscal year 1992 appropriations legislation as passed by the House and Senate, would have allowed the District of Columbia to use locally raised revenues to pay for abortions. The president vetoed H.R. 2699. H.R. 3291 (P.L 102-111), enacted 10/1/91 as the fiscal year 1992 appropriations legislation for the District of Columbia, continues to restrict use of public funds for abortions to cases where the life of the mother is endangered.	*Supports legislation at the federal and state levels to finance constitutionally permitted abortion services for indigent women.*
t*Civil Rights Act of 1991	P.L. 102-166 (S. 1745), enacted 11/21/91, reverses or modifies several recent Supreme Court decisions that restricted the rights of women and minorities to sue for discrimination in the workplace.	*Supports in principle.*
***Community Reinvestment Act (CRA)**	Early House drafts of omnibus banking legislation would have limited the enforcement and narrowed the application of the CRA, which seeks to avoid discrimination and stabilize housing and businesses in low- and moderate-income communities. The House Banking Committee dropped the language and it was not included in S. 543, the final version of omnibus banking legislation passed by the House and Senate and sent to the president.	*Opposes any narrowing of the application of the CRA.*
Constitutional Convention	S. 214 would establish procedures for convening a constitutional convention. There was no action on S. 214. There was no comparable House measure.	*Supports procedures legislation in principle but opposes certain provisions; has no view on whether a convention should be convened on any specific issue.*
Discrimination-Sexual Orientation	S. 574 and H.R. 1430 would prohibit discrimination in employment, housing, public accommodations and federally assisted programs on the basis of affectional or sexual orientation. There was no action on the measures.	*Supports federal, state and local anti-discrimination legislation in this area.*
***Family Planning Counseling**	H.R. 2707, fiscal year 1992 appropriations legislation as passed by the House and Senate, would have prohibited the Department of Health and Human Services from spending money to enforce regulations for Title X of the Public Health Services Act that prevent federally-funded family planning clinics from providing counseling concerning the use of abortion as a method of family planning or providing referral for abortion as a method of family planning. S. 323 and H.R. 3090 would ensure that women receiving assistance under Title X are provided with all information and counseling regarding their pregnancies. The president vetoed H.R. 2707; the House sustained the veto. The Senate passed S. 323. The House Energy and Commerce Committee approved H.R. 3090.	*Supports legislation to ensure that all Title X patients receive access to complete information regarding their health care options.*

Subject	Description and Status	ABA Position

COURTS/JUDICIARY

Court Stripping	S. 77 would divest the federal courts of jurisdiction in cases concerning voluntary school prayer, Bible reading or religious meetings in public schools or public buildings. There was no action on the measure. There was no comparable House measure.	*Opposes.*
~Diversity Jurisdiction	No legislation was introduced to make changes in the diversity jurisdiction system.	*Opposes abolishing or curtailing diversity jurisdiction.*
***Federal Courts Study Committee (FCSC)**	S. 1569 would implement numerous recommendations from the 1989 report of the FCSC that were not included in the Judicial Improvements Act of 1990, omnibus court reform legislation enacted 12/1/90. A Senate Judiciary subcommittee held hearings on S. 1569. There was no comparable House measure. **See related entries.**	*Supports and opposes various provisions.*
***Intercircuit Panel**	S. 1569 would authorize a five-year pilot project to resolve intercircuit conflicts through Supreme Court referral to existing courts of appeals. A Senate Judiciary subcommittee held hearings on S. 1569. There was no comparable House measure.	*Opposes creation of an intercircuit panel.*
tJudicial Compensation	Federal judges received on 2/11/91 the final stage of a pay increase package enacted in 1989 by P.L 101-194, which included a 25 percent raise and a 3.6 percent 1991 cost of living adjustment (COLA). Judges previously received as part of the package COLA adjustments for 1989 and 1990 totaling 7.9 percent.	*Supports judicial salary increases.*
t*Judicial Immunity	S. 653 and H.R. 671 would overturn the Supreme Court decision in *Pulliam v. Allen,* 466 U.S. 522 (1984), by eliminating certain grounds for injunctive relief and attorneys' fee awards against judges. H.R. 3206 would prohibit only costs, including attorneys' fees, from being awarded against judges. The Senate Judiciary Committee approved S. 653. A House Judiciary subcommittee held a hearing on H.R. 671 and H.R. 3206.	*Supports.*
***Judicial Impact Statements**	S. 1569 would require that each committee of Congress include a judicial impact statement with any reported bill or resolution that may affect the courts. A Senate Judiciary subcommittee held a hearing on S. 1569. There was no comparable House measure.	*Supports inclusion of judicial impact statements for both federal and state legislation.*
Peremptory Challenge - Judges	No legislation was introduced to permit the peremptory challenge of a federal district judge, magistrate or bankruptcy judge.	*Supports peremptory challenge of judges.*
t*Racketeer Influenced and Corrupt Organizations Act (RICO)	H.R. 1717 would limit civil actions under RICO. The House Judiciary Committee approved H.R. 1717. There was no comparable Senate measure.	*Supports certain civil RICO limitations.*

Subject	Description and Status	ABA Position
"Rule of 80"	S. 1818 would allow a federal judge who has reached the age of 70 with at least five years but less than 10 years of service to retire in senior status at reduced pay, with a requirement of working a minimum of 25 percent of an active judge's normal workload until 10 years of service is reached. The current "Rule of 80" allows a judge to retire at full pay upon reaching age 70 after 10 years of service or to retire in senior status at age 65 if the judge's age and years of service total 80. There was no action on the measure. There was no comparable House measure.	*Supports amending the "Rule of 80" to permit judges between the ages of 60 and 64 to take senior status if their age and years of service total 80.*
Social Security Court	H.R. 2159 would establish an Article I Social Security Court to hear appeals of final benefits decisions of the Social Security Administration. There was no action on the bill. There was no comparable Senate measure.	*Opposes.*
tState Justice Institute (SJI)	P.L. 102-140 (H.R. 2608), fiscal year 1992 appropriations legislation enacted 10/28/91, includes $13.550 million for the SJI.	*Supports a well-funded SJI.*
***Temporary Emergency Court of Appeals (TECA)**	S. 1569 would abolish TECA and transfer the court's existing caseload to the Court of Appeals for the Federal Circuit. A Senate Judiciary subcommittee held hearings on S. 1569. There was no comparable House measure.	*Supports abolition of TECA.*
Voir Dire	S. 862 and S. 865 would create four-year demonstration programs in four federal districts under which attorneys would be given a limited right to conduct questioning of prospective jurors in criminal and civil cases, respectively. The Senate passed the bills. There was no comparable House measure.	*Supports.*

CRIMINAL JUSTICE

***Anti-Crime Package**	The conference report on H.R. 3371, omnibus anti-crime legislation, includes numerous provisions to combat crime, including expansion of the federal death penalty to more than 50 crimes and increased financial assistance to federal, state and local law enforcement efforts. The House passed the conference report, but the legislation stalled in the Senate. **See related entries.**	*Supports and opposes various provisions.*
tAttorney Fee Forfeiture	No legislation was introduced to exempt attorneys' fees from the forfeiture language in the Comprehensive Crime Control Act of 1984. That law and the Anti-Drug Abuse Act of 1986 have been interpreted to authorize government seizure of convicted criminals' assets, including monies allegedly obtained through illegal activity and then paid to defense attorneys for bona fide legal services.	*Opposes forfeiture of fees earned by an attorney in the legitimate representation of a client.*
tAttorney Subpoenas	No legislation was introduced to provide procedural safeguards with respect to the issuance of subpoenas to lawyers in trial and grand jury proceedings.	*Supports requiring prior judicial approval before a subpoena may be issued to an attorney to obtain information about a client.*

Subject	Description and Status	ABA Position
Capital Punishment - Native Americans	The conference report on H.R. 3371, omnibus anti-crime legislation, would authorize Native American tribal governments to elect whether the federal death penalty would apply to their reservations. The House passed the conference report, but the legislation stalled in the Senate.	*Supports.*
t*Exclusionary Rule	The conference report on H.R. 3371, omnibus anti-crime legislation, would codify the Supreme Court decision in *U.S. v. Leon,* 468 U.S. 897 (1984), to allow the use of evidence obtained in violation of the Fourth Amendment if the police acted in objective good-faith reliance on a warrant that later proved to be defective. The House passed the conference report, but the legislation stalled in the Senate, which had voted previously to extend the good-faith exception to warrantless cases.	*Supports the conference report provisions.*
FBI Subpoena Authority	No legislation was introduced that would have granted the Federal Bureau of Investigation unrestricted authority to issue administrative subpoenas.	*Opposes such legislation and urges that hearings be held before legislation is considered.*
Federalizing Crimes	H. R. 3371, omnibus anti-crime legislation as passed by the Senate, would have expanded federal jurisdiction over traditionally state crimes by allowing federal prosecutors the option of seeking the death penalty in cases of homicides committed with firearms obtained in interstate commerce, even in states that ban capital punishment. Conferees did not include the provisions in the conference report on H.R. 3371, which passed the House but stalled in the Senate.	*Opposes.*
t*Gun Control - Assault Weapons	The conference report on H.R. 3371, omnibus anti-crime legislation, contains no assault weapons provisions. The House passed the conference report, but the legislation stalled in the Senate. Senate-passed anti-crime legislation would have banned the sale, possession and transfer of nine types of foreign and domestic semi-automatic assault weapons. H.R. 3371, as approved by the House Judiciary Committee, would have banned 13 types of assault weapons and would have limited gun clips to seven rounds of ammunition. The House deleted assault weapons provisions from H.R. 3371 during floor debate. Conferees did not include the Senate provisions in their report.	*Supports a ban on civilian possession, manufacture and import of assault weapons.*
t*Gun Control-Waiting Period	The conference report on H.R. 3371, omnibus anti-crime legislation, includes a five-day waiting period for the purchase of a handgun, during which local authorities must do background checks on potential handgun buyers. The House passed the conference report, but the legislation stalled in the Senate. Senate-passed anti-crime legislation included the five-day waiting period. H.R. 3371 and H.R. 7, as passed by the House, included a seven-day waiting period to permit, but not require, local authorities to conduct background checks on potential handgun buyers. Conferees adopted the Senate language.	*Supports enactment of a reasonable waiting period and performance of criminal background checks prior to the purchase of firearms.*

Subject	Description and Status	ABA Position
t*Habeas Corpus	The conference report on H.R. 3371, omnibus anti-crime legislation, would streamline habeas corpus procedures in death penalty cases by requiring competent counsel at all stages of capital punishment litigation, imposing a one-year statute of limitations for filing habeas petitions, and strictly limiting successive petitions. The House passed the conference report, but the legislation stalled in the Senate, which previously passed anti-crime legislation including provisions to bar federal courts from addressing constitutional claims in death penalty cases that have been "fully and fairly" adjudicated in state proceedings.	*Supports in principle the conference report provisions; opposes Senate version.*
Mandatory Minimum Sentences	The conference report on H.R. 3371, omnibus anti-crime legislation, includes numerous provisions that would establish mandatory minimum sentences for various offenses. Conferees did not include Senate-passed provisions that would have imposed a mandatory sentence of 10 to 30 years for possession of a firearm while committing a violent crime or trafficking in drugs. The House passed the conference report, but the legislation stalled in the Senate.	*Opposes mandatory minimum sentences.*
***National Commission on Federal Criminal Law Reform**	S. 1569 would create a National Commission on Federal Criminal Law Reform to undertake a comprehensive study of the federal criminal laws in title 18 and draft a proposed recodification. A Senate Judiciary subcommittee held hearings on S. 1569. There was no comparable House measure.	*Supports in principle.*
Peremptory Challenge-Jurors	The conference report on H.R. 3371, omnibus anti-crime legislation, does not include peremptory challenge provisions. The House passed the conference report, but the legislation stalled in the Senate. H.R. 3371 as passed by the House contained a provision amending Rule 24(b) of the Federal Rules of Criminal Procedure to equalize the number of peremptory challenges in felony cases at six per side. Conferees did not include the provisions in their report.	*Supports in principle.*
Prison Impact Statements	The conference report on H.R. 3371, omnibus anti-crime legislation, would require the attachment of a prison impact statement to any proposed legislation submitted to Congress by the judicial or executive branch that would increase or decrease the number of federal prisoners. The House passed the conference report, but the legislation stalled in the Senate.	*Supports.*
t*Racial Justice Act	The conference report on H.R. 3371, omnibus anti-crime legislation, does not include specific provisions addressing racial discrimination in capital sentencing. The House passed the conference report, but the legislation stalled in the Senate. Anti-crime legislation approved by the Senate and House Judiciary committees would have allowed death row prisoners to contest their sentences using statistical evidence to prove the existence of racial bias in application of the death penalty. The provisions were dropped in both houses during floor debate.	*Supports effective remedies to eliminate racial discrimination in capital sentencing.*

Subject	Description and Status	ABA Position
***Sentencing Guidelines**	The U.S. Sentencing Commission held hearings on numerous proposed amendments to the federal sentencing guidelines.	*Supports and opposes certain amendments. Cautions against proliferation of amendments without adequate review time from practitioners in the field.*

ELDER LAW

***Grandparents' Visitation Rights**	A House Select Aging subcommittee held a hearing on the federal role in assuring the visitation rights of grandparents. H. Con. Res. 255 would express the sense of the Congress that the states are encouraged to adopt uniform visitation rights laws. There was no action on the measure.	*Supports further development of state law in this area following recommended guidelines.*
Guardianship	S. 352 and H.R. 800 would establish federal minimum standards to protect due process and equal protection rights for individuals undergoing guardianship proceedings in the states. H.R. 930 would require states to adopt certain guardianship laws in order to receive Medicaid funds. There was no action on the measures.	*Supports continuing improvement of guardianship and conservatorship laws and procedures at the state level.*
Older Americans Act (OAA)	S. 243 and H.R. 2967 would reauthorize the OAA for four years to provide supportive services for the elderly and to establish a long-term care ombudsman program to monitor nursing home care. Both bills would provide that funding for legal assistance continue to be administered by area agencies on aging as a priority service, and would establish the state agency on aging as the focal point for elder rights and development of legal assistance programs. The Senate passed S. 243. The House passed H.R. 2967.	*Supports reauthoreation with priority on the delivery of legal services to the needy elderly.*
***Social Security - Disability Review**	H.R. 1799 would improve the Social Security disability review process. H.R. 2838 would provide funds for a General Process Accounting Office study on how to streamline the process. A House Ways and Means subcommittee held hearings on these and other proposals for improving the Social Security Administration. There was no comparable Senate measure.	*Supports improving the Social Security disability review process.*
***Social Security-Independent Agency**	S. 2038, H.R. 2838 and H.R. 3996 would establish the Social Security Administration as an independent agency. A House Ways and Means subcommittee held hearings on H.R. 2838 and other proposals for improving the Social Security Administration. There was no action on S. 2038.	*Supports.*
***Social Security - Retirement Earnings Test**	S. 243, legislation to reauthorize the Older Americans Act (OAA), S. 2038 and H.R. 2838 would partially eliminate or repeal the Social Security earnings test, which places a limit on the amount of money a retiree may earn while also receiving Social Security benefits. The Senate passed S. 243. House-passed legislation to reauthorize the OAA, H.R. 2967, does not contain repeal provisions. A House Ways and Means subcommittee held hearings on H.R. 2838 and other proposals for improving the Social Security Administration. There was no action on S. 2038.	*Supports repeal.*

Subject	Description and Status	ABA Position
ELECTION LAW		
t*Campaign Finance Reform	S. 3 would provide comprehensive campaign finance reform for Senate elections; H.R. 3750, for House elections. The Senate passed S. 3. The House passed H.R. 3750.	*Supports partial public financing of congressional elections and reasonable contribution limits. Opposes mandatory candidate spending limits.*
Direct Election	H.J. Res. 145 proposes amending the U.S. Constitution to abolish the Electoral College and to provide for direct, popular election of the president and vice-president. There was no action on the measure. There was no comparable Senate measure.	*Supports.*
Federal Election Commission (FEC)	H.R. 1362 would authorize appropriations for the FEC for fiscal year 1992. The House Administration Committee approved H.R. 1362. There was no comparable Senate measure.	*Supports.*
tVoter Registration	S. 250 would establish national voter registration procedures for presidential and congressional elections, including registration at federal offices and through motor vehicle departments. The Senate Rules and Administration Committee approved S. 250, but the Senate failed twice to cut off debate and vote on the bill. There was no comparable House measure.	*Supports in principle the elimination of barriers to registration and voting, and supports postcard registration.*
FAMILY LAW		
***Child Abuse Prevention and Treatment**	S. 838 would extend for three years the programs under the Child Abuse Prevention and Treatment Act and the Family Violence Prevention and Services Act. H.R. 2720 would reauthorize the programs for one year. The Senate passed S. 838. The House passed H.R. 2720.	*Supports reauthorization.*
~*Family and Medical Leave	S. S and H.R. 2 would provide workers with up to 12 weeks of unpaid, job-protected leave annually for the birth or adoption of a child, or for a serious illness of the employee or immediate family member. The Senate passed S. 5. The House passed H.R. 2.	*Supports.*
***Family Preservation/Foster Care**	H.R. 3603 would improve the quality of foster care, child welfare and adoption services, and improve court proceedings in foster care cases. A House Ways and Means subcommittee approved the bill. There was no comparable Senate measure.	*Supports the enactment of a number of steps to improve the court process in foster care cases.*

Subject	Description and Status	ABA Position

INTERNATIONAL LAW

***AIDS Research - World Health Organization (WHO)**	P.L 102-145 (H. J. Res. 360), a continuing budget resolution enacted 10/24/91, continues to fund the WHO Global Program on AIDS at its fiscal year 1991 level of $23 million through March 1992. H.R. 2621, proposed fiscal year 1992 foreign operations appropriations legislation, would appropriate $30 million for the program. The House passed H.R. 2621.	*Supports strong U.S. assistance for the* WHO *Global Program on AIDS and for effective coordination of international AIDS programs.*
***Airline Liability**	Montreal Protocol 3 to the 1929 Warsaw Convention would streamline the recovery system for airline liability and assure full compensation to U.S. nationals in cases of death or injury to passengers in international aviation. Montreal Protocol 4 would update the cargo provisions of the Warsaw Convention. The Senate Foreign Relations Committee approved both protocols, which now await Senate floor action.	*Supports.*
Conventional Armed Forces in Europe Treaty	The Treaty on Conventional Armed Forces in Europe would drastically reduce the level of conventional forces in Europe by imposing ceilings on military equipment deployed by North American Treaty Organization (NATO) states and former members of the Warsaw Pact in an area between the Atlantic Ocean and the Soviet Ural Mountains. The Senate approved the treaty, and the president signed it 12/12/91. P.L. 102-228 (H.R. 3807), enacted 12/12/91]/91, implements the treaty.	*Supports.*
***"Fast-Track" Trade Negotiating Authority**	S. Res. 78 and H. Res. 101 would have ended the president's "fast-track" authority in negotiating international trade agreements. "Fast-track" authority provides that Congress will vote on implementing legislation using an expedited procedure prohibiting amendments. The Senate and House rejected the resolutions, resulting in continued use of the "fast-track" procedures through May 31, 1993.	*Supports extension of "fast-track" authority.*
tForeign Agents Registration Act (FARA)	S. 346 and H.R. 3597 would narrow the registration exemptions for lawyers under FARA by eliminating all exemptions except for representation of foreign clients before a court of law and before the U.S. Patent and Trademark Office. A Senate Governmental Affairs subcommittee held oversight hearings on all lobbying disclosure laws, including FARA. A House Judiciary subcommittee approved H.R. 3597.	*Opposes.*
~International Covenant on Civil and Political Rights	The International Covenant on Civil and Political Rights requires ratifying countries to guarantee certain civil and political rights and protect those rights for all individuals in their territories. The Senate Foreign Relations Committee held a hearing on U.S. ratification of the covenant.	*Supports in principle.*
Law of the Sea Convention	The Law of the Sea Convention defines international non-seabed and deep-seabed rights and sets forth obligations to protect and preserve the marine environment. There has been no action on U.S. ratification of the convention following a 1990 Senate Foreign Relations Committee hearing.	*Supports the appointment by Congress and the president of a high-level working group to resolve deep seabed issues.*

Subject	Description and Status	ABA Position
Maritime Liability	There was no action on U.S. ratification of the 1968 Protocol (Visby Amendments) to the 1924 International Convention for the Unification of Certain Rules Relating to Bills of Lading.	*Supports.*
Overseas Private Investment Corporation (OPIC)	P.L. 102-145 (H.J. Res. 360), a continuing budget resolution extending funding through March 1992, includes $25 million for direct loans and $250 million for guaranteed loans under OPIC. H.R. 2621, proposed fiscal year 1992 appropriations legislation, includes $25 million for direct loans and $375 million for guaranteed loans under OPIC. The House passed H.R. 2621.	*Supports.*
Ozone Treaty	The Montreal Protocol on Substances That Deplete the Ozone Layer limits use of substances, such as chlorofluorocarbons, that deplete the atmospheric layer protecting the earth from damaging ultraviolet light. The Senate approved amendments to the treaty, and the president signed them 12/13/91.	*Supports.*
Torture Victim Protection	S. 313 and H.R. 2092 would provide for a civil cause of action in U.S. courts by resident aliens and U.S. citizens against those who, acting under the actual or apparent authority of the government of any foreign nation, subject an individual to torture or extrajudicial killing. The Senate Judiciary Committee approved S. 313. The House passed H.R. 2092.	*Supports.*
U.N. Appropriations	P.L. 102-140 (H.R. 2608), fiscal year 1992 appropriations legislation enacted 10/28/91, includes $842.384 million to pay contributions to international organizations, with not more than $92.719 million of the total to be expended to pay arrearages.	*Supports payments of U.S. assesssments to the United Nations as well as payments of all amounts owed but not yet paid.*
***U.N. Convention Against Discrimination Against Women**	The U. N. Convention on the Elimination of All Forms of Discrimination Against Women requires signatories to show progress in meeting the goals of full freedom and equality for women. There has been no action on U.S. ratification of the convention since a 1990 Senate Foreign Relations Committee hearing.	*Supports in principle.*
U.N. Convention on the Rights of the Child	There was no action on U.S. ratification of the U.N. Convention on the Rights of the Child, which provides a new international standard and body of international law on what the world's nations must do to improve the care and treatment of children.	*Supports in principle.*

LEGAL EDUCATION

***Higher Education Act Reauthorization**	S. 1150 and H.R. 3553 would reauthorize federal higher education programs for five years, including the Clinical Legal Experience Program; the Assistance for Training in the Legal Profession Program, which is administered by the Council on Legal Education Opportunity (CLEO); Stafford Student Loans; and the Patricia Roberts Harris Fellowships. The Senate Labor and Human Resources Committee approved S. 1150. The House Education and Labor Committee approved H.R. 3553.	*Supports.*

Subject	Description and Status	ABA Position
~*Legal Education Appropriations	P.L. 102-170 (H.R. 3839), fiscal year 1992 appropriations legislation enacted 11/26/91, includes $3.045 million for the Assistance for Training in the Legal Profession Program, which is administered by the Council on Legal Education Opportunity (CLEO); $8 million for the Clinical Legal Experience Program; and $4.22 billion for Stafford Student Loans.	*Supports.*

LEGAL SERVICES

***Advocacy for the Mentally Ill**	P.L 102-173 (S. 1475), enacted 11/27/91, provides a four-year $195 million reauthorization for the Protection and Advocacy for Mentally Ill Individuals Act of 1986, which assists states in establishing and operating protection and advocacy programs for the mentally ill.	*Supports.*
***Death Penalty Resource Centers**	P.L 102-140 (H.R. 2608), fiscal year 1992 appropriations legislation enacted 10/28/91, includes $11.524 million for death penalty resource centers, which provide expert assistance to counsel handling capital post-conviction cases.	*Supports.*
t*Legal Services Corporation (LSC) Appropriations	P.L 102-140 (H.R. 2608), fiscal year 1992 appropriations legislation enacted 10/28/91, includes $350 million for the LSC and continues existing restrictions.	*Supports adequate funding.*
t*Legal Services Corporation (LSC) Reauthorization	H.R. 2039 would reauthorize the LSC for five years with certain restrictions. The House Judiciary Committee approved H.R. 2039. There was no comparable Senate measure.	*Supports reauthoreation with minimal restrictions on local grantees.*

MILITARY LAW

Court of Military Appeals	No legislation was introduced to provide a judicial retirement and disability system for judges of the U.S. Court of Military Appeals similar to the retirement systems of all other Article I courts.	*Supports a retirement system for military court similar to those of other Article I courts.*
Feres Doctrine	H.R. 3407 would partially overturn the U.S. Supreme Court ruling in *Feres v. United States,* 340 U.S. 135 (1950), and allow members of the U.S. Armed Forces to sue the United States for damages for certain injuries caused by improper military medical care. A House Judiciary subcommittee held a hearing on H.R. 3407. There was no comparable Senate measure.	*Supports.*

PATENT, TRADEMARK AND COPYRIGHT LAW

Industrial Design	H.R. 1790 would provide for intellectual property protection of industrial designs for useful articles. There was no action on the measure. There was no comparable Senate measure.	*Supports.*

Subject	Description and Status	ABA Position
***Patent and Trademark Office (PTO) Reauthorization**	P.L. 102-204 (H.R. 3531), enacted 12/10/91, reauthorizes the PTO for one year and generally adheres to the Budget Reconciliation Act of 1990, which converted the PTO from an agency partially funded by user fees to one almost entirely funded by user fees.	*Opposes certain user fees contained in the legislation.*
Patent Infringement Venue	No legislation was introduced to repeal 28 U.S.C. 1400(b), which provides for a special venue provision for patent infringement cases, and 28 U.S.C. 1694, which governs service of process in certain patent infringement actions.	*Supports repeal of both sections.*
State Liability Exemption	S. 758 and S. 759 would clarify that states, instrumentalities of states, and officers and employees of states are subject to damages in patent and trademark infringement cases, respectively. A Senate Judiciary subcommittee approved S. 758 and S. 759. There was no comparable House measure. P.L. 101553, enacted 11/15/90, clarified that states are not exempt from liability in copyright cases.	*Opposes liability exemption for states in patent, trademark and copyright cases.*

REAL PROPERTY, PROBATE AND TRUST LAW

Bankruptcy—*Durrett* Case	No legislation was introduced to overturn the 5th U.S. Court of Appeals decision in *Durrett v. Washington National Insurance Co.*, 621 F. 2d 201 (5th Cir., 1980), which held that a non-collusive, regularly conducted foreclosure sale could be set aside as a fraudulent transfer if the sale price were less than the court determined was a reasonably equivalent value for the property.	*Supports overturning* Durrrett.
***Superfund Lender Liability**	S. 651 and H.R. 1450 would clarify lender liability provisions in the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (Superfund) by restoring the secured creditor exemption. H.R. 1450 also would clarify the liability of fiduciaries. The Senate passed the provisions of S. 651 as part of S. 543, omnibus banking legislation. Conferees did not include the provisions in the conference report on S. 543, which was passed by the House and Senate and cleared for the president. A Senate Environment and Public Works subcommittee held hearings on S. 651. A House Banking, Housing and Urban Affairs subcommittee held hearings on H.R. 1450.	*Supports clarification of Superfund liability for secured creditors and fiduciaries.*

TAX LAW

***Amortization of Intangibles**	S. 1245, H.R. 563, H.R. 1456 and H.R. 3035 would amend the Internal Revenue Code of 1986 to simplify the amortization of intangibles. The House Ways and Means Committee held hearings on the House bills. There was no action on S. 1245.	*Supports in principle.*
***Internal Revenue Service(IRS) Appropriations**	P.L. 102-141 (H.R. 2622), fiscal year 1992 appropriations legislation enacted 10/28/91, includes $6.7 billion for the IRS.	*Supports adequate IRS funding.*

Subject	Description and Status	ABA Position
***Pension Plans**	S. 1364, H.R. 2641 and H.R. 2742 would amend the Internal Revenue Code of 1986 to simplify provisions applicable to qualified retirement plans and to expand access to such plans. A Senate Finance subcommittee held a hearing on S. 1364. A House Ways and Means subcommittee held a hearing on the House bills.	*Supports in principle.*
t*Prepaid Legal Services	P.L. 102-227 (H.R. 3909), enacted 12/11/91, would extend thru 6/30192 Section 120 of the Internal Revenue Code, which excludes from taxation the payments made by an employer to a group legal services plan (up to $70 per employee) and the value of services received by employees under such a plan. S. 451, H.R. 151 and H.R. 187 would make Section 120 permanent. There was no action on the measures.	*Supports permanent authorization.*
***Tax Simplification**	S. 1394 and H.R. 2777 would simplify certain provisions of the Internal Revenue Code of 1986. A Senate Finance subcommittee held hearings on S. 1394. The House Ways and Means Committee and one of its subcommittees held hearings on H.R. 2777.	*Supports simplifiction of the tax laws.*

TORT AND INSURANCE LAW

Health Care	S. 1227, S. 1232, S. 1936, et al., and H.R. 1300, H.R. 2535, et al., propose various methods to increase access to or guarantee adequate, affordable health care for all Americans. Senate and House committees held hearings on the health care issue and the various proposals.	*Supports legislation that guarantees every American access to quality health care regardless of personal income.*
tMcCarran-Ferguson Act	S. 430 and H.R. 9 would amend the McCarran-Ferguson Act to modify or repeal the insurance industry's limited exemption from federal antitrust laws. The House Judiciary Committee approved H.R. 9. There was no action on S. 430.	*Supports repeal of the antitrust exemption and enactment of legislation authorizing certain cooperative activity.*
t*Medical Professional Liability	S. 489, S. 1123, et al., and H.R. 1004, H.R. 3037, et al., would preempt state laws or provide federal incentives for changes in the medical professional liability system at the state level. A Senate Finance subcommittee held a hearing on medical professional liability issues. There was no action in the House.	*Opposes federal legislation, maintaining that tort reform should be addressed at the state level.*
t*Product Liability	S. 640, H.R. 2700 and H.R. 3030 would preempt state product liability laws and establish a broad federal product liability law. The Senate Commerce, Science and Transportation Committee approved S. 640. There was no action on the House measures.	*Opposes broad federal preemptive product liability laws, but favors federal solutions in two discrete areas.*

LEGISLATIVE INFORMATION - Staff members of the ABA Governmental Affairs Office in the association's Washington office may be contacted at (202) 331-2200 for information about ABA policy and congressional activity on issues of interest to the legal profession. Copies of ABA testimony are available upon request from the *Washington Letter* staff. The following Capitol Hill telephone numbers also may be called for up-to-date information on legislation: **Capitol Switchboard** (to reach congressional offices) (202) 225-1772; **Bill Status** (202) 224-3121. Copies of House and Senate bills and reports may be obtained from the Governmental Affairs Office staff or by written request (accompanied by a self-addressed mailing label) to: **Senate Document Room,** Hart Senate Office Building, Room B-04, Washington, D.C. 20510, (202) 224-7860 or **House Document Room**, House Annex No. 2, Room B-18, Washington, D.C. 20515, (202) 225-3456. The monthly *Washington Letter* reports news of national public policy interest to the legal profession, including congressional, executive branch and ABA activities concerning the association's legislative policies. The newsletter is published by the Governmental Affairs Office as a service to ABA members in national, state and local bar associations. Subscriptions are available on an annual basis. Please address correspondence to: American Bar Association, 1800 M St., N.W., Washington, D.C. 20036-5886. (202) 331-2609. Rhonda J. McMillion, editor; Michael J. Zamlli, production editor/reporter; Julia C. Ross, reporter. American Bar Association, Governmental Affairs Office, 1800 M St., N.W. Washington, D.C. 20036-5886 (202) 331-2200

• M·E·M·O·R·I·A·L·S •

(This memorial originally appeared in the summer 1991 issue of the *Birmingham Bar Bulletin.*)

Judge Thomas Edward Huey, Jr.

The citizens of Jefferson County and particularly the legal community mourned the March 11, 1991 death of their beloved public servant, Judge Thomas Huey. Every member of the bar looked up to Judge Huey; his fellow judges elected him the presiding judge of the Tenth Judicial Circuit and president of the Alabama Association of Circuit Judges. Judge Huey's service included work at all levels of government—municipal, county, state, federal—and was characterized in every instance by a high degree of ability, integrity, patience and fairness. People enjoyed working with this fine, stable gentleman.

Judge Huey's qualities as a judge will be remembered by the attorneys who had the pleasure of appearing before him. He listened intently to the lawyers, was extremely understanding and learned, and although he was a quick thinker, he heard the lawyers out. Judge Huey carried out his duties with decisiveness and intelligence, and he was able to walk through life with a smile, a pleasant disposition and a good sense of humor. Judge Huey often showed sympathy for the side the law required him to rule against, and he did not belong to any ideological faction in the bar. The most respected lawyers in the bar agree Jefferson County was lucky to have Judge Huey as a circuit judge and as a presiding judge. Lawyers who operated improperly could expect rough handling from Judge Huey, and all the lawyers learned that Judge Huey would tolerate no violations of the rules. Simply put, he was an extremely good judge.

Judge Huey was born in Birmingham, Alabama on July 16, 1910 and graduated from Woodlawn High School. He attended Howard College, now Samford University, from 1927 to 1929 and received his undergraduate degree from the University of Alabama in 1931. In 1933, he graduated from the law school of the University of Alabama and was admitted to practice on June 12, 1933. From 1933 to 1936, he practiced with the firm of Harsh, Harsh & Hare, following which he became assistant state counsel of the Home Owners' Loan Corporation until 1940. From 1940 until 1951, he was the assistant city attorney of Birmingham, except for 33 months as a lieutenant commander in the United States Navy during World War II. Governor Gordon Persons appointed Judge Huey circuit judge on February 8, 1951 after the Jefferson County Judicial Commission had nominated him. From May 1966 until January 1983, he was presiding judge.

Judge Huey served as a member of the Jefferson County Judicial Commission; Judiciary Subcommittee of the Alabama Ethics Commission; and the State-Federal Judicial Counsel of Alabama. He was also a member of Omicron Delta Kappa, the Farrah Law Society, the American Legion, Elk's Lodge #1738, the Masonic Lodge, the Birmingham Exchange Club, Sigma Nu Social Fraternity, Eagles, Blue Key Service Fraternity, and the American Judicature Society. Judge Huey was a loyal Democrat and an Alabama fan.

Judge Huey consistently was given leadership positions in the organizations he joined, and the reason for this was his strength of character. At the Southside Baptist Church he was an active Sunday School teacher and deacon.

He is survived by his wife, Elizabeth Sessions Huey, and his son, Thomas Edward Huey, III.

Judge Huey devoted his lengthy career to public service. The public was well served. When his portrait is placed in the Jefferson County Courthouse, every member of the bench and bar will have a reminder of the noble side of our profession.

John D. Gleissner,
Birmingham, Alabama

Richard Forrest Dobbins

Whereas, God, our Father, the Director of the destiny of all men everywhere, in His infinite wisdom, saw fit on June 15, 1991 to call from our midst Richard Forrest Dobbins, affectionately known to his friends as "Hoss"; and

Whereas, Forrest had a deep and abiding love for his God, his family, his country and the work and services he performed for the citizens of Calhoun County; and

Whereas, during World War II he saw extensive combat as a sergeant with the Third Infantry Division in Europe where he earned the Bronze Star for gallantry and the Purple Heart. He was later recalled for another year of active duty in Korea as a first lieutenant with the 50th Tank Battalion; and

Whereas, in the early part of August 1952 he became a fulltime employee in the Calhoun County Circuit Clerk's office, under the supervision of his father, Joe Dobbins, who was then circuit clerk, and from whom he learned the traditional virtues of diligence, patience, persistence and hard work which he practiced throughout his career; and

Whereas, after serving as deputy clerk, he succeeded his father as circuit clerk and never lost an election for that office which he held until his death.

Now, therefore, be it resolved by the members of the Calhoun County Bar Association in meeting duly assembled that we mourn the passing from our midst of this faithful public servant, Richard Forrest Dobbins.

Be it further resolved that we herewith extend our sympathy and condolences to his wife, Helen Dobbins, his son, Joe, and his grandchildren, Alyson and David.

Thomas E. Dick, president
Calhoun-Cleburn County
Bar Association

RICHARD BAILEY EMERSON

Whereas, the Honorable Richard Bailey Emerson, at age 78, died in Anniston, Alabama on the 18th day of September 1991; and

Whereas, the Calhoun and Cleburn County Bar Association desires to remember his name and to recognize his substantial and unselfish contributions to the legal profession, as well as to our communities and the State of Alabama; and

Whereas, Richard was a member of the Calhoun County Bar Association, the Alabama State Bar and the American Bar Association and maintained a private practice of law in excess of 50 years; and

Whereas, Richard justly earned the accolade "the finest municipal attorney in Alabama", having ably served the City of Anniston in that capacity for 26 years; and

Whereas, Richard was devoted to his family, his Presbyterian church, his wide circle of friends, his fellow lawyer, and his fellow man, and his very name was synonymous with honesty, character, integrity, and devotion to the law and diligence; and

Whereas, Richard served as president of the Alabama Law School Alumni Association in 1966-67 and was a member of the Alabama State Bar Advisory Committee on Appellate Practice, having received certificates of appreciation from the Alabama Supreme Court in 1974 and 1985 for his outstanding and meritorious services; and

Whereas, Richard served in the United States Army from 1942-45 retiring with the rank of major after having earned numerous honors, including the Bronze Star and the awarding of honorary membership in the Military Division of the Order of the British empire; and

Whereas, Richard was a perfect gentleman and always adhered to the highest legal, intellectual and ethical standards and with his keen wit and fine sense of humor was forever a sheer pleasure to be around.

Richard is survived by his wife, Eleanor Chapman Emerson of Anniston; two daughters, Eleanor Emerson Thomas of Tuscaloosa and Virginia Emerson Hopkins of Anniston; a sister, Mavis Emerson Hooper of Florence, and eight grandchildren.

Thomas E. Dick, president
Calhoun-Cleburn County
Bar Association

CLARENCE WILLIAM ALLGOOD
Birmingham
Admitted: 1942
Died: November 30, 1991

DAVID ROSS BENSON
Sprague
Admitted: 1957
Died: December 5, 1991

THOMAS ERIC EMBRY
Birmingham
Admitted: 1947
Died: January 12, 1992

HARRY HAWTHORNE HADEN
Huntsville
Admitted: 1949
Died: April 3, 1991

JOSEPH ALLEN HORNSBY
Gadsden
Admitted: 1962
Died: September 20, 1991

WATKINS COOK JOHNSTON
Montgomery
Admitted: 1932
Died: December 26, 1991

MORRIS CLINTON MCGEE
Tuscaloosa
Admitted: 1940
Died: January 15, 1992

EDWARD RAYMOND MURPHY
Florence
Admitted: 1925
Died: November 7, 1991

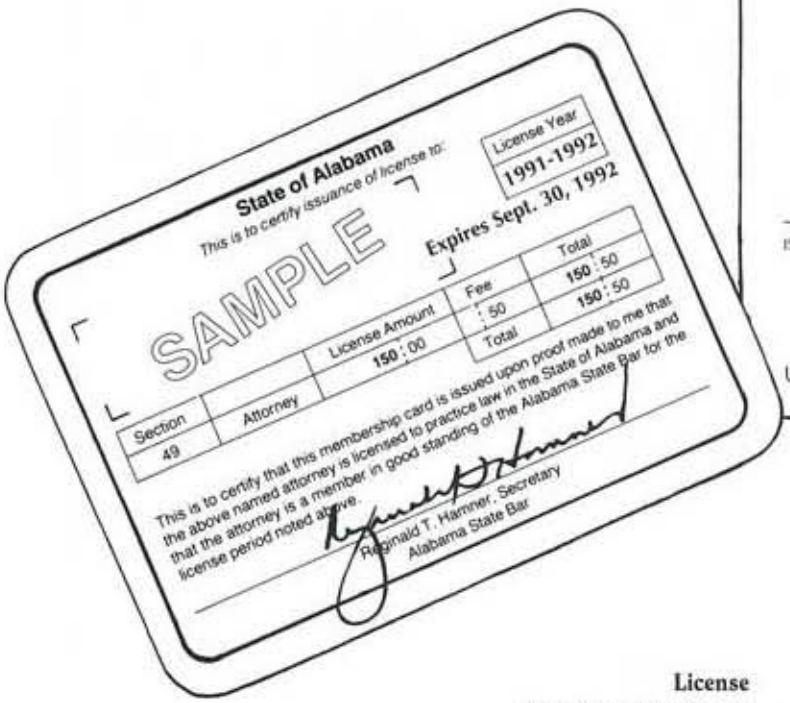
R. RANDOLPH PAGE, JR.
Alabaster
Admitted: 1977
Died: December 11, 1991

SPOTTSWOOD WILLIAM HOLLAND WILLIAMS
Greensboro
Admitted: 1946
Died: December 30, 1991

ALABAMA STATE BAR
1991-92 DUES NOTICE

(All Alabama attorney occupational licenses and special memberships expired September 30, 1991)

Annual License – Special Membership Dues
Due October 1, 1991*Delinquent after October 31, 1991



License
(purchase through the county of primary practice)

If you are admitted to the Alabama State Bar and engaged in the practice of law, you are required to purchase an annual occupational license. Section 40-12-49, *Code of Alabama* (1975), as amended. This license gives you the right to practice law in the state of Alabama through September 30, 1992. The cost of the license is $150, plus the county's nominal issuance fee, and is purchased from the probate judge or license commissioner (where applicable) in the county in which you primarily practice. In addition to the state license, all practicing attorneys should check with their municipal revenue departments to be sure that the licensing requirements of the city or town are also being met. Please send the Alabama State Bar a copy of the license when it is purchased, and you will receive a wallet-sized duplicate of your license (pictured above) for identification purposes during the 1991-92 license year.

Special Member
(paid directly to the Alabama State Bar)

Special membership status is acquired pursuant to Section 34-3-17 or Section 34-3-18, *Code of Alabama* (1975), as amended. Federal and state judges, district attorneys, United States attorneys, and other government attorneys who are prohibited from practicing privately by virtue of their positions are eligible for this membership status. Likewise, persons admitted to the bar of Alabama who are not engaged in the practice of law or are employed in a position not otherwise requiring a license are eligible to be special members. Attorneys admitted to the bar of Alabama who reside outside the state of Alabama who do not practice in the state of Alabama also are eligible for this status. With the exception of state attorneys and district attorneys, and those who hold a license at any time during the bar year, special members are exempt from mandatory continuing legal education requirements; however, this annual exemption must be claimed on the reporting form. Special membership dues are paid directly to the Alabama State Bar. In the event you enter the practice of law during the bar year, which necessitates the purchase of an occupational license, these dues are not refundable after December 31, 1991, and no credit will be given for payment of special membership dues. Membership cards, as shown in the sample above, are issued upon receipt of the dues and are good for the license year. Special membership dues are $75.

Dues include a $15 annual subscription to *The Alabama Lawyer*. (This subscription cannot be deducted from the dues payment.)

If you have any questions regarding your proper membership status or dues payment, contact Alice Jo Hendrix, membership services director, at (205) 269-1515 or 1-800-392-5660 (in-state WATS).

CLASSIFIED NOTICES

RATES: Members: 2 free listings per bar member per calendar year EXCEPT for "position wanted" or "position offered" listings — $35 per insertion of 50 words or less, $.50 per additional word; **Nonmembers:** $35 per insertion of 50 words or less, $.50 per additional word. Classified copy and payment must be received according to the following publishing schedule: **May '92 issue**—deadline March 31, 1992; **July '92 issue**—deadline May 29, 1992. No deadline extensions will be made.

Send classified copy and payment, payable to *The Alabama Lawyer*, to: *Alabama Lawyer* Classifieds, c/o Margaret Murphy, P.O. Box 4156, Montgomery, Alabama 36101.

POSITION WANTED

Position Wanted: The National Academy for Paralegal Studies has qualified paralegals in your local area ready for employment in law offices and corporations. Our paralegal graduates are trained in areas of law such as family, real estate, torts, criminal, probate, and corporate law. There is no fee for this service. **For additional information, call Lisa Piperato at 1-800-922-0771, ext. 3041.**

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For Sale: Save 50 percent on your lawbooks. Call National Law Resource, America's largest lawbook dealer. Huge inventories. Low prices. Excellent quality. Your satisfaction absolutely guaranteed. Also, call America's largest lawbook dealer when you want to sell your unneeded books. **Call for your free, no-obligation quotes, 1-800-279-7799. National Law Resource.**

For Sale: The Lawbook Exchange, Ltd. buys and sells all major lawbooks, state and federal, nationwide. **For all your lawbook needs, phone 1-800-422-6686.** MasterCard, VISA and American Express accepted.

For Sale: Model Rules of Professional Conduct; personal copies available for $5 (includes postage). **Mail check to P.O. Box 671, Montgomery, Alabama 36101. *Pre-payment required.***

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Position Offered: Attorneys wanted, experienced in insurance or subrogation for new business referrals. **Write Insurance Services Group, 413 East Broad Street, Columbus, Ohio 43215. Phone 1-800-274-1537.**

Position Offered: Attorney jobs.

NOTICE

PARTICIPATE: JOIN A SECTION OR RENEW YOUR SECTION MEMBERSHIP!

TO JOIN ONE OR MORE SECTIONS OR RENEW YOUR SECTION MEMBERSHIP, COMPLETE THIS FORM AND ATTACH SEPARATE CHECKS PAYABLE TO EACH SECTION.

Name _____ Firm or Agency _____

Office Address _____

Office Location _____ Office Telephone Number _____

Section	Annual Dues
_____Administrative Law	$20
_____Bankruptcy and Commercial Law	$20
_____Business Torts and Antitrust Law	$15
_____Communications Law	$15
_____Corporation, Banking and Business Law	$10
_____Criminal Law	$10
_____Environmental Law	$20
_____Family Law	$30
_____Health Law	$15
_____Labor Law	$30*

*if practicing 5 or more years - $10 if practicing less than 5 years

Section	Annual Dues
_____Litigation	$15
_____Oil, Gas and Mineral Law	$15
_____Real Property, Probate and Trust Law	$10
_____Taxation	$15
_____Workers' Compensation	$20
Total_____	

Remember to attach a separate check for each section.

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Position Offered: Attorneys and other professionals have the way to build six-figure passive incomes outside of their practices. We now seek three similarly motivated professionals in your market who can devote part of their time to diversify into our expanding business. **Reply to Box 247, 13839 Southwest Freeway, Sugar Land, Texas 77478. Phone (713) 242-6609.**

SERVICES

Service: Securities expert witness. Will review facts to determine suitability, churning, excessive charges, etc. Expert witness experience in both plaintiff and defendant oriented cases. Registered Investment Advisor and member of the Alabama State Bar. Resume available upon request. **Write to M.L. Bronner, P.O. Box 1310, Montgomery, Alabama 36102-1310.**

Service: Traffic engineer, consultant/expert witness. Graduate, registered, professional engineer. Forty years' experience. Highway and city roadway design, traffic control devices, city zoning. Write or call for resume, fees. **Jack W. Chambliss, 421 Bellehurst Drive, Montgomery, Alabama 36109. Phone (205) 272-2353.**

Service: Legal research help. Experienced attorney, member of Alabama State Bar since 1977. Access to state law library. WESTLAW available. Prompt deadline searches. **Sarah Kathryn Farnell, 112 Moore Building, Montgomery, Alabama 36104. Phone (205) 277-7937.** *No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers.*

Service: Certified Forensic Document Examiner. Chief document examiner, Alabama Department of Forensic Sciences, retired. B.S., M.S. Graduate, university-based resident school in document examination. Published nationally and internationally. Eighteen years' trial experience state/federal courts of Alabama. Forgery, alterations and document authenticity examinations. Criminal and non-criminal matters. American Academy of Forensic Sciences, American Board of Forensic Document Examiners, American Society of Questioned Document Examiners. **Lamar Miller, 3325 Lorna Road, #2-316, P.O. Box 360999, Birmingham, Alabama 35236-0999. Phone (205) 988-4158.**

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Service: Professional engineer and attorney with a practice of expert testimony in construction, safety, highway and structural design. Thirty years' experience in highway, railroad, buildings and power plant construction. **Call or write for resume, fees: Lamar T. Hawkins, 601 Vestavia Parkway, Birmingham 35216. Phone (205) 823-3068.** *No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers.*

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Service: University, college and public school safety and security expert witness. Experienced expert witness, consultant and workshop presenter. Published widely on campus security and school safety topics. Experienced police administrator and teacher of law enforcement courses at university. **Contact Dr. David Nichols, P.O. Box 322, Jacksonville, Alabama 36265. Phone (205) 782-5287.**

Service: Legal research assistance. Second-year law students at the University of Alabama School of Law, established business for one year. WESTLAW and LEXIS available. Memorandums available on request. $20/hour; $30/hour if needed within 48 hours. FAX service is available. **Brinyark & Griggers Legal Research, P.O. Box 020355, Tuscaloosa, Alabama 35402. Phone (205) 752-3142, 391-9689.**

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ADDRESS CHANGES

Please check your listing in the current 1990-91 *Alabama Bar Directory* and complete the form below ONLY if there are any changes to your listing.

Due to changes in the statute governing election of bar commissioners, we now are required to use members' office addresses, unless none is available or a member is prohibited from receiving state bar mail at the office. Additionally, the *Alabama Bar Directory* is compiled from our mailing list and it is important to use business addresses for that reason. (These changes WILL NOT appear in the 1991-92 edition of the directory. The cut-off date for the directory information was September 1, 1991.)

NOTE: If we do not know of a change in address, we cannot make the necessary changes on our records, so please notify us when your address changes.

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

Choose one: ☐ Mr. ☐ Mrs. ☐ Hon. ☐ Miss ☐ Ms. ☐ Other_____

Full Name _____

Business Phone Number_____

Race _____

Sex _____

Birthdate _____

Year of Admission _____

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State _____ ZIP Code_____

County _____

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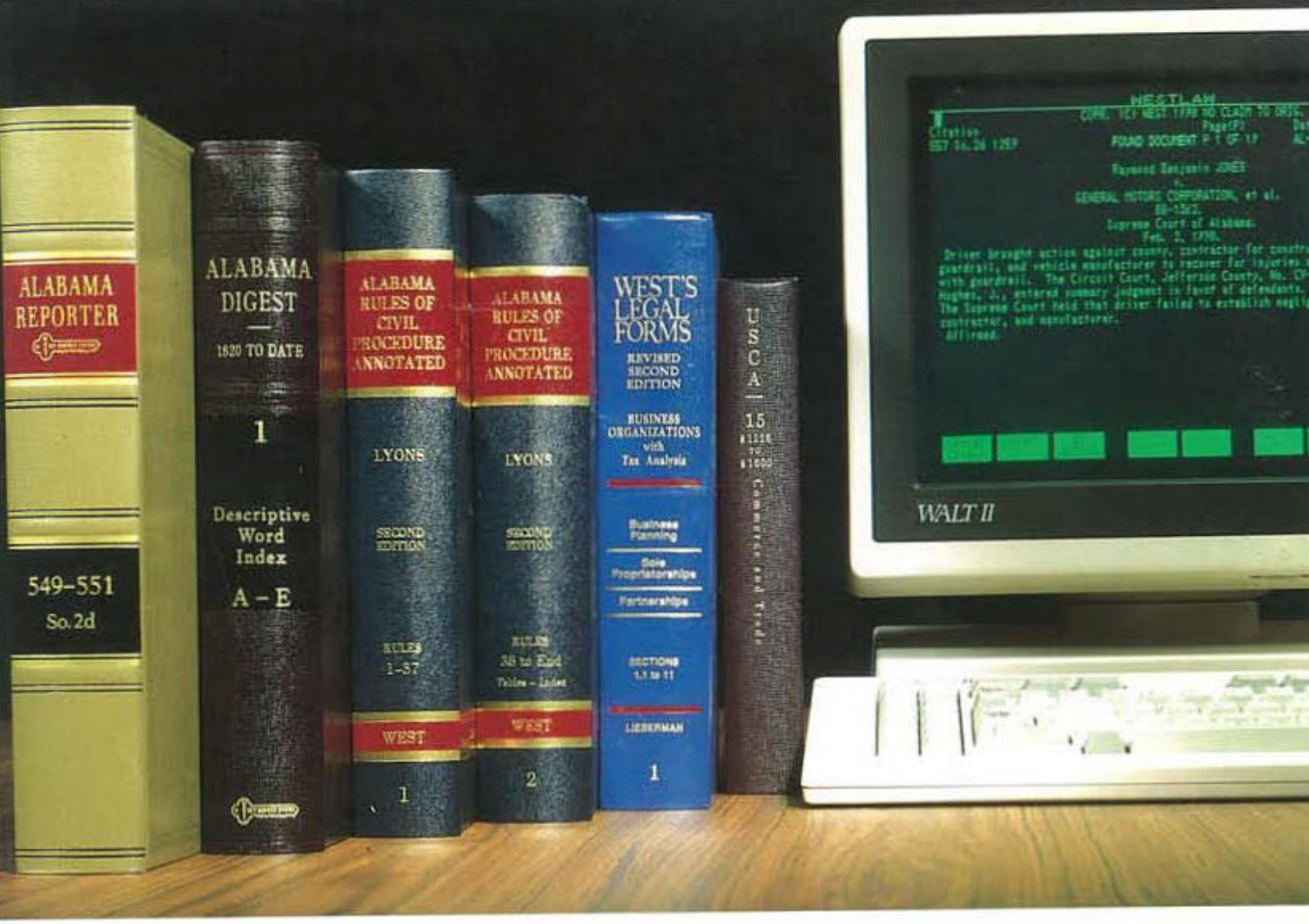
City_____

State _____ ZIP Code_____

County _____



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