
The Alabama Lawyer
Vol. 54, No. 2
MARCH 1993

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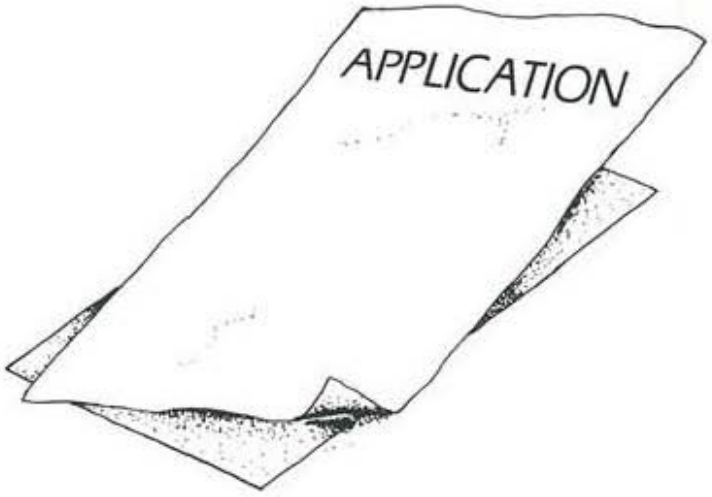

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***CHARTER MEMBER: NATIONAL ASSOCIATION OF BAR-RELATED INSURANCE COMPANIES**

NOTICE OF ELECTION

Notice is given herewith pursuant to the *Alabama State Bar Rules Governing Election of Commissioners.*

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

The terms of any incumbent commissioners are retained.

All subsequent terms will be for three years.

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

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

IN BRIEF

March 1993 Volume 54, Number 2

ON THE COVER:

A field of daisies in Alabama reflect the new warmth of spring. *Photo by James Guier*

INSIDE THIS ISSUE:

ALABAMA STATE BAR HEADQUARTERS STAFF
415 Dexter Avenue, Montgomery, AL 36104 (205) 269-1515 • FAX (205) 261-6310

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ALABAMA STATE BAR CENTER FOR PROFESSIONAL RESPONSIBILITY STAFF
415 Dexter Avenue, Montgomery, AL 36104 (205) 269-1515 • FAX (205) 261-6311

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Assistant General Counsel ..... J. Anthony McLain
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Assistant General Counsel ..... Milton L. Moss
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Secretary ..... Terri McCullers

The Alabama Lawyer

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Robert A. Huffaker ..... Editor
Susan Shirock DePaola ..... Associate Editor
Margaret Murphy ..... Managing Editor

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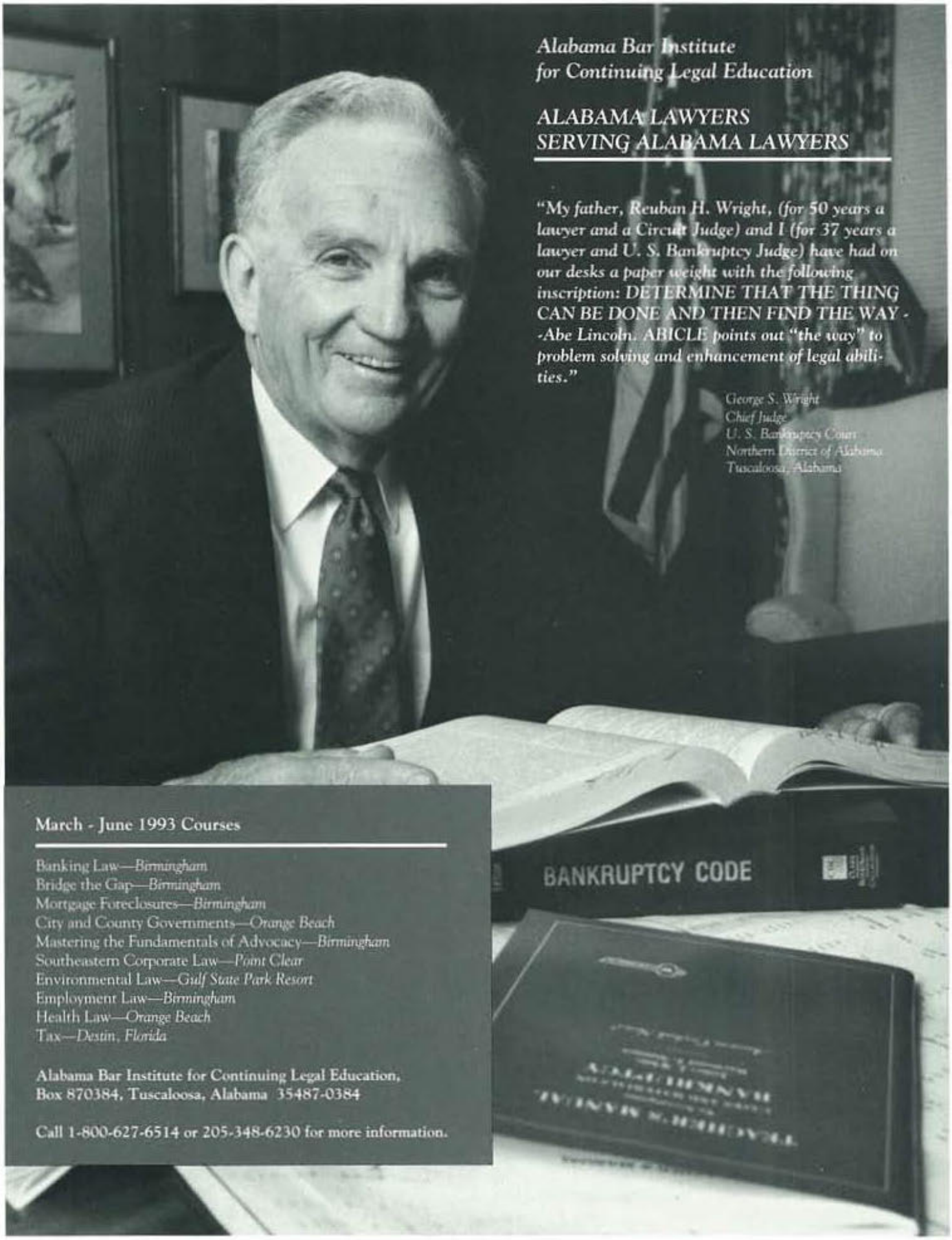

Alabama Bar Institute
for Continuing Legal Education

ALABAMA LAWYERS SERVING ALABAMA LAWYERS

"My father, Reuban H. Wright, (for 50 years a lawyer and a Circuit Judge) and I (for 37 years a lawyer and U. S. Bankruptcy Judge) have had on our desks a paper weight with the following inscription: DETERMINE THAT THE THING CAN BE DONE AND THEN FIND THE WAY - -Abe Lincoln. ABICLE points out "the way" to problem solving and enhancement of legal abilities."

George S. Wright
Chief Judge
U. S. Bankruptcy Court
Northern District of Alabama
Tuscaloosa, Alabama

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Call 1-800-627-6514 or 205-348-6230 for more information.

PRESIDENT'S PAGE

*In a democratic society, there must be one fundamental rule: "You shall not ration justice". — **Learned Hand***

Those who criticize our profession complain that quality legal services are unavailable to the poor and the middle class. As a result of Alabama's soaring poverty population, 20 percent of the citizens of this state are excluded from participation in our justice system.

The Bill of Rights guarantees a citizen charged with a crime the right to counsel, even at public expense if necessary. There is no such right in civil matters, however, where the stakes are often equally high. The inability to afford counsel can have a devastating impact on the poor because their legal problems often involve basic human needs, such as food, shelter, medical care and physical safety. The simplest civil proceeding can be overwhelming to a person with limited education or experience. Without counsel, justice is often denied.

Clarence M. Small, Jr.

I am aware of no other profession where the legal and moral imperatives to serve the poor are so great as in ours. The law of our state provides that no lawyer shall reject for any consideration personal to himself the cause of the defenseless or oppressed. §34-3-20 *Code of Alabama*, 1975. Rule 6.1 of our Rules of Professional Conduct admonishes a lawyer to render public interest legal service. The comments to the rule state that the basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer. It calls attention to the fact that the personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of the lawyer. Regardless of professional prominence or professional workload, we are instructed to set aside time to participate in the provision of legal services to the disadvantaged. Moreover, the American Bar Association House of Delegates has formally acknowledged the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services without fee, or at a substantially reduced fee, in the areas of poverty law, civil rights law, public rights law, charitable organization representation, and the administration of justice.

In Alabama, there are at least three vehicles that a lawyer may use to fulfill his obligation to the disadvantaged:

1. Participation in the Interest on Lawyers' Trust Accounts (IOLTA) program with the Alabama Law Foundation, Inc.;
2. Participation in the Alabama State Bar Volunteer Lawyers Program; and
3. Contribution to the Fund for Equal Justice.

The Alabama Law Foundation, as the recipient for the IOLTA funds in Alabama, continues to be one of the premier programs in the country. Sixty-three percent of Alabama attorneys, who by the nature of their practice maintain trust accounts, have elected to participate in IOLTA. The administrative costs of administering the fund have run about 8 percent, where the national average for charities is 18 to 20 percent. The money gets to those who need it with a minimum of red tape. In 1992, 1.1 million dollars was generated for legal aid to the poor and the administration of justice. I urge you to continue your participation, or, if you have not done so, to begin your participation in this worthy program. You may do so by writing or calling Tracy Daniel at the state bar headquarters.

Two years ago, under the leadership of then-President Harold Albritton, the Alabama State Bar Volunteer Lawyers Program was established. This is an organized pro bono program which helps guarantee the disadvantaged have equal access to the law and provides opportunities for attorneys to participate in the process of making our legal system work for everyone. By getting involved in this pro bono activity, you can see an immediate positive effect on another human being's life. Volunteering your skills and expertise to another person in crisis provides a level of personal satisfaction often different from the day-to-day practice of law. As has been said by lawyers who regularly include such work in their practice, pro bono is "good for the professional soul." In a time of increasing career dissatisfaction among attorneys, it may be a way back to the essence of what being a

(Continued on page 84)

FACTS/FAX POLL

Punitive damage awards continue to draw the attention of the business community, and indications are that efforts to legislate "tort reform" will be renewed. In your opinion, are the punitive awards returned by Alabama juries too high? Are the courts providing an effective review mechanism of large assessments? Is Alabama being unfairly singled out for criticism about its jury awards?

Please take a few moments to respond to the following questionnaire and then fax it to state bar headquarters, c/o Margaret Murphy, at (205) 261-6310, NO LATER THAN March 31, 1993. If you do not have access to a fax machine, you may mail it to P.O. Box 4156, Montgomery, Alabama 36101.

PUNITIVE DAMAGE AWARDS

1. Punitive damage awards in Alabama are too high.
   a. _____ Agree b. _____ Disagree

2. Punitive damage awards returned in this state adversely affect economic growth and public perception of the business climate in Alabama.
   a. _____ Agree b. _____ Disagree

3. Trial court judges in this state are generally responsive to high punitive damage awards and will grant a remittitur.
   a. _____ Agree b. _____ Disagree

4. The appellate courts of this state are generally responsive to high punitive damage awards and will grant a remittitur.
   a. _____ Agree b. _____ Disagree

5. Some type of legislative action is needed to address punitive damage awards in this state.
   a. _____ Agree b. _____ Disagree

6. I would favor legislation which would limit punitive damages to a specific multiple of actual damages.
   a. _____ Agree b. _____ Disagree

7. I think that the whole issue of punitive damages has been blown out of proportion.
   a. _____ Agree b. _____ Disagree

Please Note: Since the January issue of the *Alabama Lawyer* was published close to the end of the month, many members did not receive their copy in time to complete the January poll and fax it in before the deadline. If you were unable to complete the January 1993 Facts/FAX Poll and wish to do so, it must be completed and returned by March 31, 1993. The results of the January and March surveys will be published in the May 1993 issue of *The Alabama Lawyer*. See page 105.

KNOWLEDGE

Here's What Lawyers Who Have Invested In Our Time Saving Knowledge Say:

"...saves us time and money...With opposing counsel using this rapid service we can't afford to wait and wait on slower and less complete publications. With ALABAMA Law Weekly we get the case summaries almost as fast as the cases are released."

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

"...an immediate alert...a great timesaver...a valuable, practical tool with concise, easy-to-read, accurate summaries, logically organized by court and legal topic."

Billy W. Jackson, Jackson & Williams, Cullman, Alabama,
(President, Cullman County Bar Association)

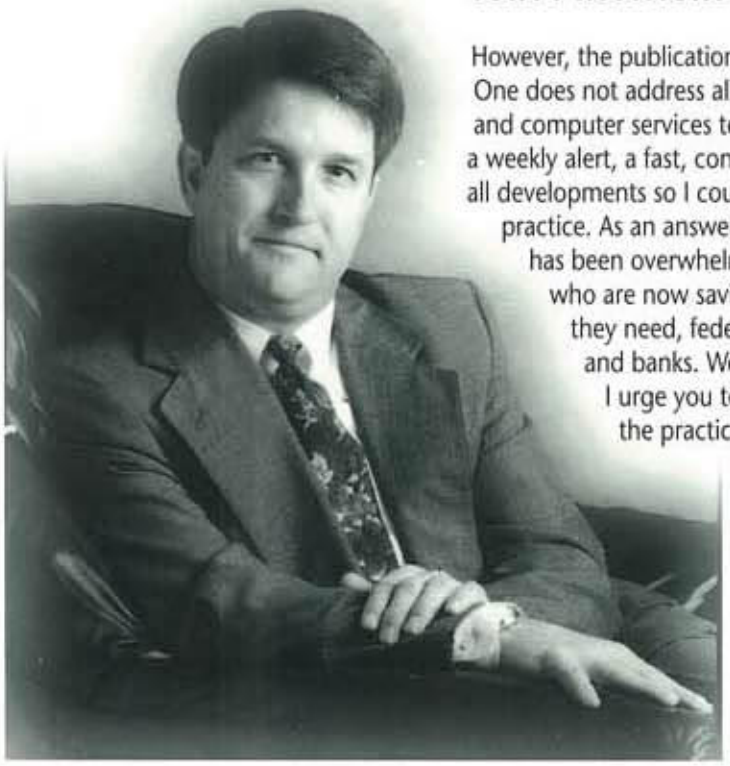
"I read and use ALABAMA Law Weekly. It gives me an edge in knowing what cases were decided and how they may affect my clients' files. It is invaluable to the busy practitioner."

Sam A. Rumore, Jr., Miglionico & Rumore, Birmingham, Alabama.

"Our clients expect us to stay abreast of all developments. Often this requires spending nonbillable time. ALABAMA Law Weekly is the fastest and best service available, giving us all the information we need and it takes a lot less time to use. Our clients win and we win."

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

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



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

J. Duane Cantrell, Editor
J.D., U of AL, 1975; LL.M.Tax, U of FLA., 1980; Private Prac.10yrs, In House Counsel 2yrs; Adjunct Prof. U of AL Sch of Law (graduate Tax Program), 1992

IS POWER.

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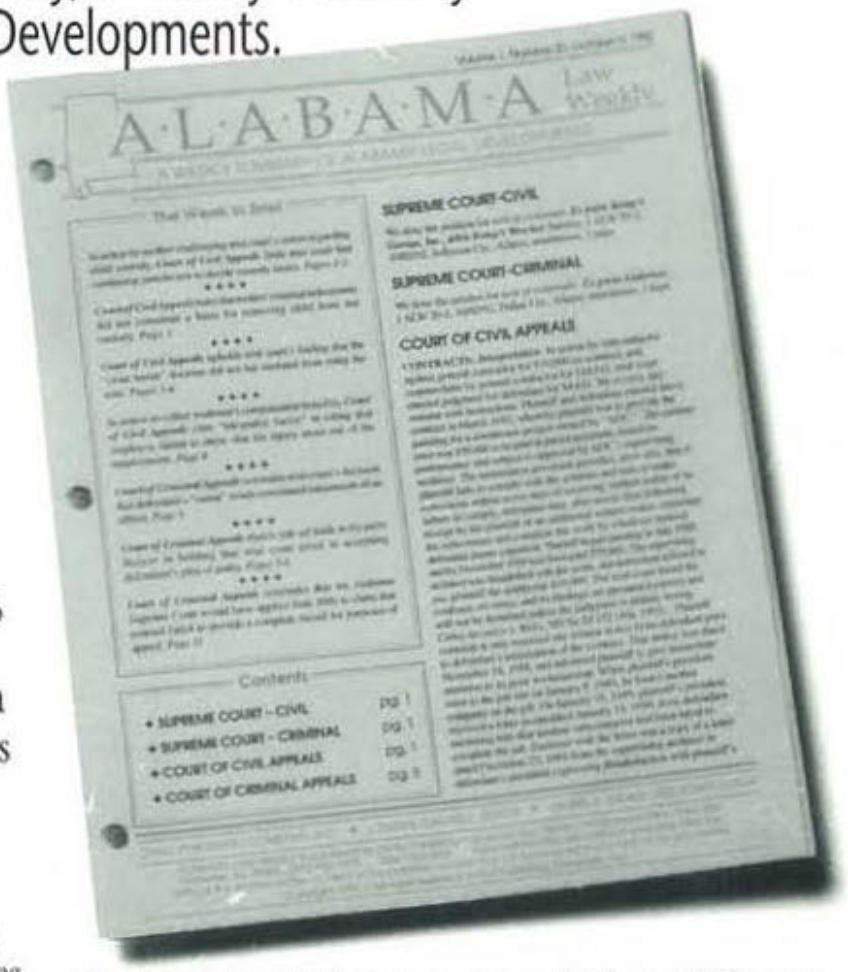
Why are More and More Attorneys Choosing Alabama Law Weekly?



The reasons are simple. Each week, ALABAMA Law Weekly provides subscribers with succinct, easy-to-understand summaries of all Alabama Appellate Court decisions almost as fast as the decisions are released.*

*Usually cases released on Friday are briefed and in the mail by the following Thursday.

COPIES OF CASES MAILED OR FAXED TO ALABAMA LAW WEEKLY SUBSCRIBERS. CALL FOR ALL THE DETAILS.

MORE POWER TO YOU.

A·L·A·B·A·M·A Law Weekly

A WEEKLY SUMMARY OF ALABAMA LEGAL DEVELOPMENTS

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

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EXECUTIVE DIRECTOR'S REPORT

BECOME AN ART PATRON

The bar associations in two of our sister jurisdictions have recently undertaken to acquire an art collection for their headquarters. They are enjoying the success of their undertakings.

Art has always appealed to me and through the years, Anne and I have picked up a few paintings by local artists who were exhibiting their talents. We did not purchase for any reason other than we liked the paintings. We attend several gallery shows each year and have met art dealers who ask me about their acquiring "corporate art" for our new headquarters building for a fee.

Reginald T. Hamner

Quite candidly, the cost for such a service was not in our budget. I had given serious thought to contacting some talented artists with lawyer connections to inquire if they would consider donating a work of art, such as a painting, sculpture or other accessory in honor of or as a memorial to a relative, to be placed in our new building.

We have quite an expanse of wall space which would be ideal for use as gallery space. Also, we have a number of attractive wooden pieces which need a vase, bowl or tabletop sculpture.

After learning of the successes that other associations are enjoying, I decided to take this opportunity to make an appeal to those so inclined to help us build an attractive art collection for our new building.

Inasmuch as "beggars can't be choosers," I would not presume to suggest either subject matter or medium. We have many neutral walls that could accomodate paintings of most any size or combination of colors. If you do not wish to donate a piece of art and, instead, make a contribution for such a work to be purchased, this alternative would be equally appreciated.

Many of our members or their firms have extensive personal and corporate collections. Perhaps you would consider placing an artwork on loan for display.

Each piece will be appropriately cataloged and the donor permanently acknowledged. I know many of our members who enjoy art shows and gallery openings. I hope they and their artist friends can help us create an appealing collection for our headquarters. Help us become the third bar association to acquire its own collection.

The Alabama State Bar Foundation was a recent beneficiary of the generosity of two of our members. Former President E.T. Brown, Jr. of Birmingham and former bar commissioner Roy L. Phillips of Phenix City have made substantial book donations to our expanded library facilities. Like so many of our former bar leaders, these two continue to give to enhance their profession. Thanks, E.T. and Roy. ■

• ALABAMA STATE BAR •

At a Glance

Keep In Touch!

- Want a CLE seminar at an exotic spot or on a particular subject matter? Call Diane at 1-800-354-6154 for a calendar and information.
- To reserve a meeting room for a deposition, call Diane at 1-800-354-6154.
- Questions regarding the purchase of your occupation license or payment of dues? Call Alice Jo at 1-800-354-6154 or (205) 269-1515.
- Want to join the Lawyer Referral Service? Call Katherine at 1-800-392-5660.
- If you attended or will be attending a CLE seminar that has not been approved for CLE credit, call Diane 1-800-354-6154 for application information.
- The state bar's FAX number, main office, is (205) 261-6310.
- To FAX something to the Center for Professional Responsibility, the number is (205) 261-6311.
- The telephone number to reach either office is (205) 269-1515, Monday through Friday, 8 a.m. to 5 p.m.

Member Services

- Bar directories for 1992-93 now cost $25 for ASB members and $40 for non-members. Send check or money order to Alabama Bar Directory, P.O. Box 4156, Montgomery, Alabama 36101.
- To change your name, address or telephone number, send it IN WRITING, to Alice Jo Hendrix, Membership Services, P.O. Box 671, Montgomery, Alabama 36101.
- To get a classified notice, an announcement in "About Members, Among Firms", or a letter to the editor in the March 1993 issue of *The Alabama Lawyer*, the deadline was Friday, January 29, 1993 for the information to be RECEIVED at the state bar. To get something in the May 1993 issue, it has to be RECEIVED at the state bar by March 31, 1993.

At The Ballot Box

- Get your ballots in to state bar headquarters by 5 p.m. on July 14, 1993 for election of president-elect of the state bar and by 5 p.m. on June 8, 1993 for election of bar commissioner for your district.
- Judicial Award of Merit nominations are due at state bar headquarters by May 15, 1993.

Let's Get Together!

- ✔ Young Lawyers' Section Annual Meeting at the Gulf, May 14-15, 1993. For room reservations, contact Sandestin directly at 1-800-277-0800. For registration information, call Barry Ragsdale at (205) 930-5283.
- ✔ The next meeting of the Alabama State Bar Board of Commissioners is March 26, 1993.
- ✔ Mark your calendar—Alabama State Bar Annual Meeting—July 15-17, 1993, Riverview Plaza, Mobile.

President's Page

(Continued from page 78)

lawyer and a professional is all about. I urge you to contact Melinda Waters, director of the Alabama State Bar Volunteer Lawyers Program, at (205) 269-1515 in Montgomery, or write for information materials at P.O. Box 671, Montgomery, Alabama 36101.

In the mid-1970s, the federal legal services programs then in effect were reorganized into the National Legal Services Corporation. Legal services in Alabama now consist of three programs administered from offices in Huntsville, Birmingham and Montgomery, with regional offices allowing for near-statewide saturation. In effect, Legal Services programs in Alabama provide a statewide law firm for the poor.

Legal Services programs closed almost 30,000 cases last year, but it is estimated that twice that many went unhandled because of money and manpower shortages. Federal budget cuts, inflation and the rising poverty rate have created a dilemma for the state's three field directors. They must have funds to retain the lawyers who are presently on their staffs and to hire additional lawyers to meet the ever-growing need.

There are 800,000 people in Alabama who are eligible for legal service assistance. Ten years ago, the ratio of eligible clients to Legal Services lawyers was 5,000 to one. Today in Alabama, as a result of reduced funding and inflation, that ratio has climbed to over 10,000 to one. If you are poor and need legal help, lawyers are hard to find and the problem, as always, is money. Funding has remained flat, while the poverty population has grown. Alabama ranks last among the states in dollars spent for legal assistance per poor person.

Recently, the Legal Services programs embarked on a plan that will enable them to provide assistance to more eligible clients and to do it more effectively through the technology they have or will purchase. The Fund for Equal Justice, the joint development project of all three Legal Services programs, has and will again call on you to contribute. I urge you to do so. ■

NOTICE

RE-APPOINTMENT OF INCUMBENT MAGISTRATE JUDGE

The current term of the office of United States Magistrate Judge Elizabeth Todd Campbell is due to expire June 3, 1993. The U.S. District Court is required by law to establish a panel of citizens to consider the re-appointment of the magistrate judge to a new eight-year term.

The duties of the position of magistrate judge include: (1) conducting most preliminary proceedings in criminal cases, such as initial appearances, bond and detention hearings, and arraignments; (2) the trial and disposition of misdemeanor cases; (3) conducting various pretrial matters and evidentiary proceedings on reference from the judges of the district court, including civil discovery and other non-dispositive motions; (4) conducting preliminary reviews and making recommendations regarding the disposition of prisoner civil rights complaints and habeas corpus petitions; and (5) trial and disposition of civil cases upon consent of the litigants.

Comments from members of the bar and the public are invited as to whether the incumbent magistrate judge should be recommended by the panel for re-appointment by the court. Such comments should be in writing and directed to:

Perry Mathis
Clerk of Court
United States District Court for the Northern District of Alabama
1729 5th Avenue, North
Birmingham, Alabama 35203

Comments must be received no later than April 1, 1993.

BAR BRIEFS

Bradley, Arant, Rose & White announces that the board of governors of the American College of Construction Lawyers elected **Mabry Rogers** as a Fellow of the College.

Rogers is a graduate of Yale University and Harvard University. He was admitted to the Alabama State Bar in 1974.

Rogers

Silberman

Wilbur G. Silberman was elected chair of the Bankruptcy & Insolvency Section of the Commercial Law League of America during the Section's annual meeting.

Silberman, of the Birmingham firm of Gordon, Silberman, Wiggins & Childs, is a past president of the Commercial Law League of America and currently serves on the board of associate editors of the CLLA.

Clark

William N. Clark and **Samuel H. Franklin** recently became Fellows of the American College of Trial Lawyers.

Clark is a partner in the Birmingham firm of Redden, Mills & Clark. He is a graduate of the U.S. Military Academy and the University of Alabama School of Law. He currently is serving as president-elect of the Birmingham Bar Association.

Franklin is a partner in the firm of Lightfoot, Franklin, White & Lucas in Birmingham. He, too, is a graduate of the University of Alabama School of Law.

James G. Troiano, a 1975 admittee to the Alabama State Bar, recently was sworn in as a judge of the Superior Court in New Jersey, the highest level trial court in that state.

Denise Jones Landreth, a member of the Birmingham firm of Najjar, Denaburg, was named 1992 Lawyer of the Year by the Young Lawyers' Section of the Birmingham Bar Association. She graduated from Auburn University and, *magna cum laude*, from Cumberland School of Law at Samford University.

Sirote & Permutt of Birmingham recently committed $100,000 to the University of Alabama School of Law's Capital Campaign effort. The gift will be used to enhance the overall endowment of the law school.

In recognition of one of the firm's founding partners and a University of Alabama School of Law graduate, Sirote & Permutt currently sponsors the Edward M. Friend, Jr. scholarship fund which provides financial assistance to outstanding law students.

Walter G. Bridges, a 1951 admittee to the Alabama State Bar, was recently elected to become a member of Phi Alpha Delta's Distinguished Service Chapter.

Walter G. Bridges receives Phi Alpha Delta's Distinguished Service Award.

He is only the 15th person to be chosen to receive this award.

The award was established in 1966 by the Supreme Executive Board of Phi Alpha Delta and was known as the Distinguished Service Chapter. Subsequently, the award was incorporated into the International Constitution of the legal fraternity.

The Distinguished Service Chapter is composed of members of the fraternity selected in recognition of their unusual and outstanding service to the fraternity. It is intended that election to the Chapter be the highest honor awarded by the fraternity other than election to international office.

William B. Matthews, Sr., after being sworn in as Dale County District Judge Place No. 1, with his wife, Florence, and Alabama Supreme Court Justice Henry R. Steagall, all of Ozark. Judge Matthews also serves as bar commissioner for the 33rd Circuit. Photo courtesy of Joe Adams, The Southern Star

Membership in the Chapter is conferred pursuant to the unanimous election by the international executive board.

Bridges joins, among others, Tom C. Clark, a former United States Supreme Court justice.

In January, over 100 criminal defense lawyers from the greater Birmingham area created the **Greater Birmingham Criminal Defense Lawyers Association.** The Association was formed to ensure that lawyers involved in the defense of those accused of criminal offenses have the opportunity and ability to voice their concerns regarding vital issues of substantive and procedural aspects of criminal law and the effect of such upon those individuals who stand accused of municipal, state or federal offenses in the greater Birmingham area, according to GBCDLA Secretary John A. Lentine.

Elected as president was C. Tommy Nail; as President-elect, Albert C. Bowen, Jr.; as Executive Vice-president, Connie W. Parsons; as Treasurer, Virginia A. Vinson; and as Secretary, John A. Lentine.

Any interested lawyer or law student should contact the Greater Birmingham Criminal Defense Lawyers Association at P.O. Box 370282, Birmingham, Alabama 35237. ■

Notice: Treat Award for Excellence

Each year at its annual meeting in November, the National College of Probate Judges honors the recipient of its prestigious Treat Award for Excellence. The award was created and named in honor of Judge William W. Treat, founder and president emeritus of NCPJ.

The College annually selects an individual who has made a significant contribution to the improvement of the law or judicial administration in probate or related fields. The purpose of the award is "to recognize and encourage achievements in the field of probate law and related fields consistent with the goals of the National College of Probate Judges." Previous recipients have been members of the judiciary, attorneys and law school deans or professors.

Submit nominations of qualified individuals to:Treat Award for Excellence Committee, National College of Probate Judges, 300 Newport Avenue, Williamsburg, Virginia 23187-8798.

This committee includes three NCPJ officers, the president of the American College of Trust and Estate Counsel, and the chair of the American Bar Association's Section on Real Property, Probate and Trust Law.

Nominations should include a resume of activities, letters of recommendation, awards received, achievements in probate and related fields of law, and any other relevant material.

Nominations received by June 15th, 1993 will be considered for selection of the recipient to be introduced at the annual meeting November 19, 1993 in Charleston, South Carolina.

NOTICE TO MEDIATORS

With the advent of the new Alabama Civil Court Mediation Rules, effective August 1, 1992, mediation has been officially approved for use by our state circuit courts as an ADR approach to settlement in the litigation process. As a result, mediators will be needed to assist the courts in this new procedure.

The Alabama State Bar **Task Force on Alternative Dispute Resolution** is working on the structured implementation of mediation. We are developing recommendations for adoption of (1) a Mediation Model with instructions, forms, etc., (2) standards for state court mediators, (3) mediator training programs, and (4) a system of central coordination, management and control of the mediation effort, which includes maintaining a statewide listing of mediators.

The task force is in need of an "inventory" of our state bar licensed attorneys who are either trained mediators, through instruction and/or experience, or prospects for future mediator status. While state court mediator status will not be restricted solely to licensed attorneys, we are focusing initially only on this group. Other trained professionals, such as family counselors, will be considered at a later date.

If you are a present or prospective mediator, please send a letter with your name, address, telephone number and fax number, with a brief summary of your mediator status (e.g., 15 years' experience in domestic relations, American Arbitration Association certification, or prospect for training) to:

Center for Dispute Resolution
Alabama State Bar
P.O. Box 671
Montgomery, Alabama 36101

Upon receipt of your letter, you will be mailed an application form for mediator status.

Marshall Timberlake, chairperson
Task Force on Alternative Dispute Resolution

BUILDING ALABAMA'S COURTHOUSES

RANDOLPH 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.*

Randolph County Courthouse, prior to restoration

Randolph County Courthouse

Randolph County was created from Creek Indian lands transferred to the State of Alabama after the signing of the Treaty of Cusseta on April 4, 1832. The county was officially established December 18, 1832. It was named for John Randolph of Virginia.

Randolph was a member of a prominent Virginia family. He was born in 1773 and devoted his life to public service. With only a short gap in his years of continuous service, Randolph represented Virginia as either a Congressman or a Senator from 1799 to 1829. Then, President Andrew Jackson appointed him Minister to Russia. In his latter years, Randolph suffered from ill health and various accounts recorded him as being peculiar, demented or possibly insane. In any event, he died May 24, 1833, only five months after the county bearing his name in Alabama was created.

Because there were several relatives in Virginia with his same name, this John Randolph referred to himself as "John Randolph of Roanoke". His "Roanoke" was not the Virginia town by that name but, rather, was his plantation home. Roanoke, the largest city in Randolph County, Alabama, was named in honor of John Randolph's home.

The jurist in Randolph County was Judge Archibald Sawyer. The earliest recorded official act in the county was the signing of a power of attorney attested by Judge Sawyer on January 9, 1833.

J.M.K. Guinn wrote a series of articles describing early events in the county which appeared in the "Randolph Toiler" in the 1890s. He reported that the first county court probably convened in November 1833 under a large oak tree on the west bank of the Tallapoosa River at Hedgeman Triplett's Ferry, approximately ten miles west of Wedowee. The first commissioner's court met in February 1834, under a large mulberry tree near Triplett's dwelling, and the first circuit court was held in April 1834 at the flat rock about one mile west of the ferry. It is obvious from these descriptions that all of these proceedings occurred outdoors.

The surviving written records from the early days of Randolph County are quite sketchy, but one thing is known for certain. An Act was passed by the Legislature on January 12, 1833 which made it the duty of the citizens of the counties carved from the recently acquired Indian territory to have commissioners appointed or to elect commissioners who would select suitable seats of justice. The Act required that the sites selected be within six miles of the center of the respective counties. Since Triplett's Ferry was more than six miles from the geographic center of Randolph County, a new county seat site was sought.

In the fall of 1834 or the spring of 1835, the county seat of Randolph County moved to Wedowee. It remains the county seat today. Wedowee was named for a Creek Indian chief, "Wahdowwee", who lived in a nearby village. Supposedly, the court session held indoors in Randolph County took place in the Indian chief's wigwam.

The new town of Wedowee was surveyed and platted by Hedgeman Triplett on December 1, 1835. The first lots were not sold until March 14, 1836. On that day, lot 108 was sold and set aside for the purpose of constructing a courthouse building.

The first courthouse building in Randolph County was a log structure with a dirt floor built in 1836. In its first year, the courthouse was quite primitive. However, court records from 1837 show that expenditures were authorized which provided for a judge's seat, a clerk's table, seats for the jury and a substantial door shutter.

In 1839, the county built a jail at a cost of $1,000. Up until that time, the sheriff had a difficult time restraining prisoners. One report recounted the use of a hollow poplar tree. Another referred to a wagon body turned upside down as the Randolph County jail.

Also in 1839, the county let a contract for the construction of a more substantial courthouse. The existing courthouse was too small to accomodate the court's business. Isaac Baker won the contract with a bid of $2,000. The building was to be completed by August 1840. The county accepted the structure as complete on September 5, 1840.

On January 1, 1840, two noteworthy events took place in the history of Randolph County. The first was the resignation of Judge Archibald Sawyer, the county's original jurist, who had served the county since January 1, 1833. The second was the changing of the name of Wedowee to McDonald. This change was not the product of a vote of the people, but was, instead, the culmination of the peculiar hobby of Francis M. Perryman, a Randolph County resident.

Francis Perryman was an ambitious, well-educated and high spirited young man who, seemingly, did not have enough to do. On a lark, he wondered what it would take to change the name of a town. When he learned that the U.S. Post Office Department gave out official town names, he began a campaign to change town names throughout the county. He was able to persuade a number of unsuspecting residents to sign various petitions for name changes, and then convince post office officials that the name changes were warranted. He first succeeded in changing the name of High Pine to Chulafinee and then to Roanoke in honor of John Randolph's plantation.

After this initial success, he proceeded to change the name of every post office in the county to suit his own fancy. Wedowee became the town of McDonald. And the name stayed McDonald from 1840 to 1844, when someone finally inquired through Congress to find out why the name was changed in the first place. The Congressional investigation uncovered the documents signed by unsuspecting petitioners who apparently were not fully informed of what they had signed. Perryman's name-changing escapade stopped and the citizens of the county seat town regained the town's historic name of Wedowee. As an aside, it is believed that Wedowee, Alabama is the only place in the world which has that name.

The first brick courthouse was built in Randolph County at Wedowee in 1857. It was destroyed by fire in 1896. Little is known about this courthouse because most of the Randolph County records were lost in the fire.

A replacement courthouse was built in 1897. The building cost $21,000 and was supposed to be fireproof. In 1937, an addition to the courthouse was built at a cost of $40,000. From an early photograph, it appeared that this courthouse was three stories in height and contained a soaring five-story clock tower at one end of the building. Despite the belief that the courthouse was fireproof, it burned in 1940. However, this

Randolph County Courthouse, after completed restoration

Historic marker details the beginnings of the Randolph County Courthouse.

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

THE ALABAMA STATE BAR ANNOUNCES A

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time the county records were saved.

The courthouse fire occurred on Saturday, August 24, 1940. It probably started on the second floor, and possibly in the courtroom. Low water pressure hampered the local volunteer fire department in its efforts to save the building. The cost of the damage was estimated at $50,000.

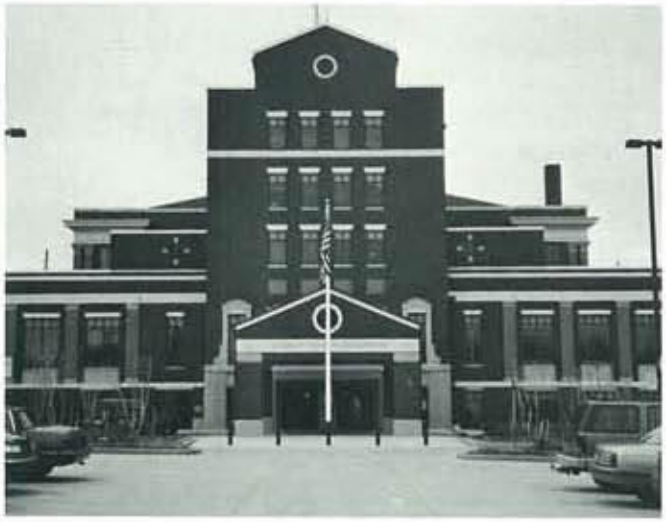
A new courthouse was completed for Randolph County in 1941. It cost $200,000 and again was constructed as a fireproof building. The architect was Paul W. Hofferbert. The structure was built under the authority of the Work Projects Administration.

By the 1980s, the courthouse building greatly needed repairs. It was in a state of structural deterioration. In the period 1985 to 1986, the building was gutted and renovated both internally and externally. Architects for this project were Chambless-Killingworth & Associates of Montgomery. The contractor was Pruett-Sharpe Construction Company. The total cost for the courthouse renovation, as well as a new jail, was approximately $1.5 million. The courthouse portion of the project cost approximately $619,000.

The author thanks Randolph County Probate Judge Mack Diamond for his assistance. ■

The Calhoun County Courthouse Revisited

The Alabama Lawyer issue of September 1991 contained a feature on the Calhoun County Courthouse. At the time the article was written, the courthouse was undergoing a major, multi-million dollar renovation. That renovation has been completed and an update is in order.



Calhoun County Courthouse, following renovation

The Anniston Star, in its Sunday edition of October 25, 1992, spotlighted its "old/new" courthouse. For more than 30 years the courthouse was the topic of negative conversation among courthouse workers, visitors and the public in general. Things were so bad at the courthouse that the building was an embarrassment to the citizens of Calhoun County.

Architects Bill and David Christian faced the enormous task of addressing the demands of the 1990s with an outdated, though historic, courthouse building. In fact, the architects had to make four buildings into one unified whole. The original courthouse was constructed in 1900.

Two buildings, including the jail, were attached and had been built in the 1940s. An annex that failed to match the structure's historic architectural style was added in the 1960s. To compound the challenge, the architects sought to keep the "old" look of the courthouse, tie the existing structures together internally and externally, make the building handicapped accessible, provide additional office space, add modern conveniences, and preserve the classical dignity of the large courtrooms.

The work progressed despite the disruption to business at the courthouse. Every effort was made to preserve historic details. Wood carvings were stripped and refinished. Missing crown moldings were duplicated and replaced. The 1960's annex became part of the traditional courthouse style and no longer stuck out like a sore thumb. The new north entrance, the refurbished lobbies and staircases and the courtrooms are particularly noteworthy features.

The newly renovated Calhoun County Courthouse was dedicated October 25, 1992. This courthouse successfully shows that planned restoration and preservation of historic structures can be a viable alternative to the wrecking ball. Congratulations, Calhoun County!

The newly renovated main building of the Calhoun County Courthouse

The author thanks presiding Circuit Judge Sam Monk for his invitation to tour the renovated courthouse, and for information used in this article. ■

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

Because new procedures for purchasing occupational licenses went into effect with the 1992-93 bar year, we caution you to be sure you have fulfilled the requirements of the new law and have a license to practice.

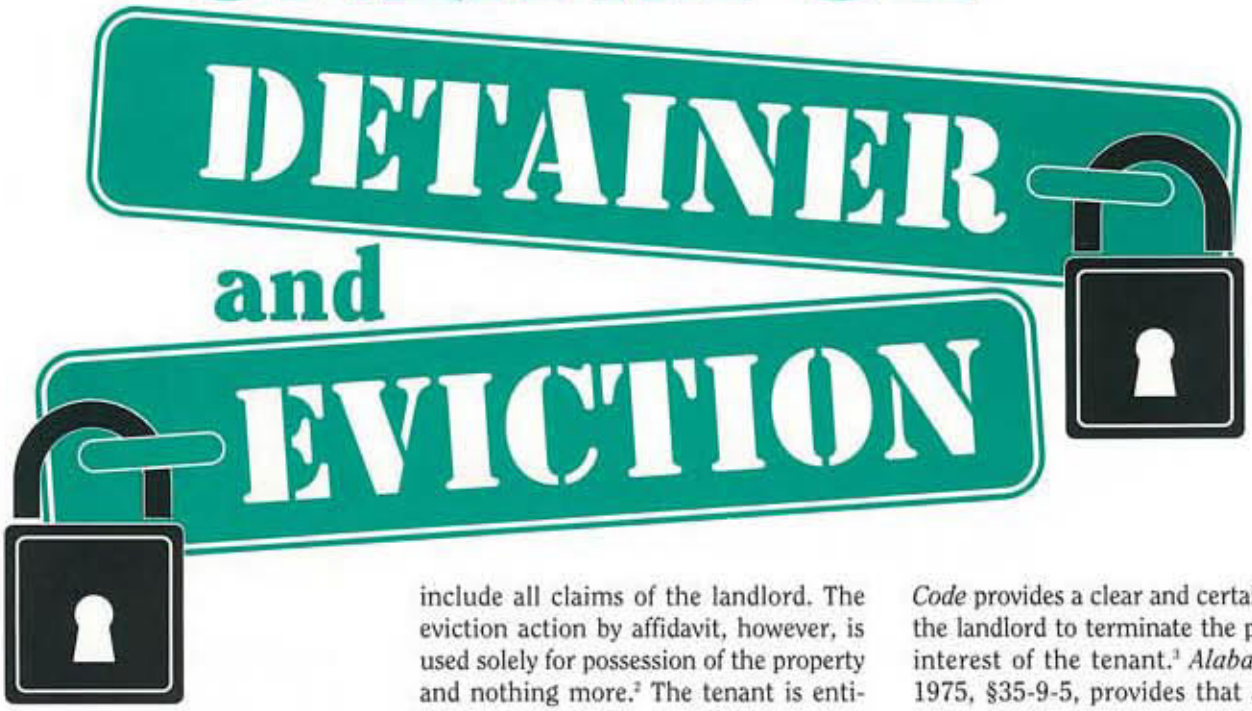
The dual invoice which was mailed in mid-September provided you with the option of paying special membership dues (if you were not in active practice in Alabama) or buying the required occupational license to practice (if you were in active practice in Alabama) on this one invoice. Definitions of these categories were set out on the reverse side of the form. However, this has caused some confusion and there are a few individuals who paid the lesser amount for special membership dues rather than purchase the occupational license which is required of those in active practice in Alabama.

If you are actively practicing or anticipate practicing law in Alabama between October 1, 1992 and November 1, 1993, PLEASE BE SURE THAT YOU HAVE THE REQUIRED OCCUPATIONAL LICENSE.

We remind you that the deadline for issuance of a refund of special membership dues was December 31, 1992. Therefore, those who have paid special membership dues and need to purchase a license SHOULD SEND $200 and return the special membership card. If you have not paid dues, you are in a delinquent status and should remit $230.

If you have any questions, call Alice Jo Hendrix at (205) 269-1515.

UNLAWFUL DETAINER and EVICTION



by PATRICK S. BURNHAM

In this day of highly leveraged real estate transactions and debt service concerns, the practitioner will sometimes be faced with clients anxious to remove a delinquent tenant. Of equal concern are the rights of the tenant in conflict with his or her landlord. The client needs sound advice. This article addresses the two separate procedures under Alabama law for a landlord to obtain possession of real property from a tenant. An action for unlawful detainer is found at *Alabama Code* 1975, §6-6-310. A second procedure is eviction by affidavit, found at *Alabama Code* 1975, §35-9-80, and known as the Sanderson Act. With either cause of action, a tenant normally receives two written notices from the landlord prior to any legal action. The two causes of action are considered, as well as special considerations involving public housing authorities and tenant bankruptcy.

Unlawful detainer

The successful landlord in an unlawful detainer action can recover a judgment for possession, as well as money damages for unpaid rent or other damage.[1] The unlawful detainer action may thus include all claims of the landlord. The eviction action by affidavit, however, is used solely for possession of the property and nothing more.[2] The tenant is entitled to some advance notice prior to the filing of either action. The tenant is entitled to know that his or her right to possession of the property is terminating and is further entitled to a second notice of ten days' duration.

The first of these protections to the tenant concerns termination of the possessory interest. As recently as November 16, 1990, in *Kennamer Shopping Center, Inc. v. Bi-Low Foods, Inc.*, 571 So.2d 299 (Ala. 1990), the Supreme Court of Alabama identified how the tenant's right to possession may be terminated. The case states:

The possessory interest may terminate in one of three ways. First, it may terminate upon the expiration of a "tenancy by the month or for any other term less than one year, where the tenant holds over without special agreement." §35-9-5. Second, it may terminate upon expiration of the term of the leasehold as expressed in the lease. §35-9-8. Finally, a tenant's possessory interest may terminate upon "default [of] any of the terms of a lease." §35-9-6.

Thus, the duration of the lease or the specific terms of the lease agreement may provide the tenant with advance notice that the right of possession is terminating. If the tenant breaches any term of a lease agreement, the right to possession may terminate. The *Alabama Code* provides a clear and certain way for the landlord to terminate the possessory interest of the tenant.[3] *Alabama Code* 1975, §35-9-5, provides that a ten-day written notice will terminate the possessory interest of the tenant. This is sometimes known as the "first notice". This written notice avoids the possibility of a dispute between landlord and tenant with regard to the duration of the lease, the verbal agreement of the parties, or other disputes relating to possession. Terminating the possessory interest by use of a first notice may be the preferred method. Service of the notice is described at *Alabama Code* 1975 §35-9-7.[4]

After termination of the possessory interest by a first notice or otherwise, a second notice is required by *Alabama Code* 1975, §6-6-310(2). The second notice or "notice to quit" acts as a demand by the landlord that the tenant deliver possession of the property.[5] The demand for possession is a ten-day notice. Chapter 14 of *Civil Actions at Law in Alabama* by McLeod provides a good example of a first and second notice. The statutory requirement for a ten-day notice or "second notice" is identified as follows:

§6-6-310(2)
Unlawful Detainer.
Where one who has lawfully entered into possession of lands as tenant fails or refuses, on ten days demand in writing after the termination of his possessory interest, to deliver

the possession thereof to anyone lawfully entitled thereto, his agent or attorney; and it is sufficient to leave a copy of such demand in writing at the usual place of abode of the party holding over.

An unlawful detainer complaint form is available from the clerk of the state district court and should be filed in the state district court where the real property is located.[6] It is appropriate when completing the complaint to identify the date of service of both the first and second notice. It is also appropriate to state specifically the reasons for the action, such as nonpayment of rent or violation of specific lease terms, disturbing others or damaging property. The unlawful detainer complaint form and Alabama Rule of Civil Procedure 12 indicate that the defendant has *seven days* to respond. If the defendant does not file an answer, the plaintiff may request a default judgment, and after the 14-day appeal time has expired, a judgment can be secured.[7]

The particulars concerning service of process should be noted by the practitioner. *Alabama Code* 1975, §6-6-332 was amended March 29, 1990. Prior to the amendment, service could be perfected by leaving notice of the action at the tenant's usual place of abode. This caused due process concerns in *Thornton v. Butler*, 728 F. Supp 679 (M.D. Ala. 1990). In response to the due process concerns, *Alabama Code* 1975, §6-6-332, was amended. The process server should first attempt personal service and then attempt to deliver the notice to a person found residing on the premises. If the process server is unsuccessful in these efforts, the amended statute provides that he or she may post the notice on the door of the premises, and on the same or following day must mail a copy of the notice, by first class mail, to the tenant at the premises address.[8] Different counties may interpret the statute in slightly different ways, and it is suggested that the practitioner verify the procedures used in the county where the suit will be filed.

The express terms of a lease agreement also must be fully reviewed by the practitioner. If the lease terms concern the right of possession or when a default occurs, this fact should be noted. The recent case of *Lynaum Funeral Home, Inc. v. Hodge*, 576 So.2d 169 (Ala. 1991) was decided January 25, 1991. Here the lease terms expressly preserved the landlord's right to declare the lease in default, even if overdue rent payments were accepted by the landlord. The Alabama Supreme Court affirmed the trial court ruling that the express terms of the lease preserve the landlord's right to declare the lease in default.[9]

Overdue rent payments must not be accepted by the landlord once the first notice is given or thereafter. Such an acceptance of payment could act as a waiver of the landlord's claim. Only where the express terms of the lease preserve the landlord's right to declare the lease in default should an overdue rent payment be accepted. See *Pieper v. American Sign/Outdoor Advertising, Inc.* 564 So.2d 49 (Ala. 1990).

Eviction action by affidavit

Circumstances may arise when the landlord seeks possession of the property as quickly as possible without regard to a claim for unpaid rent or property damage to the premises. When a tenant is "judgment proof" or creating a disturbance or damage problems, the landlord may seek relief as quickly as possible. *Alabama Code* 1975, §35-9-80, provides a cause of action to meet this need. (It should be noted that Jefferson County does not use this procedure, but relies solely on unlawful detainer.) The possessory interest of the tenant must be terminated by a first notice or operation of the lease terms. As before, a second notice is required demanding delivery of possession. Once the two written notices are properly served, the action may be commenced.

The clerk of the state district court can provide a form for commencing the action. This form is styled NOTICE OF EVICTION ACTION (Summons and Affidavit in Lieu of Complaint). The signature of the landlord, or his or her attorney, is required on the form affidavit.[10] This is actually an affidavit rather than a complaint. Once the summons and affidavit are served on the defendant, he or she is notified that an eviction will occur within seven days unless a counter affidavit is filed with the sheriff. If the tenant fails to respond with a counter affidavit, the form pleading provides an order for the sheriff to deliver possession of the property to the plaintiff. If the tenant fails to respond with the counter affidavit, an application for default judgment is not required. It is appropriate to check with the district court clerk to expedite the matter. The various state district courts may interpret eviction action by affidavit in slightly different ways. It is appropriate to check with the clerk's office on the particulars. This cause of action does provide an expedited procedure for the landlord.

The eviction action by affidavit also provides an expedited procedure and a time savings even if the tenant responds with a counter affidavit. In this circumstance, two factors act to expedite the matter. First, *Alabama Code* 1975, §35-9-85, states that the district court shall try the case "on the third day" after the tenant delivers his or her counter affidavit.[11] When the tenant files or returns the counter affidavit, *Alabama Code* 1975, §35-9-85, directs the district court to act immediately.[12] The provision states as follows:

> If the counter affidavit provided in §35-9-84 be made and delivered to the sheriff, or deputy sheriff or constable, the tenant shall not be removed; but the officer shall immediately return the proceedings to the court which issued said writ or process; and the fact or facts in issue shall be there tried by said court, and shall stand for trial on the third day after the delivery to said sheriff, or deputy sheriff or constable of such counter affidavit, Sundays and legal holidays excepted.

In addition to the expedited trial date, if the plaintiff is successful at trial, the defendant/tenant is only afforded one day to appeal the matter. *Alabama Code* 1975, §35-9-86, provides as follows:

If the issues specified in §35-9-85

Patrick S. Burnham

Patrick S. Burnham received his undergraduate degree from Samford University and his law degree from Cumberland School of Law of Samford University. He is a partner with the firm of Burnham, Klinefelter, Halsey, Jones & Cater in Anniston, Alabama. He is a member of the Alabama State Bar, the Alabama Defense Lawyers Association and the state bar's Environmental Law Section.

shall be determined against the tenant, judgment shall go against him; and the movant or plaintiff shall, after the expiration of one day after judgment, have a writ of possession and, without further delay, be by the sheriff, deputy or constable placed in full possession of the premises.

In summary, if the tenant responds with a counter affidavit, *Alabama Code* 1975, §35-9-85, provides that the case will be scheduled for trial immediately; and if the plaintiff is successful, there is only a one-day appeal as authorized by §35-9-86. This circumstance provides the landlord with an expedited procedure.

Public housing authorities

Chapter 1 of Title 24 of *Alabama Code* 1975 concerns public housing authorities. The creation of public housing authorities is authorized by this group of statutes. A public housing authority is considered a governmental entity. The Alabama Supreme Court in *Guntersville Housing Authority v. Stephens* 585 So.2d 887 (Ala. 1991) addressed the issue of whether or not a public housing authority is a governmental entity. This case held that the Guntersville Housing Authority, being incorporated pursuant to what is now *Alabama Code* 1975, §24-1-20, *et seq.*, was in fact a governmental entity. The governmental entity was, thus, subject to the effect of §11-93-2, which limits the amount of tort damages and the amount of money under settlements of tort claims that can be recovered against "governmental entities".[13] Public housing authorities, while "governmental entities" in Alabama, are also subject to certain federal regulations which relate to unlawful detainer and eviction.

Public housing authorities afford the tenant additional rights and protections by federal regulation. The rights and protections are in addition to the written notice and state court trial provided by Alabama law. The practitioner representing a tenant or a landlord should determine whether a public housing authority is involved and whether federal regulations apply.

Twenty-four CFR 966.50 provides that a tenant may request an informal meeting and a formal hearing with the public housing landlord prior to any judicial action. The failure of the landlord to afford the tenant those additional rights may be used by the tenant to defeat the unlawful detainer or eviction action.

Twenty-four CFR 966.50, *et seq.*, sets out the grievance procedure and requirements for the public housing tenant. The federal regulation defines "grievance" as any dispute which a tenant may have with respect to a public housing authority action or failure to act.[14] A grievance may thus be a first notice to vacate or a complaint against the tenant. It provides that any "grievance" entitles the tenant to an informal settlement meeting upon request. Upon oral or written notice by the tenant, the public housing authority must schedule an informal meeting with the tenant. The purpose of the meeting is to allow the tenant an opportunity to have the issue resolved. After the meeting, the public housing authority must prepare a written summary of the meeting and deliver it to the tenant. The specific requirements of the informal meeting are identified in the federal regulation.[15]

In addition to the informal settlement meeting, the tenant in a public housing facility may request a formal hearing.[16] This hearing is formal in the sense that both parties are present with witnesses, but should not be considered a judicial hearing where rules of evidence apply and a judge or jury hears the matter. Twenty-four CFR 966.55 sets forth the requirements and provides that a written request for the formal hearing must be made.[17] The formal hearing is held before a single hearing officer or a panel.[18] The public housing authority chooses the impartial hearing officer or panel in a manner described in the written grievance procedure of the public housing authority and as stated in 24 CFR 966.55.

The formal hearing is usually conducted at the public housing authority office or at some other designated place convenient to all concerned. The formal hearing is conducted by a few procedural guidelines set out in 24 CFR 966.56. This procedure should be reviewed prior to the hearing. The attorney for the tenant and for the public housing authority will normally attend such a formal hearing.

(Continued on page 96)

Unlawful Detainer and Eviction

(Continued from page 94)

The hearing affords the tenant an opportunity to be heard and to present her or his case for why the tenant should be allowed to stay and why there has been no breach of the lease.

After the hearing, the written decision of the panel or hearing officer is prepared, and a copy of the decision is sent to the tenant and to the public housing authority.[19] This decision "shall be binding" on the public housing authority unless the board of commissioners (board of directors of a public housing authority) determines that the decision at the formal hearing was contrary to law or to housing regulation.[20] This means that if the public housing authority is unsuccessful at the formal hearing, it must look to the board of commissioners of the public housing authority to override the result of the formal hearing.

The above means that tenants in a public housing facility may utilize the informal settlement meeting and the formal hearing to their advantage. The procedures afford the tenant an opportunity to resolve the dispute with the public housing authority and to delay the eviction or unlawful detainer suit. The actual terms of a public housing authority lease are required by 24 CFR 966.4(1) to include the following provisions:

When the PHA is required to afford the tenant the opportunity for a hearing under the PHA grievance procedure for a grievance concerning the lease termination (see §966.51(a)(1)), the tenancy shall not terminate (even if any notice to vacate under state and local law has expired) until the time for the tenant to request a grievance hearing has expired, and (if a hearing was timely requested by the tenant) the grievance process has been completed.

It should be noted that lease violations involving drug-related criminal activity or criminal activity threatening the health or safety of residents do not require a formal or an informal hearing. This recent change is provided at 24 CFR 966.51(a) and 24 CFR 966.4(1).

The practitioner should also note that Section 8 Housing Assistance Payments Programs have separate termination of tenancy regulations, separate and apart from those described for the public housing authorities. Twenty-four CFR 880.607 provides that a special termination notice is required in new construction facilities. At part "c", the regulation states as follows:

(c) Termination notice. (1) The owner must give the family a written notice of any proposed termination of tenancy stating the grounds and that the tenancy is terminated on a specified date and advising the family that it has an opportunity to respond to the owner.

Other portions of the regulation should be reviewed concerning Section 8 Housing Assistance Payments Programs. In a later eviction action the landlord may only rely upon the grounds previously identified in the termination notice required by §880.607. In addition, the Section 8 Housing Assistance Payments Programs for existing housing have particular grounds for termination of assistance and termination of tenancy. These particulars are found at 24 CFR 882.210 and 24 CFR 882.759.

The Housing Voucher Program also has specific termination of tenancy requirements as identified at 24 CFR 887.213. The practitioner should be aware of the additional rights which are afforded tenants under the federal regulations above.

Tenant bankruptcy

In the event a tenant files bankruptcy, it is important to note 11 USC §362 regarding the automatic stay. This statutory provision specifically requires that all efforts to collect or recover a claim against the debtor cease. The statute specifically operates to cease "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate."[21] The estate in this statute refers to the bankruptcy estate. This provision should be clear warning to the landlord to cease any and all actions regarding collection or possession of property.

The attorney for the landlord should file a motion for relief from stay requesting that the bankruptcy judge enter an order granting the landlord relief from §362 of the Bankruptcy Code so that the landlord will be permitted to pursue the unlawful detainer or eviction action against the debtor.

Eleven USC §365 of the Bankruptcy Code concerns executory contracts and unexpired leases. This provision provides the bankruptcy trustee with the opportunity to cure the breach or default in the unexpired lease agreement. Section 365 in part states:

If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee (a) cures or provides adequate assurance that the trustee will promptly cure such default; (b) compensates or provides adequate assurance that the trustee will promptly compensate a party other than the debtor to such contract or lease or any actual pecuniary loss to such party resulting from such default; and (c) provides adequate assurance of future performance under such contract or lease.

This provision provides the bankruptcy trustee with a tool to assist the bankrupt tenant. If the bankruptcy trustee is successful in assuming the unexpired lease, the language of the statute requires that the landlord receive past due rent and assurance of future performance. ■

Endnotes

1. *Alabama Code* 1975 §6-6-310.
2. *Alabama Code* 1975 §35-9-80.
3. *Alabama Code* 1975 §35-9-5 and §35-9-3 provide for termination of tenancy by written notice.
4. The written notice should not be posted at the commercial premises but at the residence of the tenant or lessee. See *Hudson v. Birmingham Water Works* 189 So. 72 (Ala. 1939). The "usual place of abode" of a commercial tenant must be considered.
5. *Alabama Code* §6-6-310(2).
6. *Alabama Code* §6-6-331—Venue.
7. ARCP Rule 62 enables the tenant to appeal the matter to state circuit court without posting a supersedeas bond as set out at *Alabama Code* 1975 §6-6-351. See *Ex Parte Forbus*, 510 So.2d 242 (Ala. 1987).
8. *Alabama Code* §6-6-332.
9. *Lynaum Funeral Home, Inc. v. Hodge*, 576 So.2d 169 (Ala. 1991).
10. *Alabama Code* 1975 §35-9-80.
11. It is suggested that the landlord file a motion for expedited hearing, citing *Alabama Code* 1975 §35-9-85 to ensure an immediate trial setting.
12. *Alabama Code* 1975 §35-9-85.
13. *Guntersville Housing Authority v. Stephens*, 585 So.2d 887 (Ala. 1991), decided by the Alabama Supreme Court, August 9, 1991.
14. 24 CFR §966.53 defines "grievance".
15. 24 CFR §966.54.
16. 24 CFR §966.55.
17. 24 CFR §966.55.
18. 24 CFR §966.55.
19. 24 CFR §966.57.
20. 24 CFR §966.57.
21. 11 USC Section 362 (Bankruptcy Code).

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The Local Bar Award of Achievement has been established to recognize local bar associations for their outstanding contributions to their communities. The awards will be presented annually at the Alabama State Bar's Annual Meeting.

Local bar associations will compete for these awards based on their size.
The three categories are large bar associations, medium bar associations and small bar associations.

Following is a list of the categories based on judicial circuit size:

LARGE	MEDIUM	SMALL		
10th	6th	1st	19th	32nd
13th	7th	2nd	21st	33rd
15th	8th	3rd	22nd	34th
	11th	4th	24th	35th
	12th	5th	25th	36th
	16th	9th	26th	37th
	23rd	12th	27th	38th
	28th	14th	29th	39th
	Bessemer Cut-off	17th	30th	40th
	(division of 10th Circuit)	18th	31st	

The following criteria will be used to judge the contestants for each category:

- The degree of participation by the individual bar in advancing programs to benefit the community;
- The quality and extent of the impact of the bar's participation on the citizens in that community;
- The degree of enhancement to the bar's image in the community.

Members of the state bar's Committee on Local Bar Activities and Services will serve as judges for the awards.

To be considered for this award, local bar associations must complete and submit an award application by **April 1, 1993**.

An award application may be obtained by writing or calling Keith Norman, director of programs and activities, or Margaret Murphy, publications director, at the state bar, 1-800-354-6154, P.O. Box 671, Montgomery, Alabama 36101.

RECENT DECISIONS

By DAVID B. BYRNE, JR., WILBUR G. SILBERMAN and TERRY A. SIDES

ELEVENTH CIRCUIT COURT OF APPEALS

Federal Sentencing Guidelines—Enhancement for perjury

United States v. Lawrence, Case No. 91-7491 (September 28, 1992). May the Court increase a defendant's sentence because he committed perjury while testifying? The Eleventh Circuit answered no, holding that a sentencing court may not enhance the defendant's sentence based on the fact that the defendant committed perjury during the trial unless the court makes a specific finding of fact unswayed by the jury's verdict. Otherwise, the Eleventh Circuit noted, all defendants would be automatically penalized for asserting their right to testify if they were found guilty.

Eleventh Circuit modifies standard of proof required for conspiracy conviction

U.S. v. Clavis, Case No. 89-9011 (November 13, 1992). Clavis and seven others were convicted of narcotics conspiracy and other offenses. On appeal, the Eleventh Circuit held that once the existence of a conspiracy is established, only slight evidence is necessary to connect a particular defendant to the conspiracy. Arguing that the "slight evidence" standard was the wrong standard of review, the defendants petitioned for rehearing. On rehearing, the Court agreed, stating that the "slight evidence" standard of review as set out in *United States v. Orr*, 825 F.2d 1537, 1543 (11th Cir. 1987), conflicted with earlier binding precedent. The correct standard of review would be either the "substantial evidence" standard articulated in *United States v. Bulman*, 667 F.2d 1374, 1377 (11th Cir.), *cert. denied*, 456 U.S. 1010, 102 S.Ct. 2305, 73 L.Ed.2d 1307 (1982), or the "reasonably minded jury" standard set out in *United States v. Gianni*, 678 F.2d 956, 959 (11th Cir.), *cert. denied*, 459 U.S. 1071, 103 S.Ct. 491, 74 L.Ed.2d 633 (1982). However, the Eleventh Circuit held that even under these higher standards of proof, the evidence of the narcotics conspiracy presented by the government was sufficient to uphold the defendants' convictions.

SUPREME COURT OF ALABAMA — CRIMINAL

Alabama Supreme Court adopts *Georgia v. McCollum*

Ex Parte Pilot, Case No. 1911116 (October 23, 1992). Is a defendant in a criminal case bound by the rule of *Batson v. Kentucky* which prevents a prosecutor from exercising his peremptory jury challenges in a racially discriminatory manner? The Supreme Court of Alabama answered yes, citing as authority the recent U.S. Supreme Court decision in *Georgia v. McCollum*, from which the court quoted the following language:

[T]he Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges. Accordingly, if the State demonstrates a prima facie case of racial discrimination by the defendants, the defendants must articulate a racially neutral explanation for peremptory challenges.

Although the court of criminal appeals had extended the rule of *Batson v. Kentucky* to apply to criminal defendants, this decision marks the adoption of this standard by the Supreme Court of Alabama.

Drug manufacture for other than personal use required for conviction

Ex Parte Colbert, Case No. 1911044 (November 20, 1992). Colbert was convicted of attempting to distribute 3,4 methylenedioxymethamphetamine—more commonly known as "ecstasy" or "MDMA"—by attempting to manufacture MDMA. On appeal, Colbert argued that the prosecution failed to prove that he attempted to manufacture MDMA where the proof showed an attempt to manufacture MDMA for his personal use and where the definition of manufacture set out in §20-2-2(14), *Code of Alabama* (1975), specifically exempts from that definition "the preparation or compounding of a controlled substance by an individual for his own use." The court of criminal appeals rejected this argument, based on the fact that forensic witnesses testified the amount of chemicals found in Colbert's apartment would have been sufficient to produce 175-250 tablets of MDMA.

The supreme court granted certiorari and reversed Colbert's conviction. In its opinion, the court held that the State's burden of proof required it to prove "beyond a reasonable doubt that Colbert intended to manufacture and overtly acted toward manufacturing the drug—that is, that Colbert intended to and overly acted to prepare and compound the drug for something other than his own use."

Based on this opinion, it is clear that the State cannot rely on the fact that the items in the defendant's possession would produce a relatively large amount of an illegal drug to sufficiently prove that he was attempting to manufacture that drug. Some overt act indicating that the drug is for more than his own use must be shown.

Worthless check prosecution centers on intent

Ex parte Stinson, Case No. 1911280 (December 4, 1992). Stinson was convicted of first degree theft of property, arising out of a check he wrote to Turner's Discount Carpeting to cover the purchase and installation of carpeting at his place of business, RLL Cosmetics.

The evidence at trial established that Stinson gave Turner a check in the amount of $1,616.04 as payment in full. Turner did not accept the check because it was made out improperly. Stinson

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promised to deliver a second check made out correctly. However, Turner attempted to cash the first check and was told that the account on which the check was drawn was already overdrawn. That same day (Saturday) Stinson gave Turner another check drawn on this same account and assured him that there were sufficient funds to cover the check. Alternatively, Stinson told Turner that if he brought the check back on Monday, the company would give him "all his money." Instead, Turner swore out a warrant against Stinson on Tuesday. As a result of Turner's actions, McArthur (who along with Stinson, was an owner of the business) put a "stop payment" order on the check. The stop payment order went into effect three days following Stinson's arrest.

The supreme court granted certiorari to determine whether the jury's verdict finding Stinson guilty of first degree theft was against the great weight of the evidence, particulary with regard to Stinson's specific intent to deprive Turner of his property—an essential element of this crime.

Justice Kennedy, writing for the court, determined that the State presented insufficient evidence of Stinson's guilt:

> In the underlying case, Stinson admittedly conducted business in a poor manner. He testified that when he entered the contract, he was not sure that the money was in the account, but that he thought that it could be transferred from another RLL Cosmetics account. The RLL Cosmetics bank statement showed that on May 29, the day Turner swore out the warrant, the account had a balance of $3,224.57, more than enough to cover the check for the carpeting. In addition, McArthur, not the defendant, initiated the stop payment order on the check. The stop payment order was dated July 1, 1990, three days after the warrant had been issued. Before swearing out the warrant, Turner did not bother to see if the RLL Cosmetics check would be honored.

Based on this decision and the court's earlier decision in *Piggly Wiggly No. 208, Inc. v. Dutton*, 601 So.2d 907 (Ala. 1992) (unconstitutional exercise of power for district attorney to prosecute writers of worthless checks for purposes of debt collection), it would appear that, absent proof of actual criminal intent, the court has no desire for the state's judicial system to become bogged down in disputes over worthless checks.

Court's first review of Alabama's "drive-by shooting" statute

Ex parte Jackson, Case No. 1911997 (January 8, 1993). Jackson was indicted for murder under Alabama's newly-enacted "drive-by" shooting statute, which makes "murder in which the victim is killed while in a motor vehicle by a deadly weapon from outside that motor vehicle" a capital offense. §13A-5-40(a)(17), *Code of Alabama* (1975). However, it was undisputed that the victim was not at any relevent time the occupant of a motor vehicle. Despite this, the trial court denied Jackson's motion to dismiss, stating that although "the gravament of [this offense] is that a defendant murders a victim while the victim is in a motor vehicle," the State would be required to prove only "that the Defendant killed someone with intent to cause the death of a person in a vehicle."

Jackson petitioned the court of criminal appeals, then the supreme court, for writ of mandamus directing the trial judge to dismiss the capital murder indictment returned against him, arguing that the doctrine of transferred intent implicitly contained in this State's murder statute—§13A-6-2(a)(1), *Code of Alabama* (1975)—could not be used to supply the additional element required to elevate murder to capital murder.

In granting Jackson's request for a writ of mandamus, the court first recognized the basic principle of statutory construction that "statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to apply to cases not covered by the words used...." and "should not be 'extended by construction'". Justice Ingram, writing for the court, concluded that:

> Under the facts alleged in the indictment, Jackson's intent to kill Prickett can certainly be "transferred" to the conduct that actually resulted in the death of Roberts. However Prickett's location (in a motor vehicle) cannot be "transferred" to Roberts so as to elevate the crime to capital murder.
>
> First, the clear statutory language of §13A-5-40(a)(17), considered together with §13A-5-40(b) and §13A-6-2(a)(1), does not yield that result.
>
> Second, we presume that the Legislature knows the meaning of the words it uses in enacting legislation. Moreover, we are convinced that the Legislature, if it intended §13A-5-40(a)(17) to apply in this case, knew how to draft a statute to reach that end.

The court determined that in light of the fact that Alabama's prior capital murder statute had contained a transferred intent provision with regard to certain capital offenses which it had not seen fit to include in this provision, the court could not modify the statute to include such a provision. The court held that:

> Jackson must have "known" that his alleged victim was "in a motor

David B. Byrne, Jr.

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

Terry Alan Sides

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

Wilbur G. Silberman

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

vehicle." It follows then, that for Jackson to have "known" that Roberts was in a motor vehicle, she must actually have been in a motor vehicle. She was not.

Accordingly, the court stated that the statute, as written, did not apply to the undisputed facts of this case. However, the court acknowledged that if the Legislature were to disagree with its interpretation, then it could "enact appropriate legislation to modify the statute and yield a different result in subsequent cases."

SUPREME COURT OF ALABAMA — CIVIL

Scope of jury *voir dire* as to relationship under insurance coverage

In *McClain v. Routzong*, [Ms. 1911347, November 20, 1992], ____ So.2d____(Ala. 1992), Roger and Judy McClain were involved in an automobile accident in which Roger was injured. The McClains sued Routzong, alleging negligence and wantonness. The McClains also sued their uninsured/underinsured motorist insurance carrier. The carrier elected not to participate in the trial of the case and agreed that the policy of insurance it had issued to the McClains provided them with underinsured motorist benefits, which would be paid if the McClains received a judgment in excess of Routzong's liability policy limits.

During *voir dire* examination, the trial court permitted the McClains to question the prospective jurors as to whether they were stockholders, directors, officers, or employees of Routzong's liability insurance carrier. However, the court denied the McClains' request to ask the prospective jurors whether they were officers or stockholders of the uninsured/underinsured carrier.

The jury returned a verdict for Routzong. The McClains appealed and argued, *inter alia*, that the trial court committed reversible error in refusing to allow them to so *voir dire* the prospective jurors.

Relying upon its holding in *Lowe v. Nationwide Insurance Co.*, 521 So.2d 1309 (Ala. 1988), the court concluded that the trial judge properly refused to allow the McClains to question the jury venire as to their association with the uninsured/underinsured carrier. In *Lowe* the court held as follows:

> A plaintiff is allowed *either* to join as a party defendant his own liability insurer in a suite against the underinsured motorist *or* merely to give it notice of filing of the action against the motorist and of the possibility of a claim under the underinsured motorist coverage at the conclusion of the trial. *If the insurer is named as party, it would have the right, within a reasonable time after service of process*, to elect either to participate in the trial "in which case its identity and the reason for its being involved are proper information for the jury", or *not to participate in the trial "in which case no mention of it or its potential involvement is permitted by the trial court."*

In the instant case, the court also held that the trial court did not err to reversal in not allowing the McClains to ask the venire this question: "Have you or any member of your family ever been involved with an employment where your job was to evaluate claims?"

No civil liability for criminal act of third party

In *N.J., a minor v. The Greater Emanuel Temple Holiness Church*, [Ms. 1910700, December 31, 1992], ____So.2d____(Ala. 1992), the court reiterated its reluctance to impose civil liability on one person for the criminal act of another.

No cause of action for wrongful discharge on "public policy" grounds

In *Howard v. Wolff Broadcasting Corporation*, [Ms. 1910603, November 25, 1992], ____So.2d____(Ala. 1992), the defendant fired the plaintiff solely because she was a female. Because the defendant had only seven employees, the

EEOC did not have jurisdiction over the plaintiff's complaint of discrimination. Accordingly, the plaintiff sued the defendant on state law claims for fraud and breach of contract. The trial court entered a summary judgment for the defendant.

On appeal, the plaintiff argued, *inter alia*, that the court should create a public policy exception to Alabama's employment "at-will" doctrine. That doctrine provides "that an employment contract terminable at the will of either the employer or the employee may be terminated by either party at any time with or without cause." *Grant v. Butler*, 590 So. 2d 254 (Ala. 1991). The plaintiff argued that because the doctrine is a judicially created one, the judiciary can and should abolish or modify it.

The court disagreed. Writing for a unanimous court, Justice Maddox noted that for three reasons, Alabama has consistently refused to judicially create a cause of action for wrongful discharge on "public policy" grounds:

(1) to do so would abrogate the inherent right of contract between employer and employee;

(2) to do so would be to overrule well-established employment law; and

(3) "contrary to public policy" is too vague or nebulous a standard to justify creation of a new tort.

Though many states have carved out exceptions to the employment "at-will" doctrine, Justice Maddox wrote that "it is the province of the legislature to create such an exception, if it should determine that employees such as Howard, who cannot come within the provisions of the Equal Employment Act, should be given the right to sue for damages."

Claim for conversion of cash lies only where money is "earmarked"; fraud claim barred by statute of limitations

In *Gray v. Liberty National Life Insurance Co.*, [Ms. 1911246, December 18, 1992], ____So.2d____(Ala. 1992), the plaintiff sued, alleging that Liberty National had fraudulently withdrawn money from his bank account to pay the premiums on a life insurance policy he had not purchased. The plaintiff also alleged claims in tort for conversion, trespass to a bank account, and outrage. The trial court granted summary judgment in favor of the defendant on the plaintiff's claim for fraud, finding that it was barred by the applicable one-year statute of limitations. The defendant was also granted a summary judgment on the plaintiff's claim for conversion.

On appeal, the court affirmed the summary judgment as to the plaintiff's fraud claim. The evidence was undisputed that as early as January 1978, the plaintiff received bank statements clearly showing that the defendant was withdrawing money each month to pay the policy premiums. He also received monthly copies of the actual draft instruments, showing increases in the amount of the policy premiums. For the next 12 years, the plaintiff continued to receive detailed bank statements "that, upon even a cursory examination, would have revealed that Liberty National was withdrawing premiums" for the insurance policy. The court concluded that on these facts, a reasonable person of ordinary prudence would have discovered the alleged fraud in 1978 or within one year thereafter.

The court also affirmed the summary judgment in favor of the defendant as to the plaintiff's claim for conversion. "An action alleging conversion of cash lies only where the money involved is 'earmarked' or is specific money capable of identification, *e.g.*, money in a bag, coins or notes that have been entrusted to the defendant's care, or funds that have otherwise been sequestered, *Greene Co. Bd. of Education v. Bailey*, 586 So.2d 893 (Ala. 1991), and where there is an obligation to keep intact and deliver the specific money rather than to deliver a certain sum." *Johnson v. Life Ins. Co. of Alabama*, 581 So.2d 483 (Ala. 1991). There was no evidence that the subject bank account was earmarked for the purpose of paying Liberty National for the premiums or that the plaintiff made any special deposits for this purpose. The bank account contained only intermingled, anonymous funds from which the plaintiff paid a number of bills; he presented no evidence that he ever sequestered any of these funds for Liberty National.

Co-employee statutes constitutional

In *Jones v. Lowe*, [Ms. 1911610, December 11, 1992] ____So.2d____(Ala. 1992), the court reversed the trial court, and held that the co-employee statutes of Alabama's Workmen's Compensation Act are constitutional, in that they give immunity to co-employees against allegations of negligence or wantonness.

At issue was the validity of Act 85-41, Acts of Ala. 1985, which extensively amended and added to the Alabama's Workmen's Compensation Act and created a qualified immunity for all co-employees. The trial court held that the decision of the Alabama Court of Civil Appeals in *Sims v. Union Underwear Co.*, 551 So.2d 1078 (Ala.Civ.App. 1989), had invalidated a provision of the Act and, thus, that the Act's nonseverability provision required the court to invalidate the entire Act. The result of this was to allow the plaintiffs to proceed on a co-employee claim for mere negligence. The trial court did, however, allow the defendants to seek an immediate appeal of its ruling.

On appeal, the court, in an opinion by Justice Shores, reversed the trial court, finding that its holding was based upon the erroneous assumptions (1) that Sims held a provision of the Act invalid; (2) that the Legislature intended to extend the statute of limitations of occupational diseases; (3) that Section 12 of the Act is subject to the requirements of Section 45 of the Alabama Constitution; and (4) that Section 12 of the Act has no "field of operation."

Alabama retains caveat emptor rule with regard to resale of used residential real estate

In *Leatherwood, Inc. v. Baker*, [Ms. 1910822, December 31, 1992], ____So.2d____ (Ala. 1992), the court reaffirmed the *caveat emptor* rule with regard to the resale of used residential real estate.

The plaintiffs purchased a used residential house in Ozark, which later was discovered to have significant structural damage. Prior to purchasing the house, however, the plaintiffs had looked at the property several times. The plaintiffs had also heard from an outside source that there were settling problems in the neighborhood. The plaintiffs inquired about this to the real estate agent who had originally dealt with the sellers of the property. It was related to the plaintiffs that the sellers knew only of one crack around the air conditioning system. Thereafter, the plaintiffs and the real estate agent again inspected the property. The plaintiffs subsequently signed an "as is" contract and purchased the house. A few months after moving in, the house began to crack in several places, and the resulting damage was major. The plaintiffs sued Ozark Realty, contending that its agents misrepresented to them the condition of the house and contending that when they purchased the house they relied on the misrepresentations made by those agents. Following a jury trial, judgment was entered in favor of the plaintiffs for $135,828.40 in compensatory damages and $75,000 in punitive damages.

On appeal, Ozark Realty argued that the signing of the "as is" statement by the plaintiffs, after being made aware of potential problems in the neighborhood by an outside source and after making their own inspection of the property, prohibited them from now claiming that they were deceived in any way regarding the condition of the property. The supreme court agreed.

Justice Adams, writing for the majority, stated that based on the fact that the plaintiffs personally inspected the property after questioning the real estate agent regarding structural problems with the property, and based on the fact that the plaintiffs signed an "as is" statement after that inspection, without hiring an expert to inspect the property, dictated that as a matter of law the plaintiffs had no claim for fraud. The rule of *caveat emptor* still applies with regard to the resale of used residential real estate, and the plaintiffs should have sought an expert opinion before signing the "as is" statement.

BANKRUPTCY

Protect administrative priority claims when confirming plans

In re Benjamin Coal Co., 978 F.2d 823; 23 B.C.D. 1063 (3rd Cir. November 3, 1992). David Benjamin, the principal officer and stockholder, under a pre-

confirmation order allowing a §364(c)(1) super priority administrative claim, post-confirmation lent $340,000 to the debtor corporation. Under the confirmed plan, he was allowed a claim for an amount due under an assignment agreement and later loans, to be repaid by a one-eighth payment 15 days after confirmation, and the remainder by the effective date of the plan. He was not paid, and some three years later, the company converted to Chapter 7. In the converted case, Benjamin was approximately six weeks late in filing his proof of claim. The Bankruptcy, District and Third Circuit courts all held that in addition to losing a general unsecured claim because of late filing, more importantly, *there was no priority under §§507 or 364(c)(1)*, and that because of the confirmation, (See §1141(d)), prior claims are discharged, and that §348(d) which normally preserves administrative claims in a converted case does not apply.

Query: Could this occur with unpaid professional fees? I do not see why not. My advice is that if there is such a possibility, that the plan provide that in the event of a conversion, such fees continue as an administrative priority, which, at least, would afford the opportunity to be paid from the Chapter 7 assets.

Chapter 7 case dismissed for substantial abuse

In re Kim M. Fonder, 974 F.2d 996; 23 B.C.D. 739 (8th Cir., September 9, 1992). The Bankruptcy Court, on a motion to dismiss filed by the U.S. Trustee, learned that the debtor, by withholding more income tax than required, had understated anticipated future income considerably and that the debtor, over a three-year period, could pay 89 percent of unsecured debt. On debtor's failure to convert to Chapter 13, the Bankruptcy Court dismissed, and both the District Court and the Eighth Circuit Court affirmed. The Eighth Circuit Court stated that in reaching its conclusion, the Bankruptcy Court may consider the schedules and testimony added at the hearing. The debtor had contended that since it could not qualify for a Chapter 13 case, there was not substantial abuse. The Eighth Circuit said it is not a prerequisite for a dismissal under §707(b) that the debtor be eligible for Chapter 13 relief.

Tension between FDIC legislation and §362(a) of Bankruptcy Code

In re Colonial Realty Company, 23 B.C.D. 1143, (2nd Cir., November 20, 1992); ____F.2d____. The FDIC, in the U.S. District Court, brought a fraudulent conveyance action against transferees of consolidated debtors. Neither the debtors nor the bankruptcy trustee was named. The trustee of the Chapter 11 case also desired to bring a fraudulent conveyance action against the debtors or one of them, and, therefore, the trustee sought to enjoin the FDIC under §362 of the Bankruptcy Code. The FDIC claimed that under 12 U.S.C. 1821 (d)(17), which was passed subsequent to the Bankruptcy Code, the FDIC was authorized to avoid transfers of an interest of an insider for which the FDIC had become a receiver. The FDIC contended that as its statute was passed after the bankruptcy statute, it was superior. However, the Second Circuit Court disagreed, saying "superior" means only "prior in right", that Congress meant to give the FDIC a preferential claim but not to abrogate the automatic stay application under regular bankruptcy procedure. The court stated that 28 U.S.C. §1334(d) gives it exclusive jurisdiction over the debtor's property, and that property which has been fraudulently transferred is not property of the estate under §541 (a)(1) until recovered. It then stated that the action of the FDIC is still subject to the stay because, under §362(a)(1), actions to recover a claim against the debtor are subject to the automatic stay, and, thus, there is a restraint to proceeding against the transferee. Then, in considering whether §362(a)(1) is "trumped" by 12 U.S.C. §1821(17), (19) or (j), the court, in a detailed analysis on each subsection, determined that the bankruptcy automatic stay remained in effect until or unless a request for relief is made and granted.

Do you recognize recoupment—if not sure, then read on

In re Newberry Corp., 9th Circuits B.A.P., October 20, 1992, 23 B.C.D. 979; 145 B.R. 998. MCE retained Newberry (debtor) to perform electrical work. Later, debtor left not only the job, but also its tools and equipment. Shortly thereafter, it filed Chapter 11. MCI meanwhile hired another contractor to complete the job. Both MCI and the new sub kept and used debtor's tools and equipment. Debtor billed MCI for over $300,000 and then sued for non-payment. MCI claimed in its defense that it had incurred damages of over $300,000. The Bankruptcy Court allowed this as recoupment. On appeal to the Ninth Circuit B.A.P. in a divided decision, the majority furnished a dissertation on recoupment stating that the essential element is that it must arise out of the same transaction. Here it did because MCI had a duty to mitigate damages. The debtor's claim for rent would not have arisen had not MCI used the equipment, and MCI would not have used it except for breach by the debtor. The court noted that generally pre-petition debts cannot be satisfied by post-petition transactions. This principle is carried out in restricting bankruptcy set-offs. Recoupment arising out of the same transaction is different, and according to the majority opinion, is allowed even though one is pre-petition and the other post-petition.

Comment: The reader is invited to note the strong dissent which examines recoupment in much greater detail, essentially contending that this case is not one of recoupment, but an undue expansion of the doctrine, and that most examples of recoupment involve an overpayment or adjustment of funds. In my opinion, the dissent is more logical. ■

FACTS/FAX POLL

This is a repeat of the poll appearing in the January 1993 *Alabama Lawyer*, which was received too late by some members for them to participate in the poll.) With some trepidation, the editors now want your honest appraisal of the quality of *The Alabama Lawyer*. Do you read it? If so, which features do you like or dislike? In short, we want a critique of the publication. Take a moment to complete the following questionnaire and then fax it to state bar headquarters, c/o Margaret Murphy, at (205) 261-6310. If you do not have access to a fax machine, you may mail it to P.O. Box 4156, Montgomery, Alabama 36101. All answers must be RECEIVED by March 31, 1993 to be included in the May issue.

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KID'S CHANCE

by CHARLES F. CARR

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

In September 1991, I was a guest speaker of Arkansas Workers' Compensation Commissioner Lyn Tatum's at the Arkansas Workers' Compensation Seminar. On the evening prior to the seminar, I had the opportunity to have dinner with Jim Oxendine, the Workers' Compensation Commissioner in Georgia. Mr. Oxendine could not say enough good things about a program in Georgia called "Kids' Chance."

He stated that since the inception of Kids' Chance, a large number of children had received scholarships enabling them to finish high school, college and trade school. I have never seen more geniune enthusiasm for any charitable event than that exhibited by Mr. Oxendine.

In July 1992, I was honored to be selected as chair of the Alabama State Bar Workers' Compensation Section. At the bar's annual meeting in Birmingham we challenged members of the section to work with us to establish the Kids' Chance Program in Alabama.

Shortly thereafter, a preliminary "Kids' Chance Organizational Committee" was established. Serving as co-chairs were Richard Browning, an attorney who primarily represents injured employees in Mobile, and John Coleman, III, an attorney who primarily represents employers in Birmingham. A very active and enthusiastic committee proceeded to establish the program in Alabama. In addition to Browning, Coleman and me, members include Wayne Wolfe of Huntsville; Steve Ford of Tuscaloosa; Steve Brown of Birmingham; Randy James of Montgomery; Don Rhea of Gadsden; Gary Pears of Birmingham; Bob Lee of Birmingham; Ross Foreman of Birmingham; Bill Lundy of Georgia; Jay St. Clair of Birmingham; Tricia Fraley of Birmingham; and Pete Cobb of Montgomery.

The first order of business was to get the organizing committee to "put their money where their mouths were". Committee members contributed or pledged between $750 and $1,500 each to create a substantial deposit to get Kids' Chance started. Operating procedures have now been approved by the Alabama State Bar Board of Bar Commissioners. The Alabama Law Foundation will administer the scholarship fund and distribute the proceeds as directed by a specially selected Scholarship Committee. The Scholarship Committee will be comprised of representatives of the following areas:

(1) two workers' compensation attorneys;

(2) the self-insured industry;

(3) the insurance industry;

(4) organized labor;

(5) the medical community; and

(6) the rehabilitation community.

The Georgia Kids' Chance is light years ahead of us as far as contributions received and scholarships issued. Our enthusiasm, however, cannot be surpassed.

We urge all citizens of Alabama to support us in our efforts. How can you help? We need a county coordinator in each of Alabama's 67 counties. If you cannot contribute financially to Kids' Chance right now, write and tell me that you are willing to help in the organization of this program. We want hospitals, businesses, union locals, doctors, rehab nurses and providers, charitable clubs and organizations, churches, and schools (high schools, vocational schools and colleges) involved in this project.

Tell me you will help in some way. If you can contribute or make pledges, do so now. Make your checks payable to Kids' Chance—Alabama Law Foundation. Whether or not you can contribute, write and let me know that you are willing to help in your geographical area. My address is:

Charles F. Carr
Rives & Peterson
1700 Financial Center
505 N. 20th Street
Birmingham, Alabama 35203

Charles F. Carr

Charles F. Carr is a 1977 graduate of the University of Alabama School of Law. He is a senior partner with the Birmingham firm of Rives & Peterson.

He is chairperson of the Alabama State Bar Workers' Compensation Section, executive director of the Aalbama Self-Insurers Association, a legal advisor to the director of the Alabama Department of Industrial Relations and a professor of workers' compensation at Cumberland School of Law.

THE ALABAMA CAPITAL REPRESENTATION RESOURCE CENTER

by ALBERT P. BREWER and BRYAN A. STEVENSON

The Alabama Capital Representation Resource Center is a non-profit community defender organization providing legal assistance to death row prisoners and attorneys representing capital defendants in Alabama.

The Alabama Capital Representation Resource Center was organized by a special task force of the Alabama State Bar in 1988. Since the Center opened in February 1989, it has significantly reduced the number of death row prisoners who are without counsel and assisted hundreds of attorneys appointed to handle capital cases.

In the late 1980s, a serious crisis existed in the provision of legal services to indigent death row prisoners in Alabama. While Alabama had the third largest death row per capita in the United States, no systemized effort was in place to assist death row prisoners in finding legal assistance. Because there is no right to counsel for indigent prisoners seeking appeals to state collateral courts or in federal court, it was not uncommon for some death row prisoners to go months and sometimes years waiting for pro bono legal assistance.

With the support of the Alabama Law Foundation, the Resource Center opened in February 1989 to provide direct assistance to death row prisoners and recruit and assist attorneys who volunteer legal aid to condemned inmates. Located in Montgomery with a staff of six full-time attorneys and four support personnel, the Center has virtually eliminated the delays in prosecuting death penalty appeals that were a result of death row prisoners having no counsel.

Although the Center still does not receive support from the State of Alabama, the support of the Alabama Law Foundation has enabled the Center to develop materials for hundreds of attorneys who volunteer or are appointed to handle death penalty cases. The Center presently produces the *Alabama Capital Reporter*, a bimonthly newsletter that details recent legal developments and rulings that have an impact on capital litigation. The newsletter is now distributed to over 300 attorneys who are involved in capital litigation in Alabama. The Center also makes two manuals available to lawyers assisting capital defendants and death row prisoners in Alabama. The *Alabama Capital Postconviction Manual* and the *Alabama Capital Defense Trial Manual* contain hundreds of sample motions and pleadings, substantive review of capital defense issues and case lists that are designed to aid counsel in meeting the challenges generated by defense work in a death penalty case.

Serious problems still remain in the provision of legal services to indigent capital defendants at trial. At any given time in 1992, there were over 200 people awaiting capital murder trials in Alabama. With no statewide public defender system to assist in handling these cases, appointed private attorneys are forced to contend with the unique challenges these cases bring. However, the Foundation's support of the Resource Center has meant that some materials and support are available to counsel and that tremendous progress has been made in providing legal assistance to the 124 prisoners presently under sentence of death. The Center is very grateful to the Foundation and its support of legal services to the poor. ■

Albert P. Brewer

Former Governor Albert P. Brewer is Distinguished Professor of Law and Government at Cumberland School of Law of Samford University. He served as Chairman of the Alabama State Bar Action Group on Post-Conviction Appeals which recommended the formation of the Alabama Capital Representation Resource Center. He has been a member of the Board of Directors of the Resource Center since its incorporation serving the first year as Chairman of the Board.

Bryan A. Stevenson

Bryan A. Stevenson is the executive director of the Alabama Capital Representation Resource Center in Montgomery. He is a graduate of Harvard Law School and also holds a graduate degree in public policy from Harvard's School of Government.

Stevenson has produced several training manuals on capital litigation and lectures across the country on litigating death penalty cases, race and poverty issues in the criminal justice system and antidiscrimination law. He was formerly a staff attorney with the Southern Center for Human Rights in Atlanta, Georgia.

He received the Reebok National Human Rights Award, the American Bar Association Wisdom Award for Public Service Litigation and the ACLU National Medal of Liberty.

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

18 Thursday
BASIC REAL ESTATE LAW
IN ALABAMA
Birmingham
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-7909

19 Friday
MORTGAGE FORECLOSURES
Birmingham
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

24 Wednesday
ADMINISTRATION
OF THE ESTATE
IN ALABAMA
Birmingham
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-7909

25 Thursday
ADMINISTRATION
OF THE ESTATE
IN ALABAMA
Huntsville
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-7909

30 Tuesday
PERSONAL INJURY
LITIGATION PRACTICE
Mobile
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-7909

31 Wednesday
PERSONAL INJURY
LITIGATION PRACTICE
Montgomery
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-7909

APRIL

2-3
CITY & COUNTY
GOVERNMENTS
Orange Beach
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

7 Wednesday
ELDER LAW IN ALABAMA
Montgomery
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-7909

8 Thursday
ELDER LAW IN ALABAMA
Mobile
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-7909

16 Friday
MASTERING THE
FUNDAMENTALS
OF ADVOCACY
Birmingham
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

22-24
SOUTHEASTERN
CORPORATE
LAW INSTITUTE
Point Clear
Alabama Bar Institute for CLE
Credits: 12.0
(800) 627-6514

April 30-May 1
ENVIRONMENTAL LAW
Gulf Shores
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

MAY

7 Friday
EMPLOYMENT LAW
Birmingham
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

14-15
ANNUAL SEMINAR
ON THE GULF
Destin, Sandestin Beach Resort
Alabama State Bar
Young Lawyers' Section
(205) 269-1515

21-22
HEALTH LAW
Orange Beach
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

Law Day U.S.A.

May 1, 1993

ORIGIN

Law Day U.S.A. was conceived in 1957 by Charles S. Rhyne, a Washington, D.C. lawyer who was then president of the American Bar Association, the national voluntary organization of the legal profession in the United States.

President Dwight D. Eisenhower established Law Day by presidential proclamation in 1958. On this occasion, he said, "It is fitting that the American people should remember with pride and vigilantly guard the great heritage of liberty, justice and equality under law . . . It is our moral and civic obligation as free men and as Americans to preserve and strengthen that great heritage."

In 1961, the first of May was set aside by joint resolution of Congress as a "special day of celebration by the American people in appreciation of their liberties and the reaffirmation of their loyalty to the United States of America," and as an occasion for "rededication to the ideals of equality and justice under laws."

PURPOSE

The purpose of Law Day is to call the attention of every American citizen to both the principles and the practice of American law and justice. It is a day to reflect on our legal heritage, the role of law in our society and the rights we enjoy under our Constitution.

It is also a day for all citizens to consider their duties, such as: (1) to be informed on government and community affairs; (2) to support and encourage efforts to modernize our courts; (3) to vote in elections; (4) to obey and respect the law; (5) to support those institutions and persons charged with law enforcement; (6) to respect the rights of others; (7) to practice and teach the principles of good citizenship in our homes; and (8) to serve on juries and as court witnesses, if called.

DID YOU KNOW?

- One thing former President George Bush, Rev. Jesse Jackson, Supreme Court Justice Antonin Scalia, former Vice-President Walter Mondale, Washington Redskin Keith Griffin, McGruff the Crime Dog, and "Vince and Larry, the seatbelt dummies" have in common is that they have been active participants in Law Day U.S.A. events.
- Ninety-eight percent of state bar associations and 94 percent of local bar associations sponsor Law Day programs which include blood drives, collection of canned goods for the homeless, swearing-in ceremonies for new citizens, and free legal advice booths in shopping malls.
- Law Day programs are conducted in all 50 states, the District of Columbia, and Puerto Rico, as well as overseas at U.S. armed services installations in Japan, Germany, the Netherlands, England, Cuba, and Italy. The most active states (in alphabetical order) are:

1. California
2. Florida
3. Georgia
4. Illinois
5. Kansas
6. Michigan
7. New York
8. Ohio
9. Oklahoma
10. Texas

ALABAMA STATE BAR ESSAY CONTEST

On a state level, the Law Day Committee of the state bar is sponsoring an essay contest for 1993. Local bars will hold their own contests and grade the entries, awarding prizes at the local level. Winners and honorable mentions are then forwarded to the state bar for consideration for statewide prizes.

The theme for the essay contest is "Justice for all—All for justice," which is also the theme of Law Day U.S.A. Entries must be received at the state bar headquarters by May 1, 1993. For more information, call Keith Norman at 1-800-354-6154.

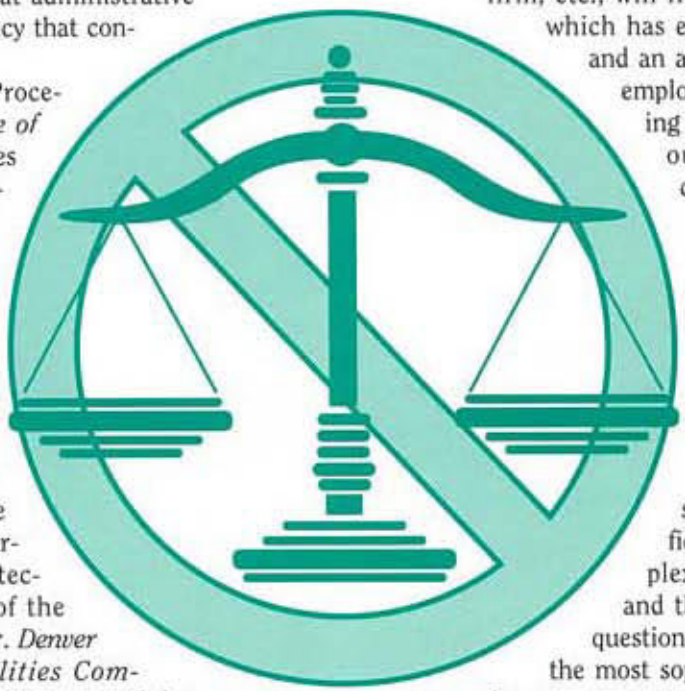
THE UNAUTHORIZED PRACTICE OF LAW?

by L. BRUCE ABLES

This is a follow-up to the article by David B. Cauthen and L. Bruce Ables appearing in the September 1992 issue of ***The Alabama Lawyer*** *[vol. 53, no. 5], page 363.*

Many of you have written members of the Unauthorized Practice of Law Committee about individuals or entities possibly being engaged in the unauthorized practice of law, and we appreciate your comments.

It is of particular interest to the Committee that non-lawyers are representing people at administrative hearings in most every state agency that conducts such hearings.



The Alabama Administrative Procedure Act §41-22-1, *et seq., Code of Alabama* 1975, gives state agencies power to adopt rules and regulations; however, it appears that the Act does not give any state agency the power to adopt a rule or regulation to permit a layperson to represent a party before any administrative hearing. Most jurisdictions hold that the representation of individuals before a state administrative agency constitutes the practice of law where such appearance is associated with the protection, enforcement or defense of the legal rights and duties of another. *Denver Bar Association v. Public Utilities Commission*, (1964) 391 Pac.2d 467. This case held that a rule adopted by the Public Utilities Commission permitting a layperson to act in a representative capacity before that body under all circumstances was invalid because it was too broad in that it would permit a layperson to practice law without a license. The Court said that if the Commission's actions were legislative or non-judicial, then persons appearing in a representative capacity in respect to these matters would not be practicing law. In *Smith v. Public Service Commissioner*, (1960) 336 SW2d 491, the Court held that the Commission properly refused an individual who was not an attorney the right to act as an attorney for himself and 25 others who had signed a petition protesting an increase in water rates. It appears obvious that any non-attorney practicing before any administrative agency within the State of Alabama is engaged in the unauthorized practice of law. How much damage has been done and will be done to individuals seeking redress in these administrative hearings cannot be determined. Another area of concern is deferred compensation plan documents. These plans (pension, profit sharing or cafeteria, etc.) are generated in different ways. A bank, insurance company, actuary firm, etc., will frequently provide a master plan which has extensive standardized language and an adoption agreement by which the employer adopts the plan. In completing the adoption agreement, the various boxes are checked, blanks completed and, frequently, language added to the plan to customize it to the employer's wishes. These plans have tax consequences that may or may not be understood by non-attorneys. These plans have great significance under Title I of ERISA, a labor law provision. The employer undertakes very substantial liabilities, including fiduciary liabilities, involving complex questions of federal labor law and the common law of trusts. These questions are far beyond the capabilities of the most sophisticated accountants, bankers, insurance agents and actuaries. These master plans are being aggressivley marketed to non-attorneys. Some institutional document providers advise the customer to have the document reviewed by an attorney. Certainly, the law is clear that mere review by an attorney of a document prepared by a non-attorney does not prevent the non-attorney from engaging in the unauthorized practice of law. Clearly, the party, actuary, insurance company or the like, who completes the blanks in the plan is not acting on his own behalf since the institution has no interest in how the blanks are completed. They just want the business. If filling in the blanks of a deed is the unauthorized practice of law (*Coffee County Abstracta v. State Ex Rail Norwood*, 1983, 445 So.2d 852), clearly, the filling of the blanks in these plans is an unauthorized practice of law. They are legal documents and the person or entity filling in the blanks does not

L. Bruce Ables

L. Bruce Ables is the vice-chair of the Alabama State Bar's Unauthorized Practice of Law Committee and practices in Huntsville with the firm of Berry, Ables, Tatum, Little & Baxter.

have a proprietary interest in them.

Apparently, there are a lot of laypersons assisting parties in divorce proceedings. There are individuals in the Huntsville, Alabama area advertising in newspapers and by flyers that they can assist people in the preparation of divorces, wills, trusts, workers' compensation—almost everything in the legal field. The ads do not quote a fee and they clearly indicate they are not attorneys but paralegals. Is this the unauthorized practice of law?

The Alabama Supreme Court in the case of *McGiffert v. State* (1979) 366 So.2d 680, on an appeal in a *quo warranto* proceeding, held that a layperson who had placed an advertisement in the local newspaper offering an uncontested divorce for a sum of money was an intrusion into the profession of the practice of law without having been duly licensed, in that this person had held himself out to the public as a person qualified to practice the law. The ad stated:

> "Considering divorce, if there is no contest, you can get your divorce without attorney's fee. The whole cost will only be $100.00. You pay court costs of $36.00. Write: Townley Services, P.O. Box 317, Kent, Alabama 36045, confidential and guaranteed."

Apparently, *McGiffert* contended that the motive behind the ad was to conduct a survey to find out the number of individuals who would be interested in securing uncontested divorces at a cost below the current market rate, that the plan was to attract young attorneys through the lure of an established market, and that the sum mentioned in the ad would be used to pay the attorneys' salaries. The Court clearly rejected this contention, saying that the Court thought the ad spoke for itself.

In the case of *Florida Bar v. American Legal & Business Forms, Inc.* (1973) 274 So.2d 225, the Court, in effect, said that even though there may actually be a service to the public, whose protection is the principal concern in having printed legal forms and copies of statutes available, the unauthorized practice of law begins when included with these forms are what purports to be instructions as to how they are to be used and filled out, that it is usually a matter of one trained in the law to determine the proper application of the forms and prevent possible injury and damage from their improper use. The Court further declared that it is a fallacy to look upon such kits as mere forms since incorrect assertions which a layman may make in attempting to use them can result in perjury, libel or contempt. Inartfully drawn wills have resulted in untold litigation, needless expense and unjust results to those intended to benefit from the estate.

The very next year the Court, in the case of *The Florida Bar v. Stupica* (1974) 300 So.2d 683, rejected the argument that the mere sale of legal forms and instructions on how to fill them out was legal because of the lack of any personal lawyer/client relationship. The Court said that the sale of forms alone is not illegal, but when those forms are coupled with direct legal instructions and advice as to their use or application, such sale does constitute legal counseling and is the unauthorized practice of law. The Court said a "kit" is distinguishable from the law text discussing legal subjects, from statutes with interpretive annotations, and from the generality of legal forms books, in that it centers upon specific advice through forms and instructions on particular aspects of the layperson's particular legal problem. Such a kit, the Court observed, assumes the role in place and instead of an attorney-at-law. This view, that the sale of a package of forms and instructions as to their use constitutes the unauthorized practice of law, is supported by *State Bar of Nevada v. Brandon* (1972) 37 *Unauthorized Practice News* 37.

Apparently, there is no unauthorized practice of law if one sells a "kit" and it has no instructions as to its use, but if it does have instructions as to its use, then apparently that would be getting into the practice of law, and that apparently would be the holding of our state supreme court if the issue were brought before it. The *Coffee County Abstract Case, supra* clearly indicates that the court would so hold.

If one reads the *Coffee County Abstract Case, supra*, it is readily apparent that the filling in of the blanks on a real estate contract, as most real estate agents in Alabama do, is the unauthorized practice of law. The filling in of blanks on a deed is an unauthorized practice of law, so would not the filling in of the blanks on a contract for the sale of real estate be the unauthorized practice of law?

What about a paralegal, in your employment, attending §341 meetings in bankruptcy?

Again, your comments about those who may be engaged in the unauthorized practice of law will be appreciated. ■

YOUNG LAWYERS' SECTION

By SIDNEY W. JACKSON, III, president

Focus on solo practitioners

Downsizing of law firms, recruiting new lawyers and the tight job market have left many Alabama young lawyers in the position of solo practitioner. The American Bar Association has recently begun to focus on issues affecting solo practitioners and so should the Alabama State Bar. A task force created to look at the question has determined that solo and small firm practitioners represent 63 percent of all lawyers in private practice. Forty-seven percent of these lawyers have not joined the American Bar Association and the same probably holds true for local bar associations. Why? A recent survey revealed the following:

— 60 percent saw little or no benefit to be derived;

— 38 percent cited the high cost of membership; and

— 30 percent believed the bar associations do not represent "lawyers like me."

Solo practitioners often perceive bar associations and young lawyer affiliation for the large, established firms and not for struggling young lawyers. This perception is wrong and I can attest from personal experience that a solo practitioner has as much or more to gain from bar association affiliation than associates in larger firms. I was president of the Mobile Young Lawyers' Association in 1989 while practicing on my own and often would get cases, advice on various matters from more experienced lawyers, and an ability to "network" at Young Lawyer functions. The immediate past president of the Mobile YLA, Mark Wolfe, also is a solo practitioner.

Besides "networking" through a local association, other methods of assisting solo practitioner or practitioners in small firms are "Bridge the Gap" seminars. The Alabama YLS frequently sponsors such seminars. The scope and purpose of the seminar is to assist new lawyers and recent graduates in bridging the gap between the theoretical practice of law as learned in law school and the actual nuts and bolts of practice in the real world. Topics at such seminars include client interviewing and case evaluation, business document drafting, litigation and case management, simple wills and trusts, and how to set up and manage your law practice. There also is information on how to avoid committing malpractice and how to obtain various types of insurance.

The American Bar Association has a wealth of information and services to assist solo practitioners and has created a nine-member task force in that regard. The Law Practice Management Section of the ABA has published a book, *How to Start and Build a Law Practice*, which includes topics such as "Getting Started", "Getting Located", "Getting Equipped", "Getting Clients", "Setting Fees", "Managing the Law Office", "Ethics and Professional Responsibility", and "Resources and Advice".

Sidney W. Jackson, III

Another area in which bar associations can assist solo practitioners is through mentoring programs. In these programs, volunteers who have practiced law for a period of time make themselves available to discuss cases, problems, general practice, etc. with solo practitioners and act as mentors.

Anyone with questions concerning sources of help for solo practitioners, please call me at (205) 433-3131 or contact the ABA at (312) 988-5614.

Sandestin Seminar speakers set

Frank Woodson of Mobile has put together a stellar cast of speakers for the May 14-15 Sandestin Seminar on the Gulf. Professor Charles Gamble will speak on evidence, Judge W. Harold Albritton will pass along his thoughts on federal court practice and Gunter Guy, city attorney for Montgomery, will speak on municipal law. Jeff Rickard of Pittman, Hooks, Marsh, Dutton & Hollis will speak on a personal injury topic, Warren Herlong of Mobile will speak on the Alabama Eminent Domain Law and Jim Pratt of Birmingham will speak on crash worthiness. Rounding out the speakers, Alan Shealey, a clinical psychologist, will speak on jury selection and how to interpret those little nods, winks, crossed arms, etc. we all get from jurors. Frank is also lining up a medical professional to speak on a related topic.

The entertainment and social functions are unbeatable and they are included in the price of the seminar. Following the morning session on Friday there will be a golf tournament and tennis tournament. Friday night there will be a cocktail party until about 7:30 p.m. and then dining on your own. Saturday there will be a beach keg party followed by the cocktail and hors d'oeuvres band party sponsored by Pittman, Hooks, Marsh, Dutton & Hollis. This party is truly one of the finest seminar social events at which to get thrown in the pool!

The Sandestin Seminar is not limited to members of the YLS. It is sponsored by the section, but it is open to young lawyers, old lawyers, judges and law students, alike. Reservations can be made by using the attached application form. Ttraditionally, the best rooms book early, so I urge you to make your plans now. I hope to see you at the seminar. ■

Registration Form for Sandestin Seminar

May 14-15, 1993 · Sandestin Resort

Name _____

Address _____

City _____ State _____ Zip _____

For reservations at the Sandestin call 1-800-277-0802.

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

Address Changes

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

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

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

Full Name _____

Business Phone Number _____ Race _____ Sex _____ Birthdate _____

Year of Admission _____

Firm _____

Office Mailing Address _____

City _____ State _____ ZIP Code _____ County _____

Office Street Address (if different from mailing address) _____

_____

City _____ State _____ ZIP Code _____ County _____

MYTH INFORMATION: CD ROM and Legal Research

by TIMOTHY A. LEWIS

"Quidquid id est, timeo danaos et dona ferentis."

This year will be the 20th anniversary of Mead Data Central's release of LEXIS®, touted, at the time, by Mead President Jerome Rubin as the nation's first and only computer-assisted legal research service. This event, followed by the advent of WESTLAW, supposedly heralded the demise of books as legal research tools. Now, two decades later, books are still the mainstay of legal research. In fact, more legal materials are being published in hard copy than ever before. (I know this because *every* invoice and publisher's flyer comes across my desk.) The online computer seems to have stimulated the print industry rather than destroyed it.

Eight years ago, history repeated itself when CD ROM technology hit the market. According to some law publishers, CD ROM is all that online databases are but without the high telecommunications cost. Researchers can search full-text documents, print out search results or download material to "cut and paste" for use in briefs and opinions without worrying about the meter running. It's a miracle! CD ROM will replace the law book as a legal research tool! NOT!

Don't misunderstand, CD ROM is a fine example of how technology can improve methods of legal research. It has a large storage capacity, yet it is compact and portable; data cannot be erased and does not deteriorate. It imitates online searching, taking advantage of a user's familiarity with online search techniques, plus there are no communications charges to worry about. CD ROM has found a niche in the legal community and rightly so: it makes legal research easier in many instances.

On the other hand, one should not enter the world of CD ROM blindly. The price is high, mainly because the cost of producing the master disk is high. Updating is difficult, not because it is expensive to make copies of the master disk, but because you cannot overwrite a disk. Access speed is slow (one to two seconds as opposed to nine to 18 milliseconds for hard disk access); there is no standard search interface among CD ROM products; and, worst of all, only one person use a CD ROM product at a time. This last disadvantage can be minimized by networking, but networking not only increases the cost but slows down access time even more.

Is CD ROM dead, then? No, despite what some writers have said, CD ROM is not dead. In fact, this past year it has experienced a revival. A local company has already begun marketing the *Alabama Code* and cases on CD ROM. After buying Lawyer's Cooperative, Callaghan and Clark Boardman, Thompson Publishing has begun an aggressive campaign pushing CD ROM products, especially one called *Casebase*, containing appellate court cases from different states. This competition has forced West Publishing Company into actively marketing state cases on CD ROM, something West seemed reluctant to do in the past. The Michie Company, not to be outdone, has its own CD ROM version of state codes and cases. Clearly, law publishers believe that there is a market for their products. By February of this year, in Alabama alone, three (and perhaps four) different law publishers had Alabama CD ROM products for sale. This large number of competitors in Alabama makes it very important that the buyer beware! Because of intense competition between publishers, each product must be carefully evaluated before a commitment is made.

Just as online databases have enhanced legal researchers' ability to perform research, so CD ROM will have the same effect. It will not, as online databases have not, replace the book in the near future, despite publishers' hype. Publishers, after all, are in the business to make sales, and one must be wary of vendors' predictions. It is the combination of online databases, CD ROM and hard copy that will be the most effective way for a skillful legal researcher to perform his or her task. ■

Timothy A. Lewis

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

DISCIPLINARY REPORT

Reinstatement

• **Kenneth Holloway Millican** was reinstated to the practice of law by order of the Supreme Court of Alabama, effective December 22, 1992. Millican had previously been suspended from the practice of law, effective April 1, 1989 for failing to comply with the annual continuing legal education requirements. [Pet. No. 92-06]

Disbarments

• By order of the Supreme Court of Alabama, Huntsville attorney **Joe N. Lampley** was disbarred and excluded from the practice of law in the State of Alabama effective January 5, 1993. Lampley consented to the disbarment based on his having been convicted of the felonies of bribery and extortion in the United States District Court, Northern District of Alabama. [Rule 22(a)(2)—Petition No. 92-08]

• **James Curtiss Bernard**, an Alabama lawyer residing in Columbus, Georgia, was disbarred by order of the Alabama Supreme Court, effective March 9, 1992. Bernard, while serving as an assistant district attorney in Georgia, was indicted on six counts of racketeering and extortion. The charges are a result of Bernard's activity in procuring dismissals or lenient sentences for persons charged with drug offenses. He was found guilty on March 7, 1992 on one count of attempting to commit extortion while holding the office of assistant district attorney in violation of 18 U.S.C. §1951.

Bernard was sentenced to 33 months confinement in the Federal Confinement Facility at Maxwell Air Force Base, Montgomery, Alabama. The Disciplinary Commission, pursuant to Rule 22(a)(2) of the Rules of Disciplinary Procedure (Interim), after hearing, ordered that Bernard be disbarred effective March 9, 1992. [Rule 22(a)(2)—Petition No. 92-03]

• Birmingham attorney **James B. Morton, II** has been disbarred from the practice of law, effective January 11, 1993. In 1990, Morton settled a claim on behalf of a client, under the terms of which the client received the sum of $10,000. After deducting his attorney fees, Morton gave the client a check for $7,600. Morton's check was returned by the bank on which it was drawn for non-sufficient funds. Morton failed or refused to make the check good or otherwise reimburse his client. A hearing was scheduled before the Disciplinary Board of the Alabama State Bar for November 6, 1992. Morton failed or refused to appear at the hearing. After hearing the testimony from the client, the Disciplinary Board determined that Morton should be disbarred from the practice of law.

Public Reprimands

• Bessemer attorney **John A. Acker, Jr.** was publicly reprimanded on December 11, 1992 for violating Rule 1.1 of the Rules of Professional Conduct which provides "a lawyer to act competently, skillfully and thoroughly"; Rule 1.3 which provides that "a lawyer shall not willfully neglect a legal matter entrusted to him"; and Rule 1.15(a) which provides "a lawyer to hold the property of clients and third persons separate from his own". The Disciplinary Commission found that in December 1991, Acker was retained to handle the closing of a real estate transaction for the purchaser. The title company required that $5,000 be put up for escrow, pending the release from one of the trustees involved in bankruptcy. Acker's closing statement reflected the disbursement to the escrow held by the title company. Acker sent the closing documents to the title company, but failed to send the $5,000 to be escrowed. In May 1992, it was verified by the administrator for the estate that the funds had never been received by the title company. After being contacted by the title company, Acker insisted that he had sent the funds. Acker refused to return calls to the attorney for the administrator. Finally, a formal written demand was made and Acker sent a check from his general account. However, the check was dishonored by his bank, then subsequently honored at a later date.

• Birmingham attorney **Robert L. Austin** was publicly reprimanded December 11, 1992 for violating DR 2-111(A)(2) of the *Code of Professional Responsibility* which provides that a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to allow the client time to employ other counsel. The Disciplinary Board found that Austin was retained to defend a client in a breach of contract suit. Thereafter, Austin became involved in a dispute with his client over attorney fees, and filed a motion to withdraw without notice to his client, approximately 11 days before the scheduled trial date. Judgment was entered against the client for failure to appear. Austin notified his client approximately seven days after the scheduled trial date that his motion to withdraw as counsel had been granted, and by separate letter, dated the same day, also notified his client that default judgment had been entered against him.

Transfers

• Birmingham attorney **Sallie M. McConnell** has transferred to disability inactive status and is no longer engaged in the practice of law in the state of Alabama, effective January 6, 1993. McConnell consented to the transfer to disability inactive status due to reasons of physical infirmity and illness. [Pet. No. 93-001]

• By order of the Supreme Court of Alabama, Boaz attorney **Larry W. Dobbins** has been placed on disability inactive status and excluded from the practice of law in the state of Alabama effective January 13, 1993. Dobbins consented to the transfer to disability inactive status due to reasons of physical infirmity or illness. [Pet. No. 93-002] ■

LEGISLATIVE WRAP-UP

By ROBERT L. McCURLEY, JR.

Alabama Rules of Evidence

The Alabama Supreme Court requested that the Alabama Law Institute undertake a study revising the Rules of Evidence. A committee of lawyers and judges was appointed by the court. The study began in September 1988. The committee was charged with proposing rules of evidence for the court to promulgate. After four years of drafting and study, the drafting committee has made its initial recommendations. The rules have been circulated to the membership of the Alabama Law Institute prior to being proposed to the Alabama Supreme Court.

The Federal Rules of Evidence were used as our model. A consensus developed that the federal rules would be adopted unless there were good reasons to deviate from them. Accordingly, some of these rules differ significantly from the corresponding federal rule. The differences usually resulted in either modifying the federal rule or replacing it altogether with the pre-existing Alabama common law principle. However, we agreed to model the work on privileges after a combination of the Uniform Rules of Evidence and the pre-existing Alabama privilege statutes, since the original proposed federal rules on privileges had been rejected.

In most instances, these rules continue the historic Alabama law of evidence either identically or with slight modification or expansion. Some rules, however, do abrogate pre-existing Alabama law. When change occurs, it generally is to implement the overall policy of promoting greater admissibility. These rules mark a shift from a system of exclusion to one of admissibility.

The rules are divided into 11 articles. These include rules on presumptions in civil actions, relevancy, privileges, witnesses, opinion and expert testimony, hearsay, authentication and identification, and contents of writings, recordings and photographs.

Special appreciation goes to Chairperson Pat Graves, who led the committee through four years of debate and study.

The study began under then Chief Justice Torbert and has received continued support and encouragement from Chief Justice Hornsby and the associate justices of the supreme court. Special thanks are extended to Bob Esdale, clerk of the supreme court, who has acted as a liaison between the court and this committee.

We were fortunate to have Charles Gamble, Henry Upson Sims Professor of Law at the University of Alabama School of Law, as the chief draftsman and reporter for the project. Dean Gamble's background and expertise as a teacher and writer in the field of evidence was invaluable. Other members of the committee are:

Joseph Colquitt, Tuscaloosa
Greg Cusimano, Gadsden
Pat Graves, Huntsville
Hon. Sally Greenhaw, Montgomery
Hon. Arthur Hanes, Birmingham
Broox Holmes, Sr., Mobile
Alfred Igou, Fort Payne
Ralph Knowles, Jr., Atlanta
Tennent Lee, Huntsville
Howard Mandell, Montgomery
William Mills, Birmingham
Bruce McKee, Birmingham
Frank McRight, Mobile
Delaine Mountain, Tuscaloosa
Richard Ogle, Birmingham
Abner Powell, Andalusia
Ernestine Sapp, Tuskegee
Griffin Sikes, Jr., Montgomery
Clarence Small, Jr., Birmingham
Hon. C. Lynwood Smith, Jr., Huntsville
Bill Clark, Birmingham, ex officio

These rules will be available to the bench and bar, prior to their adoption, to obtain comments and review.

Regular Session—1993

The 1993 Regular Session began February 2, 1993 with 515 bills introduced the first week. The Alabama Law Institute's Probate Procedure bill was introduced in the House of Representatives (H. 193) by Representatives Marcel Black and Jim Campbell and in the Senate (S. 280) by Senators Don Hale, Michael Figures and Doug Ghee.

Also expected to be introduced will be the Limited Liability Company Act (See *Alabama Lawyer*, November 1992) and the Revised Business Corporation Act.

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

Robert L. McCurley, Jr.
Robert L. McCurley, Jr. is the director of the Alabama Law Institute at the University of Alabama. He received his undergraduate and law degrees from the University.

What To Do When It Happens To You

"The art of junk science is to brush away just enough detail to reach desired conclusions, while preserving enough to maintain an aura of authoritative science." — **Peter W. Huber**

by GEORGE M. WALKER

It has happened to every lawyer who has tried cases involving expert testimony. It happens to lawyers for plaintiffs and lawyers for defendants in civil cases; it happens to the prosecution, and it happens to the criminal defendant. And, as the stakes in litigation rise, it is happening more and more often. Junk science is fast becoming a cottage industry supporting litigation, and often the extent to which junk science is introduced into evidence, and how it is attacked, can determine the outcome of a case.

Peter Huber's definition above is apt. His book, *Galileo's Revenge: Junk Science in the Courtroom,* is must reading for any litigator who frequently faces fringe expert witnesses. He describes the phenomenon well in his introduction:

> Junk science is the mirror image of real science, with much of the same form but none of the same substance. . . . Junk science cuts across chemistry and pharmacology, medicine and engineering. It is a hodgepodge of biased data, spurious inference, and logical legerdemain, patched together by researchers whose enthusiasm for discovery and diagnosis far outstrips their skill. It is a catalogue of every conceivable kind of error: data dredging, wishful thinking, truculent dogmatism, and, now and again, outright fraud.

Id. at 2-3. The dual problems for the trial lawyer in such a case are to recognize the expert as a junk scientist, and then to expose the junk science for the trier of fact.

How it creeps in

Junk science would not be a concern if it were not admissible; unfortunately, the laxity with which the courts evaluate expert testimony plays into the hands of the accomplished junk scientist. It is a fact that junk science should not be admitted into evidence; it is also a fact that it often is.

As long as the rules of evidence permit the admission of expert scientific testimony to assist the triers of fact, there will be junk scientists seeking to expand the envelope of admissibility.

Rule 702 of the *Federal Rules of Civil Procedure* authorizes the trial judge to permit a qualified expert to testify, "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Under this standard, the court can admit any expert testimony it feels may be helpful to the trier of fact. Given the propensity of many trial judges to evade evidentiary issues in the hope that the jury will "do the right thing," the standard favors admission of junk science evidence because "the rules give equal dignity to the opinions of charlatans and Nobel Prize winners." *Huber, supra,* at 17.

The problem is exacerbated because the trial judge is confronted by two or more distinct warring factions in any trial involving complex scientific evidence, and each proffers its scientific evidence as mainstream, describing opposing positions as fringe. The trial judge rarely has any background in the scientific area, and must rely upon the experts themselves for critical information. Hence, junk scientists often bring their science to the jury with nothing more than testimony that he or she is qualified to give opinions, and has opinions, regarding one or more of the issues in the case. Because judges are often loathe to exclude such opinions, it is critical for the trial lawyer to be able to identify junk scientists, to know how to investigate junk scientists, and to develop methods to expose the junk scientist and his particular brand of junk science to the jury.

Identifying the junk scientist

Part of the repertoire of the junk scientist, as defined above, is preserving enough detail to maintain an aura of authoritative science. There are certain traits of the junk scientist that often emerge, despite his or her best efforts to maintain a scientific aura. In considering an expert witness' opinions, the

more of the following characteristics he or she possesses, the more likely it is that you have a junk scientist on your hands:

1. He is qualified in his field, but the subject matter of his opinions is not quite in his field;
2. He has published, but not on the subject matter about which he is advancing opinions;
3. He has not offered his opinion in this case for publication in any peer-reviewed journal;
4. He is a member of numerous professional societies, but does not serve in any official capacity in any of them;
5. He can point to no literature in his field that supports or confirms his opinions;
6. His opinion is not shared by recognized authorities in his field;
7. His opinion relies upon unestablished facts, untenable inferences, and/or speculation;
8. His opinion is contrary to the facts, logic, and/or established science;
9. His opinion cannot be confirmed by collateral analysis; and
10. He sticks to his opinion even after his fallacies and inaccuracies have been exposed.

Investigating the junk scientist

Once a trial lawyer becomes aware that he is dealing with a junk scientist on the other side, there are a number of things that need to be done to investigate the opposing expert and to authenticate him as a junk scientist-in-fact. The following list contains the primary elements of the investigation, although different experts may require using different techniques.

Obtain a clear and concise statement of each opinion expected to be offered by the expert. An accomplished junk scientist enjoys scientific details about as much as Gino Torretta enjoyed the 1993 Sugar Bowl. Such details are inconsistent, they require explanation, and they interfere with the agenda of the junk scientist. Such details are often ignored or overlooked by the expert's opinion, or the opinion will vary from detail to detail. In a recent wrongful death case tried in federal court in Mobile,[1] plaintiff offered expert testimony opining that benzene detected in the groundwater underlying defendant's property had volatilized and migrated into the workplace air of decedent's employer next door. While plaintiff's expert theorized that decedent was continuously exposed for long periods of time due to the vapor migration, once the expert was pinned down on his theory, it was a straightforward task to demonstrate mathematically that there was not enough benzene in the groundwater to support the migration theory for a week. In most federal courts, the parties are now required to exchange expert reports; where this is not the case, a clearly worded interrogatory ought to be sufficient to pin down the expert.

Obtain the expert's resume. The CV of a typical junk scientist is larded with multitudinous accomplishments of dubious distinction, but sometimes the very brazenness that leads one to become a junk scientist in the first place can be of substantial benefit to opposing counsel. Every now and then an outright fraud can be found in the resume — always an interesting tidbit to toy with during cross-examination. More commonly, counsel will find that the resume is full of writings, lectures, speeches, and/or studies on issues other than those involved in the pending case, and that the expert in fact has not been involved in anything of substance in the areas about which he expects to give testimony. While this is generally not sufficient to disqualify an expert, it is excellent ammunition for cross-examination.

Obtain copies of relevant articles the expert has authored. Believe it or not, some experts have actually testified to opinions directly contrary to positions that they have taken in earlier published writings. It is always fascinating to watch such experts try to explain to the jury why they should believe what the witness says in court and not what the witness said in the published article. This will only rarely be the case where a junk scientist is involved, since they so rarely author anything in their areas of "sorcery," but it is an area for investigation that should not be ignored.

Obtain college transcripts. Following the precept that things are not

always as they are made to appear, acquiring the college transcript of the expert is often valuable. In another personal injury case in Mobile,[2] plaintiff identified a "human factors psychologist" as an expert who would offer testimony on the need for, and adequacy of, product warnings. The expert's college transcript revealed that he had received an "F" in logic during his sophomore year in college. The case was settled prior to trial, but undoubtedly the jury would have been interested in this background, since the expert's opinions sorely tested the concept.

Obtain the expert's contract with opposing counsel. Few experts work for free, and this is especially true of junk scientists. There is no reason to enter the field of litigation sorcery if you are not out to make a few bucks. Sometimes, perhaps out of fear that he or she is dealing with an equal, the junk scientist will enter into a written contract with opposing counsel. In the *Coleman* case, *supra*, one of plaintiff's experts entered into just such a contract, agreeing that one of the "objectives" of the expert's work was to "[e]stablish that a route existed whereby . . . contaminants are/were conveyed to the air of the . . . office building." Where the expert has promised a result such as this, it is not difficult to challenge his objectivity.

Obtain the expert's correspondence with opposing counsel. For the same reasons discussed in the preceding section, any correspondence between the expert and opposing counsel ought to be acquired and reviewed. Again, using the *Coleman* case as an example, it became apparent that decedent's treating physician reached his opinion on medical causation largely as a result of details supplied to him in a letter from plaintiff's counsel. The expert performed no independent analysis of the facts and had to admit on cross-examination at trial that if counsel had gotten any of the facts wrong, his own opinion would not be scientifically reliable. Attorney correspondence is especially important in such cases because often attorneys do not completely or fairly characterize the relevant facts in a letter seeking an expert opinion.

Obtain transcripts of the expert's testimony in similar cases. As with a contrary published opinion in an article described above, there is little that irritates a junk scientist as much as being confronted with contradictory or conflicting testimony he or she has given in other cases. Because their opinions are sometimes case-specific, the existence of prior contradictory opinion testimony is a possibility that should never be overlooked.

Obtain all standards bearing on the subject matter of the expert's opinions. Often, the opinion of a junk scientist will not be consistent with governmental or regulatory thinking. In the *Coleman* case, *supra*, it was the opinion of plaintiff's experts that benzene, at an average groundwater concentration of 1.32 parts per million, volatilized and migrated as vapor through three feet of soil and then 175 feet through a pipe into a neighboring office building, contaminating the office air with from .4 to 3 parts per million benzene. The OSHA benzene standard provides that workers who work with liquids containing .01 percent benzene (1000 ppm) or less should not expect to be exposed to airborne benzene concentrations greater than .5 parts per million. It is difficult for even the most accomplished litigation conjurer to explain why 1.32 parts per million benzene in groundwater three feet underground and 175 feet away poses a risk, while working hands-on with a liquid containing 1000 parts per million benzene would not. Regulatory standards should never be ignored in the investigation of the opinions of a junk scientist.

Obtain authoritative literature on the subject matter. Often the junk scientist is a lonely voice in the wild on the opposite side of otherwise undisputed science; indeed, that often is why he or she got hired in the first place. It is imperative that counsel obtain and review the authoritative literature, and evaluate just how far from the mainstream the expert's opinions truly are. In some cases, the opinions may be so far from mainstream as to be judicially unacceptable, as found in *Johnston v. United States*, 597 F. Supp. 374, 413 (D. Kan. 1984):

> To accept Dr. Gofman's opinion would require this Court to reject the consensus of the world's radia-

HONOR ROLL

ALABAMA STATE BAR · BUILDING FUND ·

Between December 1, 1992 and January 27, 1993, 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 December 1, please see previous issues of *The Alabama Lawyer*.

CHESTER PARK BARTON, JR.

THOMAS HALL BOGGS, JR.

JOHN BOSTWICK

PAMELA HARNEST BUCY

JARETT CHARLES CRAWFORD

WOODFORD WYNDHAM DINNING, JR.

WOODFORD WYNDHAM DINNING

HUGH ADAMS LLOYD

LISA JANET NAAS

ANNE LAURA R. PARKER

JOHN LLOYD ROBERTS

HUGH EDWARD ROZELLE

JOHN WALTER SUDDERTH

JOHN EMORY WADDELL

tion experts. This Court simply cannot believe that all of these scientists are so wrong, that Dr. Gofman alone is right, and that all of the other scientists in the world are so biased that they refuse to accept the "truth" once Dr. Gofman has revealed it to them. . . .

When the opinions of a junk scientist are far from the mainstream, look to the literature in the field for support for your attack.

Have the expert's opinions, and the bases for the opinions, analyzed by your own experts. An attorney's best source for identifying a junk scientist is his or her own expert. In a Montgomery federal court case,[3] plaintiff's toxicologist opined in his deposition that decedent's fatal liver cirrhosis was caused by exposure to trichloroethylene in his workplace. Defendant's expert pointed out to defense counsel that the toxicologist had not followed accepted toxicological methodology in reaching his opinion and, more important, that liver slides taken at the autopsy had not been analyzed. Analysis of the liver slides revealed that the decedent suffered from $Alpha_1$ Antitrypsin deficiency, a congenital enzyme deficiency known to cause liver cirrhosis. Never overlook the value of your own expert as an assistant in the investigation of the junk scientist.

Accomplish the following at the deposition of the junk scientist:

(a) Pin down the expert to his or her opinions;
(b) Have the expert identify each fact necessary for each opinion;
(c) Have the expert identify each assumption necessary for each opinion;
(d) Have the expert identify each scientific principle upon which he or she relies in reaching each opinion;
(e) Have the expert identify each piece of literature that he or she relies upon or which supports each opinion; and
(f) Find the source for each opinion, that is, whether the expert developed the opinion on his or her own or whether he or she had the assistance of opposing counsel or others in developing the opinion.

Exposing the junk scientist for the jury

In a case in which the court, despite your best efforts, has decided to permit the junk scientist to attempt to cast his spell on the jury, the work that you have done in identifying and investigating the junk scientist must be pulled together in a fashion to clearly expose him to the jury as the junk scientist that he is. To do this, the trial lawyer must marshal the facts, master the science, control the junk scientist, and challenge the opinions before the jury.

First, do not wait for cross-examination. Challenge the qualifications of the junk scientist by motion in limine and, in federal court, by a motion to suppress under Rule 104 of the *Federal Rules of Evidence*. Take the expert on voir dire before any damaging speculation is presented to the jury. Prepare explicit objections prior to the testimony for those questions seeking opinions that must be challenged.

Second, vigorously cross-examine the junk scientist. Do not fall into the trap, relied upon by many junk scientists, of fearing that you will lose points with the jury for an aggressive cross-examination. Your task is to convince the jury that the supposed expert is not what he or she has been made out to be, and this cannot be successfully done in a passive or tentative cross-examination. The cross-examination must present, in a logical sequence, all of the information accumulated in the investigation of the junk scientist. The jury must be informed, for example, that the supposed expert has never published any of the opinions about which he or she has testified, that the opinions have never been accepted in the mainstream literature, or that the opinion marks a recent and drastic scientific conversion for the expert.

Finally, have your own experts point out to the jury the inconsistencies, speculation, illogic, and/or departures from science in the opinions of the junk scientist. It is much easier for a mainstream expert to come down from the witness stand and with a marker or a piece of chalk explain for the jury the scientific fallacies than it is for the lawyer to try to attack them in argument. Jurors expect there to be conflicting expert testimony, and they are more aided by the experts in resolving the conflicts than they are by the lawyers.

Conclusion

As long as the rules of evidence permit the admission of expert scientific testimony to assist the triers of fact, there will be junk scientists seeking to expand the envelope of admissibility. As long as trial judges believe that jurors are inherently capable of distinguishing scientific fact from hocus-pocus, there will be junk scientists mumbling their own brand of scientific incantations. As long as the legal system holds out the promise that hard cases can be won by resort to fringe theories, junk scientists will proliferate. Clearly, they will always be there, instead of viewing the junk scientist as an unwelcomed problem, the trial lawyer should look at him or her as an opportunity to do two important things: (1) emphasize the frailty of the opposition's case; and (2) emphasize the validity of your own case. Properly handled, the junk scientist can achieve both things for his or her opponent. ■

George M. Walker
George M. Walker is a graduate of the University of Alabama School of Law. He is a partner with the Mobile firm of Hand, Arendall, Bedsole, Greaves & Johnston, and is and long has been an easy mark for junk scientists of every type.

ENDNOTES

1. *Coleman v. Ashland Chemical Co.*, Civil Action No. 89-0387 (S.D. Ala.).
2. *Williams v. PepsiCo, Inc.*, CV-83-646 (Cir. Ct. Mobile).
3. *Hall v. Dow Chemical Co.*, Civil Action No. 88-D-655 (M.D. Ala.).

ABOUT MEMBERS, AMONG FIRMS

ABOUT MEMBERS

Edward J. Witten announces the moving of his office to 24 N. Market Street, Suite 300, Jacksonville, Florida 32202-2856. Phone (904) 356-1335.

Robert Ford announces he has left Emond & Vines and formed the **Ford Law Firm**, with offices at Two Metroplex Drive, Suite 111, Birmingham, Alabama 35209, phone (205) 868-0104, and at 3322 S. Memorial Parkway, Suite 22B, Huntsville 35801, phone (205) 881-4426.

Charles T. Morris, former Covington County District Judge, announces the opening of his practice at 29 S. Court Square, Suite A, Andalusia, Alabama. The mailing address is P.O. Box 1433, Andalusia 36420. Phone (205) 222-8444.

Mark A. Jackson, formerly with Fine & McDowell, announces the opening of his office at 221 East Side Square, Suite 2-B, Huntsville, Alabama 35801. The mailing address is P.O. Box 2489, Huntsville 35804. Phone (205) 533-5306.

Michele G. Bradford, formerly with Legal Services Corporation of Alabama, is now coordinator of the Paralegal Program at **Gadsden State Community College** and has opened offices at 924 3rd Avenue, Gadsden, Alabama 35901. Phone (205) 549-0090.

Charles B. Hess announces the opening of his office at 30 S. Court Square, Ozark, Alabama 36360. The mailing address is P.O. Box 1281, Ozark 36361. Phone (205) 774-1630.

Teresa L. Cannady announces the opening of her office at 100-B S. Emmett Street, Albertville, Alabama 35950. Phone 891-4106. The mailing address is P.O. Box 2673, Albertville 35950.

Rick L. Burgess announces he has left Crittenden & Associates and opened his office at 2000 1st Avenue, North, Suite 1300, Brown Marx Tower, Birmingham, Alabama 35203. Phone (205) 328-6710.

Lucie Underwood McLemore announces the relocation of her offices to 207 Montgomery Street, 310 Bell Building, Montgomery, Alabama 36104. The mailing address is P.O. Box 263, Montgomery 36101-0263. Phone (205) 262-0004.

AMONG FIRMS

Lyons, Pipes & Cook announces that **M. Warren Butler** and **Meredith Van Houten** have become associates with the firm, with offices at 2 N. Royal Street, Mobile, Alabama 36602. Phone (205) 432-4481.

Burr & Forman announces that **Victor L. Hayslip, W. Benjamin Johnson** and **E. Clayton Lowe, Jr.** have become partners in the firm, and **Peter A. Grammas, Patricia Powell Burke, D.W. Collier, Allison L. Downing, Eric D. Franz, Gregory F. Harley, Alan P. Judge, Jeffrey S. Miller**, and **Yolanda Nevett-Johnson** have become associated with the firm. The firm has offices in Birmingham and Huntsville, Alabama.

Andre M. Toffel and **Daniel D. Sparks** announce the formation of **Toffel & Sparks**, and that **Martin S. Lewis** has become associated with the firm. Offices are located at 505 20th Street, North, 925 Financial Center, Birmingham, Alabama 35203.

Emond & Vines announces that **Thomas Marshall Powell** has become an associate. The firm also announces the relocation of its offices to 2200 SouthTrust Towers. The mailing address is P.O. Box 10008, Birmingham, Alabama 35202-0008. Phone (205) 324-4000.

Helmsing, Lyons, Sims & Leach announces that **Joseph P.H. Babington** has become a member and **Todd S. Strohmeyer, Wendy A. Pierce** and **William R. Lancaster** have become associated with the firm. The mailing address is P.O. Box 2767, Mobile, Alabama 36652. Phone (205) 432-5521.

E. Ray McKee, Jr. announces that **Elizabeth T. Cvetetic** has become associated with the firm, with offices at 2319 Market Place, Suite A, Huntsville, Alabama 35801. Phone (205) 551-0300.

Hornsby, Watson & Meginniss announces the relocation of its offices to 1110 Gleneagles Drive, Huntsville, Alabama 35802. Phone (205) 650-5500.

McPhillips, Hawthorne & Shinbaum announces that **G. William Gill** has become a member of the firm. The firm name will be **McPhillips, Hawthorne, Shinbaum & Gill.** Offices are located at 516 S. Perry Street, Montgomery, Alabama and the mailing address is P.O. Box 64, Montgomery 36101. Phone (205) 262-1911.

Lanier, Ford, Shaver & Payne announces that **James W. Tarlton, IV, Kelly M. McDonald** and **Apsilah G. Owens** have become associated with the firm. Offices are located at 200 W. Court Square, Suite 5000, Huntsville, Alabama 35801.

Espy & Metcalf announces the relocation of its offices to 302 N. Oates Street, Dothan, Alabama 36303. Phone (205) 793-6288.

Green & Pino announces that **Edward I. Zwilling** has become associated with the firm, with offices at Shelby Medical Building, Suite 205, Alabaster, Alabama, and the mailing address is P.O. Drawer 1883, Alabaster 35007. Phone (205) 663-1581.

Hill, Hill, Carter, Franco, Cole & Black of Montgomery announces that **John R. Bradwell** has become a member of the firm and that **R. Rainer Cotter, III**, former law clerk to the Hon. Daniel H. Thomas, senior U.S. District Judge, Southern District of Alabama, and **David E. Avery, III** have become associated with the firm.

Balch & Bingham announces that **Joseph M. Farley** has joined the firm as counsel. The firm has offices in Birmingham, Huntsville and Montgomery, Alabama and Washington, D.C.

Dewayne N. Morris and **John R. Lavette** announce the relocation of their offices to 2131 Third Avenue,

North, Birmingham, Alabama 35203. Phone (205) 254-3885.

Lloyd, Bradford, Schreiber & Gray announces that **Mark C. Peterson** has become a member of the firm, and **Daniel S. Wolter, Stephen E. Whitehead, Kyle L. Kinney** and **Legrand H. Amberson, Jr.** have joined as associates. Offices are located at Two Perimeter Park, South, Suite 100, Birmingham, Alabama 35243. Phone (205) 967-8822.

Capell, Howard, Knabe & Cobbs announces that **Debra Deames Spain, Rachel D. Sanders** and **William R. King** are now associated with the firm. Offices are located at 57 Adams Avenue, Montgomery, Alabama 36104-4045.

Bradley, Arant, Rose & White announces that **John W. Hargrove, John E. Hagefstration, Jr., Stuart J. Frentz, Paul S. Ware** and **G. Rick Hall** have become partners in the firm. The firm has offices in Birmingham and Huntsville, Alabama.

John T. Natter, formerly a partner with Pope & Natter, announces that he is now deputy director of **Naval Reserve, Pentagon**, in Washington, D.C., effective September 1992, and will be *of counsel* to **Gorham & Waldrep** in Birmingham, Alabama.

The telephone number appearing in the 1992-93 edition of **The Alabama Lawyer Bar Directory** for the firm of **Sasser & Littleton** is incorrect. It should be listed as (205) 834-7800. Offices are located at Colonial Financial Center, One Commerce Street, Suite 700, Montgomery, Alabama 36104.

Lightfoot, Franklin, White & Lucas announces that **Sabrina Andry Simon** became associated with the firm. She previously was employed as deputy chief trial attorney for the Office of Chief Counsel, U.S. Army Corps of Engineers, and has served as an adjunct professor at Miles College School of Law.

Howard A. Mandell and **Delores R. Boyd** announce the dissolution of their partnership, **Mandell & Boyd.** Howard A. Mandell will continue in his practice at 25 S. Court Street, P.O. Box 4248, Montgomery, Alabama 36103. Phone (205) 262-1666. Delores R. Boyd will have her office in the Cottage Hill Historic District at 639 Martha Street, Montgomery 36104. Her mailing address is P.O. Box 2270, Montgomery 36102. Phone (205) 264-8005.

Burttram & Henderson announces that **Lee A. DuBois** has become associated with the firm. Offices are located at 3414 Old Columbiana Road, Birmingham, Alabama 35226. Phone (205) 979-2281.

Lange, Simpson, Robinson & Somerville announces that **Morris Wade Richardson** and **Joe A. Joseph** have become partners in the firm at the Birmingham office, and that **John R. Barran** has become a partner in the firm's Huntsville office. **Floyd D. Gaines, David B. Hall, Carey Bennett McRae** and **Frances Evelyn King** have become associated with the firm in the Birmingham office, and **Robert S. McAnnally** has become associated with the Huntsville office.

Ball, Ball, Matthews & Novak announces that **Thomas Cowin**

Statement of Ownership, Management and Circulation

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The purpose, function, and nonprofit status of this organization and the exempt status for Federal income tax purposes (Check one)

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B. Paid and/or Requested Circulation 1. Sales through dealers and carriers, street vendors and counter sales	13	15
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C. Total Paid and/or Requested Circulation (Sum of 10B1 and 10B2)	9,953	10,271
D. Free Distribution by Mail, Carrier or Other Means Samples, Complimentary, and Other Free Copies	97	131
E. Total Distribution (Sum of C and D)	10,050	10,402
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2. Return from News Agents	-0-	-0-
G. TOTAL (Sum of E, F1 and 2—should equal net press run shown in A)	10,335	10,836

11. I certify that the statements made by me above are correct and complete

Signature and Title of Editor, Publisher, Business Manager, or Owner
Margaret L. Murphy, managing editor

PS Form 3526, January 1991 (See instructions on reverse)

Knowles and **Gerald C. Swann, Jr.** have become members of the firm. Offices are located at 1100 Union Bank Tower, Montgomery, Alabama, and the mailing address is P.O. Drawer 2148, Montgomery 36102-2148. Phone (205) 834-7680.

Walston, Stabler, Wells, Anderson & Bains announces that **Jerry Dean Hillman** has joined the firm as an associate. Offices are located at 500 Financial Center, 505 N. 20th Street, Birmingham, Alabama 35203.

James R. Hinson, Jr. and **Robert N. Payne**, both formerly with Leo & Associates, announce the formation of **Hinson & Payne**, with offices at 200 W. Court Square, Suite 610, Huntsville, Alabama 35801. Phone (205) 534-1923.

Hardin & Tucker announces that **Jill T. Karle** has become an associate with the firm. She received her law degree from Cumberland School of Law at Samford University, where she was the managing editor of the *Cumberland Law Review*. Offices are located at 2151 Highland Avenue, Suite 100, Birmingham, Alabama. Phone (205) 930-6900.

Hubbard, Reynolds, McIlwain & Brakefield announces that **Michael D. Smith** has become a member of the firm and **E. Kenneth Aycock** and **R. Cooper Shattuck** have become associates. The firm name has changed to **Hubbard, Reynolds, Smith, McIlwain & Brakefield**. Offices are located at 808 Lurleen Wallace Boulevard, North, Tuscaloosa, Alabama, and the mailing address is P.O. Box 2427, Tuscaloosa 35403-2427.

Lemle & Kelleher of New Orleans, Louisiana announces that **Amy Baird** recently became a member. Offices are located at 601 Poydras Street, New Orleans 70130-6097. Phone (504) 586-1241.

Alex F. Lankford, IV, formerly an assistant district attorney in Mobile, Alabama, has become associated with **Briskman & Binion**. Offices are located at 205 Church Street, Mobile.

Robert M. Hill, Jr. and **Margaret Helen Young**, formerly with Hill & Young, and **Gary P. Wilkinson**, formerly of Poellnitz, Cox & Jones, announce the formation of **Hill, Young & Wilkinson**. The mailing address is 215 W. Alabama Street, Florence, Alabama 35630. Phone (205) 767-0700.

Seier, Johnston & Trippe announces the firm name changed to **Johnston, Trippe & Brown.** Offices are located at 2100-A Southbridge Parkway, Suite 376, Birmingham, Alabama 35209. Phone (205) 879-9220.

Gordon, Silberman, Wiggins & Childs announces that **Lee Winston** and **Jon E. Lewis** have become associates. The mailing address is P.O. Box 13066, Birmingham, Alabama 35202-3066.

Malone & Newell announces that **Laura K. Gregory** has joined the firm. She graduated in 1988 from the University of Alabama School of Law, and is a member of the Alabama State Bar and The Florida Bar. Offices are located at 550 Greensboro Avenue, Secor Bank Building, Suite 300, Tuscaloosa, Alabama 35401. Phone (205) 349-3449.

W. Clint Brown, Jr. and **Sherrie Willman Brown**, formerly of Brown-Willman, and **Mark B. Craig** announce the formation of **Brown, Willman & Craig**. Offices are located at 118 E. Moulton Street, Decatur, Alabama 35601. Phone (205) 355-4956. ■

• M·E·M·O·R·I·A·L·S •

Judge Paul Westerfield Brunson

Whereas, retired Mobile County District Judge Paul Westerfield Brunson died on October 6, 1992; and

Whereas, this Association desires to record this memorial of our colleague and to recognize publicly some of the achievements of his professional career.

Now, therefore, be it known that Judge Brunson, a native of Clarke County, Mississippi, and a lifelong resident of Mobile, was blinded in a hunting accident as a youth but went on to serve as presiding judge of the District Court of Mobile County of Mobile County, Alabama, for 14 years. Judge Brunson received a bachelor's degree from Springhill College in 1936 and a law degree from the University of Alabama School of Law in 1939. He practiced law in Mobile for several years before being appointed director of the University of Alabama Mobile Center. He resumed practicing law and was later elected judge of the Court of General Sessions of Mobile County, of which he later became presiding judge. Judge Brunson retired in 1991 as a supernumerary judge of the District Court of Mobile County, Alabama.

Judge Brunson's civic activities included serving as president of the Mobile Junior Chamber of Commerce and Mobile Azalea Trail. He served as a Democratic Committee representative for Ward 15, vice-president of the Alabama Intermediate Court of Judges Association, president of the Mobile Association for the Blind, and during World War II he served as a member of the War Labor Board.

Perhaps Judge Brunson's greatest contribution to his profession and his community was the example he set for his peers. Judge Brunson not only succeeded in spite of his handicap, but excelled in all that he did. He was a zealous lawyer, a firm but fair judge and a devoted husband and father.

Wherefore be it resolved, by the Mobile Bar Association in regular meeting assembled on November 20, 1992, that while we mourn the death of our distinguished colleague, Judge Paul Westerfield Brunson, we celebrate the lifetime achievements and accomplishments of a truly remarkable man.

Allen Roff Cameron

Whereas, the Mobile Bar Association notes with regret the death in Mobile on June 29, 1992 of member Allen Roff Cameron.

Now, therefore, be it resolved that Allen, as he was affectionately known, was born in Mobile, Alabama and graduated from Spring Hill College. He obtained a law degree from the University of Alabama School of Law in 1933, the same year he began his law practice in Mobile and his long membership in the Mobile Bar Association and the Alabama State Bar. His marriage to his devoted wife, Mary Josephine Greer, as well as his relationship with his children was interrupted by World War II and his service as a naval officer in the Pacific Theater in New Guinea and Subic Bay. At the end of World War II he was separated with the rank of lieutenant. He returned to Mobile and resumed the private practice of law in the firm of Sullivan & Cameron. He distinguished himself by serving his profession and his community in many admirable ways. In 1971, he was appointed U.S. Magistrate by Judge Daniel H. Thomas, and he served as the first full-time magistrate in Mobile unit 1979, when he retired. During his retirement, he was able to spend more time with and enjoy his family and pursue his hobbies of playing golf and cultivating rare camellias. He served as president of the Mobile Men's Camellia Club for several years.

Judge Cameron was a devoted husband and father. Upon his passing, one of his friends noted that he was a "gem of a man" whose loss is felt by all who knew him. He is survived by his wife, Mary Josephine; three daughters, Eugenia C. Foster of Mobile, Muriel Cameron of Omaha, Nebraska and Mary C. Ernest of Birmingham; one son, Allen Roff Cameron, Jr.; seven grandchildren; and numerous other relatives.

Now, therefore, be it resolved, by the members of the Mobile Bar Association, in meeting assembled this 20th day of November 1992, that the Association mourns the passing of Allen Roff Cameron and does hereby honor the memory of our friend and fellow member who exemplified throughout his long career the highest principles to which the members of this Association aspire, request that this resolution be spread upon the minutes of this Association, and of the Alabama State Bar, and that a copy be presented to the family of Allen Roff Cameron.

• M·E·M·O·R·I·A·L·S •

JAY W. MURPHY

Jay W. Murphy, one of the nation's leading labor arbitrators and teachers of labor law, died December 16, 1992 in Rockwood, Tennessee. He was 81.

Murphy, who lived in Tuscaloosa, served on the faculty of the University of Alabama School of Law for 34 years beginning in 1947. Upon his retirement he became a full-time arbitrator and mediator, and throughout his career arbitrated cases in industries ranging from agriculture to textiles, shipbuilding, health care and transportation.

At the time of his death, Murphy was arbitrating a case involving a Rockford, Tennessee company represented by Gary Wright, a partner in the labor and employment law firm of Wimberly & Lawson in Knoxville, Tennessee.

"Mr. Murphy was the dean of arbitrators in the South and was highly regarded by both management and labor," Wright said. "In his 41-year career he arbitrated hundreds of cases from a list of industries as extensive—if not more extensive—than anyone in the field, creating pivotal developments in arbitration law."

"Jay was much in demand. He was widely known for his fairness and his ability to find a just solution," said Dr. Wythe Holt, UA research professor of law.

Holt and other friends and colleagues from around the country recalled Murphy's zest for life, his wide-ranging interests and his engaging disposition.

"He was vigorously committed to peace and to progress and to spiritual well-being for all," Holt said. "He will be remembered for his compassion and his intelligence—an intelligence that was warm and friendly, not sharp and abrasive. He never met an argument he didn't understand and he could debate with the best, but it was his nature to view things in a more holistic and friendly way, not a contentious way."

Charles Morgan, Jr., former national director of the American Civil Liberties Union and now a Washington, D.C. attorney, called Murphy " a man of great character in a characterless time."

Morgan said his former professor "taught the Constitution as a living instrument that guaranteed rights, including equal rights, and free expression, and he taught it to classes of students who came from a culture in which the Constitution applied to only some."

While at GWU he worked as a research analyst for the Civilian Foreign Intelligence before joining UA as associate professor of law. He later served as a visiting professor of law at George Washington University, the University of Kentucky, the University of Arkansas and New York University. During his tenure at UA, he also spent some time abroad; he and Mrs. Murphy served as visiting lecturers at the Seoul National University and helped establish that institution's graduate school of law. While in Korea, he and his wife authored two books, *Legal Education in a Developing Nation: The Korea Experience* and *Legal Professions in Korea: The Judicial Scrivener and Others.*

Holt noted that Murphy was knowledgeable about Chinese and Korean art, and was a "magnificient painter" himself.

He was a member of the National Academy of Arbitrators.

Murphy is survived by his wife, Tuscaloosa attorney Alberta Brown Murphy; his son, University of Alabama attorney Stanley Jay Murphy; daughter-in-law Marita Murphy of Tuscaloosa; brother Stanley N. Murphy of Jackson, Mississippi; sister Lu Murphy Whitaker of Black Mountain, North Carolina; grandsons Jay Thomas Murphy of Fairhope and Andrew Bridges of Tuscaloosa.

The family requests that in lieu of flowers, donations be made to the Jay Wesley Murphy Scholarship Fund, Box 870382, University of Alabama, Tuscaloosa, Alabama 35487.

PLEASE HELP US

The Alabama State Bar and *The Alabama Lawyer* have no way of knowing when one of our members is deceased unless we are notified. Do not wait for someone else to do it — if you know of the death of one of our members, please let us know.

Send the information to:
Alice Jo Hendrix
P.O. Box 671, Montgomery, Alabama 36101

• M·E·M·O·R·I·A·L·S •

DONALD LAMAR COLLINS
Birmingham
Admitted: 1957
Died: January 23, 1993

EDMONSON S. COURIC, JR.
Coral Gables, Florida
Admitted: 1960
Died: February 7, 1992

WILLIAM CECIL DANIEL
Anniston
Admitted: 1952
Died: December 19, 1992

WILLIAM GUY HARDWICK
Dothan
Admitted: 1933
Died: January 15, 1993

HULON J. MARTIN
Dothan
Admitted: 1983
Died: December 22, 1992

JAY WESLEY MURPHY
Tuscaloosa
Admitted: 1952
Died: December 16, 1992

JAMES ROBERT SCALCO
Birmingham
Admitted: 1985
Died: January 23, 1993

CHARLES EDWIN SHAVER, SR.
Huntsville
Admitted: 1931
Died: January 11, 1993

GEORGE RUTLEDGE STUART, III
Birmingham
Admitted: 1963
Died: January 3, 1993

RAYMOND GILBERT TIPTON
Scottsboro
Admitted: 1957
Died: January 10, 1993

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.

"OPPRESSION" OF MINORITY SHAREHOLDERS: CONTRACT, NOT TORT

By MICHAEL E. DeBOW

In a recent article in *The Alabama Lawyer*, Andrew Campbell took the position that a tort action now lies for a particular breach of Alabama corporate law: the majority shareholders' breach of their fiduciary duty toward minority shareholders.[1] Campbell reached this conclusion based on his reading of the Alabama Supreme Court's decision in *Ex parte Brown*[2] and its September 1991 summary affirmance of the plaintiff's victory at trial in *Michaud v. Morris*. Since the publication of Campbell's article, the court reheard *Michaud* and issued a second opinion, unanimously reversing the trial court.[3] Still, the impression exists that the court has recognized a tort cause of action in the corporate area — as evidenced by the title of a panel discussion at the 1992 annual meeting of the Alabama State Bar on the "new tort of shareholder oppression."

This is not necessarily what the Alabama Supreme Court has done either in *Brown* or in *Michaud*; it is certainly not the only defensible reading of these decisions. It is still possible for Alabama law on the oppression of minority shareholders to sound in contract, rather than in tort.[4]

This essay argues that, if Alabama is determined to try to "protect" minority shareholders, then Alabama courts and the Alabama State Bar should reject the approach taken by some states in treating the minority's cause of action as a tort.[5] Both corporate and partnership law are, conceptually speaking, forms of contract law. Because of this, Alabama should be clear that the minority's injuries are best understood as flowing from a form of breach of contract.

Specifically, the minority shareholders' claim should be viewed as a claim that the majority's behavior violates the agreement that the parties *would have reached* at the time the business was formed *if they had negotiated* a solution to the disputed point. This "hypothetical bargain" approach to contract interpretation is used by courts in filling gaps in all kinds of contracts.[6] Many commentators advocate this approach in close corporation law,[7] including the late Hodge O'Neal, the father of close corporation law. Given O'Neal's influence on close corporation law in Alabama, his conception of it as essentially contractual seems particularly important. As O'Neal saw it, courts should "'imply' or construct additional terms *for the contract* to give effect to the underlying assumptions of the parties at the time they entered into it and [should] protect *reasonable expectations* generated by the business relationship which the *contract* created."[8]

> Surely anything that can be done to clarify the scope of fiduciary duties would be welcomed by most contracting parties wishing to avoid the risk of expensive and uncertain litigation at some future date.

If Alabama is to recognize minority shareholder claims of oppression, then it should adopt the hypothetical bargain approach, and should clearly place the cause of action in the realm of contract rather than in the realm of tort. Judicial decisions in a number of other states suggest that those jurisdictions, in addition to Alabama, have yet to characterize the nature of minority shareholder oppression claims. As a result, Alabama has the opportunity to lead the way in the treatment of these kinds of cases as contractual in nature.

To date, the Alabama Supreme Court has not been clear on this point. Indeed, it is understandable that certain aspects of the opinions in *Brown* and *Michaud* have led some to conclude that these are tort decisions. For example, Justice Gorman Houston referred to the cause of action as a tort in his separate opinion in *Brown*,[9] and in his dissent from the court's original affirmance in *Michaud*. Further, the opinion on rehearing in *Michaud* speaks more than once of shareholder "rights" — and cites the Campbell article favorably on the rights of the minority.[10] Moreover, neither *Brown* nor *Michaud* clearly speaks in contract terms. Add to this the fact that the trial court verdict in *Michaud*, initially affirmed by the state supreme court, included an award of punitive

damages and that *Brown* involved a very large fee award to the plaintiffs' attorney, and it is easy to see how these two cases have come to be thought of as "corporate tort" decisions.

Of course, to call the majority's breach of fiduciary duty to the minority a breach of contract rather than a tort is more than a mere semantic difference. Most obviously, it reflects the fact that the parties to the suit voluntarily entered into a contractual relationship with one another. Thus, any claim resulting from this relationship is conceptually closer to a breach of contract than it is to an intentional tort.

Indeed, corporations can easily be viewed as bundles of contracts "among the participants in the business, including shareholders, managers, creditors, employees, and others."[11] This "contractual theory of the corporation" is currently the most widely accepted explanation of the corporate entity among business law teachers. Similarly, the partnership form is increasingly viewed as "[f]undamentally . . . a contractual relationship among the partners. To a substantial extent, this relationship is governed by ordinary contract principles regarding interpretation and the Statute of Frauds."[12] Thus, whether you think of close corporations more in corporate, or in partnership, terms, the form is best understood as a contractual relationship. Treating a business as a nexus of express and implied contracts certainly seems to track the parties' expectations more closely than does treating the business as a conglomeration of intentional torts waiting to happen. It follows, then, that viewing minority lawsuits through the lens of contract is consistent with the best explanation of both business reality and the law of business organizations.

> . . . Alabama has little choice. If it treats shareholder suits as torts, it will clearly signal business people that incorporation under Alabama law is relatively risky.

The use of contract as an organizing principle should provide some structure to the fiduciary duty owed the minority. It goes almost without saying that the fiduciary duty is a difficult concept. One well-known decision described "the doctrine of fiduciary relation" as "one of the most confused and entangled subjects in corporation law."[13] The half-century that has passed since this pronouncement has not seen any great improvement in the clarity of the duties owed under a fiduciary relationship. That the Alabama Supreme Court had such difficulty deciding *Michaud* — and ultimately produced a decision that offers very little guidance to parties attempting to plan their affairs — only underscores this point. Indeed, all that one can say about the Alabama case law to date is that it mandates a rather murky, multi-factor test for assessing the "fairness" of the majority's treatment of the minority — a test that to date has been applied only to a very successful operation (Greenetrack, in *Brown*) and a bankrupt one (in *Michaud*). Without further elucidation by the Alabama Supreme Court — or the Legislature — investors have no clear picture of how the courts will apply this test to the vast majority of businesses whose profitability lies somewhere between Greenetrack and a defunct fast food restaurant. This uncertainty can only be compounded by treating the cause of action as a tort.

Surely anything that can be done to clarify the scope of fiduciary duties would be welcomed by most contracting parties wishing to avoid the risk of expensive and uncertain litigation at some future date. Use of the hypothetical bargain approach would limit the ability of judges and juries to compensate investors who have been "injured" only by what turn out, in hindsight, to have been "bad" investments. Further, under

this contractual approach punitive damages are not appropriate in shareholder oppression cases.[14] As a result, the hypothetical bargain approach would make the cause of action for oppression less attractive to opportunistic minority owners seeking to coerce a settlement out of an arguably well-behaved majority.

This is not to say that the hypothetical bargain approach is a panacea. Indeed, commentators have stressed the difficulties inherent in the courts' assumption of this task.[15] In spite of its drawbacks, however, the hypothetical bargain approach — as a form of contract analysis — seems much preferable to conceiving the minority's claims in terms of tort.

Perhaps most importantly, focusing on the contractual aspects of close corporations would protect investors' freedom of contract. I would argue that the investors in a business venture — including the minority owners — should be allowed to contract for as much or as little coverage by the courts' notion of oppression as they want. In short, the broad duty of fiduciary care suggested in *Brown* and *Michaud* should be a default rule — that is, one that applies to a given transaction only if the parties have not expressly contracted otherwise. Put another way, a minority shareholder should be able to waive — to contract away — all or any part of the majority's fiduciary duty to him.

A corollary point, and I hope an obvious one, is that courts should enforce contractual terms which specify what duties are owed the minority. Now, in any given case, the amount of protection the minority bargained for may strike the trier of fact as imprudent, even foolish. However, a systematic focus on the contractual nature of the corporation should lead to the enforcement of the explicit terms of the corporate contract — as embodied in the charter and bylaws, and subsidiary contracts such as employment contracts, buy-back agreements, and so forth. It bears emphasis that this approach is entirely compatible with Dean O'Neal's analysis. Chapter nine of *O'Neal's Oppression of Minority Shareholders* describes contractual and other "arrangements" that investors can adopt "at the time a business is being organized or before friction among the participants has developed to avoid squeeze plays and oppression of minority shareholders."[16] Further, O'Neal clearly stated that, in evaluating the reasonableness of the parties' expectations in a business, he would place "primary emphasis on expectations generated by the participants' *original business bargain*."[17]

A willingness to enforce explicit terms relieves the court from imagining what the parties would have agreed to, hypothetically speaking, and provides an incentive for the parties to the contract to make their expectations clear up front, and to negotiate their differences explicitly rather than risk the imposition of court-drafted contract terms after the fact. Additionally, the hypothetical bargain approach will coexist more easily with the business judgment rule and the at-will employment doctrine than would a tort approach.

And, in any event, Alabama has little choice. If it treats shareholder suits as torts, it will clearly signal business people that incorporation under Alabama law is relatively risky. Forty-nine other states are eager to sell their incorporation services to investors from Alabama. It should not be too difficult for investors' legal counsel to find a state whose laws are more hospitable to freedom of contract than Alabama's would be, in this hypothetical. This would be unfortunate on two grounds. The first, most obvious ground, is that Alabama would lose incorporation revenue. The second ground is that these developments would saddle Alabama investors with the totally unjustified additional expenses incurred in incorporation (or reincorporation) in another state — expenses which one commentator recently described as "significant" for small businesses.[18]

In sum, Alabama courts should take the earliest opportunity to clarify the *contractual* nature of the minority's cause of action; further, the Alabama Legislature should consider providing statutory clarification on this issue. Of course, any legislative action should be taken with an eye toward reconciling the minority's new remedy with the statutory dissolution remedy, which may be invoked in cases of oppression.[19]

Failure to clarify the law in this area would strip investors in close corporations of their ability to plan and contract for their future obligations to one another, and would subject them to an increasing likelihood of expensive and uncertain tort litigation. In the end, the likely upshot would be that more and more small businesses would incorporate or reincorporate outside Alabama. ■

Michael E. DeBow

Michael E. DeBow is an associate professor at the Cumberland School of Law, Samford University. He is a graduate of the University of Alabama and the Yale Law School, and a member of the District of Columbia Bar. At Cumberland since 1988, DeBow teaches and writes in the areas of business organizations, government regulation of business and administrative law.

ENDNOTES

1. Andrew P. Campbell, *Litigating Minority Shareholder Rights and the New Tort of Oppression*, 53 Ala. Law. 108 (1992).
2. 562 So. 2d 485 (Ala. 1990).
3. 603 So. 2d 886 (Ala. 1992).
4. Justice Janie Shores left open this possibility in her remarks to the 1992 state bar meeting, where

she agreed that the court has not answered the question whether oppression is breach of contract or tort.

5. *See generally Sugarman v. Sugarman*, 797 F.2d 3, 14 (1st Cir. 1986) (construing Massachusetts law, and collecting cases); Lawrence E. Mitchell, *The Death of Fiduciary Duty in Close Corporations*, 138 U. Pa. L. Rev. 1675, 1714-24 (1990) (describing the "common law tort of freeze-out").
6. For recent law review articles on the general subject of hypothetical contracts, see David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 Mich. L. Rev. 1815 (1991); Jason S. Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 Yale L.J. 615 (1990); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87 (1989); *see also* Frank H. Easterbrook & Daniel R. Fischel, *The Economic Structure of Corporate Law* 1-39 (1991).
7. For discussions of the hypothetical bargain approach to close corporation cases, see Jason S. Johnston, *Opting In and Opting Out: Bargaining for Fiduciary Duties in Cooperative Ventures*, 70 Wash. U. L.Q. 291 (1992); Charles R. O'Kelley, Jr., *Filling Gaps in the Close Corporation Contract: A Transaction Cost Analysis*, 87 Nw. U. L. Rev. 216 (1992); Easterbrook & Fischel, *supra* note 6, at 228-52; Charny, *supra* note 6, at 1870-72; John A.C. Hetherington, *Defining the Scope of Controlling Shareholders' Fiduciary Responsibilities*, 22 Wake Forest L. Rev. 9, 14-30 (1987); Frank H. Easterbrook & Daniel R. Fischel, *Close Corporations and Agency Costs*, 38 Stan. L. Rev. 271, 271-79, 283-99 (1986).
8. F. Hodge O'Neal, *Introduction*, 22 Wake Forest L. Rev. 1, 6 (1987) (emphasis added).
9. 562 So. 2d at 500 n.13.
10. 603 So. 2d at 888 & n.1.
11. Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 Wash. L. Rev. 1, 7 (1990) (footnote omitted).
12. Alan R. Bromberg & Larry E. Ribstein, *1 Bromberg & Ribstein on Partnership* 1:11 (1991). Consonant with this interpretation of the partnership form, the Uniform Partnership Act can be seen "as a kind of 'standard form contract' that may be accepted or rejected by the parties." *Id.* at 1:12.
13. *Geller v. Transamerica Corp.*, 53 F. Supp. 625, 629 (D. Del. 1943), *aff'd*, 151 F.2d 534 (3d Cir. 1945).
14. "[N]o matter how reprehensible the breach, damages that are punitive, in the sense of being in excess of those required to compensate the injured party for his lost expectation, are not ordinarily awarded for breach of contract." E. Allan Farnsworth, *Contracts* 874 (2d ed.1990) (footnote omitted).
15. One of the most difficult problems is determining whether or not a "gap" exists that should be filled in by the court. For a spirited exchange on this point, compare Judge Easterbrook's majority opinion with Judge Richard Posner's dissent in *Jordan v. Duff & Phelps*, 815 F.2d 429 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988).
16. 2 F. Hodge O'Neal & Robert B. Thompson, *O'Neal's Oppression of Minority Shareholders* ch. 9, at 1 (2d ed. 1985).
17. F. Hodge O'Neal, *Close Corporations: Existing Legislation and Recommended Reform*, 33 Bus. Law. 873, 888 (1978) (emphasis added).
18. Ian Ayres, *Judging Close Corporations in the Age of Statutes*, 70 Wash. U. L.Q. 365, 374 (1992).
19. *Alabama Code* §10-2A-195(a)(1)(b) (1975).

CUMULATIVE INDEX

***The Alabama Lawyer* / January 1992 - November 1992**

CUMULATIVE INDEX

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Eleventh Circuit Court of Appeals
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The United States Court of Appeals for the Eleventh Circuit has established an Appellate Conference Program. Guidelines and procedures for this program are set forth in Rule 33-1, which took effect October 1, 1992.

Appellate conferences are scheduled by the Court with lead counsel for all parties in selected civil appeals. Conferences are scheduled well in advance of briefing and two to three weeks in advance of the conference date. They are conducted by the Court's conference attorneys, who have had extensive trial and appellate experience and significant training and experience in mediation. Most conferences are initiated by telephone.

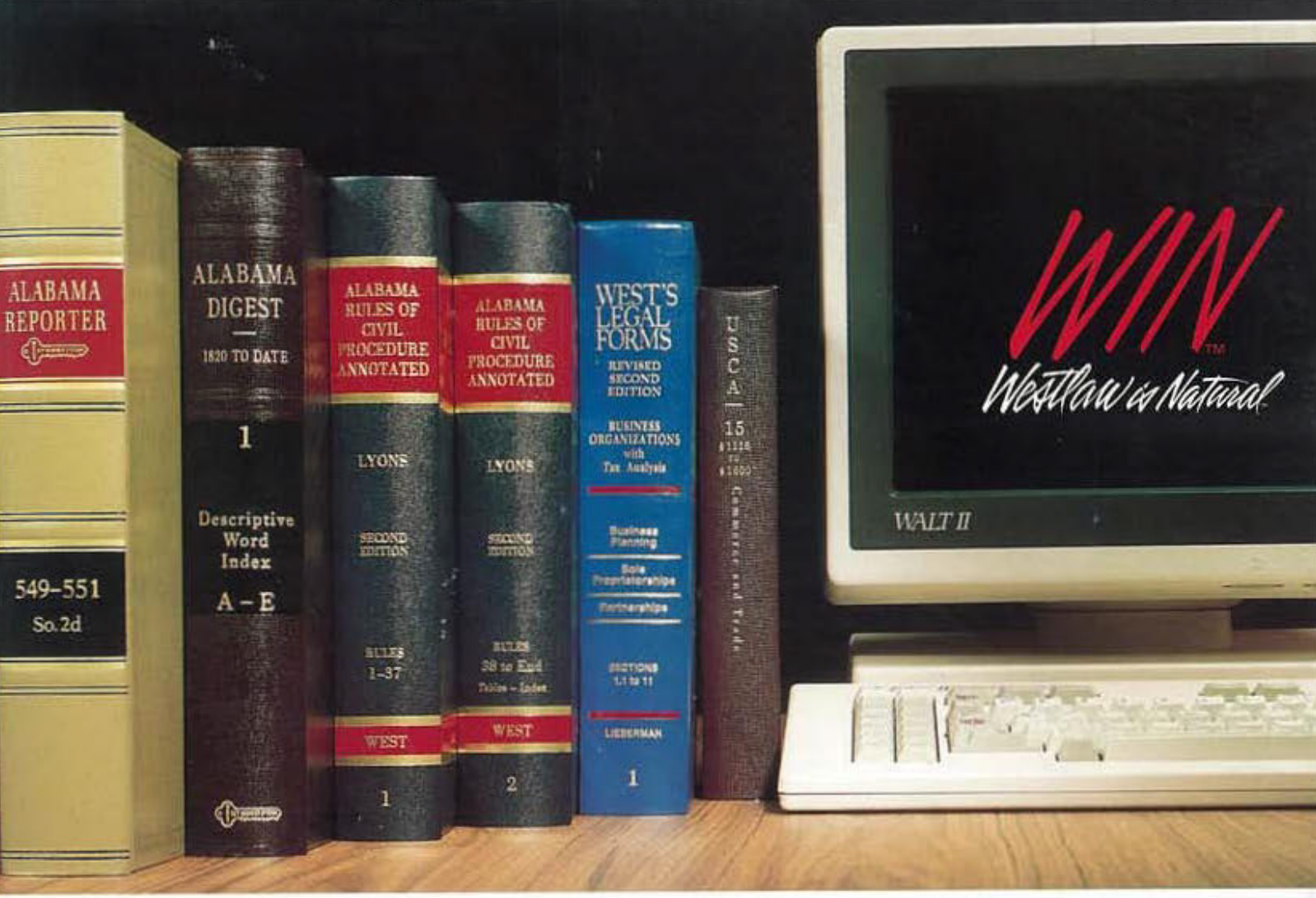
The purposes of appellate conferences are to offer participants a confidential, risk-free opportunity to evaluate their case with an informed, neutral mediator and to explore all possibilities for the voluntary disposition of the appeal. Conferences are designed to address any matter that may aid in the disposition of a civil appeal and to reduce the attendant time and expense of the appeal.

Conferences generally begin with an inquiry as to any procedural questions or problems counsel might have that could be resolved by agreement. The discussion then moves to an explanation by the parties of the issues on appeal. The purpose of this discussion is not to decide the case or reach conclusions about the issues but understand the issues and to evaluate the respective risks on appeal. In many cases, a candid examination of the probabilities for various possible outcomes of the appeal is helpful in reaching consensus on the settlement value of the case. This examination may be done in a joint session or with the conference attorney talking privately to one party.

Every effort is made to generate offers and counteroffers until the parties either settle or know the case cannot be settled and the measure of the difference between or among the parties. However, no actions affecting the interests of any party or the case on its merits are taken without the consent of all parties.

The Court, by rule and by verbal agreement of the parties at each conference, ensures that nothing said by the participants, including the conference attorney, is disclosed to anyone on the Eleventh Circuit Court of Appeals or any other court that might address the merits of the case. The Court strictly enforces this confidentiality rule.

Further information on this new program is available through the Appellate Conference Office, United States Court of Appeals, Eleventh Judicial Circuit, 56 Forsyth Street, NW, Atlanta, Georgia 30303. Phone (404) 730-2820.



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