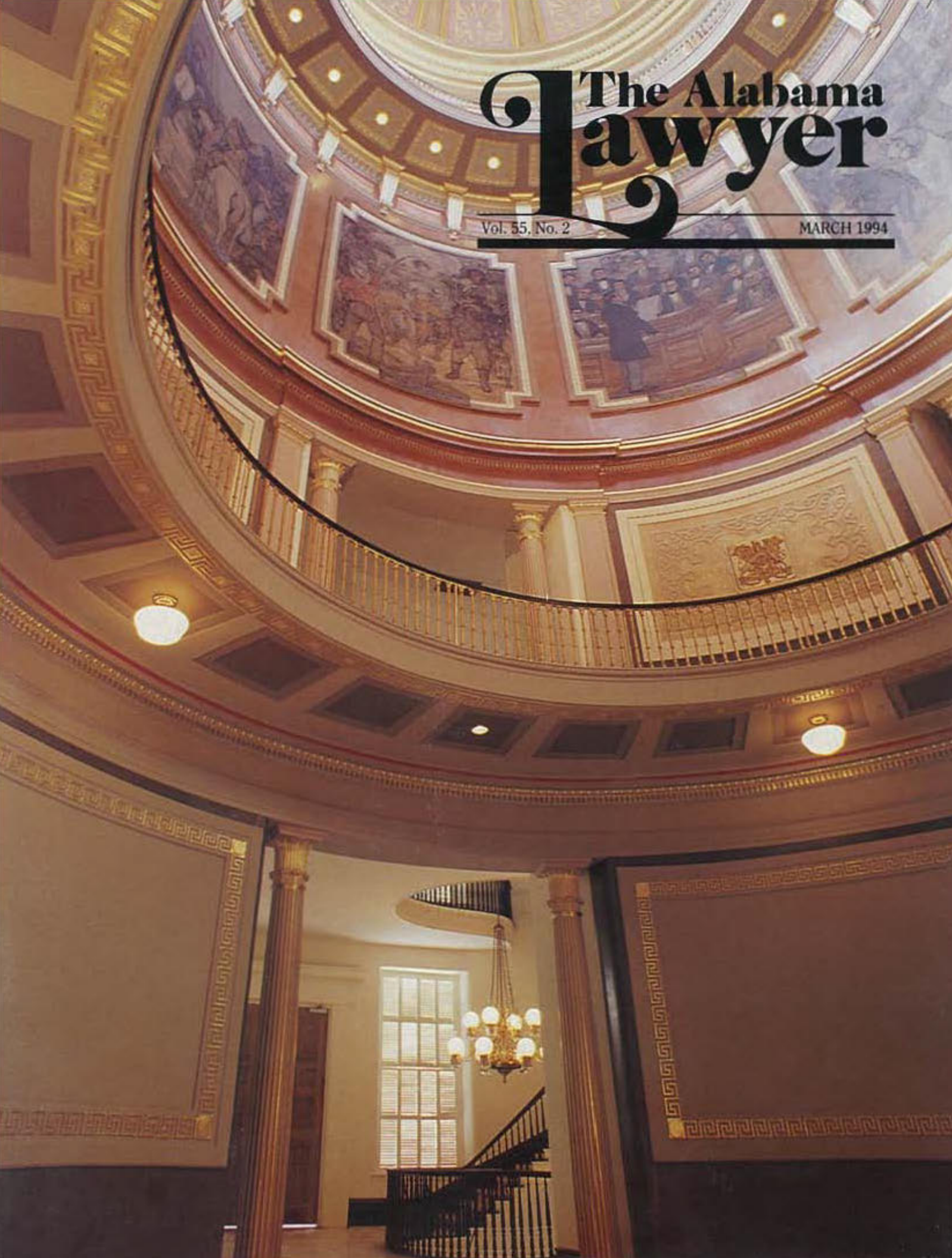
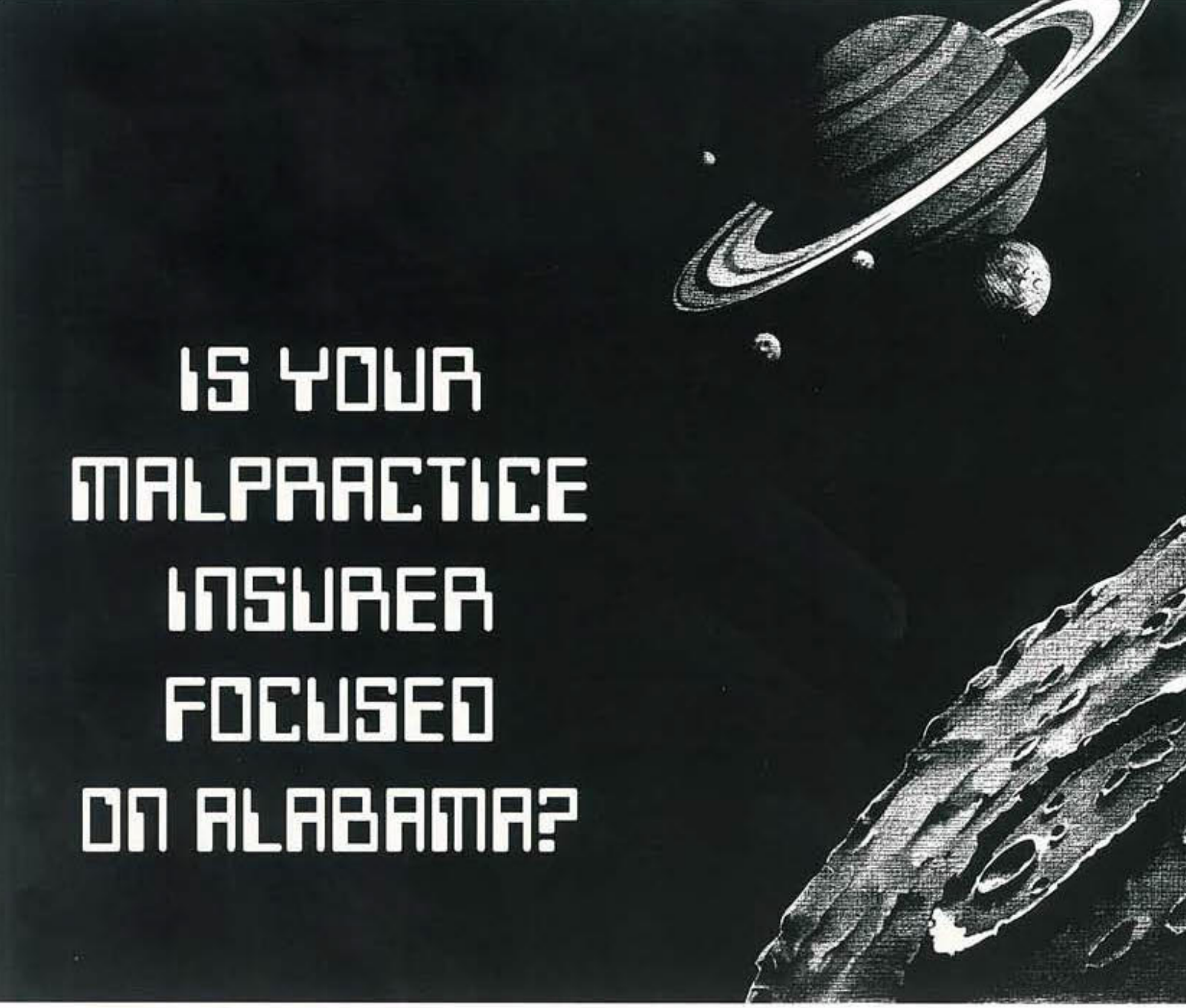


The Alabama Lawyer

Vol. 55, No. 2 MARCH 1994



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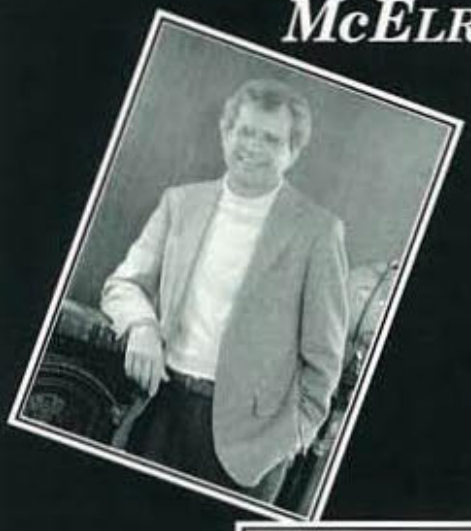
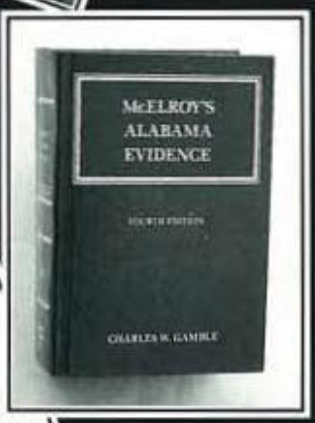
McELROY'S ALABAMA EVIDENCE

FOURTH EDITION

1993 SUPPLEMENT





Dear Fellow Lawyers:

The ongoing ***McElroy*** project has exceeded all expectations of both the author and Samford University Press. Trial judges use it religiously. Appellate judges have cited or quoted it in thirteen hundred ninety-five (1395) appellate opinions. It has been subjected to such sustained citation by the practicing bar as to be frequently referenced as the "Bible of Alabama evidence practice."

It is with a resulting sense of humility, gratitude and responsibility that I take great pleasure in introducing the ***1993 Supplement*** to ***McElroy's Alabama Evidence***. Aimed at satisfying the needs of your law practice, the supplement contains discussion of the following breaking issues in the Alabama evidence law:

1. **Proof of collateral torts by a civil defendant;**
2. **Permitting experts to testify based upon medical records and the opinions of others;**
3. **Prior inconsistent statements as substantive evidence;**
4. **Expanded concepts regarding motion in limine practice;**
5. **Admissibility in civil litigation of defendant's criminal conviction arising out of same transaction;**
6. **Constitutional attacks upon hearsay;**
7. **Illegality: exclusion of material and relevant evidence when admission would violate a statute or constitutional provision;**
8. **Silence admitted to impeach the accused;**
9. **Admission of police accident reports;**
10. **Common insurer of medical malpractice defendant and expert called to testify in his behalf;**
11. **Admissibility of juvenile confessions;**
12. **Character evidence in divorce cases;**
13. **Collateral criminal attack on premises of civil defendant;**
14. **Expert testimony in child abuse prosecutions;**
15. **Authenticating sound recordings and videotapes;**
16. **Circumventing hearsay: definitional and exception approaches;**
17. **Witness spouse's assertion of privilege not to testify against accused spouse where divorce decree not final;**
18. **Collateral accidents with product of defendant;**
19. **Evolution of identity and intent exceptions to general exclusionary rules of character; and**
20. **Rehabilitation of medical experts.**

I sincerely hope that this supplement will be a source of significant support for your lawyering efforts. It has been prepared in grateful appreciation for your continuing loyalty to the ***McElroy*** project.

Yours very sincerely,

Charles W. Gamble
Henry Upson Sims Professor of Law

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By Charles W. Gamble

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IN BRIEF

March 1994 Volume 55, Number 2

ON THE COVER:

From the second floor of the rotunda of the state capitol, between the House and Senate chambers, murals and a decorative paint scheme can be seen that were designed and partially installed by Roderick McKenzie in 1926. During the restoration of the capitol, evidence of the intended color scheme was discovered and applied to the rotunda surfaces and details. The stairhall beyond is presented the way it probably looked in the mid-19th century. The restored capitol is an exciting compilation of styles and artifacts dating from 1831 to 1992.

— Photo by Bud Hunter, Hunter Photography, Birmingham

*(**The Alabama Lawyer** expresses its gratitude to the Alabama Historical Commission and Bill Woodsmall for their assistance.)*

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The Alabama Lawyer

Published seven times a year (the seventh issue is a bar directory edition) by the Alabama State Bar, P.O. Box 4156, Montgomery, Alabama 36101. Phone (205) 269-1515.

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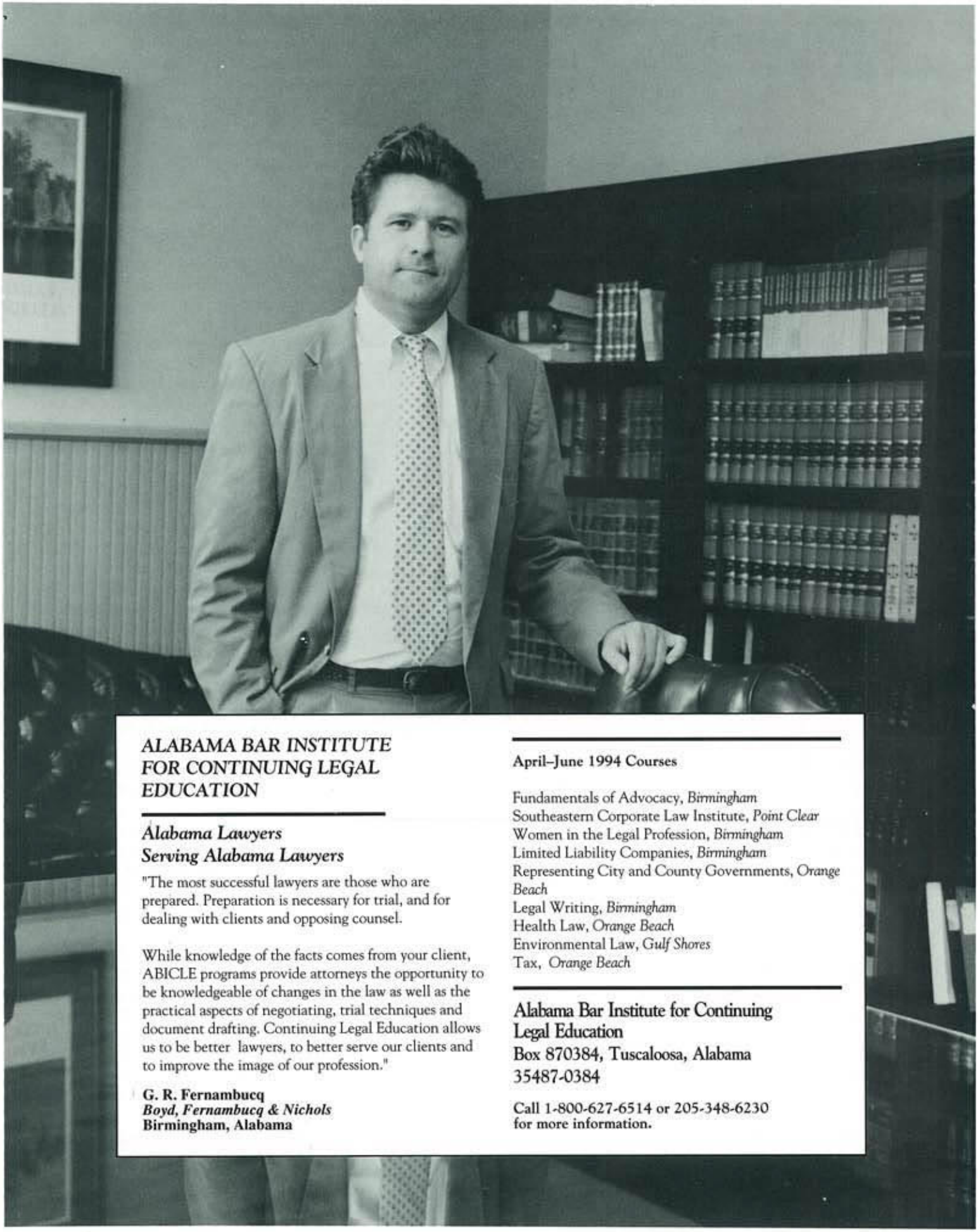
The Alabama Lawyer is published seven times a year for $20 per year in the United States and $25 per year outside the United States by the Alabama State Bar, 415 Dexter Avenue, Montgomery, Alabama 36104. Single issues are $3.50, plus first-class postage, for the journal and $25/$40 for the directory. Second-class postage paid at Montgomery, Alabama.

Postmaster: Send address changes to *The Alabama Lawyer*, P.O. Box 4156, Montgomery, AL 36101.



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TASK FORCE ON WOMEN IN THE PROFESSION

For several years, incoming presidents have started their year with a retreat for the Executive Committee. This year I tried to schedule a weekend for the retreat so that all the Executive Committee and their spouses could get together and plan the coming year. Due to various conflicts in executive member schedules, a weekend retreat was impossible to schedule and we settled for an all-day meeting the day before my first bar commissioners meeting.

We worked hard all morning going over the agenda for the next day and matters of importance to me and the state bar. When we broke for lunch, I just happened to sit down with **Commissioner Cathy Wright** and was discussing with her some of my goals for my committees and task forces. During the discussion, Cathy asked me what I thought about appointing a task force on women in the profession. It didn't take me but a second to respond that I thought such a task force would be a great idea. I am well aware of the fact that women constitute approximately 20 percent of our bar (19.3 percent to be exact), and committees dealing with women in the profession are very active at the national level, as well as in other states and larger city bars. Quite frankly, I was somewhat embarrassed that I did not recognize the need for a task force like this.

Spud Seale

Before resuming with the retreat agenda, Cathy and I agreed that we would give the proposed task force some more thought and get back in touch by telephone in the next week or so. The most difficult task was to narrow the choices for appointment to such a task force from among the many outstanding women in our bar. Celia Collins of Mobile and Margaret Young of Florence agreed to serve as co-chairs. I was also pleased to have the Hon. Sharon Yates of the court of civil appeals and Wanda Devereaux of the board of bar commissioners accept appointments.

If I ever had any doubts about why organizations such as the Junior League and PTO are so successful, they were quickly dispelled in the organizational meeting of the task force. The energy and enthusiasm exhibited by members of this task force were almost overwhelming. If I could get all committees of the bar as excited and committed to accomplishing goals of their committee, the only limit to what our association could accomplish would be our own imagination.

I want to make it perfectly clear to anyone who may be skeptical about the motivation and aims of this task force that it is not a bunch of aggrieved women with chips on their shoulders bashing men and a mostly male-dominated legal system. These are committed professionals who are, first and foremost, attorneys and who wish to address legitimate concerns within the confines of the organized bar. Any practitioner who will stop and reflect on the traditional roles and expectations of both a practicing attorney and mother will quickly realize the numerous and inherent conflicts in these roles. This is just one of the many issues which are unique to the woman lawyer and which need to be openly discussed.

In working with this task force and reviewing information provided to me by one of its members, I have a much greater appreciation for the old cigarette advertisement suggesting that women have come a long way. Considering the fact that it was not until November 7, 1907 that the Alabama Legislature passed a bill allowing women to be admitted to the state bar, and not until October 7, 1908 that the first woman was admitted, they have come a long way and in a relatively short period of time. The percentage of women lawyers has increased from 16.1 percent in 1989 to 19.3 percent today. We can expect this percentage to continue to increase as evidenced by the fact that the state's two accredited law schools, the University of Alabama and Cumberland, have women student bodies of 38 percent and 39 percent, respectively.

After meeting with this task force and listening to the concerns of its women, I am firmly convinced this task force should become a standing committee of the Alabama State Bar. I hope that its members will agree with my assessment

and make a recommendation to the bar commission. In the meantime, the task force has planned a Symposium on Women in the Legal Profession for April 29, 1994 at the Wynfrey Hotel in the Riverchase Galleria in Birmingham. It is my sincere hope that this task force and symposium will be supported by the members of our association. The issues and concerns to be addressed are those which will increasingly confront legal practitioners, firms, and the entire legal system as more women enter the profession.

I urge those of you in management of law firms and corporate legal departments to encourage the women lawyers in your organizations to attend. **The Task Force on Women in the Profession** has my unequivocal support and I trust it will have yours. ■

Local Bar Award of Achievement

The Local Bar Award of Achievement recognizes local bar associations for their outstanding contributions to their communities. Awards are presented annually at the Alabama State Bar's Annual Meeting.

Local bar associations compete for these awards based on their size.

The three categories are large bar associations, medium bar associations, and small bar associations.

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

LARGE	MEDIUM	SMALL	
10th	6th	1st	25th
13th	7th	2nd	26th
15th	8th	3rd	27th
	11th	4th	29th
	12th	5th	30th
	16th	9th	31st
	20th	12th	32nd
	23rd	14th	33rd
	28th	17th	34th
	Bessemer Cut-off	18th	35th
	(division of 10th Circuit)	19th	36th
		21st	37th
		22nd	38th
		24th	39th
			40th

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; and
- 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 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, 1994.

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.

EXECUTIVE DIRECTOR'S REPORT

Equal Justice Under Law

In an earlier column, I wrote of the Alabama State Bar's host role for the 1993 Southern Conference of Bar Presidents Silver Anniversary Meeting. With a great deal of pride and perhaps a lack of modesty, the meeting in October was, in the judgment of many, the finest ever, substantively, socially and logistically. Many attendees had never been to Alabama or the Eastern Shore. The substantive program covered three topics—professionalism, legal services, bar activities—in a retrospective format of how they had been addressed by conferee states and the profession generally over the last quarter century.

J. David Ellwanger

J. David Ellwanger, an Alabama State Bar member and president of the Southwestern Legal Foundation, delivered the keynote speech at the opening dinner. His thoughtful and provocative remarks guided the discussions over the next two days of meetings. Those of us from Alabama were proud of David's contributions. I have elected to share his remarks with our whole membership in this column. As a former executive director of the bars of the District of Columbia, Los Angeles and the State Bar of California, he is well qualified to create a director's column. Following brief introductory remarks on the "first 25 years" of the Southern Conference, he said:

Enough about the first 25 years...let's focus on the years ahead. In the next couple of days the talk will be about:

- professionalism
- delivery of legal services
- bar activities and services

My remarks tonight will focus on these three themes in the context of my theme: **Equal Justice Under Law.**

My challenge is to connect my theme with the conference's three themes. Actually, this is not a difficult task.

Lawyers are in the justice business. We are the gatekeepers of the justice system. For there to be justice, however, legal services must be available to all who need them.

We, as lawyers, help to insure that justice prevails—that the same law applies to all people, rich or poor, man or woman, black, brown or white—that those without a voice are heard, and that even unpopular views have a forum. We help balance the scales. We help promote equal justice under law.

It is a great privilege to be a lawyer. And that privilege carries with it certain duties. It has been said that professionalism encompasses four such duties, a duty to the profession, a duty to the client, a duty to the public, and a duty to oneself.

We, as professionals, have a duty, indeed a responsibility, to deliver *competent* legal services *to all who need them*. If we fail to do that, justice is one of the first casualties.

The star of the legal profession shines brightest when we promote competence and professionalism within our ranks, when we use our skill and talents to educate ourselves, to protect and serve the public, when we ensure that *justice* is part of the *justice system.*

Having said that, one of the great traditions of the Southern Conference is the sharing of good ideas. In keeping with that tradition, your discussions about professionalism and the delivery of legal services will give you a chance to compare notes, to exchange ideas about what has worked and what hasn't, and to plan for a future in which America's citizens will continue to rely on *us* to ensure that the justice system will be available to *them*.

There is much that lawyers can, should, and do accomplish as individuals. But, on occasion, lawyers *work* most effectively and *speak* most effectively not through the individual actions of individual members of the bar but through collective action and a collective voice.

It is altogether fitting that this meeting of the Southern Conference, with its focuses on professionalism and the delivery of legal services, concludes its substantive program by focusing on the role of the organized bar.

The bar's greatest responsibilities are to be the voice of the profession and to be a catalyst in promoting equal justice under law.

Underscoring the themes of this conference, we best exhibit our professionalism and we best meet the demand for the delivery of legal services by committing ourselves and the strength of our collective voice to the cause of justice.

One of the best examples is the bar's successful fight to save the Legal Services Corporation. The voice of the profession is a powerful one.

The challenge to you, the leaders of the Southern Conference in 1993, is to build on the traditions of your predecessors, to borrow from *their* vision, to help make certain that lawyers of future generations have a strong and effective voice, and to ensure that the people we represent have access to a system that cherishes, above all else, *equal justice under law.*

I want to close with a story, while at the same time telling you a little bit about the Southwestern Legal Foundation.

I now call the Southwestern Legal Foundation home. The Foundation was founded in 1947 by Dean Robert Storey, later

to be president of the ABA. Two other past ABA presidents have served as leaders of the Foundation, Leon Jaworski and Morris Harrell. Currently, Morris is chairman of the board of trustees of the Foundation.

Over the past 46 years, the Foundation has earned a national, indeed international, reputation as a premiere provider of continuing legal education.

A hallmark of the educational process is the ever-present possibility of a pop quiz, which is exactly what you are going to get right now. Now I know that lawyers want to know what all the options are before they make a judgment.

So I'm going to give you the question and I'm going to tell you what the possible options are and then I'm going to ask you for the correct answer. The question is, "The phrase 'equal justice under law', chiseled in stone in front of the Supreme Court of the United States, derives from:

Reginald T. Hamner

1. the Constitution;
2. the Declaration of Independence;
3. the Magna Carta;
4. the Northwest Ordinance; or
5. none of the above.

Now you know what the possibilities are and I'm going to ask you to select what you think the correct, appropriate answer is, and you are to do so by picking up your knife or fork or spoon and tapping it on the table.

Well, this is a *brilliant* group. Now those of you who didn't select the correct answer, which is "none of the above", should not feel too badly because you're in pretty good company.

Justice Kennedy tells this story about himself. He said that the thought occurred to him, after he'd been on the Supreme Court for a couple of weeks, that some friends of his might expect him to know where the phrase "equal justice under law" came from. Frankly, he didn't know.

He was much too embarrassed to ask his law clerks, so he decided to embark upon this research project himself. Of course, he started with *Words and Phrases* and he found "equal justice under law" and it said, "chiseled in stone on the front of the building which houses the Supreme Court—derivation unknown!"

So, realizing that he was really into a research project, he thought, "Well, I'm right here at the original source, I'll ask the court archivist if I can have access to the files dealing with the construction of the Supreme Court."

He emptied boxes around his desk and he found a file marked "correspondence". In it he found a letter from the famous architect, Cass Gilbert, written to the famous Chief Justice of the United States, Charles Evans Hughes. The letter went something like this:

"You and I have been talking about some appropriate inscription that we could chisel in stone in front of the building, but they are all too long. I've decided that the only thing that really fits is 'equal justice under law.' What do you think?"

And, in answer to that letter, Chief Justice Hughes responded, "The more I think about it, the more I think it sounds pretty good. Go ahead and do it."

"Equal Justice Under Law", chiseled in stone on the front of the building that houses the Supreme Court of the United States, born of a humble birth. Yet, it is today the cornerstone of our philosophy of justice and a part of the bedrock of our democracy. I think of it as an *exhortation* to every lawyer, a *reminder* to every judge, and a *promise* to all Americans. ■

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.

YOUNG LAWYERS' SECTION

By Les Hayes III, president

MANAGING CAREER AND FAMILY

In the recent edition of *Barrister* magazine, which is published by the American Bar Association for the Young Lawyers' Division, the lead article was "Life, Law and the Pursuit of Balance." The author, Monica Bay, discusses the problems a young lawyer faces in trying to balance his life—and suggests ways to have a life separate from a law practice while at the same time keep one's legal career on track. The article is interesting and contains information beneficial to all young lawyers; I highly recommend it.

During a recent Sunday church service, my pastor delivered a thought-provoking sermon entitled "Teach the Children Well." His words, along with the aforementioned article written by Bay, reemphasized to me the importance, as well as the difficulty, of simultaneously attempting to practice law and raise a family. No doubt there are many young lawyers who do not yet have families. Accordingly, the following comments may be neither inspirational nor applicable to you. Nevertheless, I would guess there are just as many young lawyers in the process of raising families who are attempting to balance their time spent at home with their time spent in a law practice. Although the following comments may speak more directly to young lawyers with families, I think that those attorneys without children can also benefit from them.

In Houston, Texas the police department issued a statement for parents entitled "How to Make a Child Into a Delinquent: 12 Easy Rules." They are:

1. "Begin at infancy to give the child everything he wants. In this way, he will grow up to believe the world owes him a living.
2. "When he picks up bad language, laugh at him. This will make him think he is cute.
3. "Never give him any spiritual training. Wait until he is 21, and then let him decide for himself.
4. "Avoid the use of the word 'wrong'. It may develop a guilt complex.

Les Hayes III

5. "Pick up everything he leaves lying around—books, shoes, clothes.
6. "Let him read any printed matter he can get his hands on. Be careful that the silverware and drinking glasses are sterilized, but let his mind feast on garbage.
7. "Quarrel frequently in the presence of your children.
8. "Give a child all the spending money he wants.
9. "Satisfy his every craving for food, drink and comfort.
10. "Take his side against neighbors, teachers, principals, counselors and policemen. Remind your child that they are prejudiced toward him.
11. "When he gets into trouble, apologize for yourself by saying, 'I never could do anything with him.'
12. "Prepare yourself for a lifetime of grief. You will likely have it."

The above rules, when I first heard them from my pastor, hit me like a ton of bricks. Certainly, while there are no clear guidelines to raising children, the "12 Easy Rules" are a good start.

As attorneys, we have responsibilities. We are responsible to vigorously represent our clients to the fullest extent of the law, we are responsible to maintain ethical conduct and standards of practice, and we are responsible to maintain the integrity of our profession. However, just as importantly, and probably more so, we are responsible to our families and to our children to spend time with them. All of us certainly can appreciate the importance of a quality education and, no doubt, we have an understanding and respect for the law. We should make every effort to see that our children adopt these same ideas. A good lawyer never takes anything for granted. Likewise, that same lawyer should not take for granted the instillation of good qualities and aspirations in his or her children. The preparation of a good appellate brief takes time and effort; the raising of children is no different. As evidenced by our reaching the plateau of becoming attorneys, our parents took the necessary time and effort in raising us; we should give our children nothing less. The above 12 Easy Rules, which are now on our refrigerator at home, are excellent points to remember. ■

SANDESTIN SEMINAR

MAY 20-22

Don't forget to register for the Sandestin Seminar to be held at Sandestin Resort in Destin, Florida. The dates are May 20-22, 1994. Just fill out the attached application and return it and your registration fee to Buddy Smith at the address shown on the application. Room reservations must be made directly with the Sandestin Resort. You can make your reservations by calling 1-800-277-0802 (Beachside Condominiums) or 1-800-342-7040 (Bayside Inn). The resort is holding a number of rooms on a first come, first served basis. Make your plans now to attend the Sandestin Seminar and encourage your fellow attorneys to join you. I look forward to seeing you there.

ALABAMA YOUNG LAWYERS' SECTION SANDESTIN SEMINAR

MAY 20-22

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☐ Check here if you wish to enter the golf tournament. Green fees will be paid at Sandestin.

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BAR BRIEFS


Apolinsky

• **Harold Apolinsky**, who practices with Sirote & Permutt in Birmingham, has been appointed to the Small Business Advisory Board of National Life of Vermont. He is one of eight professional advisors from across the country—attorneys and accountants who work with owners of small businesses and those in professional practices—invited by National Life to serve in an advisory capacity to the 143-year-old mutual insurance company.

Apolinsky is a senior partner with Sirote & Permutt. He is the author of *Tax Planning for Professionals*, and served as chair of the Small Business Council of America from 1991 to 1993. He is an adjunct professor of estate and gift taxation and estate planning at the University of Alabama, and an adjunct professor of estate planning at the Cumberland School of Law.

• **Douglas C. Martinson**, of the Huntsville firm of Martinson & Beason, was recently certified in civil trial law by the National Board of Trial Advocacy, an ABA-accredited organization. Martinson joins a group of 1,700 lawyers nationwide who have become certified by NBTA.

Martinson is a 1964 admittee to the Alabama State Bar.

Under appointment of the Governor of Alabama, Martinson served as special judge of the Madison County Court from 1966-1971. He has been a member of the Huntsville-Madison County Bar Association since 1964 and served as president from 1987-88. He also served as the first editor of the *Alabama Trial Lawyers Newsletter* (1973-75), which is now known as the *Journal of the Alabama Trial Lawyers Association*.

Requirements for NBTA certification include: numerous trials to jury verdict or judgment; continuing legal education; submission of a trial court brief for review; attorney and judicial references; proof of good standing in the legal profession; and a day-long examination on trial techniques, evidence and ethics.

REQUEST FOR PROPOSALS

for a History of Alabama Legal Institutions

The Alabama Supreme Court and State Law Library are soliciting proposals for the writing of a history of the evolution of Alabama's legal institutions from their genesis in the Mississippi Territory to the present. The proposed study should constitute a comprehensive history of Alabama's legal institutions, including both the judicial system and the bar. Attention should be given to the relationship of these institutions to the history of Alabama and of the United States, with special emphasis on the impact of court decisions emanating from Alabama. Analyses of the roles played by members of the bench and bar in the evolution of the laws and legal institutions of Alabama should be included. The history should be a book-length monograph acceptable for publication by a university press. A chronological organization, based on the following historical periods, is suggested but not mandated.

I. Frontier Justice and Early Statehood (from the early settlers through 1834)
II. The Ante-bellum Period: 1834-1858
III. Civil War and Reconstruction: 1859-1874
IV. The Constitution of 1875 to the Constitution of 1901: 1875-1901
V. The Constitution of 1901 to World War II: 1901-1940
VI. World War II to Court Restructuring: 1940-1971
VII. Modernization and Streamlining for the 21st Century: 1971-

Proposals should include an estimate of the time necessary to complete the research and writing of the history plus the estimated costs for the project. Deadline for proposals is **May 31, 1994**. Send proposals to the Alabama Supreme Court and State Law Library, 300 Dexter Avenue, Montgomery, Alabama 36104-4751. For further information, call **Tim Lewis, state law librarian, at (205) 242-4347.**

• **Charles F. Daniels**, with the Birmingham firm of Fletcher, Yeilding, Wood & Lloyd, has been elected a Fellow of the American College of Trust and Estate Counsel. Daniels is a 1973 admittee to the Alabama State Bar.

The College is an international association of lawyers who have been recognized as outstanding practitioners in the laws of wills, trusts, estate planning, estate administration, and related tax planning. Membership in the College is by invitation of the Board of Regents.

Battle

• Birmingham lawyer **LaVeeda Morgan Battle** was nominated by President Clinton last summer and confirmed as a member of the Legal Services Corporation's board of directors in October. She was sworn in at White House ceremonies in November. Selected to chair the board's Operations and Regulations Committee, Battle will have significant influence on how Legal Services programs operate for the rest of the 1990s.

Battle, a partner with Gorham & Waldrep, is the first person from Alabama selected by a president to serve on the 11-member LSC board. Created and funded by Congress in 1974, LSC awards grants and provides oversight to 323 local programs throughout the country. (There are four LSC-funded programs in Alabama.)

• **Gerard J. Durward** of Birmingham was recently elected to another term on the Board of Governors of the American Academy of Matrimonial Lawyers. Durward is a 1966 admittee to the Alabama State Bar.

• The Bankruptcy Judges of the Northern District of Alabama, Southern Division, announce that **David P. Rogers, Jr.** has been appointed Chapter 13 Standing Trustee, effective February 1, 1994. Rogers has been assistant trustee and general counsel for the office of the Chapter 13 Standing Trustee since September 1, 1991. The office of the Chapter 13 Trustee is located in the Financial Center, 505 N. 20th Street, Birmingham, Alabama 35203. The mailing address is P.O. Box 371008, Birmingham 35237-1008. Phone (205) 323-4631.

• The **American Bankruptcy Board of Certification** will hold its fifth bankruptcy certification examination April 29, 1994 at various sites across the country. The ABBC is an ABA- accredited, Washington, D.C.-based non-profit organization dedicated to serving the public and improving the quality of the bankruptcy bar. ABBC certification serves the public by allowing clients to make an informed decision in choosing bankruptcy counsel. The ABBC offers separate certification programs in business bankruptcy and consumer bankruptcy.

The ABBC program is the largest national bankruptcy certification program and is sponsored by the American Bankruptcy Institute.

For program information or a free directory of certified attorneys, write the ABBC at 510 C Street, NE, Washington, D.C. 20002. Phone (202) 546-1200.

Cusimano

• **Gregory S. Cusimano** has been selected to serve as a member of the National College of Advocacy Board of Trustees of the Association of Trial Lawyers of America, and was named vice-chairman of that board.

Prior to his selection as vice-chairman, Cusimano served on the faculty of several National Trial Colleges, the most recent held at Harvard Law School.

• The **1994 Judicial Conference of the Eleventh Circuit** will be May 5-7 at the Marriott Sawgrass, Ponte Vedra, Florida. The judges are convening the meeting to improve the administration of justice in their courts.

A limited number of spaces are available to any attorney admitted to practice before any of the courts of the Eleventh Circuit who wishes to attend the meeting. For more information, *write* Norman E. Zoller, Circuit Executive, 56 Forsyth Street, NW, Atlanta, Georgia 30303. ■

About Members, Among Firms

ABOUT MEMBERS

Michael W. Carroll announces the opening of his office at 2172 Pelham Parkway, Suite 101, Pelham, Alabama 35124. The mailing address is P.O. Box 1327, Pelham 35124. Phone (205) 988-8884.

Tamera K. Erskine announces her new location at 2107 5th Avenue, North, Suite 100, Birmingham, Alabama 35203. Phone (205) 252-9751.

William E. Case announces the relocation of his office to Two Office Park, Suite 522, Mobile, Alabama 36609. Phone (205) 304-0468.

Kenneth B. Trotter announces the opening of his office at 1201 University Highway, Troy, Alabama 36081. The mailing address is P.O. Box 67, Troy 36081. Phone (205) 566-4549.

William E. Smith, Jr. announces the opening of his office at 214 W. Dr. Hicks Boulevard, Florence, Alabama 35630. The mailing address is P.O. Box 496, Florence 35631. Phone (205) 767-4529.

Jerry W. Hauser announces the relocation of his office to Hightower Building, 25 LaFayette Street, South, Suite 3, Lafayette, Alabama 36862. Phone (205) 864-8884.

Boyd F. Campbell announces a change of address to P.O. Box 230238, Montgomery, Alabama 36123-0238. Phone (205) 272-7092.

Cindee Dale Holmes announces the relocation of her office to 1910 Third Avenue, North, Suite 302, Burger-Phillips Centre, Birmingham, Alabama 35203. Phone (205) 254-3664.

David O. Gatch announces his appointment as deputy attorney general, Department of Human Resources. His office is located at 1150 Government Street, Suite 105, Mobile, Alabama 36604. Phone (205) 690-6631.

William R. Foust, senior vice-president, department of human resources, Swift Textiles, Inc., announces a change of address to P.O. Box 1400, Columbus, Georgia 31994. Phone (706) 571-7592. Foust is a 1971 admittee to the Alabama State Bar.

Evelyn H. Brantley announces a change of address to 1127 Springs Avenue, Birmingham, Alabama 35242. Phone (205) 991-9062.

Clark Stanley Davis, CFP, announces he has become associated with Haines Financial Advisors, Inc. Offices are located at One Independence Plaza, Suite 614, Birmingham, Alabama 35209. Phone (205) 871-3334.

William G. Hause announces a change of address to 4222 S. County Road 59, Dothan, Alabama 36301. Phone (205) 677-3646.

AMONG FIRMS

Gerard J. Durward announces that **Pamela M. Burns** has become an associate. Offices are located at 1150 Financial Center, 505 N. 20th Street, Birmingham, Alabama 35203. Phone (205) 324-6654.

Connie Ray Stockham and **Richard J. Stockham, III** announce the formation of **Stockham & Stockham**, and that **Martin A. Maners, III** and **Stephanie N. Zohar** have become associated with the firm. Offices are located at 505 N. 20th Street, Suite 1125 Financial Center, Birmingham, Alabama 35203. Phone (205) 252-2889.

Carlisle & Associates announces that **Lois Beasley-Carlisle**, formerly of Veigas & Cox, has become associated with the firm. Offices are located at 1710 Decatur Highway, Fultondale, Alabama. The mail-

ing address is P.O. Box 121, Fultondale 35068. Phone (205) 841-4063.

Williams, Harmon & Hardegree announces that **Wesley M. Frye** has become associated with the firm. Offices are located at 1130 Quintard Avenue, Suite 403, P.O. Box 67, Anniston, Alabama 36202. Phone (205) 238-8356.

Protective Life Corporation announces that **John Johns** has become associated with the company. Offices are located at 2801 Highway 280, South, Birmingham, Alabama 35223. The mailing address is P.O. Box 2606, Birmingham 35202. Phone (205) 879-9230.

Gordon, Silberman, Wiggins & Childs announces that **Amelia H. Griffith, Rocco Calamusa, Jr., Anita P. Roberson** and **Deborah A. Mattison** have become associates. Offices are located at 1400 SouthTrust Tower, Birmingham, Alabama 35203-3204. Phone (205) 328-0640.

Locke Purnell Rain Harrell announces that **Gary R. Powell** has been elected a shareholder. Offices are located at 2200 Ross Avenue, Texas Commerce Tower, Suite 2200, Dallas, Texas 75201-6776. Phone (214) 740-8000. The firm also has offices in New Orleans, Louisiana. Powell is a 1984 admittee of the Alabama State Bar.

Miller, Hamilton, Snider & Odom announces that **Jean M. Powers,** formerly with the Atlanta firm of Elarbee, Thompson & Trapnell, has become associated with the Mobile office. Offices are located at 254 State Street, Mobile, Alabama 36601. The mailing address is P.O. Box 46, Mobile 36601. Phone (205) 432-1414.

Sigler, Moore, & Wolfe announces a name change to **Sigler, Moore, Clements & Wolfe**. Offices are located at 107 St. Francis Street, Suite 2525, First National Bank Building, Mobile, Alabama 36602. Phone (205) 433-7766.

Chamblee & Associates announces a relocation to 5582 Apple Park Drive, Birmingham, Alabama 35235. Phone (205) 856-9111. The firm also announces that **Carl E. Chamblee, Sr.** is now *of counsel.*

Jeffery A. Foshee & Associates announces that **Harry A. Lyles,** formerly chief legal counsel for the Alabama Department of Corrections, has become associated with the firm. Offices are located in Montgomery and Mobile, Alabama.

Kaffer, Pond & Pipkin announces that **Daniel A. Hannan,** formerly of Elarbee, Thompson & Trapnell of Atlanta, Georgia, has become a partner. Offices are located at 150 Government Street, Suite 3003, Mobile, Alabama 36602. Phone (205) 438-1308.

Potts & Young announces that **Mark A. Sanderson,** former assistant district attorney of Colbert County, has become associated with the firm. Offices are located at 107 E. College Street, Florence, Alabama 35630. Phone (205) 764-7142.

Smyer, White & Putt announces the relocation of its offices to 850 Park Place Tower, 2001 Park Place North, Birmingham, Alabama 35203. Phone (205) 326-6460.

Afridi & Angell announces that **David R. Baker,** formerly a partner with Jones, Day, Reavis & Pogue, has become a partner. The new name is **Afidi, Angell & Baker**. Offices are located at 230 Park Avenue, New York, New York 10169-0639 and in Abu lkDhabi, Dubai, Jebel Ali and Sharjah, United Arab Emirates, and Islamabad, Pakistan. Phone (212) 697-0300. Baker is a 1954 admittee to the Alabama State Bar.

Huie, Fernambucq & Stewart announces that **Robert V. Rogers, Nancy S. Akel** and **Amanda Owen Lawson** have become associated with the firm. Offices are located at 800 First Alabama Bank Building, Birmingham, Alabama 35203. Phone (205) 251-1193.

Bradley, Arant, Rose & White announces that **James F. Archibald, III; Jay R. Bender; James W. Davis; Carolyn Reed Douglas; Douglas E. Eckert; K. Wood Herren; Matthew H. Lembke; Justin T. McDonald; Jennifer Byers McLeod; Amy Kirkland Myers; Kenneth M. Perry; John W. Smith T; James Tassin;** and **Arnold W. Umbach, III** have become associated with the firm. Offices are located in Park Place Tower and SouthTrust Tower in Birmingham and in AmSouth Center in Huntsville.

Lanier, Ford, Shaver & Payne announces that **Claude E. Hundley, III** has become a member of the firm and **Anita J. Kimbrell, Rodney C. Lewis** and **Edward E. Wilson, Jr.** have become associated with the firm. Offices are located 200 W. Court Square, Suite 5000, Huntsville, Alabama 35801. Phone (205) 535-1100.

Heninger, Burge & Vargo announces that **Timothy C. Davis**, formerly of Gathings & Davis, has joined the firm. Offices are located at 1500 Financial Center, 505 N. 20th Street, Birmingham, Alabama 35203. Phone (205) 322-5153.

Anne R. Strickland and **Shelly B. Moss** announce the formation of **Strickland & Moss**. Offices are located at 1855 Data Drive, Suite 115, Woods Point Building I, Birmingham, Alabama 35244. Phone (205) 733-8555.

McFadden, Lyon, Willoughby & Rouse announces a name change to **McFadden, Lyon & Rouse, L.L.C. William S. McFadden** has become a member and **Thomas H. Benton, Jr.** has become associated with the firm. Offices are located at 718 Downtowner Boulevard, Mobile, Alabama 36609-5499. Phone (205) 342-9172.

Cabaniss, Johnston, Gardner, Dumas & O'Neal announces that **Douglas B. Kauffman** and **Gary W. Fillingim** have become associates of the firm. Offices are located in Birmingham and Mobile, Alabama.

Don F. Wiginton and **C. Dennis Hughes** announce the formation of **Wiginton & Hughes**. Offices are located at 105 Vulcan Road, Suite 401, Birmingham, Alabama 35209. Phone (205) 942-9233.

James E. Loris, Jr. and **Andrew J. Coleman** announce the opening of their offices at the Frank Nelson Building, 205 20th Street, North, Suite 310, Birmingham, Alabama 35203. Phone (205) 322-3300.

Griffin, Allison, May, Alvis & Fuhrmeister announces **Julia C. Kimbrough,** formerly with Crittenden & Associates, has become an associate. Offices are located at 4513 Valleydale Road, Suite 1, Birmingham, Alabama 35242. The mailing address is P.O. Box 380275, Birmingham 35238. Phone (205) 991-6367.

Duhe' & Barnard announces that **Cheryl D. Eubanks** has become an associate. Offices are located at 1904 Dauphin Island Parkway, Mobile, Alabama 36605. Phone (205) 478-6899.

Hand, Arendall, Bedsole, Greaves & Johnston announces that **Archibald T. Reeves, IV** has become a member and **John P. Kavanagh, Jr., Douglas W. Fink** and **Lisa Tinsley O'Hara** have joined as associates. Offices are located at 3000 First National Bank Building, Mobile, Alabama. The mailing address is P.O. Box 123, Mobile 36601. Phone (205) 432-5511.

Sirote & Permutt announces that **Donna K. Bowling, Annette M. Carwie, Frances Heidt, Candace L. Hemphill, C. Randal Johnson, Wanda S. McNeil, Stephen B. Porterfield, Robert W. Ruth,** and **Jeffrey H. Wertheim** have become shareholders. Offices are located in Birmingham, Mobile and Huntsville, Alabama.

Lightfoot, Franklin, White & Lucas announces that **Harlan I. Prater, IV** has become a partner. Offices are located at 300 Financial Center, 505 N. 20th Street, Birmingham, Alabama 35203. Phone (205) 581-0700.

Balch & Bingham announces the following new members: **Suzanne Ashe; Mark A. Crosswhite; Will Hill Tankersley, Jr.; Leonard Charles Tillman; Dorman Walker; Cavender Crosby Kimble;** and **Alex B. Leath, III.** Offices are located in Birmingham, Huntsville and Montgomery, Alabama and Washington, D.C.

Hill, Hill, Carter, Franco, Cole & Black announces that **Susan E. Kennedy** has become associated with the firm. Offices are located at 425 S. Perry Street, Montgomery, Alabama 36101. The mailing address is P.O. Box 116, Montgomery 36101-0116. Phone (205) 834-7600.

Tommy H. Siniard announces that **Jeffery W. McKinney**, formerly of Morris, Cloud & Conchin, has become associated with the firm. The firm also announces the relocation of offices to 125 Holmes Avenue, Huntsville, Alabama 35801. The mailing address is P.O. Box 2667, Huntsville 35804. Phone (205) 536-0770.

Sides, Oglesby, Held & Dick announces the relocation of their offices to 1310 Leighton Avenue, Anniston, Alabama 36201. The mailing address is P.O. Box 1849, Anniston 36201. Phone (205) 237-6611.

Lange, Simpson, Robinson & Somerville announces the opening of its offices in Montgomery at 8 Commerce Street, Suite 900, 36104-3531. Phone (205) 241-0000. The firm now has offices located in Birmingham, Huntsville and Montgomery, Alabama. The firm also announces that **Thomas F. Campbell, Timothy A. Palmer, R. Alan Deer, J. Franklin Ozment, Beth O'Neill Roy,** and **Rebecca St. Pierre Dunnie** have become partners in the Birimingham office, **David R. Pace** has become a partner in the Huntsville office, and **Scott Simpson, David A. Norris, William L. Waudby, David L. Warren, Jr.**, and **Deborah L. Shelley** have become associated with the Birmingham office.

Jones & Bowron announces that **Jack W. Selden,** formerly United States Attorney for the Northern District of Alabama, has become a member of the firm. The firm's new name is **Jones, Bowron & Selden**. The firm also announces that **Amy E. Gallimore** and **Maury S. Weiner** have become associates. The address is Park Place Tower, 2001 Park Place, North, Suite 450, Birmingham, Alabama 35203. Phone (205) 254-9000.

Bolt, Isom, Jackson & Bailey announces that **Michael D. Rogers** has become a partner in the firm. Offices are located at 822 Leighton Avenue, Anniston, Alabama 36201. The mailing address is P.O. Box 2066, Anniston 36202. Phone (205) 237-4641.

Finkbohner & Lawler announces that **Royce A. Ray, III** has become a member of the firm. The address is Landmark Square, 169 Dauphin Street, Mobile, Alabama 36602. The mailing address is P.O. Box 3085, Mobile, 36652. Phone (205) 438-5871.

McElvy & Ford announces that **Richard M. Kemmer, Jr.** has become associated with the firm. The mailing address is P.O. Box 517, Centreville, Alabama 35042. Phone (205) 926-9767. ■

BUILDING ALABAMA'S COURTHOUSES

PERRY 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*

Perry County Courthouse

PERRY COUNTY

Several Alabama names commemorate naval heroes of the War of 1812, including Lawrence County, named for Captain James "Don't give up the ship" Lawrence, and Decatur, the county seat of Morgan County, named for Commodore Stephen Decatur. Perry County, created by the Alabama Legislature on December 13, 1819, is also in this group. It was named for Commodore Oliver Hazard Perry, who defeated the British in the Battle of Lake Erie in 1813. Perry is remembered for the famous message, "We have met the enemy and they are ours."

Perry was born in Rhode Island in 1785. He was the son of a naval officer and served under his father as a midshipman at the age of 14. His brother, Commodore Matthew Perry, became famous for leading the first American ships into Tokyo Bay and opening Japanese ports to western trade. Besides Oliver Perry's exploits in the War of 1812, he fought the Algerian pirates during the war with Tripoli. Perry died from yellow fever while on a diplomatic mission to Venezuela in 1819. Shortly thereafter, the people of Alabama named Perry County in his honor.

Perry County is divided roughly in two by the Cahaba River. Many historians believe that this river was the boundary line between Choctaw Indians on the west and Creek Indians on the east. It was to this area that Menewa, the leader of the Creeks, fled following the Indian disaster at Horseshoe Bend in east Alabama.

The Treaty of Fort Jackson on August 9, 1814 ended the Creek Indian War. This treaty opened the territory where Perry County now lies to pioneer settlement. One of the first territorial towns was an Indian village at the junction of Old Town Creek and the Cahaba River. Combining the names of these two streams, settlers called the Indian village Cahaba Old Town.

The first known white settler in the area was Anderson West. He built a cabin near Cahaba Old Town. Soon other settlers came from the Carolinas, Georgia, Tennessee and Virginia. William Ford and his sons settled in an area called Perry Ridge. They built a sawmill and a gristmill. Thomas Means came up the Cahaba River and landed at

a place called Burrough's Ferry or Burrough's Bottom. Nathan Reid, accompanied by his sons-in-law, Michael McElroy and Warner Young, moved to the area in 1817. McElroy, who was nicknamed "Michael Muckle" by the locals, built a cabin in a clearing that was soon known as Muckle's Ridge.

The first county seat of Perry County was Perry Ridge. A crude log cabin served as the temporary courthouse. This site was located on the west bank of the Cahaba River and remained the county seat until 1822. In later years, it became known as Old Perry Courthouse. It eventually was abandoned and became part of a large cotton plantation.

Perry County Courthouse, Marion, built 1855-56

Only a few short years after the territory was opened for settlement, Michael "Muckle" McElroy complained that the territory was becoming too crowded. Although he and his family were the sole inhabitants of his "ridge", he objected to the "overpopulation" of the surrounding area and sold his holdings to Anderson West in 1818. He moved on to Mississippi, disappearing from the history of our state. Soon thereafter, while living at Muckle's Ridge, Anderson West was elected the county's first sheriff.

After the boundaries of the county were finalized, many residents concluded that Perry Ridge was not a convenient location for a permanent county seat site and demanded a more centralized location. On November 21, 1821, the Legislature authorized an election of seven commissioners who would choose the permanent site. The commissioners were elected February 5, 1822 and met the next month.

The commissioners considered four prospective sites. The first was Cahaba Old Town. It had a cotton gin, many settlers and, most importantly to the nominating commissioners, a store that sold whiskey by the half pint. The second was Burrough's Bottom, which was nominated because it had springs that were thought to have medicinal qualities, it was a place where boys could learn to swim, and it was near good fishing grounds. A third suggestion was to retain the courthouse at Perry Ridge. The fourth nominee was Muckle's Ridge, which was centrally located and had natural beauty.

The commissioners deliberated for a full day. Finally, they decided that Muckle's Ridge, which belonged to the county sheriff, was the most central and accessible location. It was chosen the county seat.

Sheriff Anderson West immediately divided his holdings into town lots and served as his own auctioneer at a land sale held May 22, 1822. Prices ranged from $150 to $280 per lot. The sheriff cleared $1,558 from the sale of this land he bought from Michael McElroy only a few years earlier.

When the auction had concluded, several people in the crowd wanted a new name for the town. Since Anderson West had lived in Charlotte, Tennessee, and Dr. Alexander, a prominent citizen, had come from Charlotte, North Carolina, it was natural that the name "Charlotte" was suggested. However, several people in the crowd were natives of South Carolina or had connections to that state. They proposed the name "Marion" in honor of Francis Marion, the Swamp Fox of the Revolutionary War. The name Marion replaced Muckle's Ridge. This tradition of naming places in west Alabama for South Carolinians is also reflected in the names of Greene County, Pickens County and Sumter County.

The first courthouse in Marion was built in 1823. It was erected by Samuel H. Nelms who had come to Marion from Greene County, Georgia. The two-story frame structure was 36 feet in length, sat on wooden blocks that were three feet high, and was described at the time as having the appearance of a "smokehouse with windows". The jail constructed at the same time was a double pen log cabin covered with finished boards.

In 1826, Marion had only 144 residents. Soon, though, the town began to grow. One reason was the move of the capital of Alabama from nearby Cahaba in Dallas County to Tuscaloosa. A number of Cahaba citizens relocated to Marion.

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.

Another cause for growth was a law passed in 1828. Up until that time, the Legislature could change county boundary lines and county seat sites whenever it desired by a simple majority vote. This made it uncertain that a town once chosen would remain the county seat. The new law required a two-thirds majority for future county and county seat changes. Thus, Marion and other county seats were more secure in their status, and this encouraged settlement. The expanding cotton economy of the county also supported the county seat's growth.

An incident in the mid-1830s precipitated the building of a new courthouse. A local historian records that one night some rowdies, under the influence of "Bacchus", pried out one of the supporting blocks under the courthouse, causing the end of the building to fall to the ground. One local citizen, Charles Langdon, was particularly outraged that drunken loafers could cause such an embarrassment to the town. He led a drive for a new and more appropriately constructed courthouse.

The old frame courthouse was replaced by a substantial brick structure. Original plans called for the cost to be $5,000. Before completion in 1837, however, the plans had been so elaborated that the final cost was $9,356. This expenditure for the courthouse illustrates how Perry County had grown in prosperity. It had become a center for the thriving cotton economy. Many legal transactions involving the transfer of land and slaves took place in Marion.

With the new wealth, Marion became a center of society and culture for the Black Belt area of Alabama. New businesses arrived. In just a few short years, frontier cabins had given way to palatial homes. Its prominence is illustrated by the social highlight of 1840. General Sam Houston, former governor of Tennessee and former president of the Republic of Texas, married Margaret Lea in Marion.

Between 1836 and 1842, three institutions of higher learning were established in the town: Marion Female Seminary, Judson Female Institute (later Judson College), and Howard College for Men (which would move to Birmingham in 1887 and later become Samford University). By 1842, Marion had become one of the leading educational centers of the state.

Due to its continued growth and prosperity a grander courthouse was needed in Perry County. Construction began in 1855 on the marble and brick building of Greek Revival design which is still in use today. The structure was originally 69 feet by 88 feet. It had two-story porticos at each entrance with six Ionic columns supporting a large pediment. Over each entrance was a full-length cast iron balcony. Later, on the west pediment, was added the town clock. At the center of each side of the building were convex towers containing spiral staircases. All of these features, except the convex towers and staircases, survive to this day.

The architect for this ante-bellum courthouse was Benjamin F. Parsons, a native of Massachusetts. Parsons used the same basic design in the 1855 residence he built for David F. McCrary at nearby Greensboro in Hale County. This classic ante-bellum home also still stands and is known as Magnolia Hall.

The builders for the Perry County Courthouse were James Didlake and Larkin Y. Tarrant.

The iron railing of the Perry County Courthouse is identical to other cast iron railings on the public buildings of that era in Alabama. The same pattern was used on the Greene County Courthouse, Wilcox County Courthouse, President's Mansion at the University of Alabama, and Gorgas House, also on the University campus. This type of iron grating was popular before the War Between the States.

On the grounds of the Perry County Courthouse is a memorial monument to Nicola Marschall. He was an artist of Prussian background, and a noted portrait painter, and served as a music teacher at the Marion Female Seminary. In 1861, A.B. Moore, then governor of Alabama and a resident of Marion, informed relatives in Marion that the Confederate government had not adopted an official flag. Marschall was notified and he submitted three designs. His "Stars and Bars" was officially selected by the new confederacy. This flag was first displayed in Marion.

The single major structural renovation to the Perry County Courthouse took place in 1954. Two annexes were added to the north and south sides of the original building. The Romanesque convex portals and the spiral staircases on each side of the building had to be removed. Before the renovation, the courthouse bricks were unpainted. After the renovation, because modern bricks did not match the color or texture of the slave-made bricks from 100 years before, the entire exterior was painted white to cover the difference.

The 1954 alterations and additions to the courthouse were designed by architect Martin J. Lide of Birmingham. C.W. Williams served as general contractor.

As a final note, much of the movie adaptation of Carson McCullers' novel, *The Heart is a Lonely Hunter*, was filmed in 1968 in Marion. The opening scenes show the Perry County Courthouse and court square. The building is one of only a few ante-bellum courthouses still in use in Alabama today.

The author gratefully acknowledges the assistance of Carol Warren Giardina in obtaining material for use in this article.

Sources: *Perry County Heritage*, W. Stuart Harris; *A Short History of Marion, Perry County, Alabama, Its Homes and Its Buildings*, W. Stuart Harris; *Ante-bellum Alabama, Town and Country*, Weymouth T. Jordan; *The History of Marion, Sketches of Life in Perry County, Alabama*, S.A. Townes. ■

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: Christie Tarantino, P.O. Box 671, Montgomery, AL 36101.**

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

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WRONGFUL BIRTH:

A Practitioner's Guide to a New Arrival

By Belinda L. Kimble

Introduction

Some years ago, two women, in separate cases, filed medical negligence actions due to their physicians' gross misinterpretations of abdominal ultrasound examinations. Both women's misdiagnosed conditions were serious and long term, life altering, financially draining, dispossessing of the women's privacy and dignity, bringing physical and emotional pain far beyond that which the healthy could imagine. Relatively uncomplicated surgical procedures would have spared both women their ordeals had the diagnoses been prompt and accurate. One woman recovered on her medical negligence claim for failure to detect cancer while it was curable. The other woman's claim for failure to detect catastrophic fetal defects while it was possible to terminate the pregnancy was dismissed by the court. Such a claim was not recognized in 1967 by the New Jersey Supreme Court in the politically sensitive climate surrounding obstetrical care, the severely disabled, and abortion. It was likewise not recognized and was dismissed by an Alabama trial court in 1992.

Much has changed since the New Jersey Supreme Court issued the country's first opinion regarding wrongful birth and denied the cause of action in 1967, as evidenced by the New Jersey Supreme Court's reversal and recognition of the wrongful birth claim in 1979. *Berman v. Allan,* 80 N.J. 421, 404 A.2d 8 (1979). The Supreme Court has guaranteed the constitutional right to decide whether to terminate a pregnancy in the first two trimesters, notwithstanding most state action. *Roe v. Wade,* 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). Medical advances in genetic prognostication and in the detection of genetic and congenital abnormalities have provided parents new opportunities to decide whether to avoid pregnancy or to terminate a pregnancy rather than conceiv-

ing or bearing a seriously defective child. The development of new lifesaving treatments of fetal anomalies both in utero and immediately after birth makes early prenatal detection of anomalies essential. This is especially important for those expectant parents for whom termination of the pregnancy is not an option. In fact, detection of many anomalies through blood tests and ultrasound has become the obstetrical standard of care. With the advent of new choices attending pregnancy has come increased judicial receptivity of actions over interference with these choices. Almost half of the states' highest courts have considered actions for wrongful birth, and all but two states have recognized such actions.

In *Keel v. Banach*, ____ So. 2d ____ (Ala. July 16, 1993), the Alabama Supreme Court faced the issue and joined the vast majority of states in recognizing a cause of action for wrongful birth. The court eschewed political pressures, preferring instead to focus on logic and law. Standing alone, the court's well-reasoned opinion may not supply the practitioner enough information to recognize, prepare and present a claim for wrongful birth in the future. This article will expand on the court's rationale, suggest some applications, and raise some issues in need of future resolution.

Definition

Wrongful birth is but one of several distinct pregnancy-related causes of action the Alabama Supreme Court has considered. Any attempt to define the cause of action should begin by defining what it is not. It is not an action for wrongful life, wrongful pregnancy, or wrongful death of a fetus.

A. Wrongful life

A cause of action for *wrongful life* arises in favor of a special needs child who claims damages because he was conceived or was not aborted due to the negligence of the physician. The Alabama Supreme Court expressly rejected this cause of action, siding with the majority of courts considering the claim for wrongful life:

> Upon what legal foundation is the court to determine that it is better not to have been born than to be born with deformities? . . . We decline to pronounce judgment in the imponderable area of nonexistence.

Elliott v. Brown, 361 So. 2d 546, 548 (Ala. 1978).

Medical advances in genetic prognostication and in the detection of genetic and congenital abnormalities have provided parents new opportunities to decide whether to avoid pregnancy or to terminate a pregnancy rather than conceiving or bearing a seriously defective child.

B. Wrongful pregnancy

A cause of action for *wrongful pregnancy* is maintained by parents who conceive a child following a sterilization procedure, where the sterilization procedure was intended to prevent conception, and not specifically the conception of an unhealthy child. The Alabama Supreme Court has only considered the theory of wrongful pregnancy in one case, which involved the birth of a healthy baby following a failed sterilization procedure. *Boone v. Mullendore*, 416 So. 2d 718 (Ala. 1982). The court found this theory suited to a traditional tort analysis, unlike a cause of action for wrongful life, and allowed the recovery of economic and non-economic damages attendant to the pregnancy and birth of the child, but not the costs associated with raising the healthy child. Wrongful pregnancy may involve the birth of an unhealthy baby, as well as a healthy baby.

The Alabama Supreme Court was presented a fact situation where a negligent sterilization resulted in the conception and subsequent birth of an unhealthy child. *Elliott v. Brown, supra*. The sterilization procedure itself did not cause the birth defects and was not performed to prevent the conception of a defective child. The court did not give a name to the parents' cause of action, and it was not discussed in the opinion. Under the *Keel* definition, the *Elliott* facts do not constitute a claim for wrongful birth, but are instead a claim for

wrongful pregnancy resulting in the birth of an unhealthy child. Where a sterilization was performed to prevent the readily foreseeable conception of a defective child, and a defective child is conceived, it is clearly a cause of action for wrongful birth under *Keel*. However, where the sterilization was performed without specific intent to avoid conceiving a defective fetus, but rather to prevent the conception of *any* child, it falls outside the wrongful birth definition, and is instead a cause of action for wrongful pregnancy.

C. Wrongful death of a fetus

When the Alabama Supreme Court was faced with the issue of whether a therapeutic abortion of an apparently healthy 13-week fetus that was misdiagnosed by the physician as doomed to inevitable miscarriage, constituted a claim for *wrongful death*, the court ruled that the Wrongful Death Act does not provide a cause of action for the death of a nonviable fetus. *See Lollar v. Tankersley*, ____ So. 2d ____ (Ala. Jan. 29, 1993), and *Gentry v. Gilmore*, ____ So. 2d ____ (Ala. Jan. 29, 1993). However, a cause of action for wrongful death will lie if death occurs before birth but after the fetus attains viability, regardless of whether the injury occurs before or after viability. *See Husky v. Smith*, 289 Ala. 52, 265 So. 2d 596 (1972); *Wolfe v. Isbell*, 291 Ala. 327, 280 So. 2d 758 (1973); *Eich v. Town of Gulf Shores*, 293 Ala. 93, 300 So. 2d 354 (1974). It is significant to note that when the fetus is nonviable, in a wrongful death context and in a wrongful birth context, the focus of the harm caused by the medical negligence is on the parents, and not on the fetus.

D. Wrongful birth

In the *Keel* opinion, the Alabama Supreme Court describes an action for wrongful birth as:

> A claim for relief by parents who allege they would have avoided conception or would have terminated a pregnancy but for the negligence of those charged with prenatal testing, genetic prognosticating, or counseling parents as to the likelihood of giving birth to a physically or mentally impaired child. The underlying premise is that prudent medical care would have detected the risk of a congenital or hereditary genetic disorder either before conception or during pregnancy. The parents allege that as a proximate result of this negligently performed or omitted genetic counseling or prenatal testing, they were foreclosed from making an informed decision whether to conceive a potentially handicapped child, or, in the event of a pregnancy, to terminate it.

Keel v. Banach, slip op. at 4-5.

According to the court, a plaintiff must prove that but for the negligence of the defendant, the pregnancy would have been avoided, or the fetus would have been aborted.

Wrongful birth is first and foremost a claim for medical negligence, utilizing the basic tort principles of duty, breach of duty, proximate cause and injury. The claim always involves a defective fetus. Without question, the fetal defects are not caused by any act or omission of the defendant. The plaintiffs are always one or both parents. The defendants are always health care providers. This claim primarily deals with people who have a strong desire to have a healthy child, as evidenced by the desire to avoid the conception of the defective child or the desire to terminate the pregnancy upon the discovery of significant fetal defects. In every case essential information about the fetal condition is either given to the parents incorrectly or is omitted altogether through negligence. The causation flowing from the misinformation is always either the conception itself or the inability to terminate the pregnancy because of the advanced gestation of the fetus. Injury occurs from the establishment of causation and continues until the demise of the fetus or child.

"Wrongful birth" is a misleading and unfortunate term. A more apt title would be "wrongful information." The wrongful conduct is not the birth of the child. After all, the parents anticipated a birth prior to conception or upon discovery of the pregnancy. The focus of the wrong is on the information provided or omitted, and not on the actual birth, as the misnomer suggests.

E. Other theories

The Alabama Supreme Court has drawn narrow confines for an action for wrongful birth. There are at least two potential causes of action, and probably others that fall just outside the strict wrongful birth definition, and which are nameless, or misnamed as a cause of action for wrongful birth.

One scenario is where the parents claim that due to the incorrect pre- or post-conception treatment or information by the defendant, they were injured when they lost the *choice* of whether to conceive or whether to terminate the pregnancy. For example, in *Shelton v. St. Anthony's Medical Center*, 781 S.W.2d 48 (Mo. 1989), a state statute prohibited an action for wrongful birth where the plaintiff claimed to have been precluded from terminating the pregnancy due to inaccurate or omitted information. The Missouri Supreme Court held that the Sheltons's complaint successfully circumnavigated the statute by pleading that they had been deprived of the *choice* of whether to terminate the pregnancy. In this scenario, the parents are unable to say what choice they would have made. They only claim that they were deprived of the opportunity to choose among the available alternatives. Damages in such a case would probably be restricted to emotional distress and mental anguish.

Another scenario involves allegations that due to the defendant's post-conception failure to diagnose fetal defects, the parents did not seek an available medical treatment in utero that would have corrected or minimized their child's defects, or the birthing facility was not prepared with advanced neonatal care that would have corrected or minimized the infant's condition or even saved his life. Such a cause of action is akin to that of a viable and otherwise healthy fetus or infant that is morbidly or mortally injured in utero or at birth due to the conduct of the physician. This cause of action is a traditional medical negligence action, and can be maintained by the parents on behalf of the child alongside an action for wrongful birth by the parents.

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Elements of Action

A. Duty

The duty owed to the parents by the health care provider is set forth in Section 6-5-542, the Medical Liability Act of 1987, *Code of Alabama*, § 6-5-542: "The standard of care is that level of such reasonable care, skill and diligence as other similarly situated health care providers in the same general line of practice, ordinarily have and exercise in like cases."

B. Breach of Duty

Section 6-5-542 sets forth the definition of the breach of the standard of care: "A breach of the standard of care is the failure by a health care provider to comply with the standard of care, which failure proximately causes personal injury or wrongful death." The *Keel* decision involved the alleged failure by the physician to properly interpret ultrasound images and perform prenatal tests that would have revealed severe multiple congenital spinal cord abnormalities in the fetus, which, if known to the parents, would have prompted the exercise of their constitutional right to terminate the pregnancy. There are many different situations where a defendant fails to exercise reasonable care, skill and diligence before conception and after conception. Examples of situations occurring before conception: physician advised parents that their first child's condition, Leber's Congenital Amaurosis, a hereditary form of blindness, was not hereditary (Colorado); physician's negligent genetic counseling induced parents to conceive and to give birth to a second child severely afflicted with anhidrotic ectodermal dysplasia (Massachusetts); laboratory negligently mislabeled father's blood, resulting in improper genetic counseling and the birth of a child with Tay-Sachs Disease (Illinois); failed vasectomy resulted in a third child with hereditary neurofibromatosis (Pennsylvania). Examples of breaches occurring after conception: physician failed to disclose that anticonvulsant medication given to mother carried high risk of birth defects (Washington); failure to warn of increased risk of Down's Syndrome in women over thirty-five (New York); failure to advise of availability of amniocentesis (New Jersey) and failure to timely report its results (Delaware); failure to diagnose Rubella in mother, resulting in Rubella Syndrome child (Idaho), and failure

to advise of the consequences of Rubella in pregnant mother (Texas).

C. Proximate cause

The Alabama Supreme Court agrees with other courts that the plaintiff must prove a causal connection between the defendant's negligence and the conception (in the case of pre-conception negligence) or birth of the defective child (in the case of post-conception negligence). In order to establish causation, it is necessary for the plaintiff to show that, had the defendant not been negligent, the plaintiff would have been aware of the possibility that the child would be seriously defective, and either the child would not have been conceived or the pregnancy could have and would have been legally terminated. Therefore, where the defendant is made aware of the defendant's negligence before conception or in time to legally terminate the pregnancy, there is no causal connection to support a cause of action for wrongful birth. Likewise, conception or the passage of the date by which to legally terminate the pregnancy must occur in order to establish causation.

Courts initially resisted recognizing a cause of action for wrongful birth because the physician could not have prevented the harm to the child. It is now generally understood that the nature of the tort of wrongful birth has nothing to do with whether a defendant caused the injury or harm to the child, but, rather, with whether the defendant's negligence was the proximate cause of the parents' losing the option of avoiding conception or, in the case of pregnancy, of making an informed and meaningful decision either to terminate the pregnancy or to give birth to a potentially defective child.

D. Damage

The Alabama Supreme Court points out in *Keel* that the basic rule of tort compensation is that the plaintiff should be put in the position that he would have been in absent the defendant's negligence. Alabama has followed this rule in other medical negligence actions. However, like any action involving personal injury, returning the plaintiff to his previous position is impossible, and a monetary compensation is the only remedy available. It is also a basic rule of tort compensation that any benefit ensuing to the plaintiff should be offset against the damages award. Some courts feel that the joys and benefits of having any child, even a defective child, should offset all damage awards. The Alabama Supreme Court disagrees, quoting a justice of the Georgia Supreme Court:

> More importantly, we would not even consider the theory that the joy of parenthood should offset the damages. Would anyone in their right mind suggest that where a healthy fetus is injured during delivery, the joy of parenthood should offset the damages? There is no more joy in an abnormal fetus come to full term than a normal fetus permanently injured at delivery. Both are heartbreaking conditions that demand far more psychological and financial resources than those blessed with normal children can imagine.
>
> *Atlanta Obstetrics and Gynecology Group v. Abelson*, 260 Ga. 711, 398 S.E. 2d 557, 565 (1990) (Smith, J., dissenting).

To establish a prima facie case in an action for a wrongful birth, it is necessary for the plaintiff to plead and prove actual injury. The supreme court recognizes that the birth of a seriously deformed child results in injury to the child's parents. However, the court follows the trend allowing only the recovery of the additional costs of treatment and special resources for the child, not the entire cost of rearing the child. The extraordinary expenses the plaintiffs are entitled to recover are those incurred because of the child's unhealthy condition, including hospital and medical costs, medication, and education and therapy.

The court also found damages for emotional distress suffered by the parents recoverable, noting that a jury could conclude that the defendants, in failing to inform Mrs. Keel of the possibility of giving birth to a child with severe multiple congenital abnormalities, directly deprived her, and derivatively, her husband, of the option to accept or reject a parental relationship with the child and thus caused them to experience mental and emotional anguish. Emotional distress would presumably also attend the rearing of the special needs child.

The court concluded that any medical and hospital expenses as a result of a physician's negligence were compensable. This likely includes the child's expenses and the mother's expenses. Physical pain suffered by the mother and loss of consortium are also compensable. It should be remembered, however, that the physician's negligence does not result in harm until conception or the passage of the last day to legally terminate the pregnancy. Damages compensable are only those which occur after the establishment of causation and harm.

Another basic tort principle, not discussed by the Alabama Supreme Court in *Keel*, but mentioned in other opinions, is that the plaintiff should use reasonable measures to mitigate his damages. *See, for example, Boone, supra*, at 723. It is the consensus that damages in wrongful birth cannot be reasonably mitigated. In an action for wrongful birth involving the preconception negligence of the defendant, it is not necessary to abort the fetus should the defect become known before viability in order to use reasonable measures to mitigate damages. Causation is established in such a case at conception, and whether the pregnancy is terminated or brought to term does not interfere with the existence of damages. Certainly, termination of the pregnancy will extinguish the damages associated with the extraordinary costs of raising the defective child. However, attendant medical expenses, loss of consortium, the mother's physical pain and suffering, and the parents' emotional distress still exist and remain compensable. By the same token, where the negligence is post-conception the parents of an impaired child are not required to put their child up for adoption in order to mitigate damages. However, if the parents decide to institutionalize or give up for adoption their impaired child, a cause of action for wrongful birth will still lie. Compensable damages still exist and remain compensable, minus the extraordinary expenses associated with raising the child.

Statute of Limitations

In *Colburn v. Wilson*, 570 So. 2d 652 (Ala. 1990), the Alabama Supreme Court had before it a wrongful birth cause of action involving the negligent performance of a sonogram which failed to detect hydrocephalus and spina bifida in a fetus. The

anomalies were detected before birth, but not in time to terminate the pregnancy. The trial court dismissed the suit, ruling that it was time-barred by the statute of limitations. The supreme court assumed, without deciding, that the plaintiffs had a legally cognizable cause of action, and agreed with the trial court regarding the time-bar.

The relevant facts are as follows: The plaintiffs alleged in their complaint that the November 1985 sonogram was performed negligently; on February 3rd or 4th, 1986, they learned of the presence of certain defects; following further tests, they learned the extent of the baby's defects; they unsuccessfully attempted to arrange for a termination of the pregnancy; they received counselling; and the baby was born March 31, 1986. Suit was filed in March 1988. The plaintiffs argued that the November 1985 negligence prevented an early diagnosis of the physical defects and denied them of the opportunity to terminate the pregnancy.

The court applied the statute of limitations under the Alabama Medical Liability Act which requires that all actions be brought "within two years after the act or omission or failure giving rise to the claim," Ala. Code, 1975, §6-5-482, and also the case law stating that the statute does not begin to run until the act complained of "accrues," that is, when all the elements of the action are present—duty, breach, causation, and injury, and an action *can be* maintained. *Ramey v. Guyton*, 394 So. 2d 2 (Ala. 1980); *Guthrie v. BioMedical Laboratories, Inc.*, 442 So. 2d 92 (Ala. 1983). In most cases involving medical negligence, the plaintiff is injured during the commission of the act or omission by the caretaker, and the injury is discovered fairly quickly. It is possible, however, for the injury to occur at a later date or for discovery of the injury to occur after the injury occurs. Obviously, causation and injury will never occur after discovery occurs. In *Colburn* the court determined that the alleged wrongful act occurred in November 1985, and that "at the latest" the cause of action accrued (injury occurred) on February 3rd or 4th, 1986, upon the discovery that the child would be born with certain defects. In either case, the supreme court ruled that the March 1988 filing, within two years of the birth of the child, was time-barred.

In *Colburn* the supreme court did not discuss the effect of discovery of the cause of action on the statute of limitations. Rather, it reasoned that if accrual were to have occurred upon discovery, the suit was not filed within two years of the accrual date, and was time-barred. Section 6-5-482 also provides that "if the cause of action is not discovered and could not reasonably have been discovered within [two years after the act or omission], then the action may be commenced within six months from the date of such discovery." This statute provision foresees that discovery can occur sometime after accrual. However, this six-month provision would rarely be put to use in a cause of action for wrongful birth. Discovery of the pre- or post-conception action occurs, at the earliest, when the parents learn of the fetal defects (unless the parents knew that a conceived child would probably be defective, as in the case of a failed sterilization intended to prevent the conception of a likely defective child, and in such event discovery of the cause of action may occur when the pregnancy is discovered). In any case, the time it takes for the plaintiffs to discover that they have a cause of action will rarely be more than nine months after the act or omission. Discovery will occur upon the birth of the visibly defective child or soon thereafter where testing or the onset of symptoms are necessary to detect the abnormality. In very rare cases will serious defects remain undiagnosed for years, requiring the practitioner to rely on the six-month discovery provision. Two years from the accrual of the action is the time within which causes of action for wrongful birth will normally be brought.

At what point are all the elements of a cause of action for wrongful birth present? In the case of pre-conception negligence, all elements are present at the time

CORRECTION

The January 1994 edition of *The Alabama Lawyer* reported the remarks made by Senior Circuit Judge John C. Godbold at an October 11, 1993 ceremony at which a portrait of him was presented to the United States Court of Appeals, Eleventh Circuit.

Judge Godbold discussed ways in which Alabama has progressed since he was appointed to the bench in 1966. Our article erroneously described one of the changes discussed by Judge Godbold as:

"Litigants, civil and criminal, are now having their legal disputes decided by juries drawn from the more affluent segments of the community."

Unfortunately, our article omitted part of the sentence of Judge Godbold's text. What he actually said about changes in the jury system was:

"Litigants, civil and criminal, are now having their legal disputes decided by juries drawn from ***the community at large, rather than juries comprised of all-white, all-male, professional and businessmen drawn from*** the more affluent segments of the community."

The Alabama Lawyer extends its apologies to Judge Godbold for this oversight in reporting his remarks.

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of conception. The defendant has breached his duty to the plaintiff, the breach has proximately caused the conception of a defective fetus, and the conception itself is the injury from which economic and noneconomic damages stem. A cause of action can now be maintained. The date of conception could never be accurately determined, but it should fall within the 38th and 42nd week prior to the due date of the baby.

In the case of post-conception negligence, all elements are present after the expiration of the last day on which the parents could have legally terminated the pregnancy, and the cause of action for wrongful birth has then accrued. At that time, the defendant has breached his duty to the plaintiff, the breach has caused the plaintiff to miss the opportunity to legally terminate the pregnancy, and the missed opportunity itself is the injury from which economic and noneconomic damages stem. Again, such a date could never be accurately determined, but it should fall within the 22nd and the 24th week of pregnancy.

An actionable tort can exist before the plaintiff's discovery of the injury. Although unusual in a medical negligence action, delayed discovery of the injury is the rule in a cause of action for wrongful birth. The discovery of the defective condition of the fetus comes after the injury first occurs, that is, after conception or after the last day the pregnancy could have been terminated. Naturally, the discovery of the defects along with discovery that the pregnancy can no longer be terminated, brings with it more injuries, emotional distress (compensable not because the parents are distressed at the news of the condition of their child, but because they are distressed at the news of having to bear this child and becoming parents to this child) and possibly increased and specialized medical care needed as the pregnancy comes to term. These injuries only appear to be the first injuries suffered because they are the first injuries of which the parents are aware, and these are the injuries which probably lead to the discovery of the physician's negligence and the cause of action. In *Colburn* the court concluded that the parents knew on February 3 or 4, 1986 that the baby would be born with defects. The brief opinion states that "it is at that point that they would have been injured and would have begun to suffer damage." *Colburn* at 654. Although the words used by the court appear to state that the first damages to the plaintiffs occurred upon discovery that the baby would be born with defects, it should be remembered that the court was not making a determination of the date of accrual of the plaintiffs' cause of action, but only stating that seen in the light most favorable to the plaintiff, the date of the discovery of the defects is the *latest* date from which the statute of limitations can run, and that, therefore, the March 1988 filing date was time-barred.

The *Colburn* opinion is not a determination by the Alabama Supreme Court of the date from which the two-year statute begins to run in a cause of action for wrongful birth. The practitioner should not rely on the current Michie's Code annotations or West's headnotes which possibly inaccurately reflect the court's opinion to determine the statute date. Rather, the prudent practitioner should calculate the statute of limitations using the Alabama Medical Liability Act's "two years after the act or omission." The statute of limitations is far too important to put to the test "the latest possible" accrual date of the discovery of the defects, or even the suggestion herein that the accrual of the cause of action occurs upon conception for pre-conception negligence and upon the passage of the last day to legally terminate the pregnancy in the case of post-conception negligence.

Although the *Colburn* decision was an unfortunate result for the plaintiffs, the decision is important because it focuses the cause of action on the parents, and not the child, and it recognizes that "wrongful birth" is a misnomer in that the birth of the child is neither the wrongful act nor the injury caused to the parents, and certainly is not the date of the accrual of the cause of action.

Consistent with *Colburn* is the court's decision in *Jones v. McDonald*, ____ So.2d _____ (Ala. December 17, 1993), wherein the court states that under the Alabama Medical Liability Act an action must be filed within two years of the act or omission, and furthermore, that the Act does not have a tolling provision which applies the continuing treatment rule. The negligent acts or omissions from which arise a cause of action for wrongful birth are not a part of the continuing pre-conception or prenatal care by the physician. Specific tests at specific points in time are done before conception or early in the pregnancy by obstetricians for the purpose of assessing genetic capability or fetal well-being. On the advice of a reliable expert, the practitioner should make a conservative determination of the date on which the negligent acts or omissions occurred.

Conclusion

The cause of action for wrongful birth has withstood much criticism from its opponents. Opponents have charged that such a cause of action would increase abortions, increase the cost of prenatal care as the result of more prenatal testing, and lead to a reduction of obstetricians practicing in the state. The Alabama Supreme Court has dealt squarely with such criticism, and approached the cause of action with intellectual honesty, not politics. As long as the laws of the land allow and protect the right to terminate a pregnancy, interference with the right will be cognizable at law. Opponents have also charged that parents cannot be damaged by the defendant's breach because the birth of any and all human life is a joyful and enriching event. The court has faced such charges and simply disagreed. The suggestion that bearing and raising a severely handicapped child brings with it no extraordinary sorrow, pain or depression could not come from those brave parents who live, pray and weep with their unhealthy child. Now those Alabama parents who are the victims of medical negligence can have their claims adjudicated by a jury of their peers. Perhaps the jurors' box will deflect the political winds surrounding obstetrical care, the severely disabled, and abortion as well as did the justices' bench. ■

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KIDS' CHANCE GOLF TOURNAMENT PLANNED

By Tracy A. Daniel

golf tournament to benefit the Kids' Chance Scholarship Fund will be held on Monday, May 16 at Cherokee Ridge Country Club near Huntsville. The tournament is being organized by the Alabama Self Insurers Association (ASIA). The cost to enter a four-person team is $400. Alternatively, any individual or group can sponsor a hole and have the right to enter a four-person team for $500. Anyone wishing to play in the tournament or sponsor a hole may contact Tracy Daniel at state bar headquarters for further information.

Kids' Chance was established in December 1992 by the Workers' Compensation Section of the Alabama State Bar through the leadership of Charles F. Carr to provide scholarships to children who had a parent killed or permanently and totally disabled in an on-the-job accident. The first three scholarships were awarded at the 1993 annual meeting of the Alabama State Bar. Over $56,000 in donations have been received from lawyers, businesses, and medical and rehabilitation professionals since the fund was established. A list of contributors follows that reflects how all involved in workers' compensation issues have supported the program.

Kids' Chance is administered by the Alabama Law Foundation. If you would like to contribute to the scholarship fund, please mail your contribution to: Kids' Chance Scholarship Fund, Alabama Law Foundation, P.O. Box 671, Montgomery, AL 36101. ■

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MARCH

1 Tuesday

KEYS TO SUCCESS IN A REAL ESTATE TRANSACTION
Birmingham
National Business Institute
Credits: 6.0 Cost: $138
(715) 835-8525

3 Thursday

COMMERCIAL REAL ESTATE ISSUES IN THE 1990s
Birmingham
Lorman Business Center
Credits: 5.5 Cost: $135
(715) 833-3940

11 Friday

BANKING LAW
Birmingham, Wynfrey Hotel
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

11-12

BRIDGE THE GAP
Tuscaloosa, Law Center
Alabama Bar Institute for CLE
Credits: 12.0
(800) 627-6514

15 Tuesday

ALABAMA APPELLATE PRACTICE
Birmingham
Lorman Business Center
Credits: 6.0 Cost: $135
(715) 833-3940

TRYING THE AUTOMOBILE CASE IN ALABAMA
Montgomery,
Governor's House Hotel
National Business Institute
Credits: 6.0 Cost: $138
(715) 835-8525

16 Wednesday

FUNDAMENTALS OF BANKRUPTCY LAW & PROCEDURE
Birmingham
National Business Institute
Credits: 6.0 Cost: $138
(715) 835-8525

18 Friday

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

25 Friday

INSURANCE LAW: BAD FAITH CLAIMS
Birmingham
Lorman Business Center
Credits: 3.8 Cost: $135
(715) 833-3940

29 Tuesday

TRYING THE AUTOMOBILE INJURY CASE IN ALABAMA
Mobile, Ramada Resort
National Business Institute
Credits: 6.0 Cost: $138
(715) 835-8525

APRIL

7-8

DNA FINGERPRINTS IN FORENSIC ANALYSIS
Huntsville
University of Alabama at Huntsville
Credits: 15.0 Cost: $625
(205) 895-6372

8 Friday

FUNDAMENTALS OF ADVOCACY
Birmingham, Wynfrey Hotel
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

CORRECTION!

In the 1992-93 Bar Directory, on page 130, the telephone number for the **Montgomery County District Attorney's** office is listed as 834-1850. The **correct** number is **832-2550.** Please make note of this in your directory.

13 Wednesday

WORKERS COMPENSATION
FOR SELF-INSURERS
Birmingham
Lorman Business Center
Credits: 6.0 Cost: $125
(715) 833-3940

14 Thursday

ALABAMA LABOR AND
EMPLOYMENT LAW
Birmingham
National Business Institute
Credits: 6.0 Cost: $138
(715) 835-8525

15 Friday

ALABAMA LABOR AND
EMPLOYMENT LAW
Huntsville
National Business Institute
Credits: 6.0 Cost: $138
(715) 835-8525

19 Tuesday

ALABAMA LABOR AND
EMPLOYMENT LAW
Mobile
National Business Institute
Credits: 6.0 Cost: $138
(715) 835-8525

20 Wednesday

ALABAMA LABOR AND
EMPLOYMENT LAW
Montgomery
National Business Institute
Credits: 6.0 Cost: $138
(715) 835-8525

21-23

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

29 Friday

LIMITED LIABILITY COMPANIES
Birmingham, Carraway
Conference Center
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

MAY

5-6

REPRESENTING CITY
AND COUNTY GOVERNMENTS
Orange Beach, Perdido Beach Resort
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

6 Friday

LEGAL WRITING
Birmingham, Civic Center
Alabama Bar Institute for CLE
Credits: 8.5
(800) 627-6514

13-14

ENVIRONMENTAL LAW
Gulf Shores, Gulf State Park
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

15-16

ANNUAL LEGAL SEMINAR
Birmingham, Sheraton Civic Center
Alabama Association of Housing
and Redevelopment Authorities
Credits: 7.0
(205) 263-0003

16-18

ENVIRONMENTAL LAWS
AND REGULATIONS
Huntsville
University of Alabama at Huntsville
Credits: 22.0 Cost: $845
(205) 895-6372

20-22

YOUNG LAWYERS' ANNUAL
SEMINAR ON THE GULF
Destin, Sandestin Resort
Alabama State Bar Young
Lawyers' Section
(205) 263-6621

Please note:

The publication date of the bar directories has been changed from December 1993 to June 1994.

WRONGFUL SUPERVISION:

New Attention on an Old Tort

By J. Mark Hart

Introduction

Compared with other torts, negligent or wanton supervision has received sparse attention. Yet recently this "quiet" tort has been catapulted to prominence by the $26,000,000 jury verdict in *Northwestern Mutual Life Ins. Co. v. Sheridan*, [Ms. 1911110, October 29, 1993], ___ So. 2d ___ (Ala. 1993) and the $1,000,000 jury verdict in *Big B, Inc. v. Cottingham*, [Ms. 1920746, Sept. 10, 1993], ___ So. 2d ___ (Ala. 1993).

While authority for the tort has existed in Alabama at least since 1910,[1] its existence has been questioned at times, and the tort has lain essentially dormant until the 1990s. The tort's origin lies in the common law rule of liability of the master for incompetency of his servant. *See Sloss-Sheffield Steel & Iron Co. v. Bibb*, 164 Ala. 62, 51 So. 345 (1910). Subsequent Alabama cases thus turned primarily on the question of the competency, *vel non*, of the employee.[2] *See e.g., Lane v. Central Bank of Alabama*, 425 So. 2d 1098, 1100 (Ala. 1983)(rejecting liability of employer for negligent supervision where plaintiff "has not established that the damage occurred because of any incompetency" of the employee).

Actually the tort is a series of related claims, which for convenience may be grouped into a tort of "wrongful supervision." The causes of action within the tort include negligent or wanton (i) hiring, (ii) supervision (including training and monitoring), and (iii) retention in employment.

While at first blush a fairly straightforward inquiry, the tort's recent and surprising potency merits careful consideration. Several threshold questions are apparent: Must the plaintiff prove actual incompetence of the employee or may mere unskillfulness or inexperience suffice? Is the tort premised upon respondeat superior or is it an independent wrong by the employer? Can the employer be liable when the employee was not acting within the line and scope of the employment? Can the employer be liable for its independent wrongful conduct if the employee is exonerated? Can the employer be liable in a differing amount than the employee?

In examining the questions emerging in the developing tort, it is useful to group the cases in categories of (i) wrongful hiring and retention, and (ii) wrongful supervision.

Wrongful hiring and retention

Alabama law has long recognized that "where skill and capacity are required to accomplish an undertaking, it is negligence on the part of the master not to employ persons having such qualifications, and that such negligence will render him liable for injuries to third persons occasioned thereby." *Sloss-Sheffield*, 51 So. 2d at 347. This principle has grown to include not only skill and capacity, but the temperament or qualities of the person employed; an employer has a duty to avoid hiring an employee who is "unworthy, by habits, temperament, or nature, to deal with the persons invited to the premises by the employer." *Brown v. Vanity Fair Mills, Inc.*, 291 Ala. 80, 277 So. 2d 893, 815 (1973); *see also* 53 Am. Jur. 2d *Master & Servant*, § 422 (1970) ("[A]n employer may be liable to a third person for the employer's negligence in hiring or retaining a servant who is incompetent or unfit.").[2]

Thus, an action for wrongful hiring requires a showing of incompetency, which in this context means "unfit, considering the nature of the employment and the risk he posed to those with whom he would foreseeably associate," and includes unfitness in ability, temperament or character. *Valdez v. Warner*, 742 P.2d 517, 519 (N.M. App. 1987)(bar liable for hiring employee with history of violent conduct); *see also Sheridan*, (Ms. 1911110), ___ So. 2d ___ (insurer liable for hiring agent with extensive history of fraudulent conduct); *Underwriters Ins. Co. v. Purdie*, 145 Cal. App. 3d 57, 193 Cal. Rptr. 248, 255 (1983)(store was liable for hiring clerk with violent tendencies); *Cramer v. Housing Opportunities Comm'n*, 501 A.2d 35, 40 (Md. 1983)(commission could be liable for inspector with prior history of rape); *Scott v. Blanchet High School*, 747 P.2d 1124, 1128 (Wash. App. 1987)(no liability for wrongful hiring where nothing in teacher's background existed to indicate he would have sexual relationship with student).

Generally, the wrongful conduct of the agent must be committed within the line and scope of his employment. *See Garcia v. Duffy*, 492 So. 2d 435, 440 (Fla. App. 1986)(no liability for assault where committed outside line and scope); *Scott v. Blanchet*, 747 P.2d 1124 (no liability because sexual relationship between teacher and student occurred after school hours and off school premises). The line and scope requirement makes sense. If the gravamen of the complaint is wrongfully employing a person, then ordinarily liability should only attach for acts committed in furthering the employment. Indeed, Alabama follows this rule. *See, e.g., Brown v. Vanity Fair Mills, Inc.*, 291 Ala. 80, 277 So. 2d 893, 895 (1973)("While ... an employer ... must use due care to avoid the selection or retention of an employee whom he knows or should know is a person unworthy, by habits, temperament, or nature, to deal with the persons invited to the premises by the employer ... [t]he complaint does not allege that the servant was acting within the line and scope of his employment at the time of the assault nor that the servant was in any way furthering the master's business at the time and place of the assault.").

Thus, as a general rule, the elements of a wrongful hiring or retention claim can be stated as follows:

1. An incompetent employee;
2. Who commits a wrongful act in the line and scope of his employment;
3. Where the employer had a duty to investigate the employee before hiring him (or failed to discharge the employee upon actual or constructive notice of his incompetency);
4. Which duty the employer breached, i.e., (a) the employer failed to investigate appropriately (or to monitor), (b) an appropriate investigation (or monitor) would have revealed the unsuitability for the particular work or employment in general, and (c) hiring the employee was unreasonable in light of the information the employer knew or should have known; *see Garcia*, 492 So. 2d at 440;
5. Proximately causing;
6. Actual damage to the plaintiff.

Wrongful supervision

Wrongful supervision claims similarly include a showing of incompetency of the employee. For instance, in *Lane v. Central Bank of Alabama*, 425 So. 2d 1098 (Ala. 1983), when the bank sued a debtor to recover on a note, the debtor counterclaimed for negligent supervision of the loan officer. In affirming dismissal of the counterclaim, the court stated:

> We are mindful of this rule and the fact that this Court recognizes a cause of action against the master based upon the *incompetence of the servant*.... Assuming Lane has been damaged by the acts of Mills, which he has not shown, he has not established that the damage occurred because of any *incompetency* on Mill's part for which the bank might conceivably be liable.

Id. at 1100 (emphasis added); *accord, Perkins v. Dean*, 570 So. 2d 1217, 1220 (Ala. 1990)(summary judgment affirmed; no evidence mental health center "had notice or knowledge (actual or presumed) of [the employee's] alleged *incompetency*")(emphasis added).

However, it may not always be necessary to prove incompetency, or unfitness, per se. Because the focus of this action is on supervision, liability may attach for harm resulting from mere inexperience or unskillfulness, which fall short of actual incompetence or unfitness. For instance, in *Cutter v. Town of Farmington*, 498 A.2d 316, 320 (N.H. 1985), plaintiff's wrists were injured during an arrest when an untrained police officer incorrectly handcuffed plaintiff in such a way that the handcuffs continued to tighten until they were removed at the police station, causing damage to his radial nerve. The police officer was acquitted in a damages suit, but a verdict was awarded against the city for negligent supervision. The court held that the determinative issue was whether the officer was incompetent, *inexperienced*, or *unskilled*, and that the city could be liable for failing to train its agents in the proper use of instrumentalities employed in the line and scope of their duties. *Id.* at 320 ("It seems clear to us that the rule is applicable in situations where the untutored agent unwittingly causes injury which was a risk of harm attendant to the employment which the principal had reason to foresee.").

Similarly, in *Anderson v. Hall*, 755 F. Supp. 2, 5 (D.D.C. 1991), a client sued a law firm for failure to supervise an associate in timely filing a lawsuit, where the client's suit was dismissed on a statute of limitations defense. The court held that failure to supervise constituted a legally cognizable claim.

Presumably, neither the new police officer in *Cutter* nor the young associate in *Anderson* was incompetent: certainly, the officer could have been taught how to clasp the handcuffs and the lawyer could have been taught a diary system. Therefore, liability

was not based on the unfitness, or incompetency, of the employee, but upon the employer's failure to supervise and instruct properly. Accordingly, unlike wrongful hiring or retention, which turn on whether the *employee* is fit for employment, wrongful supervision necessarily entails a failure by the *employer* to supervise, train, and monitor the employee and does not necessarily require an additional showing of the employee's unfitness.

Wrongful supervision, as with wrongful hiring, ordinarily requires that the employee be acting in the line and scope of employment when the alleged wrong occurs. *See, e.g., Perkins v. Dean*, 570 So. 2d 1217 (Ala. 1990) (no liability where affair between social worker and client did not start until after the former's termination of employment); *Ledbetter v. United American Ins. Co.*, 624 So. 2d 1371 (Ala. 1993)(no liability where actions of agent were "unrelated to the business of insurance" and agent had ended employment before harm began); *Scott v. Blanchet*, 747 P.2d at 1128 (sexual relation between teacher and student occurred off premises and after school hours).

There are six elements of a wrongful supervision claim:

1. An incompetent, unskilled, or inexperienced employee;
2. Who commits a wrongful act in the line and scope of his employment;
3. Where the employer had a duty to supervise the employee;
4. Which duty the employer breached by failing to exercise reasonable care or acting in reckless disregard of a known risk;
5. Proximately causing;
6. Actual damage to the plaintiff.

Special problems with "line and scope"

There can be little disagreement that it is fair for the employer to be liable for his own negligence when the employee was acting in the scope of his employment.[4] However, problems arise in extending liability for acts outside the line and scope, particularly for criminal acts.

Because wrongful supervision is an employment tort, in one sense it is unfair to hold the employer liable for acts beyond the employment. For example, if a corporate employee goes to a restaurant for lunch and gets into a fistfight over the weekend ballgame, no one expects the corporation to be liable. Thus, there is concern for extending liability beyond the line and scope, for "an employer would essentially be an insurer of the safety of every person who happens to come into contact with his employee simply because of his status as an employee." *Bates v. Doria*, 502 N.W.2d 454, 459 (Ill. App. 1986). In another sense, however, it is unfair to permit the employer to escape any consequence of his negligence, despite the fact that the act was committed outside the scope of the employment. For instance, consider the circumstances in which an apartment owner gives a passkey to an employee with a prior history of rape, without having investigated the employee, and the employee proceeds to enter an apartment with the passkey and commits a rape. *See Pontiacs v. KMS Investments*, 331 N.W.2d 907 (Minn. 1983). What if the employee gains critical information through the job, which enables him later to commit a crime? *See McQuire v. Arizona Protection Agency*, 609 P.2d 1080 (Ariz. App. 1980)(former employee who installed burglar alarm later returned, disconnected alarm, and burglared house). Although a criminal assault is outside the line and scope of the employment, the negligent entrustment of the premises or instrumentality provided an access or information that enabled the crime, which otherwise could not have been committed. In that situation, where the crime, or the ability to commit the crime, had such a substantial connection with the job, it may be appropriate to impose liability on the employer for wrongfully placing a dangerous employee in the position to do harm.

Therefore, the extent of liability may be determined by considering the nature of "the instrumentalities entrusted" to the agent and the precautions "a prudent man would take in selecting the person for the business in hand." Comment d, Restatement of Agency 2d, § 213; *see generally* 30 C.J.S. *Employer-Employee*, §§ 186-189 (1992). The traditional con-

Order
Supreme Court of Alabama

It is ordered that the last paragraph of Rule IV, Rules Governing Admission to the Alabama State Bar, entitled "Limitation on Examinations," be amended to read as follows:

"D. **Limitation on Examinations**. The number of times an applicant may be examined for admission to the Alabama State Bar shall be unlimited.

"(Section D amended effective April 28, 1993; and January 6, 1994.)"

It is further ordered that this amendment be effective immediately.

Hornsby, C.J., and Maddox, Almon, Shores, Houston, Steagall, Kennedy, Ingram, and Cook, J.J., concur.

cepts of duty and proximate cause provide a framework for this approach.

Duty

The existence of duty is a question of law for the court. *Ledbetter*, 624 So. 2d at 1373. "Duty is a threshold inquiry .... [T]he trial court must determine whether a duty existed and, if so, the extent of that duty." *Id.* "One of the fundamental elements ... is the existence of a duty owed to the person ... [to] demonstrate that he is within the zone of risks that are reasonably foreseeable by the defendant." *Garcia*, 492 So. 2d at 439.

Duty is relative. Section 213, comment d, of the Restatement of Agency provides: "One can normally assume that another who offered to perform simple work is competent. If, however, the work is likely to subject third persons to serious risk of great harm, there is a special duty of investigation." *Accord, Cramer*, 501 A.2d at 40. As suggested by the *Garcia* court, "It is necessary to consider the type of work to be done by the prospective employee. ... If, for instance, an employer wishes to give an employee the indicia of authority to enter into the living quarters of others, the employer has the responsibility to first investigate as to the safety of such action." *Id.* at 441. On the other hand, "[w]here the employee's duties include outside work with only incidental contact with others ... [there] is no obligation on the part of the employer to make an independent inquiry into an employee's past." *Id.* The court concluded "where the intended duties will require only incidental contact with others, the requisite level of inquiry is correspondingly reduced." *Id.*; *accord, Pontiacs*, 331 N.W.2d at 912-13.

The *Garcia* court also offered instruction as to the degree of investigation that fulfills the duty. For an employment where the employee would "enter into the living quarters of others ... an appropriate investigation ... would include contacting the employee's references and prior employers for information." Correspondingly, where only incidental public contact is involved, "obtaining past employment information and personal data during the initial interview may be sufficient." *Id.* Also, "[e]vidence bearing upon the difficulty or cost of obtaining such information would be relevant in determining the reasonableness of the inquiry." *Id.* Significantly, the court also added:

> Even where the circumstances dictate the need for some independent inquiry, however, there is no requirement, as a matter of law, that the employer make an inquiry with law enforcement agencies about an employee's possible criminal record, even where the employee is to regularly deal with the public.... If the employer makes adequate inquiry or otherwise has a sufficient basis to rely on the employee, there is no need to inquire about a possible criminal record... Even actual knowledge of an employee's criminal record does not establish, as a matter of law, the employer's negligence in hiring him.

Id. But see Cramer, 501 A.2d 35.

In *Ledbetter*, 624 So. 2d 1371, the court held that two insurance companies did not owe a duty with respect to actions of a former agent outside the scope of his employment. Ruby Ledbetter sued Fannin, a former insurance agent, two insurance companies and others over an alleged fraudulent scheme of Fannin. When Fannin called on Ledbetter to sell her insurance, he also persuaded her to invest $110,000 in Fannin's *own* companies (which the insurers knew nothing about). Fannin paid Ledbetter interest on her investment for a time and then ceased. Ledbetter did not attempt to hold the insurers liable on respondeat superior in Fannin's convincing her to invest the $110,000 with Fannin, but instead alleged negligent hiring, employment, and supervision. The court affirmed summary judgment for the insurers. The court held the insurers owed no duty to plaintiff, because the investments with Fannin "were unrelated to the business of insurance," and Fannin had ended his agency with the insurers before he stopped the interest payments. *Ledbetter* can be contrasted with *Sheridan*, (Ms. 1911110), which held that the insurer did have a duty where the acts by the agent pertained to the insurer's policies and plans.

Proximate cause

If liability may attach for acts outside the scope of employment, then the question becomes what is a fair limit of that liability.

> Once liability began to be imposed on employers for acts of their employees outside the scope of employment, the courts were faced with the necessity of finding some rational basis for limiting the boundaries of that liability; otherwise, an employer would be an absolute guarantor and strictly liable for any acts committed by his employee against any person under any circumstances. Such unrestricted liability would be an intolerable and unfair burden on employers. Only when an employer has somehow been responsible for bringing a third person into contact with an employee, whom the employer knows or should have known is predis-

posed to committing a wrong under circumstances that create an opportunity or enticement to commit such a wrong, should the law impose liability on the employer.

Garcia, 492 So. 2d at 439.

For instance, in *Cramer v. Housing Opportunities Comm'n*, 501 A.2d 35 (Md. 1983), the court held that the housing commission employer could be liable for a rape of tenant committed by its employee, Slater. The commission hired Slater, an employee with a prior history of rape, without investigating his background. As part of his job, he "was brought in contact with tenants ... [given] access to their homes, and under some circumstances to the keys to their homes. *Id.* at 83. Slater, as part of his job, inspected plaintiff's unit and asked her questions which revealed that plaintiff was a woman living alone with her two children. Later, at night, Slater entered the unit, apparently through a partially open, first floor kitchen window, and raped the plaintiff. Clearly, a criminal assault, committed at night, after work hours, is an act outside the employment. The court noted that probably Slater did not have a key and that he entered through the kitchen window, which was observable to the public. Nonetheless, the employer could be liable because Slater "had used his position to obtain the knowledge that Appellant and her three-year-old twins were the sole occupants of the home." *Id.* at 43, which the court concluded was the motivating factor in the attack. Thus, a substantial connection with the employment existed: Slater acquired the decisive information about the absence of a male resident during the unit inspection he conducted as part of his job. Therefore, liability could be fairly imposed on the employer.

In contrast, however, the court cautioned that it is not sufficient for the employer's liability that the act have some relation with the employment, observing that "if Slater had been negligently hired but had assaulted a tenant of the HOC previously unknown to him, in a nearby shopping center and during off-duty hours, there would be no causal relationship between the hiring and the assault." *Id.* at 39; *accord, Vanity Fair*, 277 So. 2d 893 (no employer liability where employee took hammer furnished on job but went to other premises and assaulted plaintiff).

It thus appears that the emerging rule is that there may be liability for outside-the-scope acts where the act had a *substantial* connection with the employment. *See Valdez v. Warner*, 742 P.2d at 519-20 ("there must be a connection between the employer's business and the injured plaintiff"; bar held liable when employee in bar parking lot assaulted customer who had damaged employee's car); *Pruitt v. Pavelin*, 685 P.2d at 1354-55 (providing real estate license is "analogous to the passkey" ... imparts a "patina of reliability"); *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988)(archdiocese could be liable for acts of priest with prior acts of misconduct where priest, who was engaged in marital counseling, had affair with wife he was counseling); *Bates v. Doria*, 502 N.E.2d at 459 (requiring "connection" between the plaintiff's injuries and the fact of employment"; no liability for rape by off-duty deputy sheriff); *Scott v. Blanchet High School*, 747 P.2d 1124, 1129 (Wash. App. 1987)(school had no liability for affair occurring between teacher and student after school hours, off premises, although teacher had counseled student as part of duties; "responsibility for supervision at time of the alleged activities had shifted away from the school, so that "proximity between breach of duty" and "alleged injury is so remote" that "proximate cause absent as matter of law").

Thus, in trying to mark the limits of this emerging rule of liability for acts beyond the scope of employment, it appears that a substantial connection, short of literal line and scope, can support liability where the job involves entering people's living quarters, or dealing extensively or intimately with the public. On the other hand, jobs requiring outside work, factory work, or limited public contact more readily require a showing of line and scope.

Using "substantial connection" as the litmus test, we can begin to establish contours for the rule with the language in *Valdez*, holding an act is in the line and scope, if (i) the act was "fairly and naturally incidental to the employer's business assigned to the employee," and (ii) the employee "was engaged in the employer's business with the view of furthering the employer's interest and did not arise entirely from some external, independent and personal motive on the part of the employee." *Valdez*, 742 P.2d at 518. Restating that inquiry, if, through the employment and not totally for an external, independent, or personal motive of the employee, the employee committed the wrong, or acquired an instrumentality or access which enabled him to commit the wrong, then a substantial connection can exist, supplying proximate cause.

As with duty, the element of proximate cause can be factored in on a sliding scale. Thus, the more dangerous or intimate the position given the employee, and the more prominent the employment in enabling the crime, the less likely that the fact that the employee was acting from "some external, independent and personal motive" will break the causal chain. *See, e.g., Cramer*, 501 A.2d 35.

In *Valdez*, for instance, the bar was negligent in hiring as a bar employee one with a "background of violent behavior, for a job where he would be in constant contact with members of the public, most of whom would have been drinking and many of whom might tend to be argumentative." 747 P.2d at 1129. However, it may be perfectly reasonable to hire that same person for a different job, not involving drinking or potentially volatile public contact. Otherwise, people are condemned to their past, which is inconsistent with the larger societal policy stated in *Garcia:*

> "[T]o say an employer can never hire a person with a criminal record at the risk of being held liable for the employee's tortious assault, 'flies in the face of the premise that society must make a reasonable effort to rehabilitate those who have gone astray.'"

Garcia, 492 So. 2d at 441; *accord, Vanity Fair Mills*, 277 So. 2d at 896; *Pontiacs*, 331 N.W.2d at 913.

In questions of duty and proximate cause, it is difficult to lay down hard and fast rules. To the extent a rule may be stated, there should be a bias in favor of no liability for acts outside the scope. Otherwise, the exception swallows the rule. That bias, however, may be neutralized when the employment was the enabling cause in a significant invasion of the plaintiff's physical or emotional security, as in the criminal assault and theft cases which were enabled by the employment and in the counseling relationship cases.

Separate or differing liability

In *Sheridan*, (Ms. 1911110), where the jury awarded $12,863,624 against the insurance agent and $12,863,624 against the company, the court rejected the company's contention that it was inconsistent "to assess damages based on vicarious liability and to assess, again, damages based on that defendant's own misconduct," by stating:

> In a given case the employer may be liable *both* on the ground that he was personally negligent *and* on the ground that the conduct was within the scope of employment. *Restatement (Second) of Agency*, § 213, comment H (1958) (emphasis added); Accord *Lane v. Central Bank of Alabama, N.A.*, 425 So. 2d 1098 (Ala. 1983).

Sheridan, slip opinion at 10.

The court did not discuss its contrary holding in *Ex parte City of Huntsville*, 456 So. 2d 72 (Ala. 1984). In that case, plaintiff sued both the City and a jailer for injuries he sustained while incarcerated. He sued the jailer for assault and battery and the City for (i) respondeat superior liability and (ii) negligent hiring and supervision of the jailor, as the City had received other complaints about the jailer and had not acted. The jury awarded $500 against the jailer and $5,000 against the City. The City appealed arguing that the verdict was inconsistent, because (i) the differing amounts constituted apportionment among joint tortfeasors and (ii) a principal cannot be liable for a larger amount than the tortfeasor agent.

The supreme court reversed, holding that "[w]here one inappropriate result flows from two, arguably distinct causes, the jury is not permitted to allocate damages." *Id.* at 74.

Thus, *Sheridan* departs from prior law. Under *Sheridan*, because the liability of the employer for the tort of wrongful supervision is not based on respondeat superior liability, but on the principal's independent wrong, a principal may be liable for an additional amount than that awarded for its respondeat superior liability. It is unclear, however, whether the principal may be held liable in a differing amount than the employee, or whether the employer may be liable when the employee is acquitted. *Compare Cutter*, 498 A.2d 316 *with* 30 C.J.S. *Employer-Employee*, § 186, at 262-63 ("plaintiff must first establish liability on the part of the employee").

Just Solutions

Law Day USA • May 1

The theme for Law Day USA 1994 is "Just Solutions". This theme will be used to encourage various participants in Law Day projects and events to look to their needs and experiences to consider improvements for the justice system, and, at the same time, to appreciate and preserve the many aspects of the justice system that are in good working order.

The purpose of Law Day USA, celebrated annually on May 1, is to reserve a "special day of celebration by the American people in appreciation of their liberties and to provide an occasion for rededication to the ideals of equality and justice under laws." Law Day USA was established by United States Presidential Proclamation in 1958 and reaffirmed by a Joint Resolution of Congress in 1961.

The American Bar Association, as the national sponsor of Law Day USA, prepares a detailed planning guide to assist individuals and organizations conducting Law Day programs. In addition, the ABA makes available many reasonably priced promotional and educational/informational materials, ranging from buttons and balloons to leaflets, brochures, booklets, speech texts and mock trial scripts.

State and local bar associations, libraries, community organizations, schools, churches, law enforcement agencies, service clubs, legal auxiliaries, and scouting organizations are among the many groups sponsoring Law Day USA programs and events. The events range from no-cost legal consultations, mock-trials, court ceremonies, and poster and essay contests to television and radio call-in programs.

Recent innovative programs have included coordination with sponsors of local campaigns against drunk driving, outreach programs to senior citizens, community participation in dispute resolution programs, "meet-a-judge" and "people's law school" projects.

For more information about Law Day USA, write for a free copy of the Law Day Planning Guide at the American Bar Association, 750 North Lake Shore Drive, 8th Floor, Chicago, Illinois 60611 or phone (312) 988-6134.

Alabama State Bar Essay Contest

On a state level, the Law Day Committee of the state bar is sponsoring an essay contest. 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 "Just Solutions" which is also the theme for Law Day USA. Entries must be received at the state bar headquarters by May 2, 1994. For more information, contact Keith Norman at the state bar at 1-800-354-6154.

Caution!

Attorneys in Active Practice in Alabama

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

If you are actively practicing or anticipate practicing law in Alabama between October 1, 1993 and September 30, 1994, PLEASE BE SURE THAT YOU HAVE THE REQUIRED OCCUPATIONAL LICENSE.

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

Direct any questions to:

Christie Tarantino, Membership Services Director, at 1-800-354-6154 (in-state WATS) or (205) 269-1515 ***immediately!***

Punitive damages

Punitive damages may not be awarded for negligent supervision. However, they may be awarded for wantonness, provided each element is proved by clear and convincing evidence. *Coca-Cola Bottling Co. United, Inc. v. Stripling*, 622 So. 2d 882 (Ala. 1993); *Delchamps, Inc. v. Morgan*, 601 So. 2d 442 (Ala. 1992). Two recent decisions have affirmed punitive damage awards for wanton supervision.

In *Big B, Inc. v. Cottingham*, (Ms. 1920746), a $1,000,000 punitive damage verdict was returned for assault and battery, false imprisonment, and wrongful supervision. The punitive claim was affirmed, but remitted to $600,000.

An assistant store manager, Vaughn, detained plaintiff Cottingham when her companion allegedly stole merchandise and fled. Vaughn summoned the police, but after the officer left without arresting Cottingham, Vaughn detained Cottingham in a back room of the store, verbally abused her, and forced her to perform sex acts upon threat of prosecution. The court affirmed a verdict for both respondeat superior liability and wrongful supervision.

Evidence was shown of Vaughn's incompetency, or unfitness. The mother of a 16-year-old female part-time employee had reported to the company that Vaughn had made unwarranted sexual advances toward her daughter. Although the supervisors reprimanded Vaughn, they did not interview the minor employee and did not forward a thorough report of the incident to the home office. Also, the supervisors failed to review with Vaughn the company's training manual as to the proper way to detain and question a shoplifting suspect. The court held that there was sufficient evidence of wantonness, pointing out that: "the jury could have reasonably inferred from the evidence that [the supervisors] consciously chose to downplay the incident in order to retain Vaughn, knowing that to do so would give Vaughn another opportunity to demean or otherwise mistreat a female customer or employee." Slip opinion at 11.

In *Sheridan*, (Ms. 1911110), the court affirmed a $26,000,000 verdict for fraud, breach of contract, and wanton supervision, although remitting the verdict to $12,000,000. Behr, a Northwestern Mutual agent, engaged in a broadscale scheme of fraud and deception, resulting in losses to the Sheridans on their insurance policies, qualified retirement pension plan and deferred compensation plan. When Behr absconded, his secretary told the Sheridans that no retirement plans existed, and "that they were all crooks." Slip opinion at 3.

The court held there was sufficient evidence of wanton hiring and supervision. Evidence presented established that (1) while processing Behr's employment application the district manager learned Behr had misrepresented on his application that he had never had a business insolvency; (2) the manager did not investigate Behr's financial condition (Behr had been sued 16 times in a two and one-half year period with seven lawsuits claiming fraud; he had 13 judgments and six tax liens recorded against him individually and 171 judgments recorded against him or his corporation); (3) during Behr's employment with the company, several actions were brought against him and his bank account was garnished; (4) the company had notice of other fraud lawsuits during the time of his employ; (5) other company agents testified they had seen Behr forge signatures on applications and commission checks payable to other agents; (6) those agents requested transfer to another office away from Behr; and (7) during this time the company continually promoted Behr.

The court concluded:

> [T]he jury could also have concluded that Northwestern knew of Behr's unethical conduct and not only tolerated, but actually exploited, that behavior ... because of Behr's large sales volume. Consequently, it could have concluded that Northwestern consciously factored in the possibility of adverse judgments against it and Behr as an acceptable business expense.

Id. at 18.

Severance or separate trials

In a wrongful supervision claim, evidence of other acts of the employee may be admitted to show both incompetency and notice to the principal. "This may be done by showing specific acts of incompetency and bringing them home to the knowledge of the master, or by

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showing them to be of such nature, character, and frequency that the master, in the exercise of due care, must have had them brought to his notice,.... although such specific acts of alleged incompetency cannot be shown to prove that the servant was negligent in doing or omitting to do the act complained of ..." *Big B.*, slip opinion at 6-7, quoting *Lane v. Central Bank*, 425 So. 2d at 1100.

Thus, prior acts of the agent are not admissible to prove that the agent was negligent or wanton, but they can be admissible to show incompetency and notice to the principal. This situation is similar to a negligent entrustment case, where prior conduct cannot be admitted to show that the agent was negligent in using the instrumentality, but it can be admitted to show both that the entrustee was incompetent and that the entrustor had notice. In entrustment actions, the defendants are entitled either to a severance or to separate trials of the claims, so that the evidence of prior acts, which is admissible on one claim, does not prejudice the jury's consideration of the other claim. *See Wilder v. DiPiazza*, 481 So. 2d 1091 (Ala. 1985). The same rule should apply in wrongful supervision claims.

Policy considerations

At least to a degree, our society promotes the principle that people should be forgiven for their past mistakes and offered another chance. This principle will be thwarted if the law is applied so mechanistically as to make employers insurers of their employees. This tension was the source of the skepticism expressed by the *Vanity Fair* court regarding the tort of wrongful supervision: "Because of the conflicting interests to be considered (the protection of innocent third persons as opposed to the possibility that employers would not hire those with a bad past), we await a proper case for the adoption of a proper rule in such instances." 277 So. 2d at 896. Accordingly, the tort of wrongful supervision must be applied through the balancing of competing interests and with much common sense.

There are existing evidentiary rules that can aid this process. First, for evidence to be relevant and admissible, it must be probative. If evidence is too remote, then it is inadmissible because its prejudicial effect outweighs any probative value. C. Gamble, *McElroy's Alabama Evidence*, § 21.01(2). Many people with a troubled past develop into solid, upstanding citizens. In ruling on the admissibility of prior acts, the trial court should apply the rule of remoteness in order to insure that evidence has a bona fide probative value.

Secondly, before other acts are admissible, a foundation of substantial similarity between prior acts and the act in question is required. *Id.* also at §§ 64.04(1) & 83.01(1). This evidentiary requirement can also be an effective tool in balancing the competing interests in a wrongful supervision case of protecting the public and providing the public jobs. These policy considerations can be effectively balanced by rigorously applying this foundational requirement.

Lastly, evidence should be excluded wherever its prejudicial effect outweighs its probative value. *Id.* at § 21.01(4).

Conclusion

With the verdicts in *Sheridan* and *Big B*, the bench and bar are likely to witness an increasing occurrence of wrongful supervision claims. That is a natural evolution in our legal system. As some questions are answered, others will arise. One certainty is that as the bench and bar define and explore the tort, they must keep foremost in mind at least three competing interests: the interest of employers to offer jobs, the interest of the public in protection from incompetent or untrained employees, and the interest of those with pasts to earn a living. ■

The author gratefully acknowledges the assistance of Margaret Mary Kain, librarian, Spain, Gillon, Grooms, Blan & Nettles, who provided invaluable assistance in the preparation of this article.

ENDNOTES

1. In *Sloss-Sheffield Steel & Iron Co.*, 164 Ala. 62, 51 So. 345, 347-48 (1910), the court stated: "[O]ne of the legally imposed duties was that of using due care to employ a reasonably skillful and competent [employee] . . . [or] either to discharge the incompetent servant or to use the requisite prudence to see that he committed no act of negligence ...."
2. *See Brown v. Vanity Fair Mills, Inc.*, 291 Ala. 80, 277 So. 2d 893 (1973); *Thompson v. Havard*, 285 Ala. 718, 235 So. 2d 853 (1970); *Lane v. Central Bank of Alabama*, 425 So. 2d 1098 (Ala. 1983); *Roberson v. Allied Foundry & Machinery Co.*, 447 So. 2d 720 (Ala. 1984); *Perkins v. Dean*, 570 So. 2d 1217 (Ala. 1990); *Ledbetter v. United American Ins. Co.*, 624 So. 2d 1371 (Ala. 1993); *Big B, Inc. v. Cottingham*, [Ms. 1920746, Sept. 10 1993], ___ So. 2d __ (Ala. 1993); *Northwestern Mutual Life Ins. Co. v. Sheridan*, [Ms. 1911110, Oct. 29, 1993], ___ So. 2d ___ (Ala. 1993).
3. The Restatement takes the following position:

   § 213. Principal Negligent or Reckless

   A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:
   a. in giving improper or ambiguous orders of [sic] in failing to make proper regulations; or
   b. in the employment of improper persons or instrumentalities in work involving risk of harm to others:
   c. in the supervision of the activity; or
   d. in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.

   Restatement of Agency 2d § 213 (1957).
4. Intentional or malicious conduct may be deemed within the scope if done in furtherance of the principal's business or intended for the principal's benefit. 30 C.J.S. *Employer-Employee*, § 219, at 305-06 (1992).

THE ALABAMA CLASS ACTION

"In a room of blind people, someone with partial sight in one eye is an expert."

St. Raymund
Patron Saint of Lawyers

By Alan T. Rogers

While we see more of these suits filed in Alabama state courts than just a few years ago, for many of us, an encounter with a class action requires a refresher course. This first article and one to follow are for the refresher candidate. This first article deals with basic class requirements and class types.

General considerations

Class actions in Alabama are brought under Rule of Civil Procedure 23, identical to Fed.R.Civ.P. 23. Although the Alabama Supreme Court has addressed class actions on several occasions, federal cases are legion. The Alabama Supreme Court has stated that federal decisions are persuasive authority for class action determinations.[1]

The class must meet the requirements of Ala. R. Civ. P. 23(a) and must fit within one of the types of class actions set forth in Ala. R. Civ. P. 23(b). Even then, certification of a class remains within the discretion of the trial judge "after considering practicality and manageability of the litigation."[2] The United States Supreme Court has written that class actions "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rules 23(a) have been satisfied." *General Tel. Co. of Southwest v. Falcon,* 457 U.S. 147, 161 (1982). "Mere mimicry is insufficient to undergird a decision either way on the propriety of class certification."[3]

Although a trial court's decision on certification will be reversed by the Alabama Supreme Court only for an *abuse of discretion*, the court has been willing to reverse improper class certifications.[4]

A class can be certified for only a portion of the case. A class of defendants may also be certified. Subclasses may be created to handle conflicts or individualized issues, but each subclass must independently meet all of the requirements for a class. Whether a class can be certified should be determined "as soon as *practicable* after the commencement of the action."[5]

Because of the provisional nature of a class certification, such a ruling can be changed throughout the course of the proceeding. The court may also make orders as may be necessary to avoid undue repetition and complication in presentation of arguments or evidence, allowing molding of the litigation. Once certified, a class action may not be dismissed or compromised without the approval of the court.[6]

The 23(a) requirements

The four requirements of Ala. R. Civ. P. 23(a) are often referred to as:

Numerosity;
Commonality;
Typicality;
Adequacy of representation.

Numerosity

While there is not an Alabama decision discussing, in depth, the numerosity requirement, the Alabama Supreme Court in *Rowan v. First Bank of Boaz*, 476 So. 2d 44 (Ala. 1985) reversed the trial court's certification of the class because there was "no evidence of any kind before the trial court indicating the number of customers of the bank that prepaid their installment loans."

Federal law has generally held that, if a class number is at least *50*, numerosity is met.[7] In *Jones v. Firestone Tire & Rubber Co., Inc.*, 977 F.2d 527, 534 (11th Cir. 1992), the Eleventh Circuit noted that 21 members is "generally inadequate."

Commonality

The plaintiff must show there are common questions of fact *or* law between all members of the class. Alabama cases have rarely focused upon the commonality requirement. *See, e.g., Town of Eclectic v. Mays* , 547 So. 2d 96, 102 (Ala. 1989) (concluding that "undeniably, there are common questions of law and fact"). The trial court must, however, identify the common issues of fact and law to define the class (or classes). The class cannot, for example, include plaintiffs who have no right to recovery.[8]

Typicality

The class representatives's claim must be *typical* of the class claims. The idea is that differences between the claims of the representative and those of other members of the class will operate to the detriment of class members. Some federal courts have required the representative's claims to be "co-extensive" with the claims of the class members.[9] Courts sometimes blur typicality with the requirement that the named plaintiff be an adequate representative of the class.[10]

Alabama cases on typicality

The leading Alabama case is *Ex parte Blue Cross and Blue Shield*, 582 So. 2d 469 (Ala. 1991). There, three class representatives alleged that Blue Cross had maintained an excess contingency reserve and asked for an injunction forcing Blue Cross to distribute that reserve. The trial court certified the class and granted partial summary judgment. Blue Cross sought a writ of mandamus, which was granted by the Alabama Supreme Court. Evidence showed that the named plaintiffs had either not been injured by the alleged excess contingency reserve or had actually benefitted in reduced rates. The court reversed the class certification, finding that the claims of the named plaintiffs were not typical of the class claims.

In *Amason v. First State Bank of Lineville*, 369 So. 2d 547 (Ala. 1979),[11] a debtor brought a class action against a bank alleging fraud and excess finance charges. The trial court refused class certification and the supreme court *affirmed* this holding on the basis that the named plaintiff no longer had an indebtedness to the bank, and yet sought to certify a class of those who did have indebtedness to the bank.

In *Butler v. Audio/Video Affiliates, Inc.*, 611 So. 2d 330 (Ala. 1992), a plaintiff sought certification of a class in a "bait and switch" consumer fraud action. The trial court *denied* certification and the plaintiff appealed, arguing that a class action was appropriate because of the "pervasive scheme." The supreme court affirmed, relying on the trial court's "painstakingly" written order that found that, in order to establish a violation, *each* class member would have to be questioned to ascertain why he or she had gone to the defendant's store and

purchased the item, whether he or she was satisfied with the item, whether any injury occurred, etc. Furthermore, certification was prevented by the fact that the alleged misrepresentations may have varied from one class member to another, and the plaintiff was satisfied with her purchase.

In *Harbor Ins. Co. v. Blackwelder*, 554 So. 2d 329 (Ala. 1989), participants in a self-funded insurance plan for employees brought actions alleging fraud in the inducement arising from the failure of the plan. The Alabama Supreme Court affirmed class certification. Although fraud cases are not usually candidates for class certification because of the individualized nature of communications that may occur between different class members and a defendant's representatives, not to mention individualized questions of reliance, the Alabama Supreme Court held that the certification in this *particular* case was not an abuse of discretion, finding that the misrepresentations to the class members were the same and were redressable under the same theory of recovery.

Federal cases on typicality

Federal authorities agree that the major reasons that a plaintiff's claim will not be typical are (1) standing, and (2) individualized defenses. An example is *Levine v. Berg*, 79 F.R.D. 95, 97 (S.D.N.Y. 1978), in which the court declined to certify a class because the plaintiff failed to meet the burden of showing that his claims were typical of the class. The court noted specifically that the plaintiff's testimony had been so vague and unclear that it was impossible to assess whether or not the plaintiff would be subject to unique defenses.

Another example is *Bogle v. Crow-Brighton Co.*, 96 F.R.D. 1, 3 (W.D. Okla. 1981) in which an owner of a lot in a development alleged that the developer made fraudulent representations about the construction of a clubhouse. Typicality was *not* met because there would need to be a determination for every class member of the statements that were made to them, by whom the statements were made and whether the developer had any connections with these statements. There would also need to be an individualized determination of the extent of reliance. Most federal courts now agree that the typicality requirement:

> May have independent significance if it is used to screen out class actions when the legal or factual positions of the representatives are markedly different from that of the other members of the class, even though common questions of law or fact are raised.[12]

This formulation addresses the danger "that the unique circumstances or legal theory will receive inordinate emphasis, and that other claims will not be presented with equal vigor or will go unrepresented."[13] In *Seiler v. E. F. Hutton & Co.*, 102 F.R.D. 880, 890 (D.N.J. 1984), the court held that typicality had not been met because the defendant brokers in a securities action had made individual decisions on what information to send their clients and the representations to make to their clients.

In *Brooks v. Southern Bell Tel. & Tel. Co.*, 133 F.R.D. 54, 58 (S.D. Fla. 1990) the court noted that the United States Supreme Court interprets the typicality requirement as meaning that the named representatives "must be able to establish the bulk of the elements of each class member's claims when they prove their own claims."

Adequacy of representation

A trial judge must view a class representative in a fiduciary role. The representative must protect the class members to enable the class mechanism to conclude their claims. If the class representative lacks sufficient knowledge of the facts or claims, has interests adverse or potentially adverse to the class, or is a meddler or interloper, the court may deny class certification.

Alabama cases on adequacy of representation

Perhaps the leading Alabama case on this requirement is *Ex parte Blue Cross and Blue Shield*, 582 So. 2d 469, 476-77 (Ala. 1991). The Alabama Supreme Court unanimously *reversed* a class action certification. Among the reasons, the named plaintiffs could not adequately protect the interests of the class since the evidence showed that the two named plaintiffs would have a conflict of interest with those in the purported class.

Consider also the recent Alabama Supreme Court decision in a shareholder derivative action in *Elgin v. Alfa Corp.*, 598 So. 2d 807 (Ala. 1992). There, the Alabama Supreme Court found that one of the representatives for the shareholder derivative suit was inadequate. The court noted that the plaintiff's unfamiliarity with litigation may indicate that he is not an adequate representative and noted that the representative testified that he knew "virtually nothing about the subject matter of the complaint," that his knowledge of the complaint

came from the "news media", that he had made his decision to be a plaintiff merely a week before the deposition, but had not seen the complaint until the day of the deposition and had not read it by then.

Federal cases on adequacy of representation

Adequacy of representation has been a hotly contested issue in federal cases. First, the federal courts have long held that the most important factor in determining adequacy is whether the representative can show that his interest will lead him to prove the allegations of the class (i.e., *all* of the allegations of the class) and whether his interests are in conflict with the class.[14] Second, what constitutes an adequate representative is generally viewed as a *question of fact* that depends on the circumstances of each case. Third, it is the plaintiff's burden to prove that the class representative is adequate.[15] In addition to examining the plaintiff's interests, the court will examine, among other things, (1) the representative's knowledge of the facts and involvement with the suit, (2) the representative's compliance with discovery, (3) the representative's credibility, (4) the representative's honesty and conscientiousness, (5) the representative's lawyer's ability, experience, conflicts and ethics, and (6) whether other plaintiffs have shown an interest in the litigation.

There are many federal cases regarding the representative's true interests. An example is *Greeley v. KLM Royal Dutch Airlines*, 85 F.R.D. 697, 700 (S.D.N.Y. 1980) where a passenger who refused to settle a claim against the airline for lost and stolen baggage was not entitled to certification of a class that would include passengers who had settled, since there was no assurance that the plaintiff would "vigorously litigate" the questions of fact and law unnecessary to his individual claim, but essential to recovery for the passengers who had settled.[16]

In assessing adequacy, the courts are especially wary of conflicts (even potential conflicts) between the representative and others in the class. An example of a potential conflict defeating a class is *Plekowski v. Ralston Purina Co.*, 68 F.R.D. 443, 452-53 (M.D.Ga. 1975) where a former customer brought a class action against a manufacturer of feed products based on an alleged illegal tying of feed purchases to advancements of loans. The court declined certification, holding that the plaintiff's claim was not typical and that he was not an adequate representative, finding that the plaintiff had different interests from those of wholesalers, dealers, growers, ranchers and farms who had good relationships with the defendant, but who nonetheless were purported members of the class.

Another key factor in assessing adequacy is the class representative's *lack of knowledge and lack of involvement*. An example is *Levine v. Berg*, 79 F.R.D. 95 (S.D.N.Y. 1978). There, a plaintiff brought a class action based upon the Securities and Exchange Act. The plaintiff could not recall the facts and circumstances that prompted her acquisition of the shares of the corporation, could not recall consulting reports and testified that she glanced only briefly through the complaint before it was filed. The court concluded that the plaintiff's deposition revealed an "alarming adversity to unearthing facts" and a "total reliance" on her counsel. The court noted that having a qualified counsel is not enough to satisfy the adequacy requirements.

Another example is *Epifano v. Boardroom Business Products, Inc.*, 130 F.R.D. 295 (S.D.N.Y. 1990). There, the plaintiffs brought a securities fraud action, and the court rejected one of the class representatives as inadequate because of lack of knowledge. The representative had no involvement in the filing of the complaint and had no knowledge of it, had not spoken to the attorney since the filing of the complaint, and had indicated a willingness to settle the case if personally made whole. The court noted that "an additional consideration in assessing adequacy is the extent of the plaintiff's interest in the case in terms of active involvement and time spent. A plaintiff who is not seriously interested in his own litigation cannot be relied upon to vigorously pursue the claims of others."

In *Efros v. Nationwide Corp.*, 98 F.R.D. 703, 706-07 (S.D. Ohio 1983), the court concluded that the attorneys, and not the named plaintiff, were the "driving force" in the litigation. The court was especially concerned about the "unfettered discretion" that the plaintiff had given her attorneys (such as the right to hire new counsel, trial counsel and expert witnesses without even informing her).[17]

Another consideration in determining the adequacy of representation is the failure of the plaintiff *to comply* wholeheartedly and fully *with the discovery requirements.*[18] Other courts consider that the class representative's *lack of credibility* as an important factor in determining their adequacy of representation. In *Kline v. Wolf*, 702 F.2d 400, 402-03 (2nd Cir. 1983), the district court found that the plaintiffs were vulnerable to serious attacks on their credibility and were subject to unique defenses atypical of the rest of the class and, therefore, were not adequate representatives. In *Panzirer v. Wolf*, 663 F.2d 365, 367-68 (2nd Cir. 1981) the Second Circuit affirmed denial of class certification, writing that the class representatives "lack of credibility is abundantly clear in the record. She gave no less than four versions of her conversation with her broker. [The court then described the four versions]. The credibility of a plaintiff may be considered by the trial judge in determining the plaintiff's adequacy as a class representative."

In assessing adequacy, courts have also looked at *personal factors* such as honesty and conscientiousness. In *Kendler v. Federated Department Stores, Inc.*, 88 F.R.D. 688, 694 (S.D.N.Y. 1981), the court found that a charge account customer whose recovery in a class action antitrust lawsuit would likely fall below the amount unpaid on a prior account was not a proper class representative, especially because her current charge account might be subject to cancellation based on inaccurate statements in her application.

Another key consideration for adequacy is the class representative's counsel. The court will examine (1) counsel's competence and experience, (2) counsel's conflicts, and (3) counsel's ethics and actions in this litigation.[19] Courts expect counsel to act in a fiduciary role to protect the class and will examine closely the counsel's own potential conflict of interest.[20] For example, some cases have held that it is a conflict of interest for the plaintiff's attorney to actually be a member of the class. In *Bachman v. Pertschuk*, 437 F. Supp. 973, 976-77 (D.D.C. 1977) the court ruled that an attorney could not be class counsel where his personal interest as a class member and as a person presently employed by the defendant created a conflict of interest. There are many cases holding that counsel for the class cannot also be a *class representative* because of the inherent class conflict.[21] Furthermore, several courts have stated that a class representative cannot be allied with the class counsel or have a family relationship with the class counsel.[22]

As a general matter, it should be noted that the ethical conduct of the class counsel is a relevant factor to consider when considering their adequacy.[23] For instance, some courts have looked with skepticism upon class counsel who *solicited* the class representatives and, therefore, solicited the lawsuit. Even though such solicitation may not violate the Alabama Rules of Professional Conduct (provided there was no in-person solicitation, or direct phone contact and that all solicitations were filed with the state bar)[24], the court can find that the class counsel is not an appropriate or adequate class counsel.[25]

Finally, courts will sometimes consider whether other members of the class have intervened in support of the plaintiff in determining the plaintiff's adequacy as a class representative. For instance, one court has written that, "None of the present customers of the defendant have sought to intervene in this action even though it has been pending since September 1973. The courts have recognized, as a negative factor to class certification, this lack of interest in entering the legal arena."[26]

Three class types

The plaintiff must satisfy each of the requirements of Rule 23(a) *and* fall within one of the categories of Rule 23(b) which itemizes three types of class actions:

Rule 23(b)(1)

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

1. The prosecution of separate actions by or against individual members of the class would create a risk of:

a. Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
b. Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interest of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; or

Alabama cases on (b)(1) type class

There has only been one Alabama case to discuss Rule 23(b)(1).[27] In *Taylor v. Liberty Nat. Life Ins. Co.*, 462 So. 2d 907 (Ala. 1984), a plaintiff sued, alleging misrepresentation regarding a burial policy and collaterally attacking a prior class action case. The prior action did not include individual notice to Taylor as required by Rule 23(b)(3), but not required by Rule 23(b)(1) and Rule 23(b)(2). The court analyzed whether certification of the prior action would have been proper under Rule 23(b)(1) or Rule 23(b)(2). The court determined that 23(b)(1) certification would *not* have been proper:

A rule 23(b)(1) action is proper in cases where the rights of individual class members would be prejudiced if the suit were brought individually or in cases in which inconsistent adjudication among the parties might result if the suit were individual rather than class; . . . *More simply, if the relief requested is predominantly monetary, the action must be brought as a 23(b)(3) suit.* . . 23(b)(1) and (b)(2) classes by their nature are more cohesive than (b)(3) classes.[28]

Federal cases on (b)(1) type class

Rule 23(b)(1) actually establishes two somewhat unrelated types of class actions. A Rule 23(b)(1)(A) class action is used *for the benefit of the defendant* where "there is risk of inconsistent results leaving the party opposing the class in a quandary as to how he should govern himself... "[29] There must be a real risk that separate actions will occur, otherwise there is not a danger of the courts fashioning incompatible standards.[30] Furthermore, most federal courts hold that if the threatened inconsistency is the possibility of having to pay money damages to one and not another, Rule 23(b)(1)(A) is not met (i.e., 23(b)(1)(A) is not appropriate when the threatened inconsistency is that the defendant might win one individual damages lawsuit and lose another).[31] This is especially true when the class action is brought by consumers with small claims, because the risk of multiple actions is remote.[32] Instead, the courts and commentators usually assume that 23(b)(1)(A) classes are only appropriate when the defendant will truly be in a "conflicted position" (i.e., when different results would impair the defendant's ability to pursue a uniform, continuing course of conduct).[33] Further, Rule 23(b)(1)(A) classes are less likely to be appropriate when there are more individualized issues. One federal court has gone so far as to suggest that if there are any individualized issues, Rule 23(b)(1)(A) is inappropriate.[34]

The classic example of a Rule 23(b)(1)(A) class action is where suit is brought against a riparian up-river landowner by a down-river owner, as it would be chaotic to permit various individual lawsuits by different down-river landowners.[35] Rule 23(b)(1)(A) actions are appropriate where a defending part may be "obliged by law" to treat all similarly. An example would be where an action is brought against a municipality to invalidate or modify a bond issue or assessment.[36] Note that the Eleventh Circuit and most courts hold that certification for Rule 23(b)(1)(A) cases is limited to cases seeking injunctive and declaratory relief.[37]

A Rule 23(b)(1)(B) class action requires that the adjudication might be injurious to the contentions of other individuals. Precedential effect or *stare decisis* is not sufficient, but the prejudice need not be as devastating as a defense of *res judicata*.[38] According to the notes to the Federal Rules, an example of this type of class action is a suit by shareholders to compel a dividend or recognize preemptive rights, or an action by an indenture trustee to protect the holders of securities.[39] Rule 23(b)(1)(B) classes can be seen as a type of an interpleader action, that is, where there is a limited fund or a single object and many claimants. Rule 23(b)(1)(B) is not appropriate, usually, for mass torts. One recent Federal district court has written that, "Some have argued that Rule 23(b)(1)(B) should be used for mass accident claims or other circumstances where there is a prospect of depletion of assets of a defendant by multiple claims for punitive damages, but this appears to have been rejected by most courts."[40] In fact, courts have been generally hesitant to certify any type of class action for mass tort cases, especially Rule 23(b)(1) class actions that do not allow a plaintiff to opt out.[41]

2. The party opposing the classes acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or a corresponding declaratory relief with respect to the class as a whole; or

Rule 23(b)(2) is appropriate for injunctive or declaratory judgment actions, but in addition the class proponent must show that the other party "acted or refused to act on grounds generally applicable to the class." This type of class was designed primarily to handle constitutional and civil rights cases and has also been extensively used against governmental units, for environmental claims, and for patent claims.[42] If the predominant relief sought is damages, the class should *not* be certified under Rule 23(b)(2). Because of the notice and class requirements imposed on the plaintiff in Rule 23(b)(3), class plaintiffs and their counsel sometimes attempt to improperly invoke Rule 23(b)(2) by including in their requested relief a demand for an injunction or declaratory judgment.

Alabama cases on (b)(2) type class

The leading Alabama case discussing the difference between (b)(2) and (b)(3) is *Taylor v. Liberty National Life Insurance Co.*, 462 So.2d 907 (Ala. 1984), discussed above. The Alabama Supreme Court observed that the major distinction between (b)(2) and (b)(3) classes is the notice requirement for (b)(3) classes involving monetary relief. The court emphasized that notice is *mandatory in (b)(3) class suits,* as opposed to the discretionary notice discretionary in (b)(1) and (b)(2) suits. The Alabama Supreme Court held that certification of a (b)(2) class involving claims for monetary relief without individual notice to the class members amounted to a deprivation of the due process rights of the class members. The *Taylor* court found that, since the class had been incorrectly certified under Rule 23(b)(2), the class action did not command *res judicata*. The court noted specifically that the federal complaint had requested injunctive and monetary relief, but noted that the *final settlement* of the federal case was one primarily involving monetary relief, making the equitable demands a "mere facade created by the originally named parties." It wrote, "More simply, if the relief requested is predominantly monetary, the action *must* be brought as a 23(b)(3) suit."

Federal cases on (b)(2) type class

Federal cases are unanimous that a suit seeking predominantly money damages should never qualify under Rule 23(b)(2).[43] An example is *Indiana State Employees Assoc. v. Indiana State Highway Com.*, 78 F.R.D. 724, 725-26 (S.D. Ind. 1978). There, the plaintiffs (state employees) sought reimbursement of forced political contributions and declaratory and injunctive relief. The court rejected the plaintiffs' argument that their class qualified under Rule 23(b)(2), stating that the individualized nature of the class member damage claims was such that the damage issue in the case would predominate or overwhelm issues of generalized, equitable relief.

Rule 23(b)(3)

3. The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

a. The interest of members of the class in individually controlling the prosecution or defense of separate actions;

b. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

c. The desirability or undesirability of concentrating the litigation of the claims in a particular forum;

d. The difficulty likely to be encountered in the management of a class action.

Rule 23(b)(3) is primarily a *damages* class and has been used for actions such as consumer rights, securities law violations and antitrust law violations. Courts have considered this type of class to be less cohesive than (b)(2) and (b)(1) classes and have found that the reasons for class certification under (b)(3) are *less compelling* than the reasons for certification under (b)(1) and (b)(2). Under Rule 23(b)(3), individual notice is required to each class member (who can be determined with diligent effort). Furthermore, the standards for certification are *more stringent* under Rule 23(b)(3).

Alabama cases on (b)(3) type class

No Alabama case has directly construed Rule 23(b)(3) in determining whether a class action should be certified. Nevertheless, several Alabama cases have determined that classes were not "manageable" and therefore, the classes could not be certified. A case illustrating the "unmanageable" factor is *Butler v. Audio/Video Affiliates, Inc.*, 611 So. 2d 330 (Ala. 1992), involving allegations of bait and switch consumer fraud by a department store. The trial court rejected class certification and the Alabama Supreme Court affirmed, having analyzed the proposed class under the standards of Rule 23(b)(1).

A second major Alabama case discussing the "unmanageable" factor is *Marshall Durbin & Co. v. Jasper Utilities Board*, 437 So. 2d 1014 (Ala. 1983). There, the Alabama Supreme Court found that a class was not proper because approximately 28 percent of the proposed class would be subject to *compulsory counterclaims* for delinquent gas service accounts, meaning the class would not be "manageable". The court noted that "each of these accounts would be subject to defenses which would complicate the litigation and, in the words of the trial court, 'defeat the manageability requirement of the class action.'"

Federal cases on (b)(3) type class

Rule 23(b)(3) is intended for class actions involving small claims, often consumer claims.[44] Rule 23(b)(3) lists two *requirements* for class actions: (1) common questions predominate, and (2) the class action is superior to other methods. It also lists four *factors* (not intended to be exhaustive) to be analyzed: (1) individual interest in controlling litigation, (2) other ongoing litigation, (3) desirability of concentrating litigation in this forum, and (4) the manageability of the potential class action.

The first requirement is *common questions must predominate*. While this standard has never been quantified, it is not sufficient that common questions merely exist. The cases in which courts have refused to certify class actions under the predomination requirement often involve a potential for separate adjudications of each class member's claim or defense or where there are compulsory counterclaims. An example is *Estate of Remley v. Amoco Production Co.*, 100 F.R.D. 419, 421 (S.D. Tex. 1983). There, a class of oil lessors was not certified in an action against a common lessee when each lease, because of unique qualities, drained in a different manner and at a different rate. Thus, although lessors might show that the lessee systematically drained each field, each would be required to prove individual injury. Another example is *Wilcox Dev. Co. v. First Interstate Bank, N.A.*, 97 F.R.D. 440, 446-47 (D. Oregon 1983). There, the plaintiffs alleged that a bank and its holding company *breached their contract* by charging plaintiffs an interest rate that was higher than the bank's lowest rate. The court found that this was not a proper (b)(3) class because questions of class membership involving each class member's knowledge of the "prime rate" predominated.

A third example is *Schmidt v. Interstate Federal Savings & Loan Association*, 74 F.R.D. 423, 428-29 (D.D.C. 1977). There, a federal court refused to certify a class of plaintiff home mortgagors. These plaintiffs were located in the District of Columbia, Maryland and Virginia. The court held that it would be necessary to apply three separate and possibly inconsistent bodies of law to the breach of a contract and unjust enrichment claims. Because (1) the presentation of the claims on a class basis was unduly complicated, and (2) the case would raise many questions of law that were neither common nor predominate throughout the class, class certification was denied. Note that there are several cases finding a lack of predomination because of the presence of multiple states' laws.[45] Compulsory counterclaims can also lead to a finding of no predomination.[46]

An example of common questions predominating is *Roper v. Consurve, Inc.*, 578 F.2d 1106, 1113 (5th Cir. 1978). There, credit card holders brought a class action against a national bank, alleging that credit card charges were usurious under Mississippi law. The plaintiffs argued that the individual fact determinations could be reached by using objective criteria and the assistance of a computer.

The next requirement is that a *class action must be superior to other available methods*. This analysis is designed to

determine whether the objectives of the class action procedure will be served by this analysis, and should involve a weighing of the advantages and disadvantages of class treatment as well as possible alternatives (such as joinder, intervention, joint discovery, administrative treatment, and test cases).[47] In examining the merits of class treatment, the courts have relied heavily on the four factors listed in Rule 23(b)(3). An example is *Parker v. George Thompson Ford, Inc.*, 83 F.R.D. 378, 381-82 (N.D. Ga. 1979), the court ruled that the class action failed the superiority requirement when class certification would result in a relatively small recovery for individual class members while exposing the defendant to large administrative costs and requiring substantial amounts of court time for supervision of the action.

The *first factor* under Rule 23(b)(3) is the *interest of individuals in controlling their own suits*. Cases that find that this factor has not been satisfied usually involve larger claims.[48] Another situation in which a party may have a strong interest and individual control of the litigation is when there are animosities within the class.[49]

Another consideration in determining the interest of individuals in controlling their own suits is the possibility of counterclaims against them. In *Carter v. Public Finance Corp.*, 73 F.R.D. 488 (N.D. Ala. 1977), the court refused to certify a class action for possible violations of the Truth-in-Lending law. The court determined that 85 of the potential 383 class members were in default, that the defendant had potential counterclaims against each of these class members and that such counterclaims were compulsory. The court noted that these members could find themselves exposed to greater liability for the counterclaims than they could ever hope to recover in the class action and, therefore, probably would never have chosen to bring individual actions. The court, therefore, concluded that the superiority requirement had not been met and that there was a likelihood that large numbers of the class members would move to opt out of the class. Finally, the court held that there would not be a predomination of common questions because of the numerous counterclaims and also noted the administrative difficulty imposed by such counterclaims.

The *second factor* listed within Rule 23(b)(3)(b) is the *"extent and nature of any litigation concerning the controversy already commenced by or against members of the class."*

The *third factor* is the *"desirability or undesirability of concentrating the litigation in one forum."* Wright, Miller and Kane write regarding this factor that:

> First, a court must evaluate whether allowing a Rule 23(b)(3) action to proceed will prevent the duplication of effort and the possibility of inconsistent results. Indeed, in defendant class actions, it has been suggested that clause (b)(3)(c) instructs the court to take into account the importance of protecting defendants from being subjected to "the expensive ordeal of continually having to demonstrate their innocence at trial." In this regard, the third factor is closely related to the second consideration enumerated in Rule 23(b)(3) — the extent to which other actions have been instituted.

The other consideration a district court must take account of under subdivision (b)(3)(c) is whether the forum chosen for the class action represents an appropriate place to settle the controversy, given the location of interested parties, the availability of witnesses and evidence, and the condition of the court's calendar. The analysis is similar to that used in deciding a transfer of venue question under Section 1404(a) of Title 28.[50]

The *fourth factor* is the difficulty to be encountered in the *management* of the class action. This factor is closely related to the superiority determination. Several federal lawsuits have found that proposed class actions under Rule 23(b)(3) were unmanageable and, therefore, should be dismissed. A leading case is *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1010-11, 1017 (2nd Cir. 1973). There, a class action was brought for odd lot investors. The court held that the only way that the class action would be manageable was (1) to give less than individual notice to all identifiable class members, (2) to have the defendant share the cost of the notice, and (3) to provide for a fluid class recovery[51] instead of individualized relief; therefore, the court dismissed the action because it was unmanageable — Rule 23 provides for none of these procedures.[52]

In deciding the manageability question, federal courts have also sometimes considered the counterclaims of the defendants.[53]

Conclusion

Although our trial courts are given discretion in molding class action suits, certification of such actions should not occur in the many cases that do not satisfy the fundamental requirements of Rule 23(a). Additionally, factors involved in deciding the type of class under Rule 23(b) may either operate against certification or in favor of restricted or conditional certification. The trial judge must carefully avoid the occasional temptation to grant class certification based simply on broad allegations and willing class representatives and attorneys, and instead carefully scrutinize the purported class and the named plaintiffs' claims under the Rule 23 guidelines.

The next article in a future issue of *The Alabama Lawyer* will focus on issues of venue and jurisdiction, pretrial motions, statutes of limitations, discovery, certification hearings, notice, appeals, settlement, and attorneys fees in Alabama class actions.

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Alan T. Rogers is a partner in the Birmingham office of Balch & Bingham and a 1980 graduate of Tulane Law School. He is a member of the state bars of Louisiana and Alabama, and on *The Alabama Lawyer* Board of Editors.

Endnotes

1. *See First Alabama Bank of Montgomery, N.A. v. Martin*, 381 So. 2d 32, 34 (Ala. 1980); *Rowan v. First Bank of Boaz*, 476 So. 2d 44, 46 (Ala. 1985);
2. *Marshall Durbin & Co. v. Jasper Utilities Board*, 437 So. 2d 1014, 1025 (Ala. 1983).

3. *Jones v. Diamond*, 519 F.2d 1090, 1098 (5th Cir. 1975).
4. *See e.g., Ex parte Blue Cross*, 582 So. 2d 469 (Ala. 1991); *Bagley v. City of Mobile*, 352 So. 2d 1115 (Ala. 1977).
5. Ala. R. Civ. P. 23(c) (emphasis added).
6. Ala. R. Civ. P. 23(d) and (e).
7. 1 Newberg & Conte, *Newberg on Class Actions* § 3.05 (3d Ed. 1992)(40 raises presumption); 7A Wright, Miller & Kane, *Federal Practice & Procedures: Civil 2d*, § 1762 at pp. 170-186 (1986)(listing cases).
8. *See Eagerton v. Williams*, 433 So. 2d 436, 447 (Ala. 1983) (reversing certification).
9. *Levine v. Berg*, 79 F.R.D. 95, 97 (S.D.N.Y. 1978); *compare East Texas Motor Freight, Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S. Ct. 1891, 1896, 52 L. Ed.2d 453 (1977);Bogle v. Crow-Brighton Co., 96 F.R.D. 1, 3 (W.D. Okla. 1981).
10. 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ∂ 23.06-2 (2d ed. 1991); 1 *Newberg on Class Actions* ∂3.13; 7A *Wright, Miller & Kane*, § 1764 at pp. 228-232.
11. *See also Helms v. First Alabama Bank of Gadsden, N.A.*, 386 So. 2d 450 (Ala. Civ. App. 1980).
12. *Angelastro v. Prudential-Bache Securities, Inc.*, 113 F.R.D. 579, 582 (D.N.J. 1986); *Weiss v. York Hospital*, 745 F.2d 786, 809 n.36 (3rd Cir. 1983).
13. 113 F.R.D. at 582.
14. *See Stewart v. Winter*, 669 F.2d 328, 335 (5th Cir. 1982) (a class representative is not adequate if they will neglect the injunctive portion of the case because of their concentration on damages, but finding adequacy on the facts); *Griffin v. Dugger*, 823 F.2d 1476, 1483 (11th Cir. 1987) (holding that a class representative must have suffered a cognizable injury on each and every cause of action asserted upon behalf of the class).
15. 2 *Newberg on Class Actions* §7.17; 7A *Wright, Miller & Kane*, § 1765 at p. 273.
16. *See also Parker v. George Thompson Ford, Inc.*, 83 F.R.D. 378 (N.D.Ga. 1979); 7A *Wright, Miller & Kane*, §1766 at 303 n.9 (listing cases).
17. *See also* 7A *Wright, Miller & Kane*, § 1766 at pp. 310-311.
18. *Darvin v. International Harvester Co.*, 610 F. Supp. 255, 257 (S.D.N.Y. 1985); *Norman v. ARCS Equities Corp.*, 72 F.R.D. 502, 506 (S.D.N.Y. 1976).
19. 7A *Wright, Miller & Kane*, § 1769.1; 1 *Newberg on Class Actions* §3.42.
20. *See, e.g., Piambino v. Bailey*, 757 F.2d 1112, 1143-46 (11th Cir. 1985).
21. *See* 7A *Wright, Miller & Kane*, §1769.1 at p. 386 n.24 (listing cases); *see also Lau v. Standard Oil Co.*, 70 F.R.D. 526, 528 (N.D. Cal. 1975).
22. *See* 7A *Wright, Miller & Kane*, §1769.1 at p. 388 n.25 (listing cases); *v. Tie Communications, Inc.*, 123 F.R.D. 189, 193-194 (E.D. Pa. 1988) (attorney is son of named representative; court rejects class on this basis); *Kirby v. Cullinet Software, Inc.*, 116 F.R.D. 303, 308-310 (D. Mass. 1987) (son of representative was class counsel; court does thorough analysis and determines that class representative was not adequate).
23. *See Stavrides v. Mellon National Bank & Trust Co.*, 60 F.R.D. 634, 636-38 (W.D.Pa. 1973).
24. *Alabama Rules of Professional Conduct* 7.3 and comment.
25. *See Shields v. Valley National Bank of Arizona*, 56 F.R.D. 448, 450 (D. Ariz. 1971).
26. *Plekowski v. Ralston Purina Co.*, 68 F.R.D. 443, 453 (M.D. Ga. 1975); *Kas v. Financial General Bankshares, Inc.*, 105 F.R.D. 453, 462-63 (D.D.C. 1989).
27. *Compare* these cases in which 23(b)(1) classes involved but not discussed: *Brown v. State*, 565 So. 2d 585 (Ala.1990); *Town of Eclectic v. Mays*, 547 So. 2d 96, 102 (Ala. 1989); *First Alabama Bank, N.A. v. Martin*, 425 So. 2d 415 (Ala. 1982).
28. 462 So. 2d at 910-11 (citations omitted). Note that a later federal case enjoined further prosecution of the *Taylor* litigation. *See Battle v. Liberty Nat. Life Ins. Co.*, 660 F. Supp. 1449, 1457 (N.D.Ala. 1987), *aff'd* 877 F.2d 877, 883 (11th Cir. 1989).
29. Ala.R.Civ.P. 23, *Committee Comments*.
30. *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 564 (2nd Cir. 1968); 7A *Wright, Miller & Kane*, § 1773.
31. *McDonnell Douglas Corp. v. U.S. Dist. Court. for Central Dist.*, 523 F.2d 1083 (9th Cir. 1975) (possibility that some next of kin of passengers in an airplane crash might win and some might lose did not qualify under 23(b)(1)(A)); *Pruitt v. Allied Chemical Corp.*, 85 F.R.D. 100, 106-107 (E.D.Va. 1980) (23(b)(1)(A) not appropriate when the threatened inconsistency is simply that defendant might win one lawsuit and lose another); *Goldman v. First Nat. Bank of Chicago*, 56 F.R.D. 587, 590 (N.D. Ill. 1972), *reversed on other grounds* 532 F.2d 10 (7th Cir. 1976).
32. *Eisen*, 391 F.2d at 564; 7B *Wright, Miller & Kane*, § 1782 at p. 55.
33. Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedures (I)," 81 Harv. L. Rev. 356, 388 (1967); 7A *Wright, Miller & Kane*, §1773 at p. 429.
34. *Tober v. Charnita, Inc.*, 58 F.R.D. 74, 81 (M.D. Pa. 1973); *see also In re Dennis Greenman Securities Litigation*, 829 F.2d 1539, 1545 n.8 (11th Cir. 1987).
35. *See* Advisory Committee Note to 1966 Amendment to Federal Rule 23.
36. *See* Advisory Committee Note to 1966 Amendment to Federal Rule 23.
37. *See In re Dennis Greenman Securities*, 829 F.2d 1539, 1545 (11th Cir. 1987).
38. Ala. R. Civ. P. 23, *Committee Comments*; *In re Dennis Greenman Securities Litigation*, 829 F.2d at 1546.
39. *See* Advisory Committee Notes to 1966 Amendment to Federal Rule 23.
40. *Waldron v. Raymark Industries, Inc.*, 124 F.R.D. 235, 237 (N.D. Ga. 1989); see generally, C. Lyon, *Alabama Practice: Rules of Civil Pro-cedure Annotated*, § 23.3 at p. 356 (2nd ed. 1986) (citing cases); *In re Dennis Greenman Secs. Litigation*, 829 F.2d 1539 (11th Cir. 1987); *but see In re A.H. Robins Co.*, 880 F.2d 709, 741 (4th Cir. 1989).
41. *Waldron v. Raymark Industries, Inc.*, 124 F.R.D. 235, 237 (N.D.Ga. 1989); 7A *Wright, Miller & Kane*, § 1783; *compare Newberg on Class Actions* § 17 (arguing for a contrary result).
42. 1 *Newberg on Class Actions*, § 4.11 (listing example cases); 7A *Wright, Miller & Kane*, §§ 1775, 1776.
43. *See also In re School Asbestos Litigation*, 789 F.2d 996, 1003 (3rd Cir. 1986); *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 564 (2nd Cir. 1968); *Walsh v. Ford Motor Co.*, 130 F.R.D. 260, 264 (D.D.C. 1990); *Davenport v. Gerber Products Co.*, 125 F.R.D. 116, 120 (E.D. Pa. 1989); *Hernandez v. United Fire Ins. Co.*, 79 F.R.D. 419, 429 (N.D. Ill. 1978); *In re Plywood Anti-Trust Litigation*, 76 F.R.D. 577 (E.D. La. 1976).
44. *See* 7A *Wright, Miller and Kane*, §1777.
45. *See also Simon v. Merrill, Lynch, Pierce, Fenner & Smith*, 482 F.2d 880, 882-83 (5th Cir. 1973); *Walsh v. Ford Motor Co.*, 130 F.R.D. 260, 269-75 (D.D.C. 1990) (variation among state's laws concerning scope and implications of implied warranties and about written warranties); *Coca-Cola Bottling Co. of Elizabeth, N.C. v. Coca-Cola Co.*, 95 F.R.D. 168 (D. Del. 1982); *McMerty v. Burtness*, 72 F.R.D. 450, 453-56 (D. Minn. 1976) (no (b)(3) class action because the breach of contract claims involve the laws of seven separate states).
46. *See* Advisory Committee Note to 1966 Amendment to Federal Rule†23; *Parker v. George Thompson Ford., Inc.*, 83 F.R.D. 378 (N.D.Ga. 1979).
47. *See* Advisory Committee Note to 1966 Amendment to Federal Rule 23. 7A *Wright, Miller & Kane*, § 1779 at p. 551.
48. *See, e.g., AM/COMM Systems, Inc. v. American Telephone & Telegraph Co.*, 101 F.R.D. 317, 322-23 (E.D. Pa. 1984) (anti-trust action regarding connectivity of various devices to telephone).
49. *Id.* at 322-23; 7A *Wright, Miller & Kane*, §1780 at pp. 567-68.
50. 7A *Wright, Miller & Kane*, §1780 at pp. 572-73.
51. A fluid class recovery is where there is no individualized determination of damages, but instead the "class as a whole" is the plaintiff and the jury awards a bulk sum which the defendant pays into court. 479 F.2d at 1010. Then the court (the judge) determines how that money is to be distributed. *Id.*
52. *See also Abrams v. Interco, Inc.*, 719 F.2d 23, 29-31 (2nd Cir. 1983); *Kendler v. Federated Dept. Stores, Inc.*, 88 F.R.D. 688, 694-95 (S.D.N.Y. 1981); *Galloway v. American Brands, Inc.*, 81 F.R.D. 580, 584-87 (E.D.N.C. 1978); *Trecker v. Manning Implement, Inc.*, 73 F.R.D. 554, 560-64 (N.D. Iowa 1976); *San Antonio Telephone Co. v. American Telephone & Telegraph Co.*, 68 F.R.D. 435, 443 (W.D. Tex. 1975).
53. 1 *Newberg on Class Actions* §4.34 (listing cases); *see especially, Cotchett v. Avis Rent A Car System, Inc.*, 56 F.R.D. 549, 553 (S.D.N.Y. 1972).

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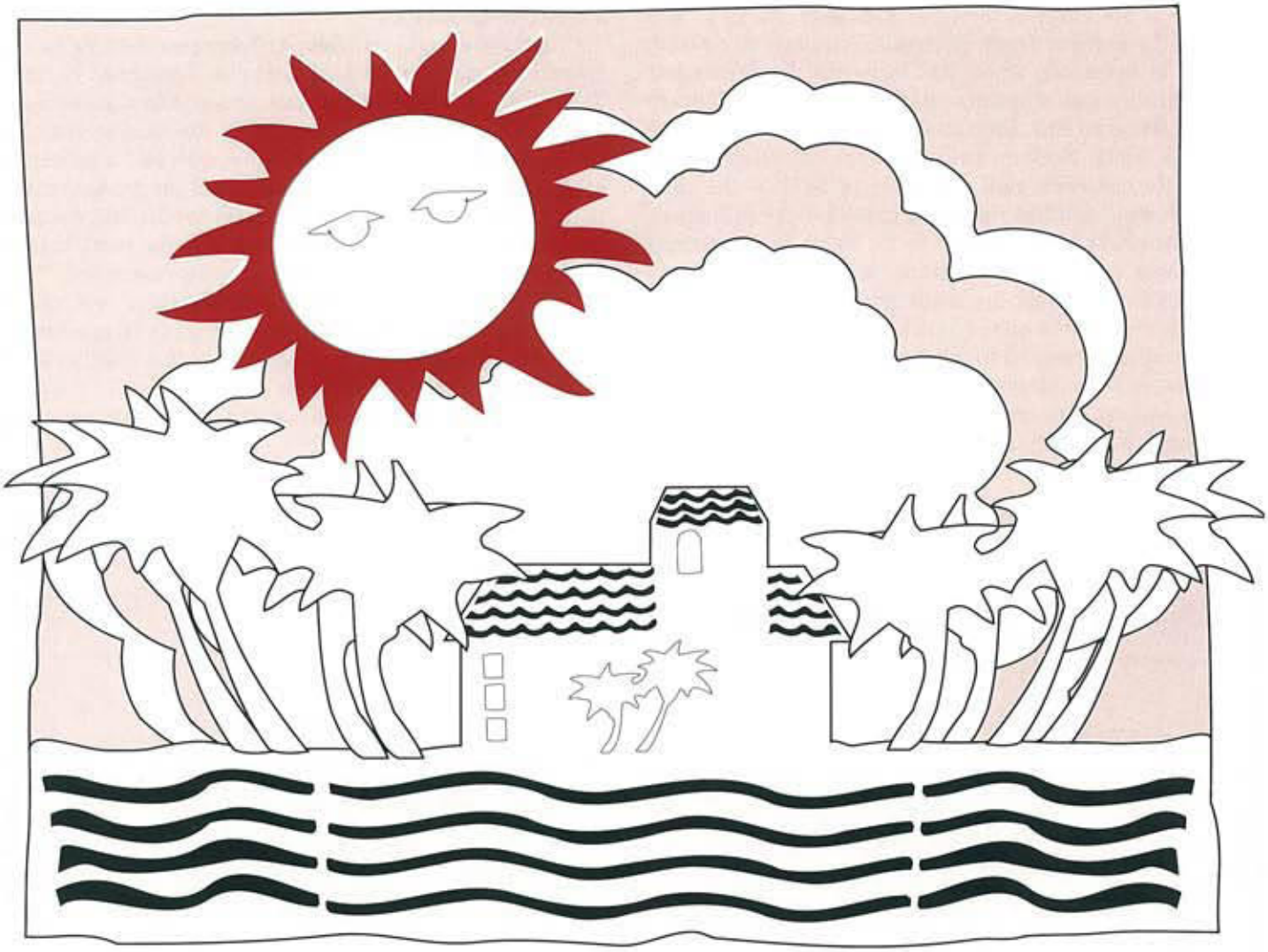


ALABAMA STATE BAR ANNUAL MEETING

July 18 - 21

Perdido Beach Resort • Orange Beach, Alabama

Registration materials and hotel reservation forms will be in the mail soon.

DISCIPLINARY REPORT

Suspension

• On October 28, 1993, the Supreme Court of Alabama suspended Bessemer attorney **John H. McEniry, III** for a period of six months, effective that date. McEniry was retained by a client from St. Louis, Missouri to redeem a house in Bessemer, which had been sold for delinquent taxes. McEniry was originally retained on or about January 6, 1990. Between that time and the time of his discharge on May 7, 1992, McEniry took virtually no action on the matter. He had been paid a retainer of $425 at the time of his retention and had received a check for the delinquent taxes. The client hired counsel in St. Louis in an attempt to get some communication from McEniry. After he was fired, McEniry returned the check he had been sent a year earlier for the delinquent taxes. It was unnegotiated. McEniry failed to respond to the grievance or answer the formal charges filed against him by the bar. A default was entered against him on the merits. He did not appear at a hearing to determine discipline. McEniry's prior discipline established a pattern of willfully neglecting legal matters entrusted to him. [ASB No. 92-552]

Public Reprimand

• Montgomery attorney **John A. Taber** received a public reprimand without general publication on September 17, 1993. Taber filed a products liability case against Allis Chalmers arising from a work-related injury. After the lawsuit was filed, Taber was advised that Allis Chalmers had filed a petition in bankruptcy. Thereafter, Taber decided that the products liability claim had no merit and therefore did not file with the product liability trustee for Allis Chalmers with the result that the lawsuit was dismissed. Throughout the representation, Taber failed to adequately communicate with the client, and, specifically, failed to inform the client that the client had no meritorious claim against the Allis Chalmers Product Liability Trust. Taber plead guilty to a violation of Rule 1.4(a) for failing to keep the client fully informed concerning the status of a legal matter. [ASB No. 92-165] ■

NOTICE OF SUBROGATION

Do you represent a client who has received medical benefits, lost wages, counseling, or funeral or burial assistance from the Alabama Crime Victims Compensation Commission?

When your client applied for compensation benefits, he/she signed a subrogation agreement pursuant to *Code of Alabama, 1975,* Section 15-23-1, *et. seq.* The attorney who has filed suit on behalf of a crime victim should give notice to the Alabama Crime Victims Compensation Commission upon filing a claim on behalf of the recipient. If notice is given, attorney fees may be awarded in an amount not to exceed 15 percent of the amount subrogated to the Commission.

If you have any questions, contact Anita Drummond or Sara Myers at the Alabama Crime Victims Compensation Commission, (205) 242-4007.

LEGISLATIVE WRAP-UP

By ROBERT L. McCURLEY, JR.

1994 Regular Session

Over 1,000 bills have been introduced in the Legislature. However, the only topic that is making the news is education reform and its accompanying tax reform.

There are numerous items that lawyers should be aware of, many of which could pass. Any lawyer having a concern with the legislation mentioned should contact their state senator or state representative to voice their support or opposition.

Bar activities

In January, the supreme court removed the maximum number of times a person could sit for the bar exam. In response, the Legislature has before it a general act and a constitutional amendment, both of which limit to five the number of times one may take the bar.

There is also pending a bill to place two district judges on the Court of the Judiciary and the Judicial Inquiry Commission.

The Administrative Office of Courts has a bill to regulate court-appointed attorneys by establishing statewide procedures promulgated from AOC.

Business organizations

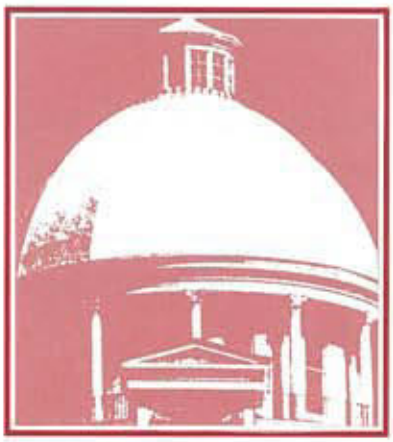
Pending is the Law Institute's revised Business Corporation Act based on the Model Business Corporation Act. See May 1993 *Alabama Lawyer*.

A bill that proposes a comprehensive scheme of regulation and policing of charitable funds solicitation is also pending.

Family law

A bill has been introduced that establishes that a judge must award joint custody in every case except for rare circumstances and that a 13-year-old child determines who will be his or her custodial parent. Another bill provides that paternity cases may be relitigated even after a final judgment when there is new scientific evidence that excludes the legal father. Several significant changes in the Uniform Parentage Act are made in another bill. Also pending is a bill that allows a withholding order to be terminated when the children reach majority by the payor parent's filing of an affidavit. The termination order becomes effective unless the other spouse objects within 20 days.

Several bills are pending that would



allow the present value of retirement pension benefits to be included in the spousal estate and subject to a property settlement.

Criminal laws

Several bills are pending that would add to the list of offenses that constitute capital punishment, and require life without parole for those who commit a similar offense twice regardless of the degree of the felony. There is increased punishment for: hate crimes; crimes against judges and court personnel, young people, and the elderly; and sexual abuse. Another bill excludes from youthful offender status anyone 16 years of age or older who commits violent crimes.

Last year, the bail system was revised. Pending again by the same sponsor is another bail reform bill.

Several bills have been introduced concerning handguns. One bill restricts handguns from schools. Another bill allows cities to regulate handguns, while a third bill provides for increased punishment for the use of handguns.

Driving laws

Also pending are bills to reduce the amount of the alcohol content in the blood for presumption of driving under the influence from .10 to .08. One bill allows the director of Public Safety to revoke a driver's license upon an arrest for DUI. In one bill a fourth DUI will be a felony. Another bill provides that an arrest for driving with a revoked license will cause a forfeiture of the vehicle.

Another proposed bill will require a new tag every time a car is sold.

New boating laws are pending that would require a license to operate a boat and restrict drivers to those 14 years of age and older. Further, there is a proposal for a DUI law for boat operators similar to the vehicular DUI law.

In one bill a person who subleases a leased car will be deemed to have committed a crime.

Real estate

One bill requires the address of the grantee to be on the deed, while another requires the grantor, grantee or attorney to certify on the deed as to the actual value of the property conveyed. Still another bill makes it a crime not to satisfy a lien.

Liability

Bills are pending to provide immuni-

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.

ty from civil suits against all peace officers, architects, engineers and builders.

Summary

Much of the legislation that passes this year will probably come in the last few days due to the priority given to education reform. The Legislature is not expected to adjourn until Monday, April 25, 1994. However, it will be approximately September before pocket parts to the *Code of Alabama* will be available. Nevertheless, copies of these bills can be obtained by contacting the secretary of the Senate or clerk of House.

New dean

The Institute is housed at the University of Alabama School of Law. Upon Dean Nat Hansford's retirement, Professor Ken Randall was appointed the new dean. Dean Randall joined the faculty in 1985 after practicing law on Wall Street. He has a J.S.D. and LL.M. from Columbia and a second LL.M. from Yale. His specialty is international law.

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

NOTICE OF ELECTION

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

COMMISSIONERS

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits: 2nd; 4th; 6th, place no. 2; 9th; 10th, places no. 1, no. 2, no. 5, no. 8, no. 9; 12th; 13th, place no. 2; 15th, place no. 2; 16th; 20th; 23rd, place no. 2; 24th; 27th; 29th; 38th; and 39th. Additional commissioners will be elected in these circuits for each 300 members of the state bar with principal offices therein. The new commissioner positions will be determined by a census on March 1, 1994 and vacancies certified by the secretary on March 15, 1994.

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, 1994).

Ballots will be prepared and mailed to members between May 15 and June 1, 1994. Ballots must be voted and returned by 5 p.m. on the second Tuesday in June (June 14, 1994) to state bar headquarters.

Dear Alabama State Bar Member/Spouse,

The Alabama Judicial Department is now in its new building. Requests to see the Judicial Building and learn about Alabama's Judicial process are at an all-time high.

Here is why I am writing to you. We have established a successful Docent Program composed of spouses of the justices and judges, members of the bar, state employees and retirees. Unfortunately, we do not have enough volunteers to cover our busy tour schedule. We are looking for capable, informed people to give us a hand in educating Alabama's citizens about our judicial process. People such as you, who are already involved in the judicial system, can offer so much to the school children and adults who visit. We would be delighted to have your participation. Many of our docents volunteer four hours one to two days a week; however, we can arrange the schedule to accommodate you. If you are interested, please contact me as soon as possible so that I can provide you with the training and materials necessary.

Phone: 242-4349 or write:
Mr. Bob Warren
Tour Coordinator
Judicial Building - 300 Dexter Avenue
Montgomery, Alabama 36104-3741

RECENT DECISIONS

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

UNITED STATES SUPREME COURT

In rem forfeiture of real estate requires notice and hearing

United States v. Good Real Property, Case No. 92-1180 (December 13, 1993). Must government agents, absent some exigent circumstance, notify real estate owners and afford them a hearing before seizing their property under civil forfeiture? The Supreme Court, in a five to four decision, answered yes.

The Supreme Court's decision in this case limited a major weapon in the war on drugs. Justice Kennedy held, *inter alia:*

> Although Congress designed the drug forfeiture statute to be a powerful instrument in enforcement of the drug laws, it did not intend to deprive innocent owners of their property.

Continuing, Justice Kennedy noted:

> the right to maintain control over [one's] home, and to be free from governmental interference, is a private interest of historic and continuing importance that demands due process before it can be stripped away.

The police found drugs and drug paraphernalia in Good's home. Good pleaded guilty to promoting a harmful drug in violation of Hawaii law. More than four years later, the United States filed an *in rem* action seeking civil forfeiture of the house and land under 21 U.S.C. 881(a)(7), on the ground that the property had been used to commit or facilitate the commission of a federal drug offense. A U.S. Magistrate Judge, in an *ex parte* hearing, issued a warrant authorizing the property's seizure, and the government seized the property without prior notice to Good and without an adversary hearing.

Good sought the return of the property arguing that he had been deprived of it without due process. The government argued that compliance with the Fourth Amendment suffices when the government seizes property for purposes of forfeiture because civil forfeiture serves a "law enforcement purpose".

The Supreme Court, through Justice Kennedy, rejected that argument, acknowledging that the Fourth Amendment does place restrictions on seizures conducted for purposes of civil forfeiture, but stated that the Fourth Amendment is not the sole constitutional provision in question when the government seizes property subject to forfeiture. The Justices reasoned that both the Fourth and Fifth amendments were implicated and that the proper question was not which amendment controlled, but whether either was violated.

The Court concluded that it would tolerate exceptions to the general rule requiring pre-deprivation notice and hearing only in extraordinary situations in which some valid governmental interest is at stake that justifies postponing the hearing until after the event. Significantly, the Supreme Court held that the seizure of real property under §881(a)(7) *is not one of those extraordinary instances; unless exigent circumstances are present, the due process clause requires the government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture.*

Alabama Court of Criminal Appeals

Prosecutor's comment on defendant's silence constitutes plain error

Powell v. State, Case No. CR-91-1522 (September 30, 1993). In 1987, Powell was convicted of the capital offense of murder during the commission of a robbery and murder during the commission of a burglary. He was sentenced to death.

On direct appeal, the Alabama Court of Criminal Appeals reversed Powell's conviction based on the prosecution's discriminatory use of its peremptory challenges in violation of *Batson v. Kentucky*, 476 U.S. 79. In 1991, Powell was retried and found guilty on both counts of the indictment and was once again sentenced to death. In an opinion authored by Judge Bowen, the court of criminal appeals found plain error and reversed and remanded for a new trial.

During the closing argument at the guilt phase, the district attorney stated:

> "Another couple of questions that y'all were asked about [during voir dire examination] has to do with direct and circumstantial evidence. Y'all probably have gathered through listening to several days of testimony in this case that there were two people involved in the commission of this crime. The victim, Esther Herchenroeder, is dead. She cannot come in and testify.
>
> "The second person involved is the defendant, Timothy Powell. There are no eyewitnesses to this crime. There were two people involved. So what do you have to look at if you don't have eyewitness testimony? You have got to go on circumstantial evidence." (R. 1977.)

There was no objection by the defense counsel to this argument. However, in a death penalty case, the court of criminal appeals is not foreclosed from reviewing the entire record for "plain error."

Presiding Judge Bowen concluded that the prosecutor's comment adversely affected Powell's substantial right not to be compelled to give evidence against himself. *Ala. Const.*, Article I, Section 6; see also *Ala. Code* (1975), §12-21-220:

If the district attorney makes any comment concerning the defendant's failure to testify, a new trial must be granted on motion filed within 30 days from entry of the judgment.

In reviewing the prosecutor's comments, the Alabama Court of Criminal Appeals followed the "per se" line of cases with the following admonition:

> In a case where there has been a direct reference to a defendant's failure to testify and the trial court has not acted

promptly to cure that comment, the conviction must be reversed.

Ultimately, the appellate court could not escape the conclusion that the prosecutor's statement "was manifestly intended to be, or was of such character that the jury would naturally and necessarily take it to be, a comment on the failure of the accused to testify." See *Ex parte Wilson*, 571 So.2d at 1261, *quoting Marsden v. Moore*, 847 F.2d 1536, 1547 (11th Cir. 1987), *cert. denied*, 488 U.S. 983 (1988).

Bankruptcy Decisions

Sixth Circuit rules bankruptcy court may not modify alimony, maintenance or support

Jean Fitzgerald v. John P. Fitzgerald, In re John P. Fitzgerald, No. 92-6520 (Nov. 10, 1993), 9 F.3d 517—Previously, Sixth Circuit Judge Cornelia Kennedy in *Long v. Calhoun*, 715 F.2d 1103 (1983) held that bankruptcy courts are empowered to consider the present needs of parties in deciding whether an obligation is in the nature of alimony, support or maintenance, but that the test was limited to situations where the nature of the obligation was unclear. In *Fitzgerald*, the parties, who divorced after 11 years, agreed that payments to the wife were for her support until death or remarriage. However, her earnings increased from $1,500 to $2,500 per month, and the debtor-husband argued that she no longer required support. An appeal was taken from the bankruptcy court discharging the ongoing requirements, as well as $90,250 in back support. Both the district court and Sixth Circuit reversed. Judge Kennedy held that the "present needs" test is used only when the divorce court decree does not make plain the nature of the obligation, but when it is clear and undisputed alimony or support, Congress has determined that such payments cannot be discharged.

Comment: In a Maine bankruptcy case, in which there was an obligation for the debtor to contribute to his children's college education, the court held such to be non-dischargeable on the theory that college education was essential because both parents were college educated. (*Warren v. Warren*) Nov. 4, 1993.

Toxic tort litigation not allowed to corrode judgment; bankruptcy judge cannot stay enforcement of supersedeas bond

Edwards v. Armstrong World Industries, 24 B.C.D. 1445; 6 F.3d 312, (5th Cir. 1993).

In an asbestos poisoning case, plaintiff obtained judgment against debtor. Debtor obtained a supersedeas bond to stay execution while appeal was pending. After losing the appeal, debtor filed for Chapter 11. Under Section 105(a), the bankruptcy court stayed execution against debtor, which stay applied to the enforcement of the supersedeas. On appeal, the Fifth Circuit held that Section 362(a) of the Bankruptcy Code did not apply to the surety—upon losing the appeal, it became a separate and individual case, and that Section 105(a) did not give the bankruptcy court authority over assets not property of the estate.

Bankruptcy Court may accept late filed complaint if creditor relies on bankruptcy court's incorrect deadline

In re Themy, 6 F.3d 688 (10th Cir. 1993).

The bankruptcy court, on a petition filed September 17, 1990, set the Section 341 meeting for October 22, 1990 and in the notice named December 21, 1990 as deadline for objecting to discharge or to except a debt from discharge. After a continued Section 341 meeting, the court sent another notice setting February 15,

The current term of the office of United States Magistrate Judge John L. Carroll is due to expire on November 24, 1994. The United States District Court is considering the reappointment of the incumbent magistrate judge and is required by law to establish a panel of citizens to consider the reappointment of the incumbent magistrate judge to a new term of office.

The duties of the magistrate judge position are demanding and wide-ranging and will include: (1) conduct of most preliminary proceedings in criminal cases; (2) trial and disposition of misdemeanor cases; (3) conduct of various pretrial matters and evidentiary proceedings on delegation from the judges of the district court; (4) trial and disposition of civil cases upon consent of the litigants; and (5) examination and recommendation to the judges of the district court in regard to prisoner petitions and claims for Social Security benefits.

Comments from members of the bar and the public are invited and should be directed to:

Hon. Solomon S. Seay, Jr.
Chairman, Merit Selection Panel
c/o Thomas C. Caver, Clerk
United States District Court
P.O. Box 711
Montgomery, Al 36101-0711

Comments should be received no later than June 15, 1994.

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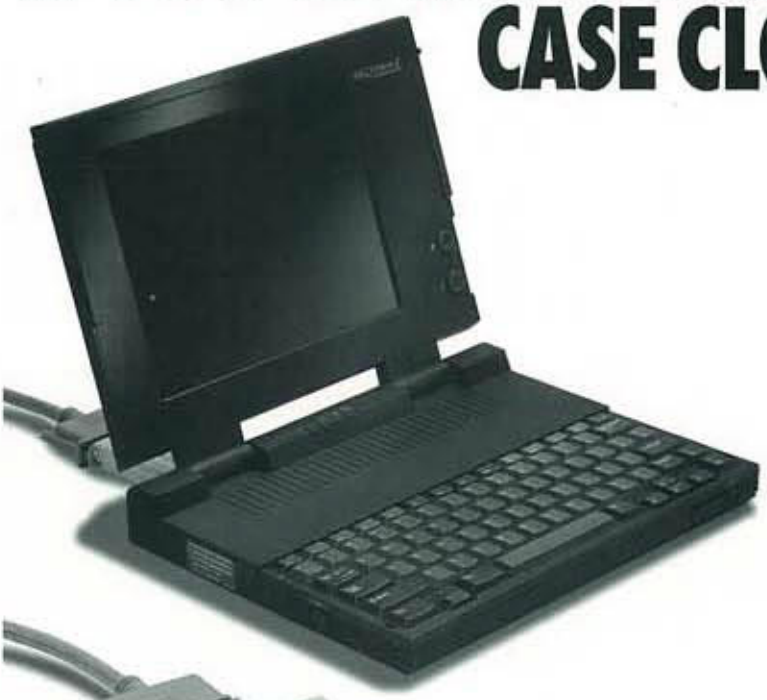

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1991 as the deadline. When a creditor filed complaint on February 14, 1991, the debtor moved to dismiss because the deadline under Rules 4004(a) and 4007(c) had been exceeded. The bankruptcy court and district court held that the bankruptcy court had authority to correct its own error, and ruled for the creditor. The Tenth Circuit affirmed, stating that a court has inherent power to correct its own mistake; that a creditor should be entitled to rely on a court's own orders; and, further, that 11 U.S.C. §105(a) gives the bankruptcy court the power to prevent an abuse of process.

Insider guarantor's hopeless insolvency does not constitute an exception to *DePrizio* Rule of allowing one-year period preceding bankruptcy to determine preference

In re Robinson Bros. Drilling, Inc., 6 F.3rd 701 (10th Cir. 1993)

The insider guarantor had a negative net worth of $96 million. The alleged preference payment reduced the liability only $175,000. Nonetheless, the Tenth Circuit held that the benefit requirement of 547(b)(1)(b) and 547(4)(B) is satisfied when there is a "quantifiable monetary reduction" in the guarantor's financial liability to a third party.

Comment: In this case, which definitely affirmed *DePrizio*, one small bit of comfort for lenders may exist in dictum by the court, when it opined that there may be the possibility of a pre-petition transfer of property so valueless as to render the preference provision inapposite, even though it did not apply to the facts of this case (see pages 703, 704). However, it appears reasonably certain that the bankruptcy bill before Congress, if and when enacted, will reverse *DePrizio*.

Eleventh Circuit holds Florida "opt-out" exemption statute for "employee benefit plans" available for Chapter 7 debtor as it is not preempted by ERISA

In re Schlein, 8 F.3d 745 (11th Cir. 1993). Schlein was an emergency room physician working as an independent contractor who, with his wife, filed a Chapter 11 petition. Schlein has made pre-petition deposits to IRAs and set up simplified employee pensions which were combined into accounts at each of two banks. After conversion to Chapter 7, debtors claimed as exempt all monies in the IRA/SEP accounts, amounting to $170,072.40. The bankruptcy judge sustained the trustee's objection on the basis that ERISA (29 U.S.C. §1144(a)) preempts state exemption laws as they relate to an ERISA employee benefit plan. The district court affirmed even though the Florida exemption statute was consistent with ERISA's requirements.

The Eleventh Circuit reversed, holding that ERISA does not preempt state exemptions passed pursuant to the opt-out provisions of the Bankruptcy Code (11 U.S.C. §522(b)). In so holding, the court of appeals construed §514 of ERISA, §522 of the Bankruptcy Code, and the pertinent Florida exemption statutes. Although Florida had opted out of the federal exemption scheme of §522(d) of the Bankruptcy Code, it has opted back in as to §522(d)(10) which covers, *inter alia*, pension and profit sharing plans. The court held that the Florida exemption statutes "related to" employee benefit plans covered by §514(a) of ERISA and that but for the savings provision of §514(d) of ERISA, the Florida statutes would be preempted. In so holding, it relied extensively on *Shaw v. Delta Air Lines*, 103 S.Ct. 2890 (1983) and the Fifth and Eighth circuits in similar cases, the reasoning being that the "opt-out" section of the Bankruptcy Code would be ineffective if the 514(d) ERISA exception did not apply.

Comment: With this opinion, it would seem that the Alabama amendment to Section 19-3-1(b) and (c) Alabama Code, should likewise be considered as not preempted by ERISA. It may be that the Alabama statute is not affected by *Patterson v. Shumate*, 112 S.Ct. 2242 (1992). In 1987, Chief Judge Pointer of the Northern District held that the Alabama Spendthrift Law did not protect a chapter 7 employee-debtor's company's pension. *In re Pilkington*, 89 B.R. 911 (N.D.Ala. 1987). Following this in 1990 the Spendthrift section was amended to add sub-sections (b) and (c). Alabama, as Florida, has opted out of the federal exemptions and a debtor should be able to exempt an IRA, SEP, company pensions and profit sharing plans. But, as this subject is greatly involved, the reader is urged to do the necessary study and reach his or her own conclusion. Please note also that Section 19-3-1 Alabama Code is not an exemption statute as such, being listed in the Code under the chapter entitled *Trusts*. ■

David B. Byrne, Jr.

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

Wilbur G. Silberman

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

• M·E·M·O·R·I·A·L·S •

Annette Clark Dodd

The Cumberland School of Law and the legal profession suffered a significant loss with the death of Professor Annette Clark Dodd on Friday, October 22, 1993. Annette began her long and useful career at Cumberland in 1967 when she was named law librarian. She held that position until 1973 when she was appointed associate professor of law. In 1978 she was promoted to the rank of professor of law. Her 26-year career at Cumberland made her the most senior member of the current faculty.

Specializing in property, decedents estates and domestic relations, Annette was genuinely devoted to her students and imbued them with both a knowledge and an appreciation of the highest ideals of the law. Her energy, strength of spirit and sense of humor endeared her to all who knew her. We remember with respect her talents as lawyer and teacher and will never forget her untiring commitment as a friend and advocate for her students.

Annette Dodd not only was among Cumberland's most popular teachers, she was greatly appreciated for her work on behalf of the legal profession. After graduation from the University of Alabama School of Law she was named a judicial clerk for Justice Pelham Merrill, thus becoming one of the first women to clerk for the Alabama Supreme Court. Active in the Alabama State Bar, she assisted in the revision of the Alabama Probate Code and authored the Rules of Practice in Juvenile Court. The advisory committees for the Probate Code, Juvenile Justice, Legal Education, Alternative Dispute Resolution and Judicial Article Implementation benefitted from her expertise and energies.

Recognizing the importance of Annette's contributions to the legal profession and to the Cumberland School of Law, many of her friends and former students have established an endowed scholarship at Cumberland to honor her memory. Students were always her primary concern. The endowment, proving need-based scholarships to second and third-year law students, will enable deserving young men and women to complete their legal education. The influence of a great teacher thus will be perpetuated in a useful and significant manner.

Annette Dodd, 55 years old at the time of her death, was a devoted wife and mother. Her husband, Hube Dodd, her children, Michael, David and Hube, Jr., and a legion of her friends and former students will sorely miss her.

Parham Williams
Vice-President and Dean
Cumberland School of Law
of Samford University

Miller Arrington Widemire

Whereas, the Mobile Bar Association notes with regret the unexpected and untimely death in Mobile, Alabama on August 26, 1993 of member Miller Widemire.

Now, therefore, be it resolved that Miller was born in Sylacauga, Alabama and attended the University of Alabama where he obtained his undergraduate degree, as well as his University of Alabama School of Law degree in 1958, and began practice in Mobile and a long membership in the Mobile and Alabama State Bar associations. He served his country with distinction in the U.S. Air Force, from which he was separated with the rank of captain. He served as director of the U.S. Small Business Administration Southeast Region in Atlanta. Miller specialized in corporate reorganization and bankruptcy law, and was widely known and respected by both his fellow lawyers and his clients.

He was a member of St. Paul's Episcopal Church, as well as the Lion's Club and the Athelstan Club. He was also active in local and state politics with the Republican Party.

Miller Widemire was a devoted husband and father, leaving surviving his wife, Barbara May Widemire of Daphne, Alabama; two sons, Miller Arrington Widemire, Jr. of Mobile and William Reese Widemire of Hattisburg, Mississippi; two brothers, Edwin Luther Widemire, Jr. and Dewitt Parker Widemire, both of Mobile; and other relatives.

Thomas E. Bryant, Jr.
President
Mobile Bar Association

• M·E·M·O·R·I·A·L·S •

M. Louis Salmon

M. Louis Salmon was born in Mobile, Alabama on August 30, 1923, and departed this life September 26, 1993.

Louis graduated from Murphy High School in Mobile in 1940. He received a B.S. degree from the School of Commerce and Business Administration, University of Alabama, in 1943, an LL.B. degree from the University of Alabama School of Law in 1948, where he was a member of Farrah Order of Jurisprudence (now Order of the Coif), and, in 1988, he was awarded a Doctor of Laws from the University of Alabama in Huntsville.

Louis served his country in World War II, European Theater of Operations, and was discharged in 1946 with the rank of captain, infantry, and was awarded the Purple Heart and Combat Infantry Badge.

In 1948, Louis married Elisabeth Echols Watts.

He moved to Huntsville with his wife in 1950 where he entered the practice of law with his father-in-law, Clarence L. Watts, who was noted for his participation in the famed Scottsboro trials.

Louis' law firm grew and in 1989, Watts, Salmon, Manning & Noojin, formerly Watts, Salmon, Roberts, Manning & Noojin, merged with Lange, Simpson, Robinson & Somerville, where Louis practiced until his death.

Louis is survived by his wife; his two children, John Houston Salmon and Margaret Elisabeth S. West; and two grandchildren, Ashlyn Elizabeth Salmon and James Louis Salmon.

Louis was an admired and respected civic and business leader. He was on the board of First Alabama Bank, Huntsville, and First Alabama Bancshares, Inc. He served his community and his profession as president of the Huntsville Rotary Club; president of the Huntsville Industrial Expansion Committee; chairman of the board of trustees of the University of Alabama Huntsville Foundation; member of the University of Alabama President's Cabinet; a trustee of Randolph School; president of the Alabama Chamber of Commerce; president of the Huntsville-Madison County Bar Association; a member of the board of the University of Alabama Law School Foundation and former president; president of the University of Alabama Law School Alumni Association; and general chairman—law, University of Alabama Law School Completion Campaign. Louis was a recipient of the Distinguished Service Award from the Huntsville-Madison County Chamber of Commerce and a recipient of the National Association of Christians and Jews Brotherhood Medal.

Louis was an active member of the Twickenham Church of Christ in Huntsville, Alabama and dedicated to its teachings.

No memorial about Louis would be complete without noting his devotion to the Republican party, and his love for the University of Alabama in Huntsville, the University of Alabama in Tuscaloosa, the service to our young people which those institutions provide, and the University's storied football teams.

This kind and gentle man was well known for his friendly personality, legal ability, trusted judgment, and total concern and devotion to his family, community and church.

Louis was one of those who lived life to its fullest and made a real difference by his presence.

The legal profession, his family and his many friends and clients will miss him.

Frank K. Noojin, Jr.
Lange, Simpson, Robinson & Somerville

Gilbert Ernest Jones, Jr.

Be it resolved, by the Executive Committee of the Birmingham Bar Association, that:

Whereas, Gilbert Ernest Jones was an active member of the bar of this city and the state of Alabama for more than 50 years and departed this life on August 9, 1993; and,

Whereas, G. Ernest Jones attended Woodlawn Grammar School and graduated from Ramsay High School; and,

Whereas, G. Ernest Jones graduated from the University of Alabama and the Birmingham School of Law; and,

Whereas, G. Ernest Jones was a receiving attorney with the Department of Justice during the 1940s and was a veteran of World War II; and,

Whereas, G. Ernest Jones practiced with Betown, Jones & Jones and later Jones & Jones; and,

Whereas, we wish to express our deep regard and sense of loss in the passing of our brother in our honorable profession.

Now, therefore, it is hereby resolved, that this resolution be spread upon the minutes of this Executive Committee and that copies thereof be sent to G. Ernest Jones' wife, Elizabeth Ann Jones, and his daughter, Eva Parsons.

William N. Clark,
President
Birmingham Bar Association

• M·E·M·O·R·I·A·L·S •

Douglass P. Wingo

Be it resolved, by the Executive Committee of the Birmingham Bar Association, that:

Whereas, Douglass P. Wingo was an active member of the bar of this city and the state of Alabama for nearly 70 years and departed this life on June 20, 1993; and,

Whereas, Douglass P. Wingo had been a citizen of this city since 1900 and graduated from Birmingham High School in 1914; and,

Whereas, Douglass P. Wingo loved athletics and sports, having played quarterback for his high school football team and continued to play handball regularly until he was more than 75 years old; and,

Whereas, Douglass P. Wingo was a graduate of Marion Military Institute and the Washington and Lee Law School; and,

Whereas, Douglass P. Wingo was a member of the United States Marine Corps in combat service in France during World War I and again served with the Marines in Okinawa during World War II; and

Whereas, Douglass P. Wingo was a quiet and principled man who sought to help others through instruction and training by teaching at Marion Military Institute and serving as a coach at Birmingham-Southern College; and,

Whereas, Douglass P. Wingo was the president of the Birmingham Bar Association in 1942 and actively practiced law until 1977; and,

Whereas, we desire to express our deep regard and sense of loss in the passing of our brother in this honorable profession.

Now, therefore, be it hereby resolved that this resolution be spread upon the minutes of this Executive Committee and that copies thereof be sent to Douglass P. Wingo's wife, Ethel Ray Wingo, and his son, Harvey Wingo.

William N. Clark,
President
Birmingham Bar Association

James Francis Berry, III
Cullman
Admitted: 1949
Died: November 1, 1993

Edward Laughton Colebeck
Florence
Admitted: 1950
Died: December 15, 1993

George Wilson Dean, Jr.
Chestertown, Maryland
Admitted: 1956
Died: December 7, 1993

Hoyt Massey Elliot
Jasper
Admitted: 1948
Died: December 28, 1993

Ben A. Engel
Birmingham
Admitted: 1938
Died: December 31, 1993

Arthur Freeman Fite, Jr.
Anniston
Admitted: 1948
Died: December 30, 1993

John Peter Kohn, Jr.
Montgomery
Admitted: 1925
Died: November 27, 1993

Grady Jackson Long
Hartselle
Admitted: 1939
Died: October 13, 1993

John Howard McEniry, Jr.
Bessemer
Admitted: 1941
Died: October 16, 1993

Connie Walter Parson
Birmingham
Admitted: 1984
Died: December 31, 1993

Lee Joseph Tyner
Opelika
Admitted: 1936
Died: October 15, 1993

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

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Please note:

The publication date of the bar directories has been changed from December 1993 to June 1994.