# The Alabama Lawyer

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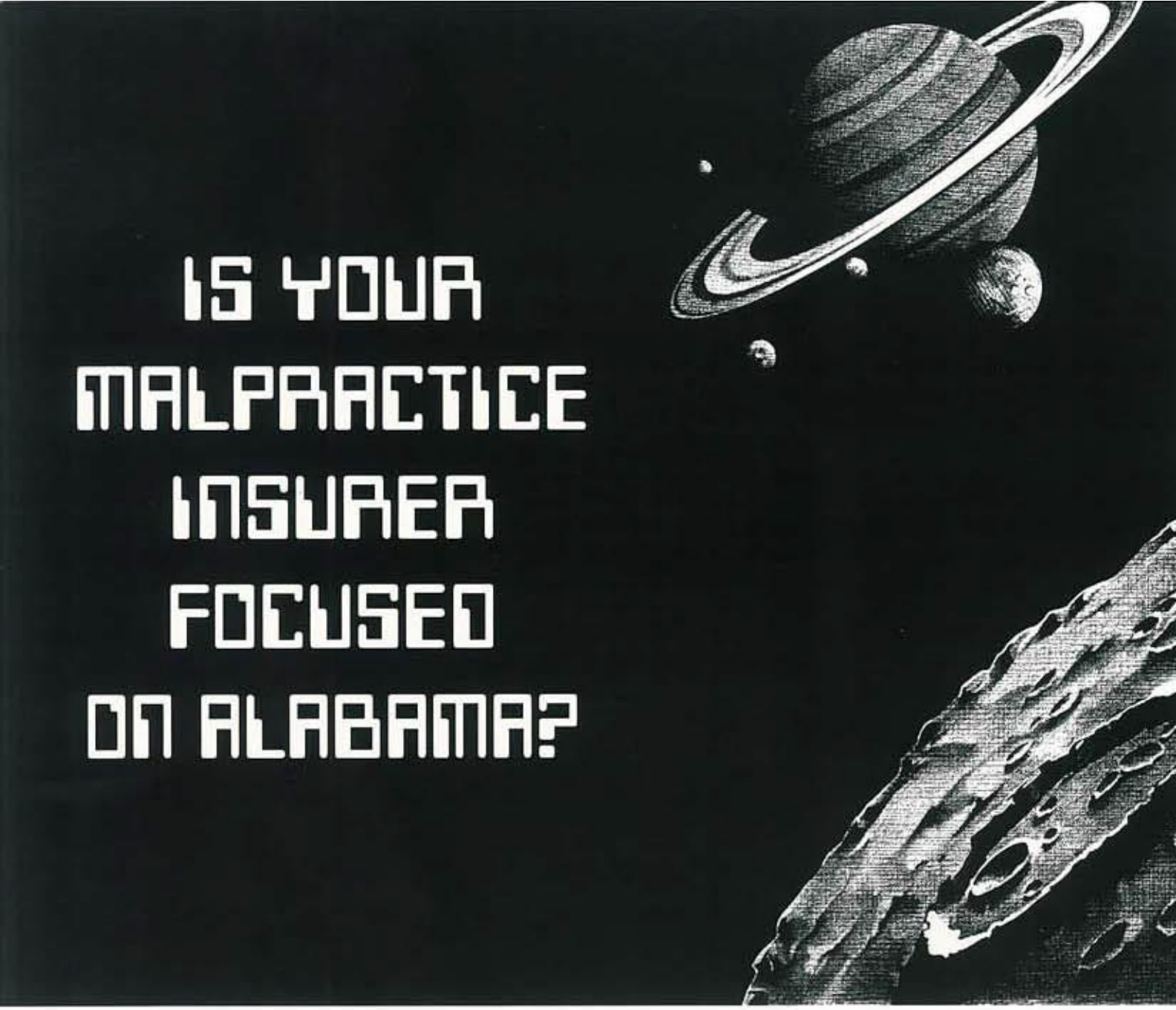


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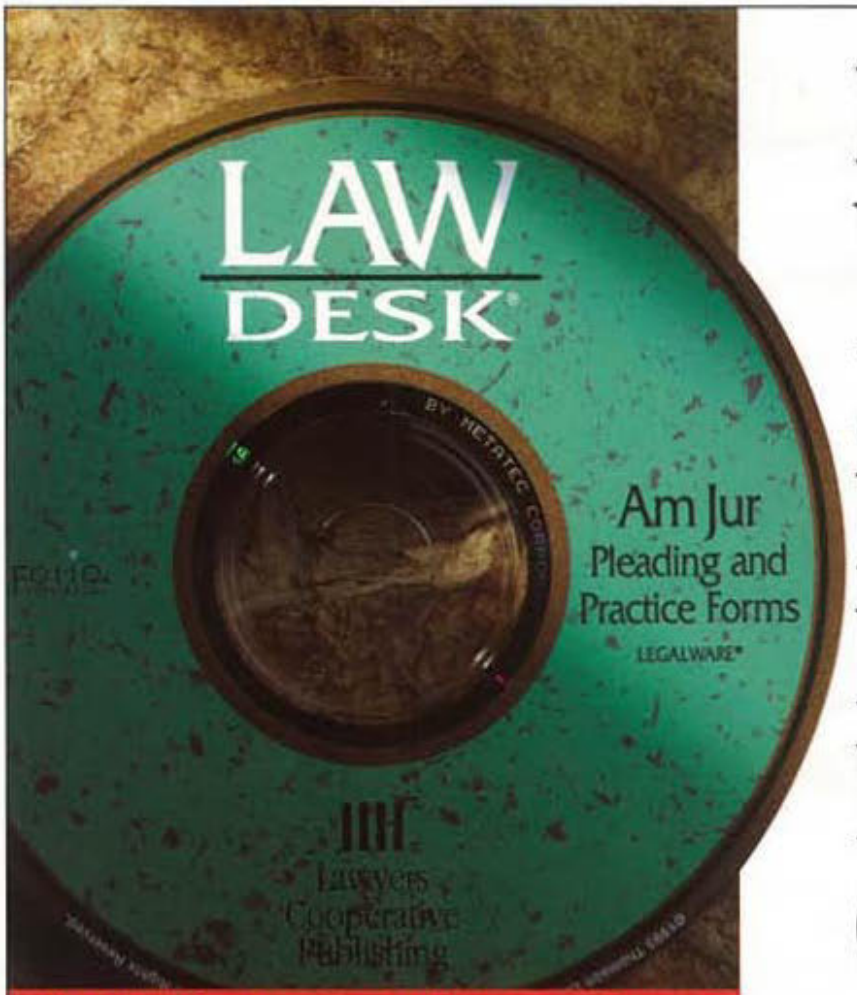


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# IN BRIEF

March 1995 Volume 56, Number 2

## ON THE COVER:

The new **Mobile Government Plaza** and the **Mobile Visitor Center** are both situated in the heart of Mobile's historical district. For further information see page 68.

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

## INSIDE THIS ISSUE:





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# CATCHING UP WITH ALABAMA STATE BAR PRESIDENT BROOX G. HOLMES

**Q. Broox, we have just returned from the Circuit Judges Conference, and you discussed with the attendees the theme of your administration. Share that with our readers.**

**A.** I had the good fortune to serve on the board of bar commissioners for a few years before I sought the job as president, and I observed that lawyers have become somewhat fragmented in the work of the bar. We don't seem to have unified support for a lot of the functions of the bar that we are charged with under the *Code of Alabama*. This has come about in recent times, in my view, because of the increased emphasis on specialization and the interest of lawyers in their own specialties. It occurred to me that if we are going to achieve these things that the bar is charged with doing, we need to have more unity. After all, we are a unified bar, which means that every lawyer who is admitted is a member of the Alabama State Bar and ought to support the bar.

What I set about to do, and I expressed it in the first

## ON THE COVER:

**Mobile Government Plaza**

Unlike a traditional courthouse or city hall, this is the nation's first structure to combine a city government, county government, and local judicial system into one facility.

The Plaza consists of a ten-story **administration building**, a nine-story **courts building,** and a massive public atrium.

The atrium was designed to be a friendly, open space, similar to a town square. One of the architects, Harry Golemon, states that, "The majority of government buildings are designed to keep people out. We wanted to design a building that invited people to feel a part of the government process."

Particulars: 581,000 square-feet, 18 different roof structures, $58 million budget, 21 courtrooms, 17 elevators, completed January 1995.

**Mobile Government Plaza**

**Atrium**

**Mobile Visitor Center — old Fort Conde**

Originally built in 1724-1735 by France, Fort Conde was headquarters for the colonial governments of France, Britain and Spain. Americans seized it in 1813. The fort consisted of casemates (firing positions) for 500 soldiers, and about 40 cannons.

The City of Mobile partially reconstructed the fort with local funds during the American Revolution Bicentennial. Today, the fort serves as Mobile's Visitor Welcome Center.

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

*President's Page*, is to help bring the bar together again. I say again, because the fragmentation and division we are experiencing is of a comparatively recent origin. When I started practice, I don't think we had nearly the divisiveness we have now. If I can begin this reunification, that will be a success in my mind, and that's the main theme in my term of office.

**Q. How do you see accomplishing this theme, or at least beginning it during your administration?**

**A.** We have already been in contact with representatives of the Alabama Trial Lawyers Association, Alabama Defense Lawyers, and others, to reach some consensus on how to resolve differences. We have contacted the presidents of the Circuit Judges and District Judges associations, and we find a lot of common ground that shows me that we have more things that we can do together than we realize. We adopted a long-range plan for the bar giving us direction as far as goals and what we need to keep in mind in going about the work of the bar. I think when our members, however diverse, really look at these goals, they will see that this is what we all ought to support, even though we differ on exactly what should be done to reach those goals.


*Robert Huffaker, editor of* ***The Alabama Lawyer****, recently sat down with President Holmes and had the opportunity to find out how the Mobile attorney feels about the first half of his term of office.*

**Q. One aspect of this theme touches upon selection or election of judges, and this issue seems to be particularly topical now. What is the role of the bar regarding judicial selection and judicial campaign issues?**

**A.** For the last four years, the bar has had a task force on judicial selection, appointed originally by then-President Harold Albritton. It was under the very capable leadership of Bob Denniston and still is. It was made up of a diverse group of Alabama lawyers, and it has studied what we were doing in Alabama with respect to selection of judges. It studied what was happening in other states, studied campaign methods and campaign problems, and as early as 1990, made the recommendation to the board of bar commissioners that we go to nonpartisan election of judges in Alabama. In December 1990, the board adopted a resolution recommending this and that legislation for that purpose be introduced in the Alabama Legislature. Legislation was introduced, but apparently the climate was not right for it to proceed. I don't know that it even got out of committee.

**Q. Do you intend to reintroduce that type of legislation?**

**A.** We have seen in recent elections, and particularly the November election, increasing problems with the election of judges running on party labels. We have also witnessed real and perceived problems with campaign contributions and the conduct of campaigns on all levels. I think that some of that is an outgrowth to running on party labels. There was and is a clamor from the public and from the newspapers and among the lawyers and judges calling for the bar to do something. The Alabama Judicial Conference was also studying these issues, and Chief Justice Hornsby supported the impetus for a citizens conference.

By December, the leadership of the Alabama State Bar felt that the bar should take the lead to improve the judicial selection process. As a result, on December 9, 1994, the board of bar commissioners unanimously adopted a resolution authorizing the formation of the Third Citizens Conference on the Alabama State Courts to study the selection of judges in Alabama, judicial campaign financing, and other important issues affecting the administration of justice in Alabama.

**Q. Who are the chairpersons of the Third Citizens Conference on Courts?**

**A.** We recommended that former Governor Albert Brewer and former Justice Oscar Adams head this Citizens Conference. They have each willingly accepted. I can't think of two more respected persons in the state to undertake this job, and we think that it is going to be a very worthwhile project. It's going to be conscientiously approached. A group of citizens who reflect the diversity in Alabama will be selected, and we hope that measures will be recommended to enhance the quality of justice and the manner in which we elect judges and conduct judicial campaigns in Alabama.

**Q. What is the timetable for that commission to report?**

**A.** We think that this work needs to be undertaken now. We have asked the Citizens Conference to make a report to the board of bar commissioners and the Judicial Conference by April 10, 1995. It's not something that we feel should wait for another election or wait even a year. It is hoped that legislation can be prepared for submission to the Legislature which goes into session in late April.

**Q. There has been a good bit of criticism about the bar's disciplinary procedures. Have changes been made to the process of lawyer discipline?**

**A.** One of the main duties of the bar is to carry out disciplinary measures involving lawyers. There has been, not only in Alabama but around the country, some criticism of the manner in which lawyer discipline is imposed. A major crit-

icism is that discipline is carried about by bar associations in complete privacy without the knowledge of the public.

Also, lay people were not involved in that process. We have addressed those criticisms. Last year our board recommended to the supreme court changes in our disciplinary rules, and, in September, we obtained an order from the supreme court approving the amendments. Action taken on lawyer discipline will be made available to the public upon a plea of guilty by the lawyer or a finding of guilty to charges. Also, we recommended an amendment, and the supreme court has entered an order, for one lay person to be added to each disciplinary panel. Lay people will now be involved in the disciplinary process. We have asked each bar commissioner to recommend a lay person in his or her circuit, with no connection to the judicial process, to serve as panel members. We have received some excellent recommendations. We should have the lay persons installed on the disciplinary boards by March.

**Q. You are the first president in a long time who has not worked with Reggie Hamner as the executive director. How has the transition been to the new executive director, Keith Norman?**

**A.** When I heard that Reggie was no longer going to be the executive director, that his term of office was going to end as mine started, I was greatly concerned. Spud Seale formed a search committee; I was on the search committee, and we received applications from a number of excellent candidates. We interviewed several candidates, and the search committee decided that the most qualified and knowledgeable candidate was already in bar headquarters—Keith Norman. The transition has gone smoother than I thought it would. Keith has worked in many areas of the bar in his position as programs director and this made the transition work. Reggie helped make the transition easy. I really don't think we've missed a beat. We've missed Reggie, but I think we are doing very well.

**Q. Another new appointment that has recently been announced is Susan Andres as director of communications. Why did the bar see a need for this position?**

**A.** A committee was appointed to see if we needed a full-time director of communications. Of course, we all know that the image of the bar, the image of lawyers, and the image of the profession are very important. We have suffered from not getting what we do in the bar across to the public. There is so much worthwhile work that goes on in the bar that is never heard of by the public. The committee recommended that we retain a full-time director of communications, and the board of bar commissioners agreed. Susan has been very successful in tracking the activities of the bar and in getting this information before the public through the media. That is very important as we participate in the Third Citizens Conference, bringing about changes in the judicial selection process.

**Broox G. Holmes**

**Q. You're about midway through your term. Is the position of the bar president more time-consuming that you had anticipated?**

**A.** I had heard various past presidents describe the problems they had and how time-consuming the job was. I attended the American Bar Leadership Institute last March, and there were a lot of warnings about how much time it would take. Of course, I have observed through the years that it does take a lot of planning time and a lot of time organizing the work of the bar and seeing it through. I had hoped for what I will call a "quiet year," because I have a full-time job in Mobile. While there have not been a lot of emergency situations, we are involved now in the Third Citizens Conference and what has come about as a result of that Conference. The bar should do its part in seeing that the Conference is as successful as it can be. I know that is going to take some time in addition to what we are already devoting to the ordinary duties of bar work. I think it's going to take more time than I expected, but I think it's work that has to be done. There are many other lawyers who are devoting a lot of time to the work of our bar. Unfortunately, you don't hear enough about their good work.

**Q. You've described the theme of your administration. At the end of your term, as you look back, what do you hope to have accomplished?**

**A.** I didn't know when I ran for president-elect that we would be faced with some of the issues we are now, particularly regarding judicial selection. I did know that I wanted to be a part of bringing together the bar. I think that if we can bring together the bar to do the work of the bar and do it better, and if we can bring about improvement of the judicial selection process, then I will have had a once-in-a-lifetime opportunity to be involved in leading the finest bar in the country.

**Q. Do you really believe that we will see tangible changes in the way we elect judges and conduct judicial campaigns in Alabama?**

**A.** I guess I'm an optimist, but I really believe that we are going to see some meaningful changes in the way we elect judges. I'm not sure whether it's going to be just the nonpartisan election of judges or some form of merit selection, but I think that with such a broad cross section of support from lawyers and judges and lay people, there are going to be some importatnt changes, changes for the better with improvements in the way we conduct judicial campaigns. I think that we have all learned something from the campaign problems we experienced last year. I really believe that there are going to be some meaningful changes in 1995. ■

# EXECUTIVE DIRECTOR'S REPORT

# IN THE SPIRIT OF PUBLIC SERVICE

In September 1993, the American Bar Association released the findings of a nationwide public opinion survey conducted by Peter D. Hart Research Associates, Inc. The survey indicated that the public's esteem for the legal profession had fallen to an all-time low and found that lawyers' favorability rating of 40 percent ranked above only that of stockbrokers and politicians.

While our nation's perception of the legal profession is not flattering, the legal professions in other countries are experiencing similar losses of esteem. For example, an editorial entitled "Rogue Lawyers" appeared in the October 25, 1994 edition of the *Mainichi Daily News*, the largest circulation English language newspaper in Japan. The editorial highlighted separate episodes of three Japanese attorneys who had been arrested the month before on criminal charges. In discussing the arrest of the three lawyers, the editorial lamented:

**Keith B. Norman**

> "Short of being arrested on criminal charges, more and more lawyers are becoming the subject of requests for disciplinary action filed by their clients by the bar association. According to the Federation, 439 such complaints were filed last year.
>
> "The Attorney-at-Law act says that lawyers should defend human rights and seek social justice, and they should value honor, secure trust and dignify their character. These words sound so empty in the face of this spate of scandals.
>
> "Some lawyers, evidently, are not above becoming involved in rampant money grubbing. Economic growth has broadened the scope of lawyers, with an increasing number solely looking after business interests and losing a sense of mission and ethics in the process."

Not surprisingly, the editorial stated that efforts should be made to get the "bad apples out of the barrel" and noted that bar association leaders had advocated strong ethics and supervision. Remarkably, the editorial concluded by saying that this endeavor should not be confined to the individual lawyer but that "the very soil that

## RESOLUTION
### by the Alabama Association of Circuit Judges

WHEREAS the Alabama Association of Circuit Judges has studied judicial selection for several years, and

WHEREAS this Association has been and continues to be concerned with maintaining integrity and public confidence in the judiciary and in judicial selection.

NOW THEREFORE be it resolved by the Association of Circuit Judges that this Association recommends to the Third Citizens Conference of Courts that methods and means of judicial selection be carefully studied to the end of maintaining integrity and restoring public confidence in judicial selection. As a starting point this Association recommends that judges be elected or selected without regard to political party affiliation by virtue of non partisan procedures.

DONE this the 20th day of January 1995.

***Editor's Note:*** *This resolution was approved overwhelmingly by the Alabama Association of Circuit Judges. An identical resolution was overwhelmingly approved by the Alabama Association of District Judges on January 20, 1995. These resolutions, along with the report of the Alabama State Bar's Task Force on Judicial Selection, will be presented later this spring to the Third Citizens Conference on the Alabama State Courts.*

breeds rogue lawyers needs to be examined and corrected." The Japanese writer penning this editorial apparently views the problems affecting that legal profession not as a specific problem of a single profession but of the entire Japanese society. This is an interesting perspective.

Closer to home, ABA President George Bushnell writes in the January issue of the *ABA Journal* that the time is now for our profession to shift its focus. He points out that many within the legal profession are concerned about the profession's "image problem." President Bushnell recommends that we need to worry less about our image problem. As he suggests:

> "The best way, the only way, to improve our image is so startlingly obvious that we often overlook it. You must serve the public. That is the obligation of every lawyer, for that is what we are all about."

Our profession should be a model for the rest of society. If we take to heart the spirit of public service which has long been the hallmark of the legal profession, not only can we change our image, but help transform society in a positive way at the same time. ■

# 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 3, 1995.

An award application may be obtained by writing or calling Ed Patterson, 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.

# LEGISLATIVE WRAP-UP

*By ROBERT L. McCURLEY, JR.*

In August 1992, the Alabama Law Institute empaneled a committee chaired by Larry Vinson of Birmingham to consider the desirability of Alabama's enacting revised Articles 3 and 4. Professor Gene Marsh of the University of Alabama School of Law served as reporter. The Committee met 14 times, concluding its work with a meeting in September 1994. Each provision of revised Articles 3 and 4 was subjected to scrutiny by committee members.

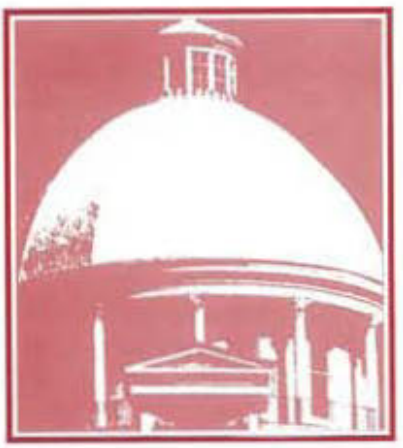
In addition to drafting this Act, the Committee drafted proposed amendments to the Alabama Mini-Code and other provisions in Alabama law to conform to the changes made in Articles 3 and 4 of the Uniform Commercial Code. The following review of this proposed Act is taken from the preface to the report to the Legislature written by Professor Marsh.

## Introduction to revised Articles 3 and 4 UCC

Promulgated in 1990 by the American Law Institute and the National Conference of Commissioners for Uniform State Laws, Revised Article 3 (with miscellaneous and conforming amendments to Article 4) was a companion undertaking to Article 4A on funds transfer that was adopted in Alabama in 1992. Both efforts were drafted by the same national committee and were undertaken for the purpose of accommodating modern technologies and practices in payment systems with respect to negotiable instruments.

Present Article 3, Commercial Paper, and Article 4, Bank Deposits and Collections, were written for a paper-based system. The existing law does not adequately address the issues of responsibility and liability as they relate to modern technologies now employed and the check collection procedures required by the current volume of checks.

The legal structures for payments have traditionally been regulated by state law through the Uniform Commercial Code. However, in recent years the federal government has established regulations for credit and debit cards, and for the availability of funds in a way that regulates a significant part of the check collection process. In 1987, Congress enacted the Expedited Funds Availability Act. The Federal Reserve implemented the law in 1988 with Regulation CC. Regulation CC covers many aspects of the forward check collection process and all aspects of the return process. Existing Articles 3 and 4 do not adequately reflect the "reality" of existing business practices in check collection and those procedures now required by the Expedited Funds Availability Act and Regulation CC. While agreements among parties to particular transactions have provided stop-gap measures to allow the existing law to function, the revision of Articles 3 and 4 is essential to update, improve and maintain the viability of Alabama's law.



Revised Article 3 modernizes, reorganizes and clarifies the existing law. The changes to Article 4 are more modest. Article 4 is amended as necessary to conform to changes in Article 3, to modernize it for automated check processing and transactions, and, as feasible, to accommodate the impact of federal Regulation CC. Provisions in Article 4 that are heavily affected by Regulation CC are largely left alone and retained for nonpreempted provisions and for items other than checks.

## Selected substantive provisions

*A. Increased scope of coverage*

Revised Article 3 clarifies the types of contracts within Article 3, thus promoting certainty of legal rules and reduced litigation costs and risks. For example, variable rate instruments are included under revised Article 3 (§§ 3-104(a), 3-112), as are traveler's checks (§ 3-104(i)).

Revised Article 3 also clarifies the impact of the Federal Trade Commission "holder" rule; it does not render the instrument conditional so as to exclude it from Article 3 (§ 3-106(d)).

The revision also clarifies the ability of the parties to an instrument that is not included in Revised Article 3 to contract for the application of its rules to their contract (§ 3-104, Official Comment 2).

Credit and debit cards are clearly excluded under revised Article 4 (§ 4-104(a)(9)).

*B. Truncation and processing by automated means*

Section 4-110 authorizes electronic presentment of items and related provisions remove impediments to truncation (§ 4-406(a)). Section 4-406 allows an institution the benefit of its provisions even though the institution does not return the checks due to truncation. If both the customer and the institution fail to use ordinary care, a comparative negligence standard is used rather than placing the full loss on the institution (§ 4-406(e)).

Revised Article 3 makes clear that a financial institution taking checks for processing or payment by automated means need not manually handle the instrument if such processing is consistent with the

**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.

institution's procedures and the procedures do not vary unreasonably from those of other banks (§§ 3-103(a)(7), 4-104(c)). These provisions are designed to accommodate and facilitate efficiency, lower costs and recognize the reality of existing check collection practices mandated by the Expedited Funds Availability Act and Regulation CC.

*C. Encoding warranty*

Recognizing current check collection practices, revised Article 4 includes a new warranty provision with no counterpart in existing Article 4.

Section 4-109(a) provides warranties given by a person who encodes information (usually a depositary bank) that the information is correctly encoded. If the customer of a depositary bank does the encoding, the depositary bank also makes the warranty.

*D. Bank definition*

The definition of bank is expanded for the purposes of Articles 3 and 4 to include savings and loans and credit unions so that their checks are directly governed by the Uniform Commercial Code (§§ 3-103(c), 4-105(1)). Section 4-104 clarifies that checks drawn on credit lines are subject to the rules for checks drawn on deposit accounts.

*E. Presentment and transfer warranties*

Revised Articles 3 and 4 adopt clearer language to make the law more understandable and easier to apply. The revision divides the presentment warranties (§§ 3-417, 4-208) from the transfer warranties (§§ 3-416, 4-207), which are currently combined (with considerable confusion and complexity) in the existing law.

Revised Article 3 retains the rule of *Price v. Neal*, to the effect that the drawee takes the risk that the drawer's signature was unauthorized, unless the person presenting has knowledge of the unauthorized signature (§§ 3-417(a), 4-208(a)).

*F. Statute of limitations*

Revised Articles 3 and 4 include statutory periods of limitation that will make the law uniform rather than leaving the topic to widely varying state law (§§ 3-118, 4-111).

*G. Individual agent and corporate liability*

Except as against a holder in due course, § 3-402 allows a representative to show that the parties did not intend individual liability where the representative signed without adequate indication and representation. The revision allows full protection to the agent who signs a corporate check, even though the signature does not show representative status.

Revised Article 3 specifies that the law of agency will govern whether represented persons are bound by signatures. Thus, an undisclosed principal can now be liable on an instrument.

*H. Accord and satisfaction*

Under § 3-311, payees can avoid the unintentional accord and satisfaction by returning the funds or by giving a notice that requires checks to be sent to a particular office where such proposals can be handled.

On the other hand, a drawer of a full settlement check is protected from the instrument being endorsed with protest and thus losing the money and being liable on the balance of the claim.

*I. Cashier's checks*

Section 3-411 and related provisions considerably improve the acceptability of bank obligations like cashier's checks as cash equivalents by providing disincentives to wrongful dishonor, such as the possible recovery of consequential damages.

*J. Allocation of loss for forged endorsements*

Existing law essentially allocates losses on an all-or-nothing basis on parties who may be more or less innocent. Revised Article 3 brings more rationality to this area, using a comparative negligence scheme in several places.

Revised § 3-404, as in present law, places the risk of endorsements by imposters, and those generated by dishonest employees drawing instruments for drawers, on drawers, but does not require that the endorsement be in strict conformity with the payee's name to get the benefit (§ 3-404(c)).

Revised § 3-405 expands the per se negligence rule in present § 3-405 to the case of an endorsement forged by a payee's employee, and in that case and that of the faithless employee who supplies a name to a drawer and then forges the endorsement of the payee, does not require strict conformity to the name to place loss on the drawer or employer. However, any negligence of the bank will be taken into account and a comparative negligence standard is adopted instead of the present absolute rule (§§ 3-404(d), 3-405(b)).

Existing § 3-406 is revised so that negligence of the financial institution does not prevent it from asserting the preclusion, and comparative negligence is also the rule (§ 3-406(b)).

Actions for conversion of instruments will be governed by general conversion law (§ 3-420(a)). A payee who never received the check cannot sue a depositary bank for dealing with a check with a forged endorsement (§ 3-420(a)(ii)). What a joint payee can recover is clarified in missing indorsement cases (§ 3-420(b)). A depositary bank is made liable in conversion for acting inconsistently with the owner's rights when an endorsement is unauthorized and the revision blocks suit by the drawer for conversion (§§ 3-420(a)).

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.

# ABOUT MEMBERS, AMONG FIRMS

## ABOUT MEMBERS

**G. R. Mahmood** announces the opening of his office at 101 North Side Square, Huntsville, Alabama 35801. Phone (205) 536-8877.

**Robert P. Reynolds** announces the relocation of his office to 303 Williams Avenue, Suite 117, Huntsville, Alabama 35801. Phone (205) 534-6789.

**Max Cassady**, formerly law clerk to U.S. District Judge Alex T. Howard, Jr., and formerly associated with Johnstone, Adams, Bailey, Gordon & Harrris, and with Burns, Cunningham & Mackey, announces the opening of his office at 208 Rural Street, Evergreen, Alabama 36401. Phone (334) 578-5252.

**David B. Blankenship**, formerly of Blankenship & Rhodes, announces the opening of his office at 229 East Side Square, Huntsville, Alabama 35801. Phone (205) 517-1550.

**Scott J. Humphrey**, formerly of Stewart, Davis & Humphrey, announces the opening of his office at 1736 Oxmoor Road, Suite 201, Homewood, Alabama 35209. Phone (205) 879-8792.

**James M. Hivner** announces the relocation of his office to 306 W. Alabama Street, Florence, Alabama 35630. The mailing address is P.O. Box 113, Florence 35631. Phone (205) 766-3400.

**Patrick A. Jones** announces the relocation of his office to 212 Oakwood Avenue, Northwest, Huntsville, Alabama 35811. Phone (205) 533-2827.

**C. Tommy Nail** announces the relocation of his office to 604 38th Street, South, Birmingham, Alabama 35222. Phone (205) 595-3888.

**Elizabeth C. McAdory** announces the relocation of her office to 2101 Executive Park Drive, Opelika, Alabama 36801. The mailing address is P.O. Box 2857, Opelika 36803. Phone (334) 749-9951.

**Gary D. Hooper,** formerly of Emond & Vines, announces the relocation of his office to 215 N. 21st Street, 8th Floor, Birmingham, Alabama 35203. Phone (205) 251-7788.

**Alyce Manley Spruell** announces the opening of her office at 2824 7th Street, Tuscaloosa, Alabama 35401. Phone (205) 345-8755.

**Neva C. Conway** announces a change of address to 3755 Highway 14, Millbrook, Alabama 36054. Phone (334) 285-3335.

## AMONG FIRMS

**McDaniel, Hall, Conerly & Lusk** announces that **John F. McDaniel** and **Keri Donald Simms** have become shareholders. Offices are located at 505 N. 20th Street, Suite 1400, Birmingham, Alabama 35203-2626. Phone (205) 251-8143.

**Smith, Spires & Peddy** announces that **Michael B. Walls, Todd N. Hamilton** and **Scott M. Roberts** have become members. **David A. Hughes** and **Reed R. Bates** have become associates. Offices are located at 650 Financial Center, 505 N. 20th Street, Birmingham, Alabama 35203-2662. Phone (205) 251-5885.

**Rushton, Stakely, Johnston & Garrett** announces that **Robert C. Ward, Jr.** and **William H. Webster** have become associates. Offices are located at 184 Commerce Street, Montgomery, Alabama 36104. The mailing address is P.O. Box 270, Montgomery 36101-0270. Phone (334) 206-3100.

**Massey & Stotser** announces that **J. Doug Fields, Jr.** has become an associate. Offices are located at 1100 E. Park Drive, Suite 301, Birmingham, Alabama 35235. Phone (205) 836-4586.

**Yearout, Myers & Traylor** announces that **C. Jeffrey Ash** and **P. Mark Petro** have become partners. Offices are located at 2700 SouthTrust Tower, 420 N. 20th Street, Birmingham, Alabama 35203-3204. Phone (205) 326-6111.

**Pierce, Carr & Alford** announces the formation of **Pierce, Carr, Alford, Ledyard & Latta. Andrew C. Clausen** and **H. William Wasden** have become shareholders. **C. William Daniels, Jr., Rachell Sanders-Cochran, W. Pemble DeLashmet, Robin Windham Jones** and **Jean Walker Tucker** have joined the firm. Offices are located 1110 Montlimar Drive, Suite 900, Mobile, Alabama 36609. The mailing address is P.O. Box 16046, Mobile 36616. Phone (334) 344-5151.

**Prince, McKean, McKenna & Broughton** announces that **Michael P. Windom** has become a member and **J. Ritchie MacPherson Prince** has become an associate. Offices are located at First Alabama Bank Building, 13th Floor, 56 Saint Joseph Street, Mobile, Alabama 36602. The mailing address is P.O. Box 2866, Mobile 36652. Phone (334) 433-5441.

**Jackson, Taylor & Martino** announces that **Robert J. Hedge** has become a partner. Offices are located at SouthTrust Bank Building, 61 Saint Joseph Street, Suite 1600, Mobile, Alabama 36602. The mailing address is P.O. Box 894, Mobile 36601. Phone (334) 433-3131.

**American General Life & Accident Insurance Company** announces that **Katherine McKenzie Thomson** has become associated with the firm. Offices are located at American General Center, Nashville, Tennessee 37250-0001. Thomson is a 1991 admittee to the Alabama State Bar.

**Norman, Fitzpatrick, Wood & Kendrick** announces that **Kile Travison Turner** has become an associate. Offices are located at 1500 Liberty National Building, 2001 3rd Avenue, South, Birmingham, Alabama 35233-2101. Phone (205) 328-6643.

**James M. Wooten** and **John A. Lentine** announce the formation of **Wooten & Lentine**. Offices are located at 2000 1st Avenue, North, Suite 1212, Birmingham, Alabama 35203. Phone (205) 322-7707.

**Emond & Vines** announces that **Robert W. Shores, R. Graham Esdale** and **Michael L. Allsup** have become associates. Offices are located at 2200 SouthTrust Tower, 420 N. 20th Street, Birmingham, Alabama. The mailing address is P.O. Box 10008, Birmingham 35202-0008. Phone (205) 324-4000.

**Douglas J. Fees** announces that **Anne Gresham Sargent** has become associated with the firm. Offices are located at 401-403 Madison Street, Huntsville, Alabama 35801. Phone (205) 536-1199.

**Reid & Thomas** announces that **Frederic A. Ransom** has become associated with the firm. Offices are located at 501 SouthTrust Bank Building, Anniston, Alabama 36201. The mailing address is P.O. Box 2303, Anniston 36202. Phone (205) 236-1240.

**Pradat & Upton** announces that **Michael J. Upton** has become a partner. Offices are located at 2902 7th Street, Tuscaloosa, Alabama 35401. The mailing address is P.O. Box 1119, Tuscaloosa 35403. Phone (205) 345-2442.

**Gillion, Brooks & Hamby** announces that **Harry V. Satterwhite** has become an associate. Offices are located at 501 Bel Air Boulevard, Suite 240, Mobile, Alabama 36606. The mailing address is P.O. Box 161629, Mobile 36616. Phone (334) 476-4350.

**Lightfoot, Franklin, White & Lucas** announces that **Julia S. McIntyre, Stephanie Keller Womack** and **Melody L. Hurdle** joined the firm as associates. Offices are located at 300 Financial Center, 505 N. 20th Street, Birmingham, Alabama 35203. Phone (205) 581-0700.

**Rives & Peterson** announces that **Mark A. Stephens, Jane G. Ragland, Thomas L. Oliver, II, Susan S. Hayes,** and **Charles J. Kelley** have become shareholders. **Roger C. Foster, Eric J. Breithaupt, D. Keith Andress, David P. Condon** and **Anne C. Palmer** have become associates. Offices are located at 1700 Financial Center, 505 N. 20th Street, Birmingham, Alabama 35203. Phone (205) 328-8141.

**Constangy, Brooks & Smith** announces that **Tammy L. Dobbs**, formerly law clerk for the Honorable Judge Sharon Blackburn of the United States District Court, Northern Division, has become an associate. Offices are located at AmSouth/Harbert Plaza, 1901 6th Avenue, North, Suite 1410, Birmingham, Alabama 35203. Phone (205) 252-9351.

**Samford, Denson, Horsley, Pettey & Martin** announces that **Amy J. Himmelwright**, former law clerk for Lee County Circuit Judge Robert M. Harper, has become an associate. Offices are located at 709 Avenue A, Opelika, Alabama 36801. The mailing address is P.O. Box 2345, Opelika 36803-2345. Phone (334) 745-3504.

**Zeanah, Hust, Summerford & Davis** announces that **Christopher H. Jones** has become a member and the new name is **Zeanah, Hust, Summerford, Davis & Jones.** Offices are located at AmSouth Bank Building, 2330 University Boulevard, 7th Floor, Tuscaloosa, Alabama 35401. The mailing address is P.O. Box 1310, Tuscaloosa 35403. Phone (205) 349-1383.

**Cabaniss, Johnston, Gardner, Dumas & O'Neal** announces that **Herbert Harold West, Jr.** has become a partner. Offices are located in Birmingham and Mobile, Alabama.

**Lloyd, Schreiber & Gray** announces that **Gerald A. Templeton** has become a member and **Ashley T. Robinson** has joined the firm as an associate. Offices are located at Two Perimeter Park South, Suite 100, Birmingham, Alabama 35243. Phone (205) 967- 8822.

**Micki Beth Stiller** announces that **Brenda L. Vann**, formerly with the Administrative Hearing Division of the State Department of Human Resources, has become associate. Offices are located at 225 S. Decatur Street, Montgomery, Alabama 36104. Phone (334) 834-5544.

**Clyde Alan Blankenship** and **Susan C. Conlon** announce the formation of **Blankenship & Conlon.** Offices are located at 200 W. Court Square, Suite 201, Huntsville, Alabama 35801. The mailing address is P.O. Box 324, Huntsville 35804. Phone (205) 536-9008.

**Prince, Baird & Poole** announces that **Silas G. Cross, Jr.** has become a member. The new name is **Prince, Baird, Poole & Cross**. Offices are located at 2501 6th Street, Tuscaloosa, Alabama 35401. The mailing address is P.O. Box 128, Tuscaloosa 35402-0128. Phone (205) 345-1105.

**Stone, Granade & Crosby** announces the opening of its Daphne office at Daphne Professional Park, Highway 98, 7133 Stone Drive, Daphne, Alabama 36526. Phone (334) 626-6696. Offices are also located in Bay Minette and Foley, Alabama.

**Walston, Stabler, Wells, Anderson & Bains** announces that **Anne Byrne Stone**

has become a partner in the firm, and **Gregory L. Doody, Dawn Helms Sharff** and **Julia Boaz Cooper** have become associates. Offices are located at 500 Financial Center, 505 20th Street, North, Birmingham, Alabama 35203. The mailing address is P.O. Box 830642, Birmingham 35283-0642. Phone (205) 251-9600.

**Huie, Fernambucq & Stewart** announces that **Christopher S. Rodgers** has become a partner. **Gregory L. Schuck** and **Edward McFarland Johnson** have become associates. Offices are located at 800 First Alabama Bank Building, Birmingham, Alabama 35203. Phone (205) 251-1193.

**Rufus R. Smith, Jr.** announces that **John M. Maddox** has become an associate. The new name is **Rufus R. Smith, Jr. & Associates**. Offices are located at 129 S. Saint Andrews Street, Suite 102, Dothan, Alabama 36301. The mailing address is P.O. Drawer 6629, Dothan 36302. Phone (334) 671-7959.

**Balch & Bingham** announces the association of **Joseph B. Cartee, Ed R. Haden, N. DeWayne Pope, LeeAnn M. Pounds** and **Andrew W. Tunnell**. Offices are located in Birmingham, Montgomery and Huntsville, Alabama and Washington, D.C.

**Addison, Vickers & Howell** announces the formation of **Addison, Vickers, Howell & Talkington. William F. Addison, David W. Vickers, Shirley Darby Howell** and **Scott R. Talkington** are members. **Elizabeth Vickers Addison** will serve as *of counsel*. Offices are located at 1200 Bell Building, 207 Montgomery Street, Montgomery, Alabama 36104. The mailing address is P.O. Box 1828, Montgomery 36102-1828. Phone (334) 269-0700.

**Bond & Botes** announces that **Robert D. Reese** has become a shareholder. Offices are located at The Daniel Building, 15 S. 20th Street, Suite 1325, Birmingham, Alabama 35233. Phone (205) 254-9004.

**Judith S. Crittenden** and **Virginia L. Martin** announce the formation of **Crittenden & Martin**. Offices are located at 1044 Park Place Tower, Birmingham, Alabama 35203. Phone (205) 324-9494.

**Burr & Forman** announces that **Jeffrey T. Baker, Paul P. Bolus, David A. Elliott, Gary W. Farris, William S. Hereford** and **Jill Verdeyen Deer** have become partners. **John E. Norris, William C. Byrd, II, James E. Fleenor, Jr., Charles A. Hardin, Heather C. Harrison, Reid S. Manley,** and **Joel P. Smith, Jr.** have become associates. Offices are located in Birmingham and Huntsville, Alabama.

**Benjamin H. Albritton**, formerly of Almon & McAlister, announces a change of address to **Janecky, Newell, Potts, Hare & Wells.** Offices are located at 3300 First National Bank Building, Mobile, Alabama 36602. The mailing address is P.O. Box 2987, Mobile 36652. Phone (334) 432-8786.

**VHA, Inc.** has appointed **Richard Heard** vice-president, general counsel and secretary of the company. Offices are located at 220 E. Las Colinas Boulevard, Irving, Texas 75039-5500. The mailing address is P.O. Box 140909, Irving 75014-0909. Phone (214) 830-0000. Heard is a 1983 admittee to the Alabama State Bar. ■

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

The Judicial Award of Merit was established in 1987, 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.

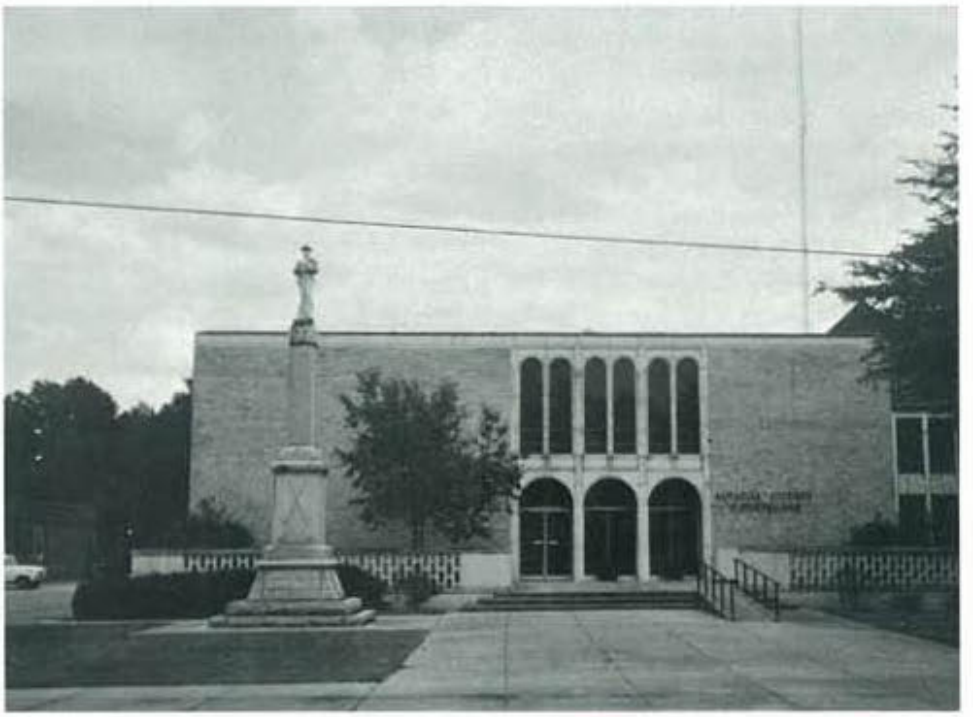
Nominations should include a detailed biographical profile of the nominee and a narrative outlining the significant contribution(s) the nominee has made to the administration of justice. Nominations may be supported with letters of endorsement.


# BUILDING ALABAMA'S COURTHOUSES

## AUTAUGA 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.*



*Autauga County Courthouse addition, constructed in 1962*

### AUTAUGA COUNTY

Autauga County lies in the center of Alabama. Significantly it has held a central position in the Indian or aboriginal history of the state, its political history, the agricultural progress of Alabama, and its early industrial development.

Historians agree that the name "Autauga" comes from the Creek Indian language. However, it is difficult to find two sources who concur on its actual meaning. Autauga may mean "plenty", "land of plenty", "clear water", "border", or "corn dumpling". Each possible definition has its advocate. It is enough for this article to conclude that Autauga was named for an Indian town, Atagi, on the west side of the Alabama River located at the junction of Atagi (now Autauga) Creek and the river. The site of this Indian village and stream would continue to be significant throughout Autauga's history.

Settlers came into present-day Autauga County after the close of the Creek War in 1814. They sought farm land and homesteads and were attracted by the fertile soil in the area. The first permanent settlements date to 1816. The area was originally part of Montgomery County, but the territorial legislature at St. Stephens created the new county of Autauga on November 21, 1818. Its boundary was extended north and northwest by action taken on December 13, 1820.


*Marker on courthouse grounds*

The Act which created Autauga County provided that for the time being court should be held at Jackson's Mill on Autauga Creek. However, the legislation also contained the traditional escape clause of that era. If there was a lack of necessary buildings for the holding of court at Jackson's Mill, then court could "adjourn to such other places contiguous thereto as may seem proper." Little is known of this first court site.

On November 22, 1819, one year and one day after the county was created, the territorial legislature appointed five commissioners to select a site for the permanent county seat of Autauga County. They were also authorized to contract for and supervise the construction of a

courthouse, jail and public pillory. Finally, the commissioners received authorization to purchase up to 40 acres for the public buildings of the county and they were allowed payment of $15 each for their services.

Meanwhile, the former Indian village of Atagi had been abandoned and by 1817 was overgrown in peach and plum trees. In 1817, white settlers established the town of Washington on the Atagi site. This town was named for George Washington and would also be known as Washington Ferry due to the river crossing at that point.

A group of investors had purchased land at this location at various government land sales. This land syndicate, consisting of Captain J. P. House, General Thomas Woodward and Dr. Alexander Hutchinson, offered to give Autauga County land for the courthouse and jail if the courthouse were located there. The commissioners accepted this offer and Washington became the first permanent county seat. While a brick courthouse was being constructed between 1820 and 1821, courts were held at the first hotel in town which had been built by Captain House.

The first jury at Washington met on April 12, 1820. This jury was presided over by John A. Elmore, Sr., who was chief justice of the Court of Justices of the Peace. Elmore was a resident of the eastern portion of Autauga County and was prominent in Alabama politics. He died in 1834. When Autauga County was subdivided on February 15, 1866, the new county created was named Elmore in his honor.

Washington remained the county seat of Autauga County for approximately ten years. However, as the county grew, dissatisfaction over the courthouse location also grew. Washington was located on the southern edge of the county. It was inconvenient to many citizens of the county, some of whom lived as far as 40 miles away.

On December 28, 1827, the legislature responded to the dissatisfaction, authorizing an election to be held in August 1828, for the purpose of determining the wishes of the citizens on removal of the courthouse. The actual vote tally of that election is lost to history. However, on December 2, 1830, the legislature again appointed a five-member commission to select a seat of justice. This time the commissioners were charged to select a courthouse site with due regard to "centrality, population, health, and general convenience."

*Autauga County Courthouse, constructed in 1905*

The commissioners chose the town of Kingston. Kingston, which various sources claim was named either for a town in England or one in north Georgia, was located in the approximate center of Autauga County. It was situated about eight miles northeast of the town of Independence, near present-day U.S. Highway 82. Although it was at the physical center of the county, Kingston was not the center of population. One newspaper editor in Wetumpka referred to it as the "Great Sahara" because of its location in the wilderness. Kingston never really prospered as county seat. Its population remained quite small. The actual move of the county seat to Kingston took place in August 1832. Nothing is known of the courthouse building in the town. After the removal of the courthouse to Kingston, Washington gradually declined and by 1879 was all but deserted.

The only historic event of significance to take place in Kingston was a great rally in 1863. The rally was called for the purpose of raising a quota of soldiers from Autauga County for the Confederate Army. A big barbecue was held and a number of patriotic speeches delivered. One of the leaders at this rally who volunteered to equip the soldiers was a transplanted northerner who had arrived in the county only a few years after Kingston was selected county seat. In 1863, he was Alabama's leading industrialist and a very wealthy man. His name was Daniel Pratt.

Pratt was born on July 20, 1799, at Temple, New Hampshire. He was apprenticed as a carpenter and in 1819 moved to Georgia where he learned the business of making cotton gins. He came to Alabama in 1833 and settled near the Elmore plantation in Autauga County where he set up a blacksmith and cotton gin shop. When the lease on his mill site ran out and the rent was increased, he moved his operation to McNeil's Mill on Autauga Creek. He stayed at this location for a number of years until this lease ran out and the rent increased again. In 1838 he purchased land on Autauga Creek to permanently establish his Pratt Gin Company.


*The courthouse at Prattville was built in 1870.*

Through hard work Daniel Pratt prospered in his new home state. His gin company became the foremost producer of cotton gins in the world. He opened a blacksmith shop in 1840 and a grist mill in 1841. He established a carriage factory, a tin shop, a sash and blind factory, and a foundry. In 1846 he founded a textile mill.

Pratt, as a transplanted New Englander, remembered the sights of his boyhood. He duplicated a New England village in the creation of his industrial town. Autauga Creek ran through the middle of his town, providing needed water power for his factories which were built solidly of red brick like those of New England. Even his worker housing closely resembled comparable structures in the northeast. The town which he founded on the banks of Autauga Creek became known as Prattville. It is the oldest continuously functioning industrial community in the state of Alabama.

In 1847 the University of Alabama conferred on Daniel Pratt the unique honorary degree of master's of Mechanical and Useful Arts as a token of the respect and honor of the University trustees for him. In the presentation of this degree, University of Alabama President Basil Manly stated, "He has attained, in an eminent degree, that which is the end of all letters and all study: the art of making men around him wiser, better, and happier. He has shown in a substantial manner that he values and knows how to promote the industrial and economic virtues among men, rendering his own intelligence and honesty a blessing to all that come within the sphere of his influence."

Pratt, through his son-in-law, Henry DeBardeleben, continued to serve his adoptive state with new ventures in north Alabama. The Pratt coal seam, the Pratt mines, and Pratt City in Jefferson County are evidence of his involvement. Pratt died on May 13, 1873, at Prattville. He was revered for his benevolence as well as for his business skill, and he was recognized universally as an enlightened industrialist.

Following the Civil War, Autauga County was reduced in area and population. In 1866, Elmore County was created from land taken from eastern Autauga County as well as Coosa, Tallapoosa, and Montgomery counties. In 1868, Baker County, later called Chilton, was created from land taken from northern Autauga County as well as Bibb, Perry, and Shelby counties. The population of Autauga dropped from 16,739 in 1860 to 11,623 in 1870.

In the midst of these changes, a movement began to relocate the courthouse. By 1868 Prattville had long since become the real center of wealth, population, and business activity in the county. That year the legislature named it the county seat, leaving Kingston to become nothing more than a ghost town.

The first courthouse built in Daniel Pratt's town was constructed in 1870 at 147 South Court Street directly across from the creek, dam and industrial complex in Prattville. The building is brick, rectangular, and two stories in height. It has seven windows lengthwise, and three windows along its width. The gabled roof has wide eaves supported by paired scrolled brackets. This building is an example of the Italianate style of architecture. A high-ceilinged courtroom occupied the second floor of the courthouse and county offices were found below.

This first Prattville courthouse and jail were sold for $5,500 during the first decade of this century, and these proceeds were applied to the cost of the new courthouse and jail. The interior of this building is now gutted and serves as a warehouse. A service station was added to the west side of the building some time around 1924.

The second and present Prattville Courthouse is located at 134 North Court Street. Construction began in 1905 and was concluded in 1906. The Bruce Architectural Company of Birmingham served as architects and Lewman & Company of Louisville, Kentucky, were the contractors. At the same time, Dobson & Bynum of Montgomery contracted to design and build a new jail.

The courthouse in Prattville is two stories in height with a raised attic. It is constructed of buff-colored brick. The building is dominated by a four-story clock tower and belfry at the southwest corner topped with a pyramidal roof. The main entrances, on the south and west sides of the building, feature vestibules with Syrian arches. The basic architectural style of the building is modified Richardsonian Romanesque. The net cost of the new courthouse and jail was $84,400.

**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.

By 1959 the county had outgrown its 54-year-old courthouse and a decision had to be made concerning its future. The architectural firm of Pearson, Humphries, & Jones of Montgomery submitted three plans for the consideration of the Autauga County Board of Revenue.

Plan A called for the addition of a wing with some remodeling of the former structure at an estimated cost of $170,000. Plan B called for a complete remodeling of the old courthouse with the addition of a wing. The old building would be gutted and new ceilings and floors would be added. The electrical, plumbing and heating systems would be replaced. The cost estimate for this plan was $305,000. Plan C called for a new courthouse at an estimated cost of $375,000. The architects recommended Plan C.

After considering all factors and desiring to retain the existing courthouse, Autauga County chose Plan B, renovating the courthouse and connecting it to a new wing by a glassed-in walkway. The work took approximately 15 months to complete. Pearson, Humphries, & Jones were the architects and C. F. Halstead Construction Co. of Montgomery performed the work.

The renovation and expansion combined old and new and was a synthesis of Romanesque and Modern architecture. The new wing was built with the same buff-colored brick as the existing courthouse, and Alabama marble was used throughout for stairs and wall sections. The old building received a complete face-lift and was renovated to maximize sound and lighting efficiency. This project was completed in 1962 and the total cost approached $390,000.

In 1970 a new jail was constructed and again Pearson, Humphries, & Jones of Montgomery served as architects. Lynn H. Blair Contractors, Inc. of Alexander City built the new jail. It was constructed on the east side of the courthouse and matched the brick and stone materials of the courthouse building. The new jail is connected to the courthouse by a second-story enclosed corridor. The total cost of the project was approximately $400,000.

On August 30, 1984, the United States Department of the Interior established the Daniel Pratt Historic District in Prattville and named the district to the National Register of Historic Places. The district consists of over 200 properties built between 1840 and 1930 that represent the commercial, industrial, residential, and institutional architecture of the city. The two courthouses in Prattville that have served Autauga County since 1870 are among the structures in the district.

The author acknowledges the assistance of Prattville attorney George P. Walthall, Jr. for his help in obtaining materials for this article. ■

Sources: Autauga County: *The First Hundred Years, 1818-1918,* compiled by Daniel S. Gray, 1972; *Report on the Officials of Autauga County*, J. T. Gorman, 1911; *History of Autauga County*, Shadrick Mims, 1976.

# BAR BRIEFS

• **Charles A. Powell,** a partner in the Birmingham firm of Powell & Frederick, has been named chairman of the Section of Labor and Employment Law of the American Bar Association. This section has more than 19,000 members, and membership is comprised of attorneys whose practices are largely devoted to representation of employers, unions, employee plaintiffs, public boards and administrative bodies.

Powell is a 1961 graduate of Birmingham-Southern College and a 1964 graduate of Duke University School of Law.

• The American College of Trust and Estate Counsel announces that **Lynn Baxley Ault**, with the Birmingham firm of Lange, Simpson, Robinson & Somerville, has been elected a Fellow of the College.

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

• The Montgomery County Bar Association elected the following members to serve as officers for 1995:

**President:**
***Lee H. Copeland***

**Vice-President:**
***Tom J. Methvin***

**Secretary/Treasurer:**
***Mark Anderson***

**Board of Directors:**
***William R. Blanchard***
***E. Terry Brown***
***Laura Crum***
***Kent Garrett***
***Mike Jackson***
***Cole Portis***

• **William H. Satterfield**, a partner with the Birmingham firm of Balch & Bingham, has been named to the board of directors of the National Waterways Conference. The NWC is the national organization for America's inland waterways industries, and is dedicated to the enhancement of the nation's navigation and waterways programs.

Satterfield received his undergraduate degree with highest honors from Georgia Tech, his master's from Indiana University and his law degree, *magna cum laude,* from Cumberland School of Law.

• **Jeffery J. Hartley** of Mobile has been selected as a member of the National Bankruptcy Review Commission. Senate majority leader George Mitchell made the appointment upon the recommendation of Sen. Howell Heflin of Alabama, chairman of the Senate subcommittee on courts and administrative practice.

After two years of in-depth analysis of the bankruptcy code, the commission will issue a report to the President, Chief Justice and Congress recommending further legislative changes to the nation's bankruptcy laws.

Hartley currently is law clerk to Judge Margaret A. Mahoney, United States Bankruptcy Court for the Southern District of Alabama in Mobile. He is a graduate of Spring Hill College in Mobile and the University of Alabama School of Law.

• **Merceria Ludgood,** former director of the Legal Services Corporation of Alabama, has been selected director of the Office of Program Services at the Legal Services Corporation in Washington, DC. She assumed her new responsibilities on a part-time basis in January and will complete her transition to the new position by mid-spring. Ludgood has been LSCA's director since December 1991.

Ludgood, a Mobile native, earned her undergraduate and master's degrees in education from the University of Alabama. She graduated from Antioch School of Law in Washington, DC in 1981 and returned home to enter private practice. Prior to being named LSCA's executive director, Ludgood had served on LSCA's board of directors since 1982. ■

# Attention Trustees: Is Real Property in the Corpus Secure From Civil Forfeiture Under 21 U.S.C. §881?

By Lois S. Woodward


For a variety of reasons, trustees seldom invest trust assets, whether principal or income, in real estate ventures; however, the corpus of a trust may well include real property. A grantor or testator, for example, may place in the trust income-producing rental property or a family residence in which trust beneficiaries may continue to live. If the occupants of this trust property engage in certain illegal drug-related activities, the trustee may find that the property is the subject of a forfeiture action under 21 U.S.C. § 881. Although the trustee may be able to avoid forfeiture under the "innocent owner" defense available under the statute, it nevertheless would have to undergo the burden and expense of participating in the forfeiture proceedings.

This article will discuss this far reaching forfeiture law as it applies to trustees holding real property as part of the trust corpus. It first will summarize the general operation of the federal civil forfeiture statute[1], including the defenses available under it, next will note recent constitutional limitations on this law, and then will address more specifically the issues a trustee faces when realty in the trust either is used in connection with illicit drug-related activity or becomes the subject

### Operation of 21 U.S.C. § 881

In order to combat the increasing trade in illicit drugs, Congress in 1970 enacted the Comprehensive Drug Abuse Prevention and Control Act, which authorized the civil forfeiture of certain controlled substances and the instruments by which these controlled substances were manufactured and distributed.[2] This original law, which was intended to deprive drug offenders of the fruits of their crime,[3] closely paralleled earlier laws providing for the seizure and forfeiture of tangible property used in and thereby deemed "guilty" of criminal activities.[4] When these forfeiture provisions failed to stem the tide of drug trade as anticipated, Congress expanded the range of property subject to forfeiture to include first the proceeds of illegal drug transactions[5] and later all real property used in connection with a violation of federal drug laws.[6] This expanded forfeiture law encompasses the interests of not only drug-dealing property owners, but also any others who may have an ownership interest in realty used in connection with illicit drug-related activities[7] — including trustees, absentee landlords, mortgagees,[8] or even unwilling co-owners.

The government's right to real property used in connection with a drug transaction arises under 21 U.S.C. § 881(a)(7) ("Section 881"), which provides that:

> (a) Subject Property. The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> ... (7) All real property,[9] including any right, title and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title[10] punishable by more than one year's imprisonment....

Civil forfeiture proceedings are actions in rem and are governed by the Supplemental Rules for Certain Admiralty and Maritime Claims applicable to admiralty and maritime in rem actions.[11] Under the Supplemental Rules, an attorney general may initiate forfeiture proceedings by filing a verified complaint with the federal district court having jurisdiction over the subject property.[12] This complaint must "describe with reasonable particularity the property that is the subject of the action." This complaint also must "state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading." Once a verified complaint for the forfeiture based on federal statutory violations has been filed, the Supplemental Rules specifically provide that the clerk of the court, without any judicial review, shall issue a summons and warrant for the arrest of the subject property;[13] the warrant then shall be executed and the property seized by the federal marshal.[14]

Although the Supplemental Rules and Section 881 specifically allow for the seizure of property pursuant to ex parte proceedings, the United States Supreme Court recently opined that such seizures of real property — effected without notice or an adversarial hearing — are constitutionally invalid.[15] In *United States v. James Daniel Good Real Property*, the Court rejected the notion that the Fourteenth Amendment is the sole constitutional provision applicable to the Government's seizure of property subject to forfeiture, and determined that forfeiture proceedings also must comply with the Due Process Clause of the Fifth Amendment.[16] The Court could find no extraordinary circumstances that would justify postponement of notice and hearing in a typical seizure of real property under Section 881(a)(7).[17] In the absence of such exigent circumstances, the Court held that the government must "afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture."[18] Accordingly, the government may execute process by serving the arrest warrant on the subject real property, but may not seize such property until after a Due Process hearing.[19]

Once process has been executed, a person claiming an interest in property that is the subject of a forfeiture action must file a claim within ten days after execution and must serve an answer within twenty days after the claim has been filed.[20]

The respective burdens of the claimant and the government at a seizure hearing are well-established by statute and case law.[21] The claimant first must establish standing as an owner of the contested property.[22] Courts have recognized that bona fide trustees clearly have standing to assert claims regarding the property in dispute.[23] The possession of bare legal title alone, without commensurate dominion and control over the property, however, may be insufficient to establish standing.[24] Acknowledging that drug traffickers often attempt to disguise property interests by placing title in someone else's name, courts will look behind record title to determine if a straw man has been used to conceal the financial affairs or illegal dealings of someone else.[25]

After the claimant has established standing, the government then must show probable cause for the forfeiture by establishing the necessary connection between the real property in question and the proscribed activity.[26] Some federal circuits require the government to prove that the real property had a "substantial connection" to the illegal activity.[27] Although the Eleventh Circuit has not expressly adopted any standard regarding the degree of connection necessary for forfeiture of real property under Section 881 (a)(7),[28] it has applied the "substantial connection" test to the forfeiture of proceeds under Section 881(a)(6).[29]

The Eleventh Circuit also has noted that any conflict among the circuits regarding the required degree of connection between the illegal activity and the real property in question may be "semantic rather than practical."[30] Courts agree that the property must be used to facilitate a crime, but need not be

integral, essential, or indispensable to the criminal transaction.[31] The use of property for general discussions about unspecified drug transactions should not be deemed to have facilitated illegal activity.[32] On the other hand, the presence or intended presence of drugs on the property is not a prerequisite to forfeiture under Section 881(a)(7).[33] Furthermore, the government need not show any relationship between the subject property and any particular drug transaction as long as the requisite connection exists generally.[34] Forfeitures may be predicated on the occurrence of a single drug transaction on the subject property;[35] however, at least one Supreme Court justice has suggested that the United States Constitution would not permit the forfeiture of a building in which an isolated drug sale took place.[36]

To establish the necessary connection, the government must show that it had a "reasonable ground for belief of guilt, supported by less than prima facie proof, but more than reasonable suspicion."[37] In order to make its case, the government need not secure any criminal conviction.[38] In fact, a claimant's failure to respond to requests for admissions regarding use of the subject property for illegal drug trafficking may serve as "admissions on file" sufficient to support a summary judgment for forfeiture.[39] The government also may present circumstantial evidence and otherwise inadmissible hearsay evidence.[40] Evidence that would support an alternative hypothesis still is probative of the issue of probable cause.[41]

After the government has established probable cause under the rather lenient standard discussed above, the claimant then has to prove, by a preponderance of the evidence, a defense to the forfeiture.[42] Unlike the issues of standing and probable cause, which are matters of law, the question of whether a claimant establishes a sufficient defense is a matter of fact, to be decided by the fact finder.[43] If a claimant has requested a jury trial, the jury may hear inadmissible hearsay evidence during the probable cause portion of the hearing. Corrective instructions by a court may not be sufficient to remedy the prejudicial effects of this inadmissible evidence.[44] For this reason, a jury trial may need to be bifurcated in order to avoid reversible error.[45]

In order to establish a defense to forfeiture, a claimant obviously may attempt to show that the property was not used in a drug transaction. Section 881(a)(7), however, expressly provides another (and more viable) defense to an owner who neither knew of nor consented to the illegal activity on the property — the "innocent owner" defense.[46] In order to prevail on this defense and thereby avoid forfeiture, the owner must establish either ignorance of[47] or non-consent to the proscribed activity[48]. In order to establish ignorance, an owner need prove only the absence of *actual* knowledge, not the absence of *constructive* knowledge.[49] The Eleventh Circuit has recognized that nothing in the legislative history of Section 881(a)(7) requires a standard of "should have known."[50] An owner, however, should not rely on its willful ignorance; if it has knowledge of facts that imply illegal activity, a Court may well expect it to investigate the situation.[51]

Even if an owner has actual knowledge of the illegal activity connected to the property, forfeiture can be defeated by proving the absence of the owner's consent to such activity.[52] In the Eleventh Circuit, an owner can establish the requisite non-consent by proving that it took all reasonable steps to prevent the illegal use of the property.[53] Courts in this circuit have recognized that this "reasonable efforts" standard can be satisfied by contacting and cooperating with law enforcement authorities, especially when a claimant is unable to halt the illegal activity on its own.[54]

**Congress expanded the range of property subject to forfeiture to include first the proceeds of illegal drug transactions and later all real property used in connection with a violation of federal drug laws.**

### Recent Constitutional Limitations on Civil Forfeiture

The sweeping scope of forfeitures authorized under § 881(a)(7) has been limited by a recent Supreme Court decision upholding a constitutional challenge to this statute. In *Austin v. United States*, the Court, after reviewing the historical developments of forfeiture laws, determined that forfeiture under Section 881(a)(7) is punishment and, as such, is subject to the limitations of the excessive fines clause contained in the Eighth Amendment.[55] The Court declined, however, to establish any test to determine whether a particular forfeiture is constitutionally excessive.[56] In remanding the case to the Eighth Circuit Court of Appeals, the Supreme Court noted that the connection between the property and the offense might be relevant in determining an in rem forfeiture's excessiveness, but specifically stated that its decision should not limit the appellate court from considering other factors in making this determination.[57]

In a concurrence challenging the Court's historical review of forfeiture laws, Justice Scalia argued that the excessiveness inquiry for statutory in rem forfeitures is different from the usual excessiveness inquiry for monetary fines and in personam forfeitures. Rather than focusing on the value of the property in relation to the offense, Justice Scalia suggested that the relevant inquiry should consider the relationship of the property to the offense: Can the forfeited property properly be regarded as an instrumentality of the offense? Is the relationship between the property and the offense close enough to render the property, under traditional standards, "guilty" of the offense and thereby forfeitable?[58]

The Eleventh Circuit has not articulated a test or set of factors to use in determining whether a forfeiture is excessive under the Eighth Amendment. This circuit, however, has suggested that some proportionality inquiry is appropriate for an excessive fines clause analysis.[59] The District Court for the Middle District of Alabama, drawing on Scalia's concurrence in *Austin* and the Eleventh Circuit's comments regarding proportionality, has developed a two-step balancing test to determine whether a forfeiture of real property under Section 881(a)(7) violates the excessive fines clause.[60] Under this test, the government has the initial burden of establishing a "substantial" connection between the defendant property and the drug trafficking by showing a pattern of illegal activities occurring at the defendant real property. If the government establishes this substantial

connection, a presumption in favor of forfeiture arises and the burden shifts to the claimant to prove that the forfeiture is a "grossly disproportionate" punishment given the nature of the offense committed. A Court then would balance the value of the defendant property against the nature of the drug trafficking.

Other federal district courts also have formulated standards by which to review an excessive fines clause defense.[61] Some courts have adopted a proportionality analysis, while others have applied an instrumentality test; still other courts have used multi-factored tests that incorporate both the proportionality and instrumentality inquiries.[62] In any excessive fines analysis, however, the owner's culpability should not be a factor. If the excessive fines issue is reached, a determination already will have been made that the claimant is not able to take advantage of the innocent owner defense and is, in some sense, culpable — if only by reason of its negligent failure to prevent the illegal activity on the property. The Eighth Amendment's prohibition against excessive fines thereby presents an opportunity for a claimant who cannot establish an innocent owner defense to defeat an in rem forfeiture.

### Trustees and Civil Forfeiture under Section 881(a)(7)

A trustee who believes trust property to be threatened by forfeiture must satisfy not only the obligations imposed on property owners by courts under Section 881, but also its fiduciary duties, and then must address any conflict between these two sets of obligations. If this conflict is too great and the potential liability too high, a trustee may consider resignation, consistent with the terms of the underlying trust instrument. However, if a trustee has made a determination that it will not or cannot resign, the trustee must act in accordance with its legal duties.

Case law indicates that an owner with knowledge of illegal activity on the property should contact and cooperate with law enforcement authorities. Courts have applied this standard to require a wife to turn in her husband or attempt to remove herself from the illegal activity.[63] Must a trustee, therefore, contact law enforcement authorities about an occupant's illegal activities on the trust property, even if the occupant is a beneficiary of the trust? Such an obligation would seem to conflict with the trustee's fiduciary duty of loyalty to the beneficiary.[64] An even greater conflict arises when the underlying trust instrument specifically directs the trustee to retain the subject property for the use of the occupant/beneficiary and to provide generally for his or her welfare.

Balanced against the trustee's duty of loyalty to a beneficiary is its duty to protect the trust estate.[65] The purpose of a trust is "to provide a fund for the maintenance of the beneficiary while at the same time protecting the beneficiary from his or her own improvidence or incapacity."[66] A trustee cannot allow a beneficiary's actions to endanger or destroy the very fund created for his or her welfare. If the trust property is to be used by other beneficiaries, either simultaneously or successively, a trustee also must protect the interests of these beneficiaries. A trustee has an overriding fiduciary duty to preserve trust property and, therefore, in the context of a Section 881 forfeiture action, must do whatever is reasonably necessary to preserve trust property,[67] consistent with its general fiduciary duties.

A trustee certainly must exercise due diligence in maintaining and conserving the property. Although the Eleventh Circuit has indicated that an owner will not be penalized under Section 881(a)(7) on the basis of activities that it *should* have known were occurring on the property,[68] Alabama law may require a higher standard of fiduciaries. However, if Alabama law does in fact impose a higher standard on fiduciaries, this higher standard of duty should not operate to raise the standard imposed on owners under Section 881(a)(7) as it applies to trustees. A trustee's failure to satisfy its fiduciary duties leaves it vulnerable to claims by beneficiaries, but should not affect the trustee's obligations under Section 881.

A trustee who suspects possible illegal activities on trust property thus is placed in a difficult situation. Decisions under Section 881(a)(7) do not seem to impose on the trustee, as owner, an affirmative obligation to discover such activities. On the other hand, do a trustee's fiduciary obligations require it to undertake such an investigation? This investigation could confirm the suspected wrongdoing, providing the trustee with actual knowledge of the illegal activity and thereby requiring the trustee under Section 881(a)(7) to take affirmative action to prevent further violations.

If a trustee becomes aware that illegal activities are occurring on trust property which may subject the property to forfeiture, the trustee must take all reasonable steps to prevent further illegal use of the property in order to establish its non-consent to such use, and thereby perfect the innocent owner defense to forfeiture. The trustee first may attempt to stop the illegal activity on its own by notifying the occupant that any such activity on the trust property cannot continue. A trustee should note, however, that its correspondence with the occupant, as well as any documents or memos the trustee may produce that relate to suspected drug-related activities, probably is discoverable. To the extent such material evidences the trustee's knowledge of illegal activity on the property, it may benefit the government's case. On the other hand, materials that reveal the trustee's attempts to prevent illegal activities may help establish the non-consent necessary to prevail on the innocent owner defense.

If the trustee is unable to stop the illegal activity on its own, it must take additional steps. Assuming the occupant is not a beneficiary, the trustee may evict the tenant or, if eviction is not possible, contact and cooperate with law enforcement authorities. If the occupant is a beneficiary, however, the question of what additional steps the trustee is required to take in order to prevent illegal activity on the property is by no means clear. Should the trustee attempt to sell the property? Its ability to sell trust property may be limited by the underlying trust instrument. If the instrument does not confer the power of sale on the trustee or specifically require the trustee to retain the subject property, a sale may be difficult, if not impossible. Any proposed

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sale might be challenged by the occupant/beneficiary or other beneficiaries.

Given the conflicting obligations present in this situation, should the trustee seek instructions from the court? In seeking instructions from the court, the trustee inadvertently may bring illegal activities on the trust property to the attention of law enforcement authorities, who then may institute a forfeiture action or bring criminal charges against the occupant/beneficiary. The beneficiary, on the other hand, may claim that the trustee has committed libel or slander against him or her in its allegations regarding illegal activity. For this reason, a trustee seeking instructions from the court or attempting to sell the property carefully should consider whether sufficient evidence exists regarding the suspected drug activity to justify the proposed action or to meet any claims the beneficiary might assert against the trustee.

If the trustee is unable otherwise to stop the illegal activity, should the trustee be required to contact law enforcement authorities about illegal activity on the trust property, possibly implicating the beneficiary? The reasonableness and necessity of any of these above-discussed actions ultimately is a question of fact to be decided by the factfinder.

Once trust property is arrested in a forfeiture action, the trustee should respond promptly by filing the required claim and answer to the complaint. The trustee also should contest the forfeiture and participate actively in all stages of the proceedings in order to preserve and protect its rights. A trustee's failure to effectively defend against a forfeiture action may leave it vulnerable to claims by the beneficiaries that the trustee breached its fiduciary duty to protect the trust property. The trustee should scrutinize closely the allegations contained in the complaint, as well as the purported connection between the trust property and the illegal activity. If the trustee had no actual knowledge of the illegal activity connected to the property or, even if it had knowledge, did not consent to such activity, the trustee should assert the innocent owner defense. If, however, the trustee is unable successfully to assert the innocent owner defense, the trustee still may challenge the forfeiture as an excessive fine prohibited by the Eighth Amendment.

## Summary

In summary, a trustee confronting the possible forfeiture of trust property under Section 881(a)(7) must be mindful of both its general fiduciary duties and the judicially imposed requirements an owner must satisfy in order to avoid forfeiture, as well as any potential conflict between these sets of obligations. A trustee must take all reasonable steps to protect and preserve the trust property. The scope of such action, however, is by no means clear. Ultimately, the sufficiency of any steps taken by a trustee to protect trust property is a question of fact that should be determined on the basis of the totality of the circumstances, taking into consideration any conflicts between the trustee's duty to protect the property and any duty of loyalty owed to an occupant/beneficiary. ■

## Endnotes

1. This article will not address criminal forfeiture (e.g., under 18 U.S.C. §§ 981, 1955, or 1963 or 21 U.S.C. § 853) or forfeiture under the state statute, *Ala. Code* § 20-2-93.
2. P.L. 91 - 513, Title II, Part E, § 511, 84 Stat. 1276, codified at 21 U.S.C. § 881.
3. For a discussion of the legislative history of this Act, see Note, *"Caught in the Crossfire": Protecting the Innocent Owner of Real Property from Civil Forfeiture under 21 U.S.C. § 881(a)(7)*, 65 St. J. L. Rev. 521, 525 (1991) (authored by Alice Marie O'Brien).
4. These civil forfeiture statutes were based on the fiction that the property involved in a crime is itself the offender and that the offense is attached primarily to that property. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974). Proceedings under these forfeiture statutes, therefore, are in rem actions against the seized property, rather than in personam actions against the property owners, and stand independent of, and wholly unaffected by, any criminal proceedings in personam. *Id.* The case law interpreting these statutes is by no means consistent; however, the property owner's innocence generally is not a defense to forfeiture. *See Austin v. United States*, 125 L.Ed.2d 488, 500-03 (1993).
5. 21 U.S.C. § 881(a)(6), enacted November 10, 1978.
6. 21 U.S.C. § 881(a)(7), enacted October 12, 1984.
7. Real property may be forfeited not only because it was used in connection with illegal drug transactions but also because is represents the proceeds of such transactions. This article will address only forfeitures arising on the basis of illegal activities conducted on or in connection with the subject property.
8. The rights of lienholders in forfeiture actions have been addressed in several decisions. *See U.S. v. Federal National Mortgage Association*, 946 F.2d 264 (4th Cir. 1991); *In re Newport Savings & Loan Association*, 928 F.2d 472 (1st Cir. 1991); *U.S. v. Six Parcels of Real Property*, 920 F.2d 798 (11th Cir. 1991); *In re Metmor*, 819 F.2d 446 (4th Cir. 1987). This subject also has been addressed in several articles. *See* Note, *The Drug War and Real Estate Forfeiture Under 21 U.S.C. § 881: The "Innocent" Lienholder's Rights*, 21 Tex. Tech L. Rev. 2127 (1990)

(authored by Brad A. Chapman and Kenneth W. Pearson); Smith, *Mortgage Lenders Beware: The Threat to Real Estate Financing Caused by Flawed Protection for Mortgage Lenders in Federal Forfeiture Actions Involving Real Property*, 25 Real Prop., Prob. & Trust J. 481 (1990); Case Comment, In Re Metmor Financial, Inc.: *The Better Approach to Post-Seizure Interest Under the Comprehensive Drug Abuse Prevention and Control Act*, 65 Notre Dame L. Rev. 853 (1990) (authored by Christopher M. Neronha).

9. Even property covered by a state homestead exemption is subject to forfeiture. *U. S. v. Lot 5, Fox Grove, Alachua County, Florida*, 23 F. 3d 359 (11th Cir. 1994), cert. denied 115 S. Ct. 722 (1995).

10. 21 U.S.C. § 881(a)(7). The violations of Title 21 (Food and Drugs) covered by Section 881 relate generally to the illegal manufacture, processing or sale of controlled substances.

11. Section 881(d) states that:

"[t]he provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws...shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this title, insofar as applicable and not inconsistent with the provisions hereof..."

21 U.S.C. § 881(d).

The customs laws do contain rules governing summary or administrative forfeiture actions, 19 U.S.C. §§ 1609, 1612, 1615, but do not state specifically what procedures shall govern judicial forfeiture actions. These rules merely state that judicial forfeiture proceedings shall proceed "in the manner prescribed by law." 19 U.S.C. § 1608. *See* 19 U.S.C § 1610. By default, judicial forfeitures therefore are governed by the Supplemental Rules. *U.S. v. $38,000.00 in U.S. Currency*, 816 F.2d. 1538, 1555 (11th Cir. 1987). Neither the Supplemental Rules nor the customs laws were designed to govern Section 881 forfeiture actions and, therefore, are not easily applied to such proceedings. The interplay between these two sets of rules may create additional problems. This situation has been declared by one court as a "procedural morass." *Id.* at 1540.

12. 21 U.S.C. § 881(b). This section provides that:

Any property subject to civil forfeiture to the United States under this title may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property ...

13. Fed. R. Civ. P. Supp. R. C(2).

14. Fed. R. Civ. P. Supp. R. E(2). In addition to the seizure procedure outlined in the Supplemental Rules, Section 881(b) provides two other methods by which personal property may be seized for forfeiture under administrative proceedings. First, seizure may be made without the process prescribed by the Supplemental Rules in four specific situations, including when the Attorney General has probable cause to believe that the property is subject to civil forfeiture under Title 21 of the United States Code. The government also may request the issuance of a warrant authorizing seizure of property subject to forfeiture in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure. *See also* Fed. R. Crim. P. 41. Neither of these seizure procedures, however, would bring the subject property within the jurisdiction of a court.

15. *U.S. v. James Daniel Good Real Property*, 114 S.Ct. 492 (1993).

16. *Id.*

17. *Id.* 114 S. Ct. at 505. The Court distinguished its decision in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), which held that the government could seize a yacht subject to civil forfeiture without affording prior notice or hearing. The Court found that the nature of the property in that case — a yacht — and "the ease with which an owner could frustrate the government's interests in the forfeitable property created a 'special need for very prompt action' that justified the postponement of notice and hearing until after the seizure." The Court emphasized that constitutional due process requires prior notice and a hearing and that exceptions to this general rule would be applied only in "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the [seizure]." The Court found no showing of such exigent circumstances in this case to justify the ex parte seizure of real property. *Good*, 115 S.Ct. at 488-99, 500-01, 505.

18. 114 S. Ct. at 505.

19. The specific procedure that the government follows in order to obtain an arrest warrant for property subject to forfeiture may vary from district to district. For example, in the Middle District of Alabama, the U.S. Attorney's office has a policy of seeking warrants only from a judicial officer, not from the court clerk, as allowed under the Supplemental Rules. This article does not attempt to describe these various local procedures.

20. Fed. R. Civ. P. Supp. R. C(6). This rule allows the court to grant the claimant additional time within which to file a claim.

21. *U.S. v. One Parcel of Real Estate at 1012 Germantown Road, Palm Beach County, Florida*, 963 F. 2d 1496, 1500 (11th Cir. 1992).

22. *Id.* Standing is a threshold issue and a claimant must demonstrate both Article III standing and statutory standing. *U.S. v. $38,000.00 in U.S. Currency*, 816 F.2d 1538, 1543 (11th Cir. 1987). In order to prove Article III standing, a claimant need not own the property; a lesser property interest, such as a possessory interest, is sufficient. Id. at 1543-44. Unless claimants meet the burden of establishing Article III standing, federal courts lack jurisdiction to consider their claims. *Id.* at 1543. In contrast to the Article III standing requirements, a claimant has a duty to establish statutory standing only when, and as, the statute itself provides. Id. at 1544.

23. *U.S. v. One Parcel of Property Located at Route 27, Box 411 (Patterson Road), Montgomery, Alabama*, 845 F. Supp. 820, 824 (M.D. Ala. N.C. 1993) (Trustee has standing to challenge forfeiture). *But see U.S. v. Certain Real Property*, 724 F. Supp. 908 (S.D. Fla. 1989) (Court denied motion of testamentary trustee to intervene and file a certified claim in forfeiture action). The Supreme Court also has recognized that an owner need not be a bona fide purchaser for value; even an individual who acquired the contested property as a gift may assert standing as an owner. *U.S. v. A Parcel of Land, Buildings, Appliances, and Improvements Known as 92 Buena Vista Avenue, Rumson, N.J.*, 113 S.Ct. 1126 (1993).

24. *U.S. v. Real Property at 5000 Palmetto Drive*, 928 F.2d 373, 375 (11th Cir. 1991).

25. *U.S. v. A Single Family Residence and Real Property Located at 900 Rio Vista Boulevard, Ft. Lauderdale*, 803 F. 2d 625, 630 (11th Cir. 1986). *See also, U.S. v. Certain Real Property*, 724 F. Supp. 908 (S.D. Fla. 1989) (Testamentary trust failed to insulate subject property from forfeiture).

26. *1012 Germantown Road*, 963 F.2d at 1500.

27. *U.S. v. Parcel of Land and Residence at 28 Emery Street*, 914 F.2d 1, 3-4 (1st Cir. 1990); *U.S. v. One Parcel of Real Estate Located at 7715 Betsy Bruce Lane*, 906 F.2d 110, 112-13 (4th Cir. 1990); *U.S. v. Schifferli*, 895 F.2d 987, 989 (4th Cir. 1990); *U.S. v. Santoro*, 866 F.2d 1538, 1542 (4th Cir. 1989); *U.S. v. Premises Known as 3639-2nd Street N.E.*, 869 F.2d 1093, 1096-97 (8th Cir. 1989); cited in *U.S. v. Approximately 50 Acres of Real Property Located at 42450 Highway 441 North, Fort Drum, Okeechobee County, Florida*, 920 F.2d 900, 902 (11th Cir. 1991). At least one circuit has rejected the substantial connection test and instead requires the government to show only that the real property had "more than an incidental or fortuitous connection" to the crime. *U.S. v. One Parcel of Real Estate Commonly Known as 916 Douglas Avenue*, 903 F.2d 490, 493-94 (7th Cir. 1990); cited in *Okeechobee County*, 920 F.2d at 902. The "substantial connection" test is based on the legislative history of Section 881(a)(6), not language contained in Section 881(a)(7). *See Okeechobee County*, 920 F.2d at 902.

28. *U.S. v. Real Property and Residence at 3097 S.W. 111th Ave., Miami, Florida*, 921 F.2d 1551, 1556 (11th Cir. 1991); *Okeechobee County*, 920 F.2d at 902.

29. The District Courts in the Eleventh Circuit also have applied this "substantial connection" test to real property forfeited under Section 881(a)(7). *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*; *See also U.S. v. Four Parcels of Real Property in Green and Tuscaloosa Counties, Alabama*, 941 F.2d 1428 (11th Cir. 1991).

35. *3097 S.W. 111th Ave.*, 921 F.2d 1551 (Court upheld forfeiture based on a single drug sale that occurred on residential driveway).

36. *Austin v. U.S.*, 125 L. Ed.2d. 488, 509 (Scalia's concurrence indicates he believes forfeiture of building in which isolated drug transaction takes place could violate Eighth Amendment's prohibition against excessive fines). *See infra* text accompanying note 57.

37. *1012 Germantown Road*, 963 F.2d 1496, 1501 (11th Cir. 1992). *See also U.S. v. 4 Parcels of Real Property in Greene and Tuscaloosa Counties in the State of Alabama*, 941 F.2d 1428, 1440 (11th Cir. 1991). The Eleventh Circuit recognizes this as the same standard used to determine the legality of arrests, searches, and seizures in criminal law.
38. *U.S. v. One Parcel Property Located at 427 and 429 Hall Street*, 853 F. Supp. 1389 (M.D. Ala. May 19, 1994).
39. *U.S. v. 2204 Barbara Lane*, 960 F.2d. 126 (11th Cir. 1992).
40. *Id. See also U.S. v. Four Million Two Hundred Fifty Thousand*, 762 F.2d. 895, 904 (11th Cir. 85) (circumstantial evidence can support finding of probable cause).
41. *Id.*
42. *Germantown Road*, 963 F.2d.at 1501.
43. *Id.*
44. *Germantown Road*, 963 F.2d at 1503.
45. *Id.*
46. Section 881(a)(7) provides that "no property shall be forfeited under this paragraph, to the extend of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without knowledge or consent of that owner."
47. *U. S. v. One Single Family Residence Located at 6960 Miraflores Avenue*, 995 F. 2d 1558 (11th Cir. 1993).
48. *Germantown Road*, 963 F.2d at 1503-06.
49. *Miraflores*, 995 F.2d at 1561; *See also U.S. v. One Parcel of Property Located at Rt. 1, Box 137, Randolph, Chilton County, Alabama*, 743 F. Supp. 802 (M.D. Ala. 1990).
50. *Miraflores*, 995 F.2d at 1564.
51. See *U. S. v.One Parcel of Real Property Located at 3100 N.E. 48th Street, Unit No. 618, Fort Lauderdale, Broward County, Florida*, _F. Supp. _(1994 WL 715618) (S.D. Fla. 1994) for a discussion of the Eleventh Circuit's decisions regarding the requisite lack of actual knowledge.
52. *1012 Germantown Road*, 963 F.2d at 1505. However, the "lack of consent" defense is not available to owners who acquire the subject property after the occurrence of the illegal act giving rising to forfeiture. If such an owner knows of the illegal activity at the time he takes his interest, he cannot assert the innocent owner defense to forfeiture of the property. *U. S. v. One Parcel of Real Estate Located at 6640 S.W. 487 Street, Miami, Dale County, Florida*, 41 F. 3d 1448 (11th Cir. 1995).
53. *Id.* In *U.S. v. One Single Family Residence Located at 15603 85th Avenue North, Lake Park, Palm Beach County, Florida*, 933 F.2d 976 (11th Cir. 1991), the court held that when a claimant to a forfeiture action under Section 881(a)(6) has actual knowledge, at any time prior to the initiation of the forfeiture proceeding, that his legitimate funds are commingled with drug proceeds, the legitimate funds are subject to forfeiture. In this case the claimant and his drug-smuggling brother had invested jointly in a parcel of real estate. The court stated that the claimant could avoid forfeiture as an innocent owner by proving that, after acquiring knowledge of the illicit source of the other funds, he had done everything reasonably possible to withdraw the commingled funds or to dispose of the property. *Id.* at 982.
54. *Id.* at 1506. The Eleventh Circuit's insistence on a claimant's contacting and cooperating with law enforcement authorities is clearly evident in *U.S. v. Sixty Acres in Etowah County*, 930 F.2d 857 (11th Cir. 1991). In this case, the court found that the claimant's generalized fear of her drug-dealing husband (who had murdered his first wife) did not excuse her failure to contact the police about his illegal activities on her property. The court held that only a fear of *immediate* harm could justify a defense of duress, thereby excusing her failure to take action. The wife/claimant, therefore was unable to succeed in asserting the innocent owner defense. As an alternative to contacting the police, the decision suggests the claimant should have removed herself from the scene of the illegal activity. *Cf. U.S. v. One Parcel of Property Located at 1508 North Decatur Street, Montgomery, Alabama* (1992 WL 302919 (M.D.Ala.)) (forfeiture law does not require parent/owner to conduct a police-style investigation of family members over their protests that they are not involved in drug-related activity).
55. 125 L. Ed.2d. 448, 506 (1993).
56. *Id.* at 506.
57. *Id.*
58. *Id.* at 488. In his concurrence, Scalia offers the following example to demonstrate the necessary relationship between the property and the offense:

    "Scales used to measure out unlawful drugs sales, for example, are confiscable whether made of purest gold or the basest metal. But an in rem forfeiture goes beyond the traditional limits that the Eighth Amendment permits if it applies to property that cannot properly be regarded as an instrumentality of the offense — the building, for example, in which an isolated drug sale happens to occur. Such a confiscation would be an excessive fine." *Id.*
59. *U.S. v. One Single Family Residence Located at 18755 North Bay Road, Miami*, 13 F.3d. 1493 (11th Cir. 1994). This decision was rendered in connection with the appeal of an in rem forfeiture action under 18 U.S.C. § 1955. The government argued that the subject property — the residence of an eighty year old invalid and his family — was subject to forfeiture because, as the site of weekly poker games, it had been used in an illegal gambling business. Based on these facts, the court found the forfeiture of the $150,000 home to be a disproportionate penalty. *Id.*
60. *U.S. v. One Parcel at 227 & 229 Hall Street, Montgomery*, 853 F. Supp. 1389 (M.D. Ala. 1994).
61. To date, no federal circuit court has articulated a specific test. *Id.*
62. *Id. See also U. S. v. One Parcel of Real Estate Located at 13143 S.W. 15th Lane, Dade County, Miami, Florida*, _ F. Supp. _ (1994 WL 735581) (S.D. Fla. 1994) (applying both instrumentality and proportionality inquiries); *U. S. v. One Parcel of Real Property Located at 461 Shelby County Road 361, Pelham, Alabama*, 857 F.Supp. 935 (N.D.Ala. 1994) (applying proportionality test).
63. *1012 Germantown Road*, 963 F.2d at 1506.
64. Rest. 2d Trusts § 170.
65. Rest. 2d Trusts § 176.
66. *Patterson Road*, 845 F.Supp. at 824, citing 76 Am. Jur. 2d Trusts § 121 (1992).
67. *Id.*
68. *Miraflores*, 995 F.2d. at 1561.

# Post-Traumatic Stress Disorder vs. Pseudo Post-Traumatic Stress Disorder

*A Critical Distinction for Attorneys*

By Karl Kirkland, Ph.D.

Post-traumatic stress disorder (PTSD) is emerging as a frequently encountered and troubling diagnostic phenomenon in civil litigation, criminal cases, and worker's compensation claims. This article reviews literature and presents information concerning important distinctions between actual PTSD and fabricated PTSD. This information is critically important to attorneys involved in personal injury suits, cases involving criminal responsibility questions, and work-related injuries where PTSD is alleged to be the primary explanatory variable. Practical suggestions are offered to differentiate between the two diagnoses.

## Introduction

Post-traumatic stress disorder (PTSD) is a psychological disorder that is receiving considerable attention in forensic settings since its initial description in the nomenclature of psychological diagnostic manuals and journals in 1980 following the end of the Vietnam War. Initial use of the term was confined to post-combat trauma responses. Use of the diagnosis quickly spread to appropriately encompass a host of other types of responses to trauma including natural disasters, criminal victimization, family violence, work-related trauma, and other events "outside the range of usual human experience that would be markedly distressing to almost anyone, e.g., serious threat to one's life or physical integrity, serious threat or harm to one's children, spouse, or other close relatives, sudden destruction of one's home or community, or seeing another person who has recently been or is being seriously injured or killed as the result of an accident or physical violence."[1] As with any relatively new diagnostic entity, the potential for abuse or inappropriate use of the term also emerges. This paper's purpose is to educate attorneys to prevent such misuse in the legal arena.

## PTSD

PTSD is a unique diagnosis in that use of the term requires determination of an external gate-keeping condition: exposure to an event through "direct encounter or witness that involves actual or threatened death or serious injury combined with a response involving intense fear, helplessness, or horror."[2] The syndrome then involves a triad of responses involving episodic unwanted recollections of the trauma, emotional anesthesia or numbing of feelings, combined with heightened autonomic nervous system arousal resulting in hypervigilance and easy irritability sometimes evolving into rage.

Re-experience of the trauma involves intrusive unwanted visual images of the actual event. This feature may also take the form of recurrent dreams or nightmares. Specific environmental stimuli such as the breaking of window glass that occurred during a rape or robbery, or conditioned seasonal-light variation reminiscent of the event, or a time-of-the-year-anniversary type phenomenon may trigger re-experience of the event. Actual flashbacks may be an included feature.

Emotional anesthesia involves a lack of contact or awareness of emotional factors or feelings as a defensive measure to protect the individual from emotional pain. Emotional numbing usually includes pervasive use of denial, withdrawal from others, and patterns of isolation. Such withdrawal and alienation results in major impairments in interpersonal relationships causing marital problems, parenting difficulties, sexual dysfunction, and academic or vocational maladjustment.

Heightened autonomic arousal describes the fight or flight response which involves intense physiological responses in the absence of a current external danger. These responses include heart palpitations, shortness of breath, chest pain, exaggerated startle response, difficulty concentrating, and vague somatic complaints. Additional related psychological responses include event-related guilt, survivor guilt, behavioral avoidance of event-related stimuli, memory impairment, sleep disturbance, increased worry, and a foreshortened sense of one's own future.

PTSD is a definable, treatable disorder that is readily assessed through clinical interview, medical history, and psychological testing. The Minnesota Multiphasic Personality Inventory (MMPI) and the Minnesota Multiphasic Personality Inventory 2 (MMPI 2) both have PTSD scales that are useful in the assessment of PTSD and pseudo PTSD.[3] Physiological monitoring with biofeedback and polygraph equipment has also been used in the assessment of PTSD.[4] Valid and accurate assessment of PTSD can be accomplished with careful review of records, comprehensive clinical interview, psychological testing, and measurement of imagery, cognitive, and physiological responses.

## Pseudo PTSD

Pseudo or fabricated PTSD has been described in the literature by at least two researchers.[5, 6] Paul Lees-Haley notes that the typical development of pseudo PTSD follows a certain course involving an external trauma. A critical difference between PTSD and pseudo PTSD is that in the latter the external event is often *not* outside the range of normal human experience or is *not* an event involving actual or threatened death.[7] In fact, the external event in a civil case alleging psychological injury may be a motor vehicle accident or work accident that does not meet the gate-keeper requirement of severity as outlined above. In criminal cases, there may be an alleged qualified event that occurred in the past, but bears no current, causal relationship to the instant offense in question, thereby excluding actual PTSD as a valid forensic claim.

## Case example

A 57-year-old married white female was involved in a relatively minor motor vehicle accident. There were no physical injuries to any party other than

muscle soreness. However, the patient alleged development of PTSD symptoms in the weeks that ensued. Her symptom picture worsened over time, particularly after retaining an attorney and filing a lawsuit. Her symptom picture involved some actual but rather exaggerated features of PTSD.

The patient visited her family physician and was treated with antianxiety and antidepressant medication. Careful review of the patient's history revealed multiple past stressors (a prior criminal victimization, death of one of her children, two previous psychiatric hospitalizations, and multiple marital/family problems). Yet, the patient blamed her entire symptom picture on the last traumatic event (the accident), thereby figuratively "shooting the messenger." The patient's symptom picture was directly negatively affected by learning about PTSD from print media and her attorney. She also became more "ill" with development of litigation features and other secondary gain variables. The causal development of her entire lifelong symptom picture was facilitated by a time line event diagram.

## Alternative explanations

False attribution of blame is a variation on actual malingering. Rather than purposeful overt exaggeration, the patient appears to unconsciously accept the tenets of the legal case and thereby minimizes all other potential causes of the symptom picture. This can develop into a situation that creates an actual disservice to the patient from a therapeutic point of view in that acceptance of an inaccurate etiology of the problem is fostered, regardless of the outcome of the lawsuit.

Overt malingering should also be ruled out as the operative "cause" of the patient's symptom picture. In the case of malingering, greed, dishonesty, and antisocial personality disorder features are nominated as possible causal factors in pseudo PTSD. Use of record review, clinical interview, interviews with third parties to confirm patient self-reports, and the MMPI are essential tools in this regard.

Keane, Malloy, and Fairbank developed a 49-item PTSD scale utilizing existing items in the MMPI.[8] Their findings have lead to the establishment of typical PTSD profiles on the MMPI as a whole as well as on this special PTSD scale. In a subsequent study, they compared Vietnam veterans with PTSD, well-adjusted Vietnam veterans without PTSD, and mental health professionals familiar with PTSD in terms of their responses to the PTSD scale.[9] The latter two groups were professionally evaluated to ensure normal functioning and then instructed to respond to the MMPI items *as if* they were attempting to fabricate PTSD symptoms for purposes of compensation.

**"PTSD is a legitimate, potentially disabling, but treatable psychological disorder that is showing up with increasing frequency in the courtroom."**

Results revealed that actual PTSD patients could be successfully discriminated from pseudo PTSD profiles on the basis of psychometric assessment with the MMPI. Specifically, both of the above pseudo PTSD groups produced elevations on scale F and the PTSD scale of the MMPI that were significantly higher than those of the group with the real disorder. These results have important implications for objective differentiation of PTSD from pseudo PTSD, particularly when assessment of the individual in a civil or criminal forensic context is augmented by a comprehensive history, clinical interview, review of *all* previous medical records, and interviews with witnesses and other collateral contacts.

Actual confirmation of the nature of the external stressor is *required* in the legal arena to rule out pseudo PTSD. The forensic psychological expert should be expected to review the veteran's military record (DD214 form) to verify the nature and extent of actual combat experience. In addition, the expert witness may need to actually view the crime scene, DA file, evidence file, or personally view the damaged automobile in criminal and civil cases to ensure that gate-keeper conditions are met in terms of quality of severity of the external stressor.

Epidemiologic surveys of the incidence of trauma and responses to traumatic events are also helpful in the detection of fabricated PTSD. In one recent study, 1,007 young adults were screened for the above variables.[10] In this sample the findings were that traumatic events that qualify for the PTSD stressor definition were relatively common in that 40 percent of their subjects reported an exposure of that magnitude at some time during their life. However, the rate of development of PTSD after such exposure was only 24 percent across categories of responses revealing a high degree of resiliency and positive coping among those who do not develop PTSD.

Of particular interest in this study were the rates of development of PTSD compared by type of event. Sudden injury or being in a serious accident

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Dr. Karl Kirkland is a licensed psychologist and certified forensic examiner in private practice in Montgomery with the firm of Kirkland, King & Renfro, Clinical Psychologists, PC. His primary interests are in the area of forensic psychology with expertise in assessment of various psycho-legal competencies, criminal responsibility and personal injury claims. He is also an assistant professor of medicine, University of Alabama School of Medicine—Montgomery Internal Medicine Residency Program. Dr. Kirkland is a past president of the Alabama Psychological Association (1987) and the Association of Licensed Psychologists in Alabama (1982-84).

had a lower rate (12 percent) than physical assault (23 percent). Threat to life (24 percent), news of the sudden death of a loved one (21 percent), and seeing someone killed (24 percent) all had very similar rates of development of PTSD. A markedly higher rate of 80 percent was observed in women who reported rape. This is compared to a 20 percent - 30 percent incidence rate among combat Vietnam War veterans.[11] The finding that 75 percent of those exposed to typical PTSD events (with the exception of rape) *did not* go on to develop the disorder should be particularly useful to attorneys who are seeing claims of this disorder rapidly growing in civil, criminal, and worker's compensation cases.

In the process of differentiating between PTSD and pseudo PTSD, it is also helpful to know that it may be neither. Malingering has already been mentioned as a possible competitive diagnosis. Other possibilities would include substance abuse, obsessive-compulsive disorders, severe marital and family problems, somatoform disorders, mood disorders, schizophrenic disorders, anxiety disorders, and personality disorders. As discussed above, comprehensive current assessment, as well as a heavy emphasis on *all* records prior to the trauma and third party interviews, can be vital to making the differential diagnosis.

## Summary

In summary, PTSD is a legitimate, potentially disabling, but treatable psychological disorder that is showing up with increasing frequency in the courtroom. It is imperative, fair, and deserving that actual cases of PTSD be properly identified and treated. It is equally important that cases of pseudo PTSD and competing diagnoses be identified and properly handled within the legal setting to avoid improper and inaccurate forensic outcomes. This is particularly important in light of the fact that PTSD has provided the basis for seven-figure out of court settlements in personal injury suits and not guilty by reason of insanity verdicts in criminal trials.[12, 13] PTSD has even been used as a defense in a tax fraud matter.[14]

It is clear that individuals exposed to trauma can respond in a variety of ways, both adaptive and maladaptive. Too often the attorneys, and sometimes the clinicians, are poorly armored, equipped, or prepared to ferret out true PTSD from pseudo PTSD or some other response. This article points out that there are objective standards for accurate diagnostic classification in this emerging area that can improve quality of forensic outcomes. Clearly, additional research and review studies in the area are also called for to improve similar goal attainment. ■

## Endnotes


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12. *State vs. Heads No. 106, 126* (1st Judicial District Court, Caddo Parrish, PA, October 10, 1982) and *People vs. Wood No. 80-7410* (Circuit Court, Cook County, Illinois, May 5, 1982).
13. *U.S. vs. Tindall*, Cr. No. 79-376 (D. Mass., September 19, 1980).
14. *U.S. vs. Oldham*, IP81-28-CR (S.D., Ind., December 1981).

# C·L·E OPPORTUNITIES

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

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# Report on 1994 Annual Meeting of the American Bar Association and Actions of the ABA House of Delegates

**By H. Thomas Wells, Jr., Alabama State Delegate**

*ANNUAL MEETING*

The 116th Annual Meeting of the American Bar Association was held August 4-10, 1994, in New Orleans, Louisiana. The meeting highlighted a year-long theme of finding "Just Solutions" to problems faced by the justice system and the profession. During the meeting, members had the opportunity to volunteer their time to work with several New Orleans public service agencies to construct a "Habitat for Humanity" home inside the Morial Convention Center that was later moved to a permanent site in New Orleans. As you may be aware, Habitat for Humanity seeks to eliminate impoverished housing and to make decent shelter a matter of conscience and action. The house will be occupied by a local needy family selected by Habitat officials according to criteria established by the organization.

In his parting message, President R. William Ide, III of Atlanta, Georgia stated that he believes the duty of the ABA is to face and deal with the social and political issues facing this country at this time. He outlined a ten-point action plan which he believes must be initiated to address the public's dissatisfaction with lawyers and the legal system. The action plan would: (1) deal with all forms of public complaints; (2) publicly denounce unethical action by lawyers and judges; (3) isolate undignified forms of advertisements and develop an advisory system to publicly notify those whose advertising is considered undignified; (4) help people find good lawyers by assisting state and local bar associations in restoring credibility in referral services and by mounting a comprehensive public service campaign that notifies people of the availability of such services; (5) help people avoid bad lawyers by working with state and local bar associations to establish something akin to local "better business bureaus"; (6) stop unethical solicitation; (7) address the "billable hours syndrome"; (8) ask law schools to provide curricula that is more "practice-oriented", such as courses in ethics and client relations; (9) support our state and local bar associations; and (10) bring the public into the system by establishing a permanent non-lawyer advisory committee to the ABA.

The ABA medal was presented to Justice William Brennan for his work in the protection of individual rights and accepted by his son, William Brennan, Jr., a member of the House of Delegates. ■

# OPINIONS OF THE GENERAL COUNSEL

*By ROBERT W. NORRIS, general counsel*

**Question:**

"For several years I was an associate at a local law firm. During that time a plaintiff brought a case to the firm. A now partner in the firm investigated the case thoroughly, and after doing so, declined to take the case. I never had any involvement in the case nor did I ever see or touch the actual file. No suit was ever filed, from what I understand. After I left the firm, I opened a practice in a building with another attorney. Recently, the defendants' attorney died, and the attorney in my building will be handling the case for the defendants. This attorney has asked me to also work on the file, and the client is in agreement. My question is, can I work for the defendants without violating any ethical rules?"

**Answer:**

Yes, you may participate in the representation of the defendants, even though a partner at your former law firm once reviewed the plaintiff's file and declined the case.

**Discussion:**

The problem you raise is covered by the interplay of Rules 1.9 and 1.10. The Disciplinary Commission is likening your co-counseling arrangement with the other attorney to be employment by him rather than the client. The general rule is that when a lawyer switches firms he or she must have actual knowledge about a former client before there is any disqualification or imputed disqualification in representing a party adverse to the former client. While at your "old" firm, you neither represented the client nor gained any specific knowledge about the client according to your factual statement.

The Comment to Rule 1.10, Rules of Professional Conduct, states:

"Paragraphs (b) and (c) operate to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(b). *Thus, if a lawyer while with one firm acquired no knowledge of information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict."* (emphasis added)

Thus, under the Alabama Rules of Professional Conduct, a "moving" lawyer is only deemed to carry actual knowledge along with him/her. The new firm's situation is subject to that actual knowledge. Here, there is nothing that prevents you individually from representing this defendant. There is also no former client conflict to impute to your co-counsel. ■

[RO-93-03]

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# NOTICE OF ELECTION

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

## PRESIDENT-ELECT

The Alabama State Bar will elect a president-elect in 1995 to assume the presidency of the bar in July 1996. Any candidate must be a member in good standing on March 1, 1995. Petitions nominating a candidate must bear the signature of 25 members in good standing of the Alabama State Bar and be received by the secretary of the state bar on or before March 1, 1995. Any candidate for this office also must submit with the nominating petition a black and white photograph and biographical data to be published in the May *Alabama Lawyer*.

Ballots will be mailed between May 15 and June 1 and must be received at state bar headquarters by 5 p.m. on **July 18, 1995**.

## COMMISSIONERS

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

The terms of any incumbent commissioners are retained.

All subsequent terms will be for three years.

Nominations may be made by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. Either must be received by the secretary no later than 5 p.m. on the last Friday in April (April 28, 1995).

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

# ASB Roadshow '95 is "On the Road"!

***Huntsville/Madison County Bar Association***
*Susan Andres, state bar director of communications and public information; Ben Rice, president, HMCBA; Bob Smith, member, The Alabama Lawyer Board of Editors; Pat Graves, member, board of bar commissioners; and Tracy Daniel, executive director, Alabama Law Foundation*

***Limestone County Bar Association***
*(l-r) Melinda Waters, director, Volunteer Lawyers Program; Bill Mathews; Jerry Batts; Circuit Court Judge Henry W. Blizzard, Jr.; Tom Woodruff; Tracy Daniel*

The first step toward increasing communication "within" the Alabama State Bar got off to a great start February 1 in Decatur with the Morgan County Bar Association as the first stop of a two-day, six-association trip. Susan Andres, ASB director of communications, Melinda Waters, Volunteer Lawyers Program director, and Tracy Daniel, Alabama Law Foundation executive director, met with members of the Madison, Lauderdale, Colbert, Limestone, and Lawrence County bar associations.

The ROADSHOW '95 presentation has been designed to provide a brief overview of the major areas of focus for the state bar in 1995, while offering members and bar staff an opportunity for interaction. Brochures and flyers highlighting ASB programs, resources and services are made available to members, and a video on the Kids' Chance scholarship program is also shown. The major purpose of ROADSHOW '95 is to encourage input from the membership on ways that the state bar can better serve individual and collective needs of Alabama lawyers, as well as talk about issues facing the legal profession today.

A large percentage of association members attended each meeting and results of those discussions will be used to establish the direction of future state bar efforts. Highest priority concerns included the areas of increasing the positive public image of lawyers and in strengthening unity within the bar through better methods of communication and sharing of resources. Complete results of the ROADSHOW '95 visits will be covered in future publications.

Additional trips are being scheduled at this time to reach as many state bar members as possible. Any association that has not contacted the ASB about a ROADSHOW '95 visit or that would like additional information should contact Susan Andres at 1-800-354-6154 or (334)269-1515. ■

***Lawrence County Bar Association***
*Susan Andres; Jimmy Speake; Mike Terry, president, LCBA; Sean Masterson; Tracy Daniel; and Jerome Thompson*

***Lauderdale County Bar Association***
*Wilson Mitchell; Melinda Waters; Ken Hewlett, member, board of bar commissioners; Circuit Judge Donald H. Patterson; and Bob Hill, member, board of bar commissioners*

# The Mediation Alternative

## Participating in a Problem-Solving Process

By William D. Coleman

### The Litigator as problem-solver

Recently, I read of a lawyer who was caused to reflect upon his life's work when asked by his daughter: "What did you do today, Daddy?" followed by "What does a lawyer do, anyway?" The lawyer was dumbfounded, but searched for an answer he thought sounded pretty good: "A lawyer is someone who helps people with their legal problems, with problems they have with the law."[2] Likely, you or I might provide a similar answer. But what did you really do yesterday? Did you return urgent phone calls; write letters to other lawyers responding to their letters of the previous day; review documents; take depositions; draft pleadings, discovery requests, responses or motions; or travel to, and sit around, a courthouse waiting to argue, and finally arguing, your motion in court? Did you really solve any problems? In your last trial did you, or did you and the opposing lawyer, working together, solve problems? Or were you each a part of it?

Lawsuits often seem to take on a life of their own — unnecessary correspondence, protracted depositions, ineffective motions — with staggering legal costs and delays, but without focusing on the underlying cause of the dispute or the personal or business objectives of a client. Often, no one is attempting to solve the problem. Clients are becoming increasingly wary of legal costs and insistent that unnecessary costs be avoided. They are apt to demand that business relationships and business objectives be foremost in the mind of their attorney.[3] They want to hear how you will solve their problem more than hear about what litigation tactics you will use in the lawsuit. They are increasingly familiar with alternatives to litigation, particularly mediation, which many clients perceive to be the panacea for the quagmire of "anachronistic" civil litigation.

"Discourage litigation, persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser — in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man."[1]

**— Abraham Lincoln, 1850**

This article will briefly touch on recent advances in Alabama of alternative dispute resolution procedures, where the focus is upon mediation. It will then attempt to answer some of the more common questions about the mediation alternative: What is mediation? Why not negotiate without a mediator? How is a mediator selected? Who should attend the mediation? When should the mediation occur? How is the mediation conducted? Should I disclose or hold back my cards?

### Brief history of mediation movement in Alabama

Alternative Dispute Resolution was a term unknown to many Alabama attorneys a few years ago. Today, "ADR" and "mediation" have become "household

words" in our profession. How did this transformation occur so quickly? A unique aspect of the Alabama mediation movement has been its impetus. In other states, the norm has been for a docket-conscious judiciary to propose, if not coerce, the mediation process upon a reluctant bar. But in Alabama the state bar, acting principally through a Task Force on Alternative Methods of Dispute Resolution ("Task Force on ADR"), has spearheaded the mediation movement.

The Alabama Civil Court Mediation Rules ("Mediation Rules"), drafted by the bar's Task Force on ADR, became effective August 1, 1992.[4] Announcing the newly adopted Mediation Rules on these pages in July 1992, the then-Chair of the Task Force on ADR wrote: "The introduction of the Mediation Rules is not likely to be remembered as a revolutionary step in the history of Alabama legal practice. It is, however, an evolutionary step."[5] In fact, the Mediation Rules have served as a catalyst for a quantum leap during the past two years in the utilization of mediation for the resolution of cases pending in Alabama courts. There are circuit judges and mediators across the state who have embraced the mediation process and who attest to its benefits as a docket and litigation management tool that results in a high percentage[6] of settlements without the stress, expense and uncertainty of a trial.

During the past two years, the bar's former Task Force on ADR and its current Committee on ADR focused primarily upon efforts to educate the bar, the judiciary and the public about the mediation process. Articles have been published in statewide and local legal and business periodicals. County bar associations have been encouraged and assisted in organizing county bar ADR committees. Task Force and Committee members have assisted in presenting seminars on mediation and conducting mediator training programs, and have assisted in presenting programs at the state court judges' mid-winter conference in 1993, the bar association convention in 1994, the state court judicial conference in 1994 and the new judge's orientation program in late 1994. The Task Force on ADR prepared and published in June 1994 an ADR Handbook with Mediation Model.[7] This article furthers, and is a part of, that ongoing educational effort.

The Task Force on ADR, recognizing its need for permanence and increased stature, petitioned the Board of Bar Commissioners in 1993 for the transformation of that group into a permanent committee. The Board approved the change, creating the Committee on Alternative Methods of Dispute Resolution ("Committee on ADR") effective July, 1994. This action of the Board is indicative of the state bar's recognition that ADR has become a significant and permanent aspect of the practice of law that is here and now.

The Alabama Center for Dispute Resolution ("Center"), conceived in 1992 and funded in late 1993, became fully operational in 1994.[8] The Center is located in the state bar building and maintains educational and resource materials. The Center will serve as a clearinghouse for ADR information and will coordinate ADR programs throughout the state. It currently maintains a roster for use throughout the state court system of persons who have registered with the Center to offer their services as mediators. Established by the bar, the Center operated initially as an arm of the bar's Task Force and it now provides support for the

## ADR Resources Now Available

- **ADR Handbooks With Mediation Model:** The Alabama State Bar Committee on Alternative Methods of Dispute Resolution has prepared a handbook addressing alternative dispute resolution (ADR) procedures currently available in Alabama with a focus on mediation. The purpose of the handbook is to provide a useful tool for judges and attorneys in utilizing ADR in Alabama.
- **Mediation Training Information**
- **Roster of Mediators Available In Your Area**
- **How to be listed on the Alabama Center For Dispute Resolution's Statewide Roster of Mediators**

For complete information on all ADR resources and programs call Judy Keegan at the Alabama Center for Dispute Resolution, (334) 269-0409.

work of the bar's Committee on ADR. Recently, the Center was placed under the overall supervision of a new Supreme Court Commission, discussed below.

On July 1, 1994, the Alabama Supreme Court Commission on Dispute Resolution ("Supreme Court Commission") was created by court order.[9] Chief Justice Sonny Hornsby, declaring it a "historic day" when he announced the creation of the Supreme Court Commission, stated that the order signals a commitment by the state judiciary and the state bar to move toward alternative dispute resolution, which he recognized to be on the forefront of judicial reform nationwide. He emphasized that the creation of the Supreme Court Commission maintains the forward momentum of the ADR effort, where the focus presently is upon mediation.[10] The broad-based, 19-member Supreme Court Commission is charged in the Supreme Court's order with instituting guidelines for the orderly progress of ADR programs and procedures in the state court system, supervising the Center, initiating and coordinating community-based ADR programs, developing qualification criteria and standards of conduct for mediators, and addressing funding for implementing ADR.[11]

## Mediation defined

Webster defines mediation as "intervention between conflicting parties to promote reconciliation, settlement, or compromise."[12]

In essence, it is "facilitated negotiation." Mediation is accomplished by means of a settlement conference presided over by a trained neutral party, the mediator, who will identify the issues, question perceptions, use logic, conduct private caucuses, suggest alternatives, assist with risk analysis, and stimulate negotiation between the opposing parties. And, the mediator will maintain decorum in the mediation proceedings. The mediator will not hear testimony or adjudicate any claims or disputes. Mediation is not arbitration.[13] It is an informal method of dispute resolution that is strictly voluntary, nonbinding and confidential. The parties or the mediator may at any time discontinue the mediation, which is successfully concluded only when the parties voluntarily reach an agreement for settlement.

## Negotiation versus Mediation

Many attorneys are skilled negotiators[14] and they may perceive no reason to engage a paid mediator. Due to inherent difficulties of direct negotiations between parties, there are a number of reasons the use of a trained mediator will increase substantially the probabilities of a successful negotiation. First, negotiating parties are reluctant to negotiate with perfect candor. They fear candor exhibits weakness in their claims or defenses. Negotiators strain to avoid "making the first offer" and refuse "to bid against ourselves" even to avoid an impasse. Predictably, the mediator who stresses confidentiality is able to determine much more quickly the true gap between the positions of the parties.

Second, mediation accommodates a face-to-face joint meeting of the parties, but with a neutral party present to maintain order. A party is able to ventilate his frustrations by expressing to the mediator in the presence of the other party his heartfelt perspectives and even his anger. This experience is often therapeutic and sometimes essential to a successful negotiation.

Third, in the absence of a mediator, feelings of fear, anger or distrust by one party directed at an "adversary" may bring emotions to a boiling point, resulting in rudeness and walk-outs. The mediator can hold the emotions in check by using private caucuses and shuttle diplomacy. The mediator is able to discuss the interests of the parties without the emotional baggage that often attends direct negotiations between them.

Fourth, the trained mediator will be better able to recognize and serve the ego needs of the parties. Egos must be separated from the problem. (Sometimes, the ego needs of attorneys must be addressed; they can foreclose even the possibility of a negotiated settlement.)

Fifth, the trained mediator can focus the parties in the private caucuses on their interests, as opposed to their legal positions. In all cases, it will be in the interests of the parties to avoid litigation costs and the risk of an adverse decision by a third party. The mediator can steer the parties away from "bottom line" positions and have them focus upon their BATNA (Best Alternative To A Negotiated Agreement).[15]

Sixth, a candid, private assessment by the neutral mediator of the relative strengths and weaknesses of a party's claims can be given.[16] The mediator's evaluation often is extremely helpful to the parties, depending upon the experience and expertise of the mediator with the subject matter of the dispute. In some cases clients may listen more attentively to the candid, private assessment of the neutral mediator than they do to the opinions of their own counsel.

Finally, because the mediator is able to meet and discuss the interests of the parties privately and view them objectively, he is in a better position to suggest alternative means to resolve the dispute. Mediated settlements tend to be more creative.

## Selection of mediator

The Mediation Rules provide that the court select a mediator agreeable to the parties, but if the parties do not agree, the selection is in the discretion of the court.[17] The mediator is required to have such qualifications as the court may deem appropriate, given the subject matter of the mediation.[18] In some of the more populated counties of the state, the circuit court judges have a list of potential mediators in their circuit from which a choice can be made. A list of mediators is maintained by the Alabama Center for Dispute Resolution.[19] Before accepting an appointment, the mediator should disclose any circumstances likely to create a presumption of bias or to prevent a prompt mediation from being scheduled.[20]

## Attendance at mediation

Mediation sessions are private. Generally, only the parties and their representatives will attend mediation sessions.[21] Of course, the parties and mediator may consent to other persons attending. One key ingredient for a successful mediation is to ensure that persons with authority to settle physically attend the mediation session. Being available by phone is not sufficient. If there are unavoidable limitations on the authority

of those attending, such as where approval of a board must be obtained or statutory procedures must be followed before settlements become final, such limitations should be disclosed and understood from the outset.

## When to mediate

Mediation may occur before or after suit is filed, and if after suit, at any time prior to trial. One should keep in mind that the Mediation Rules are applicable only to cases pending in circuit courts.[22] The circumstances of each case must be considered in determining whether a particular dispute is ripe for mediation. As a general rule, the mediation should occur as soon as possible to avoid unnecessary costs of litigation, particularly the cost of extensive and expensive pretrial discovery, but should occur only when there is an understanding between the parties of the matters in dispute and remedies sought.

It is important to consider the emotional state of the parties. Mediation provides an excellent forum for resolving controversies fostered or inflamed by emotions, but in some cases the process should be delayed to allow heightened emotions to wane.

## Confidentiality

A mediation should be approached with the understanding that information disclosed to the mediator will be treated as confidential unless the party disclosing the information agrees otherwise. In all court-connected mediations in Alabama, the mediator is prohibited from divulging confidential informa-tion, all reports or documents received by the mediator are confidential, and the mediator may not be compelled later to divulge either the fact that such documents exist or their contents.[23] The parties shall also maintain the confidentiality of information received during the mediation and cannot rely upon or introduce as evidence admissions or settlement proposals of the other party, or proposals or views expressed by the mediator, or that another party had or had not agreed to settle as suggested by the mediator. Courts are prohibited from inquiring into, or receiving information about, any aspect of the mediation proceedings or the cause or responsibility for the termination or failure of the mediation process.[24] No record should be made of the mediation proceedings.[25]

Where the parties mediate prior to a lawsuit being filed, or subsequent to the filing but without a court order directing the mediation, the parties should enter into a pre-mediation confidentiality agreement since the Mediation Rules will not be applicable. Confidentiality is normally a central ingredient for a successful mediation. With respect to the admissibility of a settlement proposal, one may rely on existing case law limiting or precluding its admissibility. Preferably, however, the parties should enter into a pre-mediation confidentiality agreement, perhaps one which adopts the confidentiality and other provisions of the Mediation Rules.

## The mediation process

The process for each mediation may vary somewhat depending upon the type of mediation (private or court connected) and the type of disputes (a simple "fender bender" or a complex case such as the successfully mediated school "equity funding" lawsuit). And there will be differences in the techniques used by different mediators. The following comments, however, will apply to practically any mediation.

### A. Facilities

A most important consideration for the site of the mediation is the adequacy of the facilities — a sufficient conference room for all parties to meet and sufficient smaller conference rooms for private caucuses with representatives of each party. Usually, the mediation will be conducted at a neutral site such as a conference room at the courthouse or the mediator's office. If the mediation may need to go on into the evening hours, facilities in a lawyer's office or hotel may be preferable to a governmental building which may close at an early hour. Where the parties do not agree, the mediator may fix the time and place of the mediation session.[26]

### B. Pre-Mediation Statement

The Mediation Rules require that each party provide the mediator with a brief

memorandum setting forth the party's position with regard to the issues to be resolved at least ten days before the mediation session.[27] In actual practice such statements are not provided in relatively simple cases with few issues and few parties. In more complex cases, however, such statements can be very helpful to allow the mediator to become familiar with the relevant facts and key issues involved. This presents an opportunity for the advocate to effectively represent his client — a good pre-mediation statement that includes copies of key documentary evidence, diagrams, graphs or organizational charts may be particularly helpful to the mediator and to the client if presented in a favorable light for the client. Usually, the pre-mediation statements are considered confidential, and are thus presented only to the mediator, not to the other parties. Thus, the advocate is presented an opportunity to advise the mediator in advance of any unusual factual or legal matters that may bear on the negotiations.

Whether the parties will file mediation statements, whether the statements will be provided only to the mediator, and the nature of such statements should be agreed upon in advance between the parties with the mediator. Such a statement, whether in the form of a brief or a short letter, usually should include an identification of the parties, a description of the dispute and what damages are sought, a statement of the history of past settlement discussions and a candid assessment of the strengths and weaknesses of the parties' claims and defenses.



### C. Mediator's Opening Statement

The mediation will begin in a joint session — a meeting of all parties and their attorneys. The mediator will usually begin by introducing himself or herself and describing the mediation process for those parties unfamiliar with it. The mediator will advise that there will be "opening statements" from the parties, followed by the mediator meeting individually with the parties. The mediator should stress the voluntary, confidential nature of the proceedings. The mediator should advise that any party may "opt out" at any time, but should suggest that no party take that action without first discussing their proposed action in private with the mediator. He or she will probably make reference to the inherent costs and risks of litigation. The mediator will advise that following the opening statements from the parties, the mediator will summarize the significant points in contention, and when the parties agree the summary is correct, the summary will create the agenda for attacking the disputes.

### D. Opening Presentations

The opening presentations of the parties should be thoughtfully prepared. This is an opportunity for the attorney, as advocate, to present the client's position in an understandable and compelling light. It is as important as an opening statement at trial, but not subject to the same rules. In mediation, an advocate is allowed to present his client's "view of the world" in a way to help inform and explain, thus assisting in soothing emotional impediments to a resolution. The advocate is not limited to referring to matters that he "expects to prove during trial," but instead may explain his client's position based upon hearsay, impressions, or feelings.

Demonstrative aids may be particularly helpful in some cases. Such aids may include enlarged photographs or diagrams; time line charts illustrating relevant events in chronological sequence; blown up damage calculations or accounting computations proving, or refuting, damages claimed; a videotape of the scene of the accident, or alleged faulty construction, etc. Keep in mind that the opening presentation, while ostensibly presented to inform the mediator, should be used to attempt to convince the adverse party to change its position. The opening presentation can provide the mediator with his or her best tool for discussing later with the other party in private caucus the relative strengths and weaknesses of its position.

In complicated cases with sophisticated party representatives, a probability assessment or "decision tree" analysis showing claims, defenses, uncertainties and probabilities, and resulting in an analytical "expected value" of the claim, may set the foundation for approaching and attacking the uncertainties of the litigation. The application of a sound litigation risk analysis can result in good settlement decisions.

Sometimes, the attorney should prepare the client to make a statement during the opening presentations. Such a statement can allow the client to vent his frustrations about the dispute, and even his anger with the other party. The client may be the best person to express those feelings and such expression may fulfill the client's need to "say his piece" to the other party. Venting such emotional feelings may be essential to clear the way for an intelligent, objective search for a negotiated resolution.

### E. Private Caucuses

Immediately following the initial joint session and opening presentations, the mediator will begin meeting privately with each party. During these private caucuses, the mediator will seek to ascertain the interests and needs of the parties relative to the dispute. Using the "agenda" created at the conclusion of the joint session, the mediator will strive to learn the candid feelings of the parties about the strengths and weaknesses of the claims and defenses and, as is often necessary, will engage in "reality testing" where the mediator is of the opinion a

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party is not realistic in its appraisal or expectations of the case. The mediator will cause the parties to devote attention to their BATNA,[28] with due consideration to the time, emotional strain and cost of proceeding with litigation.

The mediator will seek creative ways of removing impasses while using "shuttle diplomacy" in search of a solution. As the caucuses continue, the mediator may be requested to provide his or her appraisal of the relative strengths and weaknesses of the claims. The mediator's response is usually given considerable weight by the parties.[29] The experienced mediator will be careful, however, not to deliver the appraisal in a manner that indicates the mediator has abandoned his or her position as the neutral participant in the mediation process.

While each mediation is different, often the clients take a larger role in the private caucuses than they have in the prior legal proceedings. Clients need to be able to discuss their feelings and express their interest to feel a part of the process. On occasion, if the attorneys agree, joint meetings of the parties and the mediator without attorneys present can foster a resolution. In other cases joint meetings of the attorneys and mediator without the parties can be helpful in leading to an agreement.

### F. Holding the "Smoking Gun" or "Trump Card"

The mediator will seek to determine in the private caucuses if there are any "smoking guns" that have not been disclosed — a key witness, an expert's findings, a key memo, even a scrap of paper that proves a telephone conversation occurred on a certain date. Such evidence presents a conundrum. Settlement may become likely only if the evidence is disclosed, but an attorney may feel that if settlement is not reached, the impact of the evidence at trial will be substantially diminished. Psychologically, litigators are not well-equipped to disclose smoking guns voluntarily prior to trial. Realistically, however, trial by ambush rarely occurs. Even if the opposing party does not obtain the evidence in discovery, pretrial procedures requiring exchange of exhibits before trial effectively make trial by ambush illusory.

The mediator may point out that, in order to cause the other party to significantly change its position, you need to give the party a reason to make that change. The impact of the "smoking gun" evidence on the other party during mediation may be greater than any impact such evidence might have at trial. Further, any experienced litigator knows that, no matter how unassailable a smoking gun appears to be, all guns are susceptible to misfiring if not backfiring. Consider the case where Party A refuses to allow the mediator to disclose the existence of a letter written by Party B that effectively admits liability (a copy of the letter having been recently obtained from an ex-employee of Party B). In a private caucus with Party B, however, the mediator learns in confidence that Party B is aware that Party A has the letter, and he learns further that Party B is "loaded for bear." When the letter is offered by Party A at trial, Party B will be able to prove conclusively that the letter was fabricated by the ex-employee months after the date of the letter and after the employee was fired for embezzlement. When a party holds his cards so close to the vest, he never knows until he plays them whether the other party has a trump card. Trials are sometimes endured for the sake of gamesmanship at the expense of unwitting, but paying, clients.

In such circumstances the mediator is precluded from violating his obligations of confidentiality to each of the parties, but he should attempt to avoid such gamesmanship by focusing the parties upon their interests and needs as identified from the outset in the private caucuses. The client who pays the cost of admission to witness the game may be more inclined to skip the game with its uncertain outcome in favor of a known resolution that satisfies his interests and needs.

### G. Closure

Once an agreement is reached, the terms of the mediation settlement agreement should be put in writing. The importance of a written settlement agreement cannot be overstressed. At the end of a long and difficult mediation, the parties may feel a tremendous burden lifted from their shoulders and may be inclined to go celebrate or to "go back to work" at the office. New issues can arise when parties try to express their agreement in writing; these issues should be resolved before the mediation is concluded if possible. If the nature of the matter will require more formal or comprehensive legal documents, then at least the essential points of the settlement should be listed and the parties should sign it as a memorandum of their agreement. In that event the agreement should expressly state that a more comprehensive document will be prepared. In some instances it may be beneficial for the mediator to dictate the essential elements of the agreement in the presence of the parties and have the parties acknowledge on the tape recording their agreement to the terms as expressed by the mediator.

## Mediator fees and expenses

Mediator fees and expenses incurred in connection with the mediation process will normally be borne equally by the parties, but the parties may agree otherwise and the court may otherwise direct.[30] Some insurance companies have established a policy of agreeing to prepay the cost of the mediation in order to induce a claimant to participate in the mediation process. There is no standard or customary fee charged by mediators, most of whom in Alabama are either practicing attorneys or retired judges. Practicing attorneys normally charge their hourly rate, sometimes with a reduction depending upon the nature of the claims and the parties involved.

## Conclusion

Mr. Lincoln's admonition more than a century ago about steadfast reliance upon litigation to resolve disputes is apropos today. Frequently, when the dust settles following litigation, there will be more

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than one losing party. A Pyrrhic victory is no victory at all, and it is even more of a loss for a party who was never advised of the opportunity to participate in the "win-win" mediation alternative. The mediation process has proven to be an excellent medium for lawyers to be peacemakers. It provides their clients with a maximized opportunity to avoid the stress, expense and uncertainty of a trial. The mediation wave is crashing now all around us. Lawyers who embrace the process can learn to ride the mediation wave for the benefit of their clients and to the credit of their profession without running the risk of drowning in a needless sea of litigation. ■

## Endnote

1. *Lincoln Talks—An Oral Biography* 52-53 (Emanuel Hertz ed. 1939) (quoting John G. Nicolay & John Hay, Abraham Lincoln), quoted in *Dutton v. Wolpoff and Abramson*, 5 F.3d 649, 652 (3rd Cir. 1993).
2. Robert E. Shapiro, "Can A Litigator Be A Problem-Solver?", 20-4 *Litig.* 22 (Summer 1994).
3. See, Kay Owens Wilburn, "Alternative Dispute Resolution in Alabama: Time for A Genuine Implementation of Processes That Can Better Serve the Client," 24 *Cumb. L. Rev.* 217 (1993-94).
4. These rules were drafted by the state bar president's Task Force on ADR. Prior to the Alabama Supreme Court adopting the Civil Court Mediation Rules, the draft was reviewed and approved by the state bar's board of bar commissioners, a task force appointed by Chief Justice Hornsby and comprised of judges and court personnel to study ADR methods, the District and Circuit Court Judges Association, and the Standing Committee for Revisions to the Alabama Rules of Civil Procedure. J. Noah Funderburg, "Civil Court Mediation Rules," 53 *Ala. Law.* 250 (July 1992)
5. *Id.*
6. In several of the larger circuits there are one or more judges who have embraced the mediation process. For example, Circuit Judge Douglas I. Johnstone of Mobile has referred virtually 100 percent of the civil cases set for trial on his docket to mediation since he referred his first case, a complex one "impossible to settle," to a successful mediation in December 1993. Judge Johnstone keeps mediation statistics — he has assigned a total of 284 cases to mediation during the past year, and of those 66 percent (187 cases) have already been successfully resolved in the mediation process. Of the remaining 97 cases referred, about 55 failed to settle during mediation, and the balance are in the process. Circuit Judge Joseph D. Phelps of Montgomery estimates approximately 30 to 40 percent of his cases "that otherwise would go to trial" are mediated, with a settlement success rate of approximately 80 to 85 percent. Circuit Judge Kenneth O. Simon of Birmingham estimates approximately 40 to 50 cases on his trial docket have been referred to mediation with a success rate of approximately 80 to 85 percent. Telephone interviews with Judges Johnstone, Phelps and Simon (Nov. 1994). Judge John N. Bryan, Jr., former presiding judge of the Tenth Judicial Circuit of Jefferson County, has become active as a mediator since leaving the bench in 1991; he estimates he has conducted approximately 350 mediations in the past three years with a settlement success rate of approximately 87 percent. Telephone interview with Judge John N. Bryan, Jr. (Nov. 1994).
7. The handbook, *Alternative Dispute Resolution Procedures in Alabama with Mediation Model*, published in June 1994, by the state bar Task Force on ADR, is available for $10 from the center.
8. The formation and development of the Center was approved by the board of commissioners of the state bar on October 30, 1992, in response to a petition of the state bar's Task Force on ADR. The Center became funded in December 1993, with IOLTA funds provided by the Alabama Law Foundation. Initially, the operation of the center was assigned as an additional duty of the state bar's then-Director of Programs, Keith B. Norman. In August 1994 the center became fully operational when Judy Keegan (J.D.

1986, Catholic University) was hired as the administrator of the center. One may obtain information about ADR materials or educational programs, or obtain information about mediators or register on the center's roster as a mediator, by calling the center at (334) 269-0409.

9. Order Establishing the Alabama Supreme Court Commission on Dispute Resolution, dated June 13, 1994. This order was in response to a petition initiated by the state bar's Task Force on ADR and subsequently approved and jointly submitted by the Alabama State Bar, the State Circuit Court Judges Association and the State District Court Judges Association.
10. Statement by Chief Justice Sonny Hornsby, press conference at Alabama Judicial Department Building in Montgomery (July 6, 1994).
11. At the Supreme Court Commission's first meeting in September 1994, Marshall Timberlake of the Birmingham Bar was elected its first chair. Mr. Timberlake served with energy and vision as chair of the bar's Task Force on ADR from July 1992 to July 1994, and was instrumental in proposing the creation of the Commission.
12. Webster's Ninth New Collegiate Dictionary (1991).
13. Arbitration is sometimes preferred over litigation, but usually because the parties have more faith in the quality of the arbitrators as decision-makers. Arbitration is actually another form of adjudication and often has some of the war-like characteristics of litigation. It is usually expensive, sometimes is protracted and can result in hostilities and destruction of business or personal relationships.
14. For a widely-read book providing proven strategies for successful negotiation, see R. Fisher and W. Ury, *Getting To Yes: Negotiating Agreement Without Giving In* (Houghton-Mifflin; 1981), republished in paperback in 1983, 1991 by Penguin Books. *Getting to Yes* is based upon the work of the Harvard Negotiation Project, a research project at Harvard University that deals continually with all levels of negotiation and conflict resolution.
15. *Id.* at 97. *Getting to Yes* teaches that knowing one's BATNA will protect against both accepting an agreement one should reject and rejecting an agreement one should accept.
16. The mediator should ensure that the parties understand clearly he/she is not providing legal advice. Where the parties are not represented by attorneys, the mediator may be wise to decline to offer an opinion.
17. Ala. R. Civ. Ct. Mediation 3.
18. Ala. R. Civ. Ct. Mediation 4.
19. The list currently maintained by the center includes all who have asked to be placed on the list and who have completed a form setting forth his/her training and experience. Alabama has not adopted any minimum qualification requirements. The adoption of minimum requirements for mediator registration with the center is currently under consideration by the bar's Committee on ADR and the Supreme Court Commission.
20. Ala. R. Civ. Ct. Mediation 4.
21. Ala. R. Civ. Ct. Mediation 10. In all cases where a claim is covered by insurance, an agent of the insurer with authority to settle up to the lesser of the policy limits or the plaintiff's last demand should attend.
22. Ala. R. Civ. Ct. Mediation 1.
23. Ala. R. Civ. Ct. Mediation 11. The bar's Committee on ADR is studying the need for possible exceptions to the rule of confidentiality — for example, where a child abuse or neglect situation is made known to the mediator.
24. *Id.*
25. Ala. R. Civ. Ct. Mediation 12.
26. Ala. R. Civ. Ct. Mediation 7.
27. Ala. R. Civ. Ct. Mediation 8.
28. See *supra* note 15 and accompanying text.
29. In actual practice such appraisals are routinely provided by most mediators, but some mediators avoid such appraisals to ensure against "giving a legal opinion" to a party. Such an appraisal or opinion may be particularly risky where the parties are not represented at the mediation by their own attorneys.
30. Ala. R. Civ. Ct. Mediation 15.

# Women in the Legal Profession

## TASK FORCE LUNCHEON

Of the 22 women who serve as district, circuit, and appellate court judges for the State of Alabama, 14 were in attendance at a recent luncheon given by the Task Force on Women in the Legal Profession. The purpose of the luncheon was to honor women in the judiciary during the midwinter district and circuit court judges' meeting. The task force was also seeking input from the judiciary as to direction for its future activities. The task force was established in 1993 by the Alabama State Bar.

■ *Judge Sharon Yates, Alabama Court of Civil Appeals and Task Force Co-Chair Celia Collins, Mobile, assisted in the planning of this first luncheon honoring women in the judiciary.*

■ *District Court Judge Sally Greenhaw, Montgomery; **The Alabama Lawyer** Associate Editor and luncheon co-planner Susan DePaola, Montgomery and Circuit Court Judge Susan T. Moquin, Huntsville*

■ *Susan DePaola, Judge Susan Moquin, Susan Andres, ASB Director of Communications and Judge Inge P. Johnson*

■ *Wanda Devereaux, Montgomery, and Judge Sue Bell Cobb, Alabama Court of Criminal Appeals*

# SAVING TAMMY FERRELL'S LAND: *A Legal Services Case*

By William Z. Messer

Legal Services clients are by definition poor, which often means that a problem which would merely be an inconvenience for someone better-off becomes a crisis for a poor person. For example, a low-income rural client (we'll call him Joe) buys an old dilapidated car—"as is," of course—from a shady used-car dealer, only to have the car break down repeatedly. This causes Joe to lose his minimum-wage job because his employer will not tolerate any lateness or absences and can easily find another unskilled worker to replace him. Next, Joe is denied unemployment compensation because the car problem was his fault, not the employer's, and Joe cannot get to another job without the car. Joe has neither the collateral nor the good credit to get a loan and so uses his rent and utility money to have the car fixed. By the time his first paycheck comes in from a new job, Joe's utilities have been disconnected and he has received an eviction notice. What began as a single problem has mushroomed into a multi-layered disaster.

On a "typical" day in a Legal Services office, Joe may be just one of eight new clients with similar predicaments that need to be dealt with immediately. The frustration level is high, but so is the satisfaction when a Legal Services lawyer can get the lights turned back on, convince the landlord to stop the eviction, successfully appeal the unemployment compensation denial, and revoke acceptance of the lemon sold by the used-car dealer, getting the client's money back. The gratification resulting from helping such a client is a significant reason why lawyers choose to work with Legal Services in Alabama.

*With help from Legal Services, Tammy Ferrell and her mother remain together on their family property in rural Lee County.*

Like any other law office, a Legal Services office seeks to provide high quality legal advice and representation to its clients. The problems faced by Legal Services range from simple to amazingly complex, with all of them extremely important to clients. To illustrate, take the case of Tammy Ferrell, a client who first came to the Legal Services office in Opelika in 1993 seeking a divorce.[1] Because of funding from the Alabama Law Foundation, the Opelika office has a domestic violence project coordinator, Donna Henderson, who specializes in representing victims of domestic violence.

Tammy Ferrell married James Brewer in October 1991. At that time, Tammy's aunt deeded a 1.4 acre-section of family land to Brewer for the couple to live on. They moved into an old run-down house on the property. In January 1994, Brewer alone bought a mobile home, mortgaging the land, and had it moved onto the property. Tammy signed nothing and had never even seen the documents. The couple moved into the mobile home shortly thereafter and tore down the old house.

On numerous occasions her husband physically and verbally abused Tammy. The abuse escalated during the marriage. In February 1993, Tammy called the sheriff's department after her husband attacked her. He continued to threaten her, and her fear and his treatment of her drove her to psychological counseling. Tammy and her husband divorced in April 1993, but the divorce was set aside the next month when they reconciled. In June 1993, Brewer tried to run over Tammy with a car, and the

next day he threw her on the floor, yelling and cursing at her while slapping and hitting her all over. He threw a knife at her, but luckily, it missed, sticking into a wall.

Donna Henderson filed for a divorce on Tammy Ferrell's behalf and obtained an immediate temporary restraining order barring Tammy's husband from harassing, contacting, or threatening Tammy and from visiting her home. After substantial efforts, Henderson was able to negotiate a divorce settlement on the day of trial in which Tammy was awarded the 1.4 acres of family property as well as alimony of $500 per month for 12 months.

Unfortunately, Tammy's problems were not over. After she moved away to protect herself from the abuse, her husband stopped making payments on the mobile home. During the divorce proceedings, Tammy tried to reach an agreement with the assignee of the mortgage to keep the mobile home, but was refused. Ultimately, it was repossessed.

Tammy Ferrell's now ex-husband did not make the alimony payments he was ordered to pay, and Tammy began falling further behind on her bills. Then she learned from a letter to her ex-husband that her land would be foreclosed on July 27, 1994. Tammy came to see another Legal Services attorney in the Opelika office on July 20, seven days before the scheduled foreclosure sale. The attorney filed a Chapter 13 bankruptcy to allow Tammy to catch up her debts and to prevent the loss of her property. The foreclosure, as well as collection efforts by other creditors, was automatically stopped.

Tammy's attorney then filed an adversary proceeding in bankruptcy court seeking to have the mortgage declared void on the ground that the property was homestead when the mortgage was entered into (since Tammy and her husband were living in the old house when he mortgaged the land), and Tammy had never signed the mortgage as required by Alabama Code § 6-2-3. The assignee of the mortgage vigorously and skillfully argued that the mortgage was valid either in its entirety or as to the excess over the $5,000 homestead exemption (the property was worth $7,000).

Briefs were filed on both sides, and two hearings were held in the case. Tammy and her entire family attended these oral arguments because what was at stake was property that had been in the family for nearly a century. The second hearing was held a few days after Tammy had been released from the hospital for treatment of a ruptured cyst, and her family stayed with her at the courthouse and made her as comfortable as possible while waiting for her case to be heard.

Ultimately, the court correctly ruled that the mortgage was entirely void as to the single and undivided lot of land.[2] Since Tammy also had not signed the promissory note, the court further ruled that the assignee had no claim against her.

Tammy and her family had not completely understood the judge's ruling, but they thought it might be good news. Their joy at learning that the land still belonged to Tammy, that it was still in the family, was deeply touching.

Tammy Ferrell is regularly making her payments to the Chapter 13 trustee. Once her debts are paid off and she is earning enough money, she hopes and intends to either build a home or buy a mobile home to put on her property. Her family will help. ■

## ENDNOTES

1. The client's name has been changed, but the facts reflect what happened in her cases.
2. See *Sims v. Cox*, 611 So. 2d 339 (Ala. 1992); *Worthington v. Palughi*, 575 So. 2d 1092 (Ala. 1991).

**William Z. Messer**

William Z. Messer is litigation coordinator for Legal Services Corp. of Alabama. He joined LSCA as a staff attorney after graduating from Duke University School of Law in May 1982 and was promoted to senior attorney in 1989. He was named to his current position in February.

## LEGAL SERVICES FIELD PROGRAMS

Three Legal Services field programs in Alabama provide legal assistance to poor people in a wide variety of civil matters. Legal Services of Metro Birmingham, with 13 attorneys and paralegals, assists eligible individuals in Jefferson and Shelby counties. Legal Services of North Central Alabama's 11 advocates represent poor persons in Madison, Limestone, Morgan, and Cullman counties. Legal Services Corporation of Alabama, the largest of the three programs, has 46 lawyers and 16 paralegals in 14 offices to represent clients in the state's other 60 counties. A fourth program, the Alabama Consortium of Legal Services Programs, provides training, communication coordination and other support services to the three field programs. In 1994, Alabama Legal Services programs helped approximately 25,000 clients with problems ranging from AFDC to zoning.

All three programs operate as independent non-profit entities indirectly funded by the federal government. Lawyers appointed by the Alabama State Bar and local bar associations sit on their boards. The Alabama Law Foundation funds a total of eight domestic violence project coordinators, attorneys whose speciality is representing victims of domestic violence in breaking the cycle of abuse. The Legal Services programs assist the Alabama State Bar's Volunteer Lawyers Program, headed by Melinda Waters, by providing intake and eligibility screening of potential clients whom private lawyers have agreed to represent on a *pro bono* basis. Legal Services programs also sponsor private attorney involvement projects, in which private attorneys represent eligible Legal Services clients for a fraction of their normal fees.

# TORT LIABILITY FOR CRIMINAL ACTS OF THIRD PARTIES

## A Survey of Alabama Law

By R. Scott Williams and Stephen L. Poer

### Introduction

The intersection of criminal conduct in civil tort liability poses significant and often difficult policy issues for our courts. With increasing frequency, criminal conduct, generally the province of criminal prosecutions, now forms the basis for alleging potential civil liability, not just against the criminal actor but against third parties with whom the criminal actor has some relationship. A line of decisions by the Alabama Supreme Court over the past decade has defined the narrowly-circumscribed standard for imposing a civil liability in such cases in Alabama. This article identifies and analyzes those decisions.

### The special relationship or circumstances test

The courts' historical reluctance to impose civil liability for the criminal misconduct of third parties is reflected in *Moye v. A.G. Gaston Motels, 499 So. 2d 1368 (Ala. 1986).* In *Moye*, the Alabama Supreme Court observed that, even at that late date, it had not yet decided a single case "whose facts have commanded us to impose liability on a business for injuries to its invitees as a result of the criminal conduct of a third person." *Id. at 1370.* The supreme court continued the uninterrupted trend in *Moye*, upholding the trial court's entry of summary judgment in favor of a motel owner who had sponsored a dance at the conclusion of which an attendee was shot and killed. The court ruled that the difficulty in imposing liability is twofold—lack of duty and proximate causation. In reaching its result, the *Moye* court relied upon the traditional rule followed in Alabama that "absent special relationships or circumstances, a person has no duty to protect another from criminal acts of a third person." *Id.* Thus, the court clearly outlined the applicable standard for the imposition of a duty in tort.

The special relationship or circumstances test was again applied in *King v. Smith, 539 So. 2d 262 (Ala. 1989),* where the estate of the victim of a violent psychiatric patient sued the patient's psychiatrist, claiming that the psychiatrist's misdiagnosis of the patient's mental condition ultimately resulted in the patient's murder of his daughter and suicide. On the facts before it, the supreme court found that the psychiatrist's limited treatment of the criminal actor, on an out-patient basis, was not sufficient to support a finding of the special relationship or circumstance necessary to impose a duty to protect another from the criminal acts of a third party. *Id. at 264.* The court thus upheld the summary judgment entered by trial court in favor of the psychiatrist.

Not long thereafter, the court had another occasion to apply the special relationship or circumstances test, in *Morton v. Prescott, 564 So. 2d 913 (Ala. 1990).* In *Morton*, the court held that a person assaulted by a mental patient was not entitled to recovery against the patient's treating psychiatrist, who had discharged the mental patient just one day after the patient had been involved in a physical altercation at a psychiatric hospital. The court held that no duty flowed from the psychiatrist to the indi-

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vidual plaintiff because the psychiatrist did not know, or have reason to suspect, that the psychiatric patient intended to harm the plaintiff. The supreme court accordingly upheld the trial court's dismissal of all claims against the psychiatrist. In reaching its decision, the *Morton* court distinguished the leading California decision in the area, *Tarasoff v. Regents of University of California, 17 Cal. 3rd. 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976).* There, the California court had held that where a therapist knows of a threat of harm to a specific, identifiable third person, there is an obligation and duty to use reasonable care to warn the intended victim against the danger. The Alabama Supreme Court, however, held on the facts presented in *Morton*, where there was no specific threat of harm to an identifiable third person or persons, the psychiatrist had no duty to warn against possible wrongdoing by the patient. *Id. at 916.*

### The *Young* opinion

The leading Alabama appellate decision upholding the imposition of civil tort liability arising from the criminal acts of a third party is *Young v. Huntsville Hospital, 595 So. 2d 1386 (Ala. 1992).* In *Young*, a female hospital patient sought recovery against the hospital for a criminal assault which she claimed occurred while she was an allegedly sedated patient of the hospital. The plaintiff had been admitted to the hospital for treatment of kidney stones and, while in the hospital, was sexually assaulted in her hospital bed. *Id. at 1387.* There was evidence that the criminal actor was a trespasser who previously had been warned by the hospital to leave the premises and the hospital had not elected to enforce its posted visiting hours. *Id. at 1389.*

The court in *Young* applied the special relationship test as stated in the Restatement (Second) of Torts § 315 (1966), which provides as follows:

> There is no duty so to control the conduct of a third person so as to prevent him from causing harm to another *unless*:
>
> (a)a special relationship exists between the actor and the third person which imposes a duty upon the actor to control the third persons' conduct, or;
>
> (b)a special relationship exists between the actor and another which gives rise to the right to protection.
>
> *Id. at 1388.*

Applying the articulated standard, the court concluded that a special relationship did exist between Young and the hospital. The court found that, in her sedated condition, Young was unable to protect herself from any such assault and held that a "hospital or healthcare provider owes a duty to a sedated or anesthetized patient, who, because of such condition and the circumstances around it, is dependent upon the hospital or healthcare provider". *Id. at 1390.* In reaching this conclusion, the court noted the growing national trend toward expanding the special relationship or circumstances exception to the general rule of no liability. *Id. at 1388.* The court emphasized, however, that "we still recognize that [i]t is difficult to impose liability on one person for an intentional criminal act by a third person . . . ." *Id.*

As a final note, in addressing the extent to which liability might be imposed upon the hospital, the *Young* court held that although a negligence claim would lie against the hospital, the conduct of the hospital was not sufficient to sustain submission to a jury of the claim of wantonness. The court thus reversed the trial court's dismissal of the plaintiff's negligence claims but affirmed the trial court's holding of insufficient evidence to sustain a claim of wantonness. *Id. at 1389.*

### Post-*Young* applications

Subsequent to its decision in *Young*, the Alabama Supreme Court has decided several cases involving the special relationship or circumstances test, with varying results.

*Thetford v. City of Clanton, 605 So. 2d. 835 (Ala. 1992)*, was a wrongful death action filed on behalf of the estate of a wife killed by her husband. The husband had been admitted to a hotel room by the hotel manager after the wife had explicitly requested of the

hotel that the husband not be allowed entry to the room. *Id. at 837.* The trial court granted summary judgment in favor of the hotel and certain other defendants. The Alabama Supreme Court, in a plurality *per curiam* opinion, reversed the finding in favor of the hotel, holding that jury questions existed as to whether the hotel had acted reasonably in permitting entry into the room by the husband and whether it was foreseeable that the husband would harm the wife. Specifically regarding the intervening criminal act of the husband, the court, without citing the *Young* opinion, recognized that to recover against the hotel for the husband's criminal conduct, the plaintiff was required to establish that the defendant knew or had reason to know of the probability of harmful conduct by the husband against the wife. *Id. at 840.* On the issue of proximate cause, the *Thetford* court specifically noted that criminal misconduct is not an "intervening cause" cutting off liability unless it is unforeseeable. *Id.*

One should observe that, in *Thetford*, the court did not emphasize the question of duty, but principally focused most of its analysis on questions of foreseeability and proximate cause. On the duty issue, the court relied upon the general rule, borrowed from prior decisions in other jurisdictions, that an innkeeper has an affirmative duty, stemming from a guest's right of privacy and peaceful possession, not to allow unregistered and unauthorized third parties to gain access to the rooms of its guests. *Id. at 838-840.* Although the *Thetford* opinion did not specifically address the Restatement analysis, its finding of duty is consistent with the Restatement test. More importantly, *Thetford* is a significant decision because of its analysis of the second prong at issue in these cases — proximate cause.

In *N.J. v. Greater Emmanuel Temple Holiness Church, 611 So. 2d 1036 (Ala. 1992)*, the court returned explicitly to the *Young* and Restatement approaches. There, the court upheld summary judgment in favor of a church which had been sued by a minor who allegedly was assaulted and raped while at the church following the conclusion of a daycare session which was held on church premises. Plaintiff brought her action against both the alleged attacker and the church, specifically claiming that the church had failed to use reasonable care in overseeing the daycare program and allowing the attack to occur. *Id. at 1037.* The supreme court declined to apply the special relationship or circumstances exception to liability and found that the plaintiff had failed to prove that the church knew or should have known that there had been previous criminal activity at the church or previous criminal conduct by the alleged attacker. *Id. at 1038.*

In another recent case involving an alleged assault on minors, the court precluded liability against a hotel owner-operator. In *E.H. v. the Overlook Mountain Lodge, ____ So. 2d ____, 28 ABR 13, p. 1339 (Jan. 28, 1994)*, a hotel allowed an individual to check in with several different boys over a period of time. It was later learned that this individual sexually molested the boys, while on the hotel premises. Although the hotel was aware that the attacker was accompanied by the boys while at the hotel, the court held that there was no substantial evidence indicating that the hotel was aware of the criminal acts being committed on the premises. The court thus affirmed the entry of sum-

mary judgment in favor of the hotel. In its opinion, the court addressed whether the hotel had a duty to the individual plaintiffs, and recognized that such a duty would arise if there had been evidence of a series of previous criminal acts making the subject criminal conduct reasonably foreseeable.

In *Habich v. Crown Central Petroleum Corp., 642 So. 2d 699 (Ala. 1994)*, the court again refused to impose civil liability for third party criminal misconduct. In *Habich*, the plaintiff, a convenience store employee, sought recovery arising from her attack and rape by an intruder at the store, claiming that the store had been negligent in providing a safe work environment for its employees. Moreover, the plaintiff claimed that, under the special relationship exception, the store had an affirmative duty to protect her from criminal assault because of certain policies of the store which she claimed effectively rendered her as defenseless as the sedated patient in *Young*. On the facts presented, the court found the analogy to *Young* to be unconvincing and affirmed entry of summary judgment in favor of the store. *Id. at 701.*

The supreme court most recently returned to the special relationship or circumstances test in *Saccuzzo v. The Krystal Co., ____ So. 2d ____, 3 ALW 13-14, Case No. 1930721, 1994 Ala. Lexis 390 (Aug. 1994)*, a wrongful death action seeking recovery against a defendant fast food restaurant as a result of a shooting which occurred in the parking lot of the premises. The court, distinguishing the facts in *Young* and *Thetford*, concluded that there was no evidence that the restaurant knew or should have known that the plaintiff was in danger of being injured. Thus, the restaurant had no duty to protect the plaintiff from the criminal conduct which caused the injury. The court's discussion of *Thetford* and *Young* seems to suggest that application of the exception to the general rule should be limited to circumstances where the facts are compelling and egregious (as in *Thetford*) or where the defendant has a clear and special duty to protect a vulnerable plaintiff, such as the patient in *Young*.

## Conclusion

The task of balancing the harshness of imposing civil liability on one arising from the criminal conduct of another against the tort system's legitimate goal of compensating victims of wrongdoing, is delicate and difficult. As Justice Houston observed in *Moye*, "[i]t is this recognition of the harsh reality that crime can and does occur despite society's best efforts to prevent it that explains this court's requirement that the particular criminal conduct be foreseeable and that the defendant have 'specialized knowledge' that criminal activity which could endanger an invitee was a probability." *Moye at 1372.* Moreover, as Justice Shores observed in an early case absolving a bank from liability for a shooting which occurred during the course of a bank robbery, "[n]ot all problems of complex society can be solved in civil litigation . . . ." *Berdeaux v. City National Bank of Birmingham, 424 So. 2d 594, 595 (Ala. 1982).*

Yet when called upon to resolve such difficult issues as those presented by the cases discussed in this article, the court has achieved a substantial measure of balance and consistency by adhering to the special relationship or circumstances exception. The results reached by the court in applying the test, taken as a whole, affirm the court's legitimate reluctance to impose harsh liability for the criminal conduct of others while preserving a narrow avenue for relief where such relief is clearly warranted. ■




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# YOUNG LAWYERS' SECTION

*By HERBERT HAROLD WEST, JR.*

# SEMINAR AT THE BEACH

The Executive Committee of the Young Lawyers' Section held its second meeting January 11, 1995, in Birmingham, Alabama. A great deal of the discussion at the meeting concerned the upcoming seminar at the beach. You should note that the Executive Committee approved two changes in registration for this year's seminar. First, in addition to an early registration fee of $120, the Executive Committee approved a reduced registration fee of $75 for lawyers who have been admitted to practice for less than two years. For this year's seminar, lawyers who were admitted to practice after May 20, 1993 will be eligible for the reduced fee. Second, those interested in playing golf must register and pay the required green fee and cart fee in advance. A limited number of tee times are available, so those interested in playing in the golf tournament should register early.

The seminar will be held at the Sandestin Resort located in Sandestin, Florida and will take place on May 19th and 20th. You may make reservations at the resort by calling 1-800-277-0800 before April 17, 1995. After April 17, 1995, you may still make reservations, but on that date the resort will release any rooms in our room block that have not been reserved. You may register for the seminar by cutting out the attached registration form and mailing it, together with your registration fee, to Robert J. Hedge, P.O. Box 894, Mobile, Alabama 36103-5130, or by returning one of the brochures that will be mailed out soon.

The Executive Committee also discussed a joint project between the Young Lawyers' Division of the American Bar Association and the Federal Emergency Management Association to staff booths at which victims of disasters may ask questions concerning their legal rights. The Alabama YLS is responsible for providing volunteers for disasters occurring in Alabama. This program is being chaired by Candis McGowan and she is in need of volunteers from across the state. Prior to staffing a booth, each volunteer is given a short course and a packet of materials on the questions that victims often ask and how to answer them. Volunteers are prohibited from representing persons seeking help at the booths and must refer those in need of legal assistance to a local bar association referral service. If you have an interest in participating in this project, please call Candis at (205) 328-9576. Your help will be very much appreciated. ■

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# DISCIPLINARY REPORT

### Transfer to Disability Inactive Status

• Dothan attorney **Gregory P. Thomas** was transferred to disability inactive status, effective January 4, 1995. Thomas' transfer was ordered by the Supreme Court of Alabama pursuant to a prior order of the Disciplinary Board of the Alabama State Bar. [ASB Nos. 92-289, 93-038, 93-039 & 93-329]

• Pelham attorney **Millard Lynn Jones, Jr.** voluntarily transferred to disability inactive status, effective October 6, 1994. Jones' transfer was ordered by the Supreme Court of Alabama pursuant to a prior order of the Disciplinary Board of the Alabama State Bar. [ASB Nos. 91-838, 92-292 & 94-185]

### Surrender of License

• Mobile attorney **Patrick M. Sullivan** has surrendered his license to practice law. In an order dated November 23, 1994, the Supreme Court of Alabama, based upon Sullivan's surrender of his license, cancelled and annulled Sullivan's license to practice law in this state effective November 1, 1994. [ASB Nos. 94-063 and 94-075]

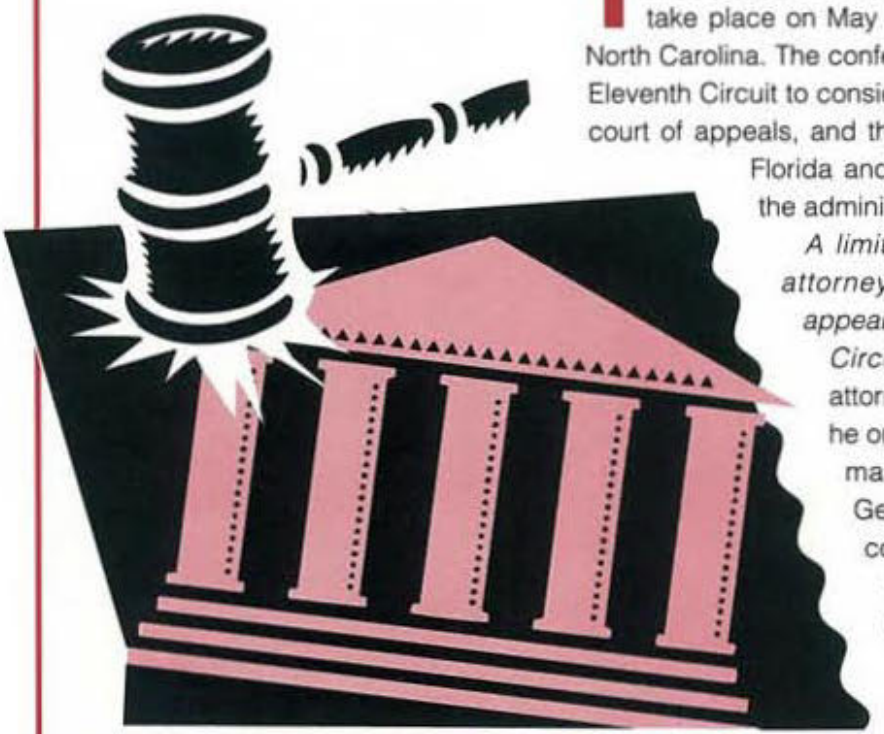
• Tuscaloosa attorney **William Gary Hooks, Jr.** has surrendered his license to practice law. In an order dated November 15, 1994, the Supreme Court of Alabama, based upon Hooks' surrender of his license, cancelled and annulled Hooks' license to practice law in this state effective October 27, 1994. [ASB No. 93-172(A)]

### Suspensions

• The Supreme Court of Alabama, in an order dated December 6, 1994, suspended Birmingham attorney **Bruce Leland Jaffe** from the practice of law in the State of Alabama for a period of three years, said suspension effective October 1, 1994. Said suspension was based upon Jaffe's pleading guilty in the United States District Court for the Northern District of Georgia to a violation of 18 U.S.C. §371, in that he knowingly and willfully conspired with an alien in obtaining entry into the United States by willfully false and misleading representations and willful concealment of facts. [Rule 22(a) (2); Pet. No. 94-06]

• On December 16, 1994, Anniston attorney **Hilliard Wayne Love** was suspended from the practice of law by the Alabama Supreme Court for a period of 45 days. This suspension was effective January 15, 1995. Love was charged with the willful neglect of a legal matter entrusted to him by three of his clients. He did not contest the charges and agreed to the discipline ultimately imposed. [ASB Nos. 93-143, 94-030 & 94-155] ■

## Judicial Conference of the 11th Circuit



The meeting of the Judicial Conference of the Eleventh Circuit will take place on May 25-27, 1995 at the Grove Park Inn, Asheville, North Carolina. The conference is being convened by the judges of the Eleventh Circuit to consider the business of their respective courts (the court of appeals, and the district and bankruptcy courts in Alabama, Florida and Georgia) and to devise means of improving the administration of justice in those courts.

*A limited number of spaces are available to any attorney admitted to practice before the court of appeals or any of the district courts of the Eleventh Circuit who wishes to attend the meeting.* If an attorney is interested in attending this conference, he or she should write to the Circuit Executive, Norman E. Zoller, 56 Forsyth Street, NW, Atlanta, Georgia 30303. By return mail, he will forward a conference registration form, describe the conference's hotel accommodations, room charges and the substantive and social programs of the meetings. ■

# RECENT DECISIONS

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

## BANKRUPTCY

**Eleventh Circuit in reversal says that proceeds of sale of FCC broadcasting station are subject to security interest**

*Beach Television Partners*, 26 B.C.D. 323; 38 F.3d 535; 11th Cir., (Nov. 17, 1994). The debtor, Beach Television Partners (BTP), granted a security interest in all of its personal property including its broadcasting licenses to Orix Credit Alliance (Orix). BTP filed a Chapter 11 petition, which later was converted to Chapter 7. After the conversion, the trustee entered into a contract to sell the licenses for $140,000. The bankruptcy and district court denied Orix's motion to be paid out of the assets. The appellate court, in reversing, said that because of the exclusive authority under the FCC Act of the FCC to control transfer of licenses, there could be no security interest granted in broadcasting licenses, in that the Act did not allow an ownership interest in such "property", and that UCC 9-203(1) requires an ownership interest in an asset to be assignable. However, the FCC has now stated that a security interest in the sale of a broadcasting license does not violate FCC policy, which statement allows the licensee private rights in the license, and, thus, as reflected in *In re Ridgely Communications, Inc.*, 139 B.R. 374 (Bkrtcy. D.MD. 1992), such interest can be a perfected security interest. The opinion in one of the concluding sentences provides: "A security interest in the proceeds of an FCC approved sale of a broadcast license in no manner interferes with the FCC's authority and mandate under the Act to regulate the use of broadcast frequencies."



**Chapter Eleven debtor's attorneys must be careful in retaining or selling causes of action**

*Harstad Companies v. First American Bank*,26 B.C.D. 310; 39 F.3d 898; Eighth Cir. (Nov. 9, 1994). Keith and Diane Harstad (Harstad Companies) filed Chapter 11 on February 16, 1990. Almost two and a half years later they filed an amended disclosure statement in which it was stated they had not finished their review and were uncertain as to whether there were avoidable preferential transfers. There was nothing as to preferential transfers in the plan confirmed October 19, 1992. Nonetheless, on January 15, 1993, debtors filed a suit for almost $850,000 against First American Bank (Bank), including $140,663 paid to bank on December 8, 1989 for an insufficient check. The district court affirmed the bankruptcy court's granting Bank's motion to dismiss on grounds that the debtor had no standing to bring the action, and further that it would not benefit the estate. The Eighth Circuit affirmed holding that the mere retention of jurisdiction by the bankruptcy court as to post-confirmation matters was insufficient to reserve preference actions in the post-confirmation Chapter 11 debtors. The court noted that while they were debtors in possession, debtors had the power to avoid preferences, but failed to do so, and that the debtors could have retained the right to recover preferences by them or by a designated agent had the plan so provided. The Eighth Circuit said to adopt the Harstads' argument that 1141(b) vests all property of the estate in the debtor, unless otherwise provided in the plan, would render 1123(b)(3) which requires specific language, a nullity. Section 1123(b)(3) purposefully requires creditors to be alerted to whether there are potential causes of action. Finally, the court said that as there was nothing to indicate the Harstads would return any recovered funds to the creditors, there was no benefit to the creditors.

**Comment:** It is difficult to ascertain from the opinion as to whether a full reference in the disclosure statement as to the debtor's intention to retain "avoidable transfers" as a post petition asset, and to disclose fully the facts, would have been sufficient even though not mentioned in the plan. My suggestion is that there be a specific statement in both the disclosure statement and in the plan.

**To contest IRS claim, be sure to serve notices on U.S. attorney for district**

*In re Hernandez*, 173 B.R. 430 (N.D. Ala. 1994, J. Acker). Debtor filed contest to proof of claim filed by IRS on behalf of the United States. A copy of contest was mailed to the Special Procedures section of IRS, but neither the contest nor notice of contest was given the U.S. attorney for the Northern District of Alabama or the U.S. Attorney General. The bankruptcy court confirmed the debtor's plan and sustained the contest. The IRS failed to appear because it mistakenly understood that issues raised by the contest had been resolved. After the bankruptcy court denied the United States' motion to set aside the order disallowing the claim, the United States

appealed to the district court. Judge Acker referred to Bankruptcy Rule 7004(b)(4) requiring service of process upon the United States by first-class mail to the United States Attorney for the district where the action is brought, and also to the United States Attorney General in Washington. Quoting *In re Simms*, 33 B.R. 792, 793 (N.D. Ga. 1983), Judge Acker determined that the bankruptcy court acted without jurisdiction as to the United States, and thus reversed and remanded.

**Former counsel not allowed to file motion for relief to set aside judgment in which opinion criticized former counsel**

*Matter of El Paso Refinery, L.P.*, 37 F.3d 230 (5th Cir. Nov. 9, 1994). The bankruptcy court entered a memo opinion criticizing Andrews & Kurth (A&K) for not timely filing an application for approval of the employment of a consultant. A&K filed a Rule 60(b) motion when the bankruptcy court approved employment of the consultant *nunc pro tunc*. In its 60(b) motion, A&K objected to findings in which the consultants' employment was approved. A&K argued its right to standing in the case on four grounds: (1) it is a party's "legal representative" as the term is used in 60(b); (2) as former counsel to the debtor, it is now a creditor of the estate; (3) it is a party in interest under 1109(b); and (4) as a matter of justice. The appellate court rejected all these arguments in holding that A&K had no standing as a former attorney for the debtor, which simply claimed that the wording of the opinion damaged it, although there was no direct monetary damage.

**Eleventh Circuit rules on Alabama law as to competing liens on homestead, and gives primer on real estate law**

*Thomas Haas, Bernice Haas v. IRS & SBA*, 31 F.3d 1081 (11th Cir. Sept. 13, 1994). Debtor filed suit to determine priority between a federal tax lien and a reinstated mortgage. The tax lien preceded the reinstated mortgage filing, but the original mortgage was filed prior to the tax lien. The original mortgage was filed in 1979 and on March 31, 1986 erroneously released. Thereafter, the IRS filed a tax lien much in excess of the value of the real estate. Debtor filed Chapter 11 on October 7, 1991. The bankruptcy court held the reinstated mortgage to have precedence under the equitable doctrine that there had been no prejudice to innocent parties. The district court affirmed, based upon the bankruptcy court's finding that the IRS had placed no reliance upon the release. On appeal, the IRS argued: (1) 26 U.S.C. 6323 gives the government the status of a hypothetical lien creditor; and (2) the same §6323 forbids application of the "relation back" doctrine. (Alabama does have such doctrine.) In response, the court of appeals said that state law governs property or rights to property, and that the federal statute creates no rights "but merely attaches consequences, federally defined to rights under state law." Thus, as Alabama is a title state, title passes with a mortgage to the mortgagee, subject to the equitable right of redemption in the mortgagor which is a property right. Federal law would then govern priority, as the federal tax lien attached to the property right of the mortgagor. The principles governing priority are: (1) first in time, first in right; and (2) a federal tax lien is superior to an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inchoate non-federal lien. The issue here was whether the real estate mortgage lien was in existence when the tax lien was filed - was it protected under Alabama law against a judgment lien arising at the time the tax lien was filed? The court said that under Alabama law, a mistaken cancellation may be expunged if no innocent party is prejudiced, but that Alabama law protects a judgment creditor without notice. Admittedly the IRS had the status of a hypothetical judgment creditor, but as lack of notice is not a requirement on the IRS, the IRS would have priority over the reinstated lien which had been released in error. The Eleventh Circuit bolstered its conclusion by referring to Treasury Regulations forbidding application of a relation back principle to award an unperfected lien priority over the tax lien.

**Comment:** Because of the federal law, the IRS was fortunate indeed, as it did not have notice of the mistaken satisfaction, and conducted itself as if there had been no satisfaction. The result here may be a correct interpretation of the law, even though inequitable.

## SUPREME COURT OF THE UNITED STATES

**Prior consistent statements to rebut a charge of recent fabrication–the common law prevails**

*Tome vs. United States,* Case No. 93-6892 63 US LW 4046 (January 10, 1995). Under the *Federal Rules of Evidence* is an out-of-court statement admissible to rebut an allegation that testimony is a lie or the product of an improper motive if the statement was made after the alleged improper motive arose? The Supreme Court, by a five-to-four decision, said no.

Writing for the majority, Justice Kennedy held that the Rule, *801(d) (1)(B),* "permits the introduction of the declarant's consistent out-of-court statements ... only when those statements were made before the charged recent fabrication or improper influence or motive." Thus, *Rule 801(d)(1)(B)* permits the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive *only* when those statements were made before the charged fabrication, influence or motive occurred.

The prevailing common-law rule for more than a century before adoption of the *Federal Rules of Evidence* was that a prior consistent statement introduced to rebut a charge of recent fabrication or improper influence or motive was admissible *if the statement had been made before the alleged fabrication, influence or motive came into being, but it was inadmissible if made afterwards.*

Both McCormick and Wigmore state the rule in a more categorical manner: "The applicable principle is that the prior consistent statement has no relevancy to refute the charge unless the consistent statement was made before the source of the bias, interest, influence or incapacity originated."

The Supreme Court's opinion suggests the following caveat to the practitioner:

> Permitting the introduction of prior statements as substantive evidence to rebut every implicit charge that a witness' in-court testimony results from recent fabrication or improper influence or motive would shift the trial's whole emphasis to the out-of-court, rather than the in-court statements. It may be difficult to ascertain when a particular fabrication, influence or motive arose in some cases. However, a majority of the common-law courts were performing this task for over a century, and the Government has presented no evidence that those courts or the courts that adhere to the rule today have been unable to make the determination.

**Habeas corpus–avoidance of the procedural bar to successive petitions**

*Schlup vs. Delo,* Case No. 93-7901 63 US LW 4089 (January 23, 1995). Must a successive habeas petitioner who says newly discovered evidence proves his innocence show by clear and convincing evidence that no reasonable juror could have found him guilty in light of such evidence? A sharply-divided United States Supreme Court held no.

Led by Justice Stevens, the Court ruled that a less demanding standard applies to such cases and that the petitioner must show that "it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt." Justice Stevens observed that the standard, although a tough one, better provides adequate protection against the kind of miscarriage of justice that would result from the execution of a person who is wholly innocent. Thus, the more lenient standard of *Murray v. Carrier, 477 U.S. 478* applies. That decision requires a habeas petitioner to show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent," *Id. at 496,* rather than the more stringent *Sawyer* standard, which governs the miscarriage of justice inquiry when a petitioner who has been sentenced to death raises a claim of actual innocence to avoid a procedural bar to the consideration of the merits of his constitutional claims.

The Supreme Court, in a trio of cases, has clearly and firmly established an exception to the procedural bar for fundamental miscarriages of justice, i.e., Carrier, 477 U.S. at 495; Kuhlmann v. Wilson, 477 U.S. 436; and Smith v. Murray, 477 U.S. 527. To ensure that the fundamental miscarriage of justice exception would remain "rare" and be applied only in the extraordinary case, while at the same time ensuring that relief would be extended to those who are truly deserving, the Court has explicitly tied the exception to the petitioner's innocence.

Finally, in order to satisfy *Carrier's* "actual innocence standard," a petitioner must show that in light of the new evidence, it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. The focus on actual innocence means that a District Court is not bound by the admissibility rules that would govern at trial, but may consider the probative force of relevant evidence that was either wrongly excluded or unavailable at trial.

Chief Justice Rehnquist and Justices Kennedy, Thomas and Scalia dissented.

**Supreme court finds scienter requirement in child pornography statute**

*United States vs. X-Citement Video,* ___ U.S. ___ (1994). The Protection of Children Against Sexual Exploitation Act, *18 U.S.C. 2252(a)(2),* proscribes the knowing receipt of any visual depiction if such depiction either was produced by the use of a minor engaging in sexually explicit conduct or is of such conduct.

The Ninth Circuit held that the term "knowingly" applied only to the verb "receipt" and not to how the material was produced or what it depicted. In other words, an individual who received a child pornography videotape would fall within the statute even if he thought it contains sport highlights, so long as he knowingly and physically received the tape. As a result of the strict liability nature of the statute, the Ninth Circuit found it unconstitutional and in violation of the First Amendment.

The Supreme Court reversed the Ninth Circuit's ruling. The High Court applied traditional rules of statutory construction and examined the legislative history. In doing so, the Court found the "knowingly" requirement to apply not only to the physical act of receiving the material, but also to the subject or method of production of the material. ■

**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.

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**Eugene Walter Carter**
*Montgomery*
*Admitted:* 1920
*Died:* December 14, 1994

**Salena Mae Cason**
*Trussville*
*Admitted:* 1981
*Died:* December 26, 1994

**James Hardin Faulkner**
*Pelham*
*Admitted:* 1949
*Died:* December 28, 1994

**Marshall H. Fitzpatrick**
*Birmingham*
*Admitted:* 1950
*Died:* December 1, 1994

**James G. Gann, Jr.**
*Birmingham*
*Admitted:* 1951
*Died:* September 14, 1994

**Thomas C. Najjar, Jr.**
*Birmingham*
*Admitted:* 1958
*Died:* January 5, 1995

**Curtis Lee Rosser**
*Centre*
*Admitted:* 1993
*Died:* December 17, 1994

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# • M·E·M·O·R·I·A·L·S •

## Marshall Hooks Fitzpatrick

WHEREAS, Marshall Hooks Fitzpatrick, a native of Birmingham, Jefferson County, Alabama, departed this life on December 1, 1994, at the age of 71, a longtime resident of Cahaba Heights, Jefferson County; and

WHEREAS, he attended Yale University, and was a graduate of the University of Alabama and its law school. He was an associate member of the *Alabama Law Review*, a member of the Farrah Order of Jurisprudence, and a member of the Defense Lawyers Association. He served overseas with the 86th Blackhawk Division during World War II; and

WHEREAS, Marshall was a member of the Cahaba Heights United Methodist Church and took an active interest in the United Methodist Children's Home in Selma; and

WHEREAS, our colleague is survived by his wife, Sue Fitzpatrick; daughters, Bonnie Keith and Terrie Branch; a son, Marshall Fitzpatrick, Jr.; a sister, Dorothy Wooten; and a grandson, Regan Branch; and

WHEREAS, we, on behalf of the members of the Birmingham Bar Association, desire to express our deep regard for Marshall Fitzpatrick and our profound sense of loss in the passing of our colleague who served the legal profession and judicial system of this county competently and well.

**J. Fredric Ingram**
**President**
**Birmingham Bar Association**

## Robert Clifford Fulford

WHEREAS, Judge Robert Clifford Fulford, a member of the Birmingham Bar Association since 1947, died at the age of 75 on October 29, 1994; and

WHEREAS, Judge Fulford was a native of Georgiana, Alabama, and graduated from the University of Alabama and the University of Alabama School of Law; and

WHEREAS, Judge Fulford served his country with distinction, serving as an officer in the United States Navy during World War II and the Korean War; and

WHEREAS, Judge Fulford was active in causes for his community, state and nation, working in politics throughout his life, and serving as a member of the Alabama Democratic Executive Committee; and

WHEREAS, Judge Fulford was appointed to the United States Bankruptcy Court in 1985, in which position he served with honor and distinction until his death; and

WHEREAS, Judge Fulford was deeply respected by the members of this community, the bar, and by his colleagues on the bench; and

WHEREAS, we wish to express our enduring regard and respect for our distinguished colleague who served our profession, our state, and our nation in such an exemplary manner.

IT IS, THEREFORE, HEREBY RESOLVED, by the Executive Committee of the Birmingham Bar Association, that this resolution be spread upon the minutes of this Committee, and that copies thereof be sent to Judge Fulford's wife, Toula Hagestratou Fulford; his daughter, Anne Kirby Fulford Hallman; his son, Robert Craig Fulford; his stepdaughter, Mary Helen Matsos McCoy; and his sister, Alice Nell Fulford Kirven.

**J. Fredric Ingram**
**President**
**Birmingham Bar Association**

## Thomas C. Najjar, Jr.

WHEREAS, Thomas C. Najjar, Jr. was an active member of the Birmingham Bar Association and the Alabama State Bar at the time of his death on January 5, 1995; and

WHEREAS, Tom Najjar was a senior partner in the firm of Najjar & Denaburg; and

WHEREAS, he was a graduate of the University of Notre Dame and the law school of the University of Alabama; and

WHEREAS, Tom was recognized and highly regarded by the bench and bar as an outstanding trial lawyer in both federal and state courts. In fact, he was fearless in pursuing the causes of his clients, both rich and poor. He was a shining example of what is good and right in our profession. Tom served on the many committees of our bar and was one of the founders of the Hillcrest Foundation; and

WHEREAS, he is survived by his wife, Sandra Najjar; a stepdaughter, Terri Thrasher; stepson, Keith Farr; his father, T.C. Najjar, Sr.; and a brother and sister-in-law, Charles and Louise Najjar; and

WHEREAS, Tom Najjar loved life and lived life and brought good spirit to all who knew him. We hereby express our deep regard to Tom Najjar and our profound sense of loss in the passing of our colleague who has served our profession well.

IT IS THEREFORE, HEREBY RESOLVED, that this resolution be spread upon the minutes of the Executive Committee and copies thereof be sent to his wife, Sandra Najjar, and Charles Najjar, his brother.

**J. Fredric Ingram**
**President**
**Birmingham Bar Association**

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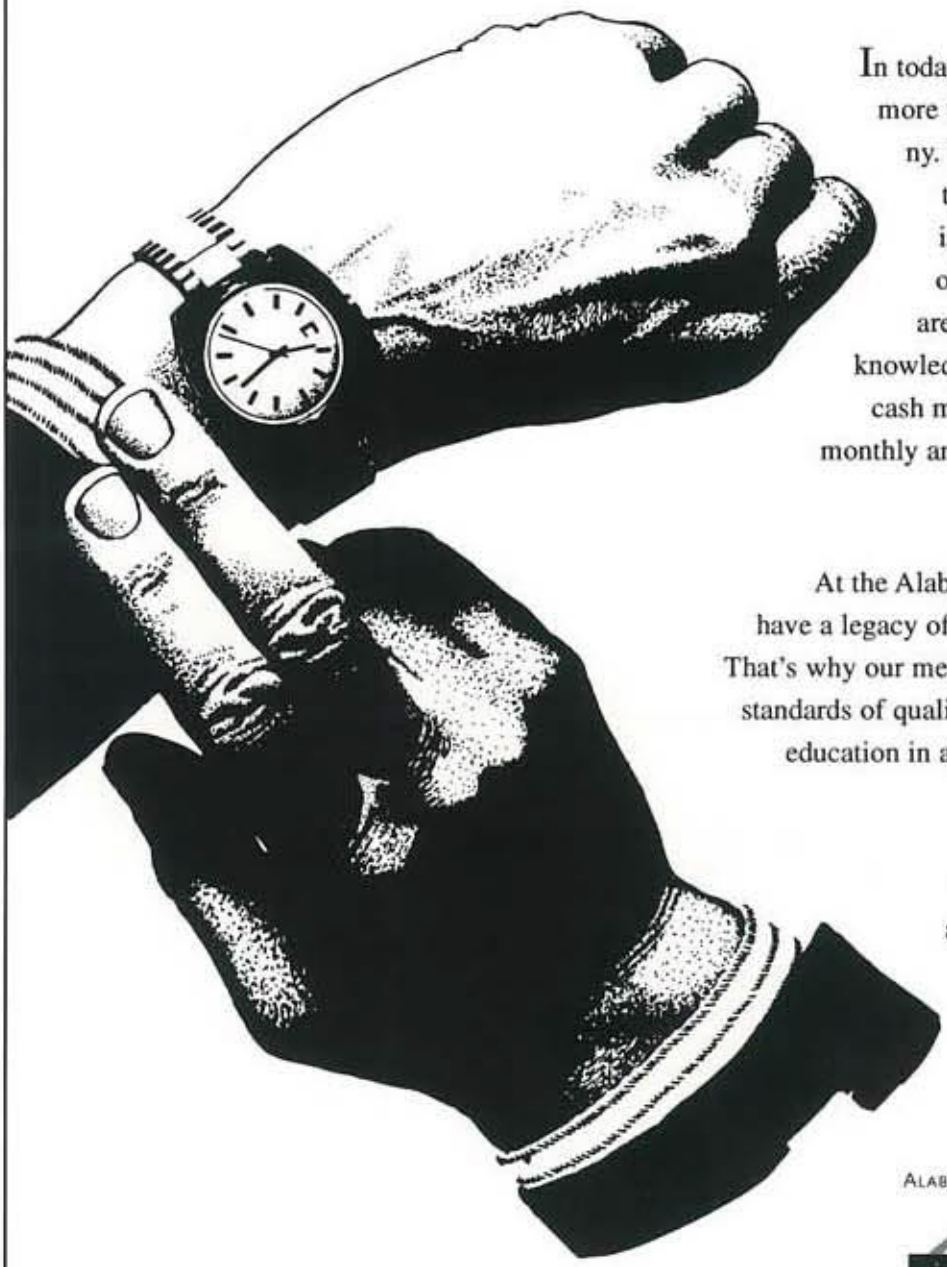

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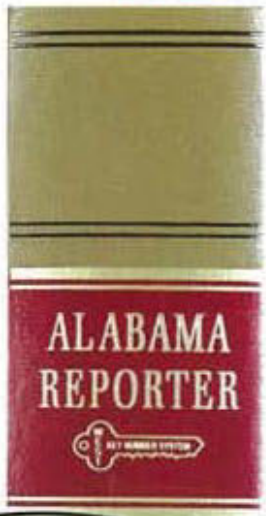


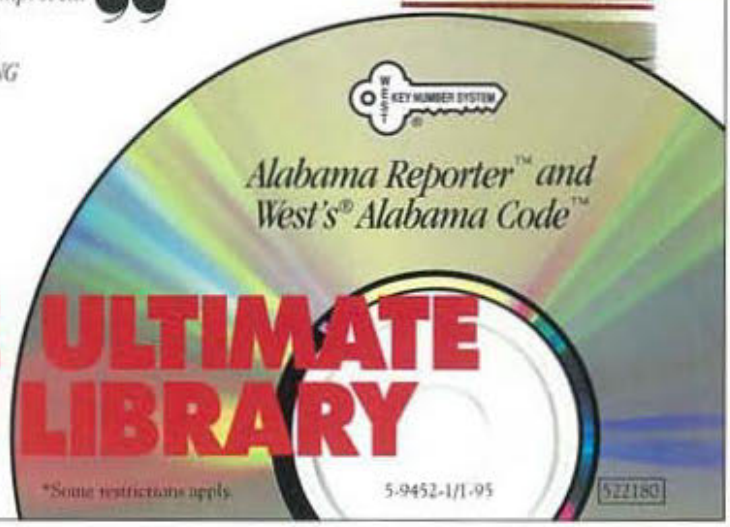


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