The Alabama Lawyer

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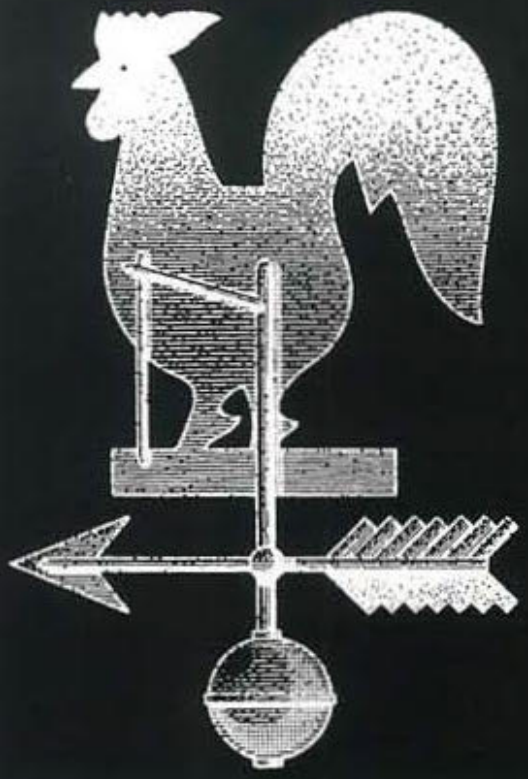

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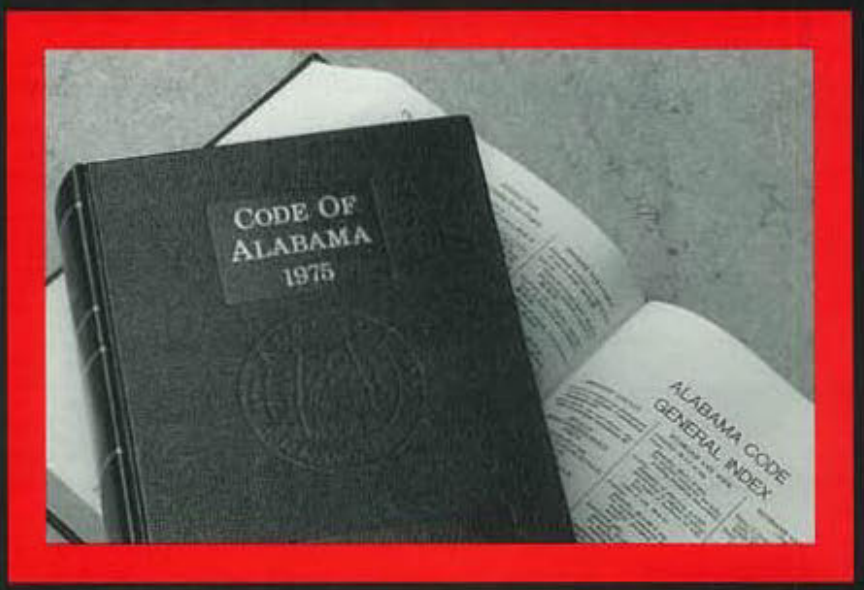

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IN BRIEF

March 1996 Volume 57, Number 2

ON THE COVER:

A group of snow geese swimming on a pond in Montgomery County, Alabama. Snow geese breed in the arctic regions of North America and eastern Siberia. They migrate long distances, sometimes flying so high that they can barely be seen. Even at this distance, however, they can often be identified by the shifting curved lines and arcs they form as they fly. Many snow geese spend their winters along the mid-Atlantic Coast and Gulf Coast. (See National Audubon Society's Field Guide to North American Birds, Eastern Edition.)

— Photo by Paul Crawford, JD, CLU

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PRESIDENT'S PAGE

"Reason is the life of the law; nay, the common law itself is nothing else but reason."

—Sir Edward Coke,
The Institutes of the Laws of England, vol. 1, 1628-1641.

Sir Winston Churchill wrote in his four-volume work on *The History of the English Speaking People* in a chapter in Volume 1 on the development and importance of the Common Law. He stated that at the beginning of the reign of King Henry II on March 27, 1155, a modern lawyer would find an English courtroom a strange place but at the end of the reign of King Henry II, 33 years later on April 17, 1188, the modern lawyer would have felt at home. As all law students know, the English common law was adopted by our colonies and later by almost all of our states. It has continued to develop and remains the backbone of our present legal system. Learned Hand wrote, "(Common Law) stands as a monument slowly raised, like a coral reef, from the minute accretions of past individuals, of whom each built upon the relics which his predecessors left, and in his turn left a foundation upon which his successors might work." "Review of Judge Cardozo's *The Nature of the Judicial Process*,"35 *Harvard Law Review*, 481 (1922).

John A. Owens

For better or for worse there is a strong push, as I write, to alter in significant ways the operation of the common law, an evolution not of a thousand years, not even 33 years, but in one short special session working without the benefit of briefs, oral argument, debate, significant committee hearings, or even input from the judiciary of the bar.

Writing two months ahead of publication is always difficult. We are now in the middle of the 1996 Special Session of the Alabama Legislature dealing with so-called "tort reform" or, as some put it, "lawsuit abuse". The Citizenship Education Committee which I spotlighted in my article in the November issue of *The Alabama Lawyer* certainly has its work cut out for itself. It is sad to see how little is known about how our judicial system works, about basic fundamental rights and responsibilities under our existing civil laws, about the Bill of Rights of the United States Constitution, or about the doctrine of separation of powers. Somehow there has developed an unjustified fear that all small businesses are in danger of being put out of business by litigation. A friend of mine, who operates a small manufacturing plant, recently expressed this fear to me. The individual is quite involved in the business community and in the civic affairs of this community. I asked him to list every small business he knew of in Alabama or elsewhere which had, in fact, been put out of business by a lawsuit. He could not list one. Yet fear is there and a perception does exist.

I became concerned about the rhetoric and the way in which the issues were being addressed. I wrote the following press release: "MONTGOMERY, January 22, 1996-John A. Owens, president of the Alabama State Bar, issued the following statement today:

"As president of the Alabama State Bar, I wish to express my concern over the manner in which 'tort reform' is being addressed in the Alabama legislature. The Alabama State Bar does not involve itself in politics except when it concerns the regulation of the legal profession or the administration of justice. I am now concerned that what is happening may adversely affect the administration of justice in this state.

"Although not intervening into the matter, the Alabama State Bar has tried to keep abreast of the developments. We asked repeatedly for copies of all of the various proposals which would be introduced. We did receive the Governor's package shortly before the legislature met but no others. Unfortunately, the Governor's package of bills was not ever debated in the House and the bills which passed the House did so without a dissenting vote and with very little debate. Only a select few people ever had a chance to read these bills before the session began.

"I question the wisdom of undertaking any such sweeping reform with so little thought, debate or input into the nature of the reform. The Board of Bar Commissioners of the Alabama State Bar has not met since any of the bills were available for review. However, when 'tort reform' was considered in 1987, the Alabama State Bar did adopt certain general principles to consider. They are all true today, but two of these principles are especially relevant in the haste and confusion which exists in regard to the bills under consideration. These are:

'1. The Legislaton is the most technical, broadest and serious kind of legislation that can be imagined because it affects every citizen, and every citizen is both a potential plaintiff and a potential defendant.

'2. The social cost of injuries and frauds are always paid by somebody: either the victim, the guilty party or the public through welfare and charity.

"For example, some of the bills which I have seen would change time frames for considering motions for summary judgment in court and other rules applicable to the procedure used to conduct civil litigation. Why should time standards be imposed upon the courts which simply are not workable? Why not at least seek the input of the judiciary into what is work-

able and what is not? Much of the legislation seems to be aimed at isolated situations. Because this legislation is so important and so sweeping, it deserves careful scrutiny and careful attention.

"In November, I wrote an article which was published in the January issue of *The Alabama Lawyer*. The words I wrote were based upon my observations of almost 29 years of practicing law in Alabama. Quoting myself, I said:

> 'Our judiciary with its jury system has worked well to protect the rights of citizens and to enforce their legal obligations in criminal and civil cases throughout the history of the United States. It works well today. Literally hundreds of cases of one type or another are tried throughout this state every week. We are blessed with one of the finest judicial systems in the country. Almost without exception, our judges are honest, decent, hard-working, learned men and women who are proud of their positions and who are proud to serve the public.'

"My hope is that our legislative leaders will draw back, seek input and try to craft a reasonable, comprehensive, understandable and workable plan. We must not lose sight of the goal to improve the administration of justice and we must not lose sight of what is in the best interest of all citizens of the state of Alabama. Alabama's citizens deserve a sound, well-balanced system of justice. If requested to do so, the Alabama State Bar is ready and willing to work with our state's leaders to help facilitate this process."

What might happen when a press release such as the above is issued is unknowable. This morning a paraphrased version appeared on page 7A of *The Tuscaloosa News*. Maybe something will come of it—maybe not. In any event, I wanted the lawyers of this state to at least know that the Alabama State Bar is trying to act as a voice of reason. We are not advocating any particular position expect that the majesty of the law is due respect and the significance of the law to all of our citizens is too important to be drastically altered with sound bites, misplaced fear and a hurried process void of the 'reason' which Sir Edward Coke so appropriately called "the life of the law". ■

Judicial Award of Merit Nominations Due

The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the state bar's Judicial Award of Merit through May 15, 1996. 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 award is not necessarily an annual award. It may be presented to a judge whether state or federal court, trial or appellate, who is currently serving and who is determined to have contributed significantly to the administration of justice in Alabama. The recipient is presented with a crystal gavel bearing the state bar seal and the year of presentation.

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

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

EXECUTIVE DIRECTOR'S REPORT

Members of the Alabama State Bar serve in numerous representative capacities. Appointments are made, usually by the board of commissioners pursuant to an appropriate statute or bylaw governing the entity involved. Service by bar members stretches across a broad spectrum of areas and involves many different responsibilities.

Nationally, the Alabama State Bar has three elected members of the **American Bar Association House of Delegates.** These persons, who serve at their own expense, serve two-year terms and may be re-elected. The board of commissioners elects these persons. Currently serving are Phillip E. Adams, Jr. of Opelika, James Jerry Wood of Montgomery and J. Mark White of Birmingham. They are not, however, the only Alabamians in the House. N. Lee Cooper, president-elect of the ABA and former chair of the House of Delegates, is a member, as is Ben H. Harris, Jr. of Mobile, who is a former member of the ABA Board of Governors. William C. Knight, Jr. of Birmingham represents the Birmingham Bar Association and H. Thomas Wells, Jr., also of Birmingham, serves as the state delegate who was elected by ABA members statewide. The terms of Mr. Adams and Mr. Wood conclude at the end of this year's ABA annual meeting. Mr. White's term expires in 1997.

Keith B. Norman

Passage of the Judicial Article resulted in the establishment of the **Judicial Inquiry Commission, the Court of the Judiciary** and **the Judicial Compensation Commission.** According to the Judicial Article, the bar must elect two persons to serve on each of these bodies. Those currently holding these positions and the years in which their current terms expire (noted in parentheses) are as follows:

Judicial Inquiry Commission: Norman Waldrop, Mobile (1999); William B. Hairston, Jr., of Birmingham (1999). Judicial Compensation Commission: Charles R. Adair, Dadeville (1999); Broox G. Garrett, Jr., Brewton (1999). Court of Judiciary: William D. Scruggs, Jr., Fort Payne (1997); Nelson Vinson, Hamilton (2000).

In addition to Mr. Scruggs and Mr. Vinson, the bar elected as an alternate on the Court of the Judiciary William C. Roedder, Jr. of Mobile.

The bar elects eight of the 15 persons who comprise the Board of Directors of the **Legal Services Corporation of Alabama.** Currently serving are: Bryant A. Whitmire, Jr., Birmingham (1996); Kathleen M. Warren, Gadsden (1996); Malcolm R. Newman, Dothan (1997); Robert D. Segall, Montgomery (1998); David R. Peeler, Mobile (1998); and Linda W. H. Henderson, Tuskegee (1998).

One member of the **Alabama Securities Commission** is elected by the board of commissioners. Actually the board submits three names to the governor as required under Section 8-6-51 (A), *Code of Alabama,* 1975 and the governor names the member from those three. Currently serving as the bar's representative is William D. Hasty, Jr. whose appointment extends to 1997.

The bar commission also elects members to the **Board of Trustees of the Alabama Law Foundation, Inc.** Those serving by election are: S. Dagnal Rowe, Huntsville (1996); Rowena Teague, Birmingham (1996); Harry W. Gamble, Jr., Selma (1997); Ben H. Harris, Jr., Mobile (1997); R. Blake Lazenby, Talladega (1998); and Allen C. Livingston, Dothan (1998). In addition, the president, president-elect and immediate past presidents of the Alabama State Bar serve on the foundation board by virtue of their office.

The **Alabama Board of Legal Specialization** was created in 1994 when the Alabama Supreme Court adopted the Rules of Specialization. The members of the board of specialization are selected by the board of bar commissioners. Currently serving are: Clay Alspaugh, Birmingham (1996); Bill Coleman, Montgomery (1996); Steve Ford, Tuscaloosa (1996); Herndon Inge, Mobile (1996); Sam Franklin, Birmingham (1997); Claude Hunley, Huntsville (1997); Will Lawrence, Talladega (1997); Nancy C. Hughes, Birmingham (1997); Charlie Beavers, Birmingham (1998); Gregg Everette, Montgomery, (1998); Robert B. Reynolds, Huntsville (1998); and Jacob Walker, III, Opelika (1998).

The recently created **Alabama Supreme Court Commission on Dispute Resolution** is required to have at least three members of that body appointed by the president of the Alabama State Bar. Currently those members are: Alyce M. Spruell, Tuscaloosa (1999); William D. Coleman, Montgomery (1996); and Marshall Timberlake, Birmingham (1997).

Due to Congress' decision to eliminate funding for post-conviction defender organizations (PCDOs), the **Capital Representation Resource Center** is no longer functioning in the same capacity as before. Until Congress' decision to eliminate funding for PCDOs, the members of the Capital Representation Resource Center board included: H. Thomas Heflin, Jr., Tuscumbia (1996); Al L. Vreeland, Tuscaloosa (1996); Frank H. McFadden, Montgomery (1997); Richard S. Manley, Demopolis (1997); J.L. Chestnut, Jr., Selma (1998); Anne W. Mitchell, Birmingham (1998); Frank S. James, III, Birmingham (1998); and Albert P. Brewer, Birmingham (1998).

Each state bar in the Eleventh Judicial Circuit has three named delegates to its **Judicial Conference.** These persons are appointed for a three-year term with each incumbent president

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Executive Director's Report

Continued from page 70

of the state bar naming one delegate and an alternate. The current delegates and alternates are: Delegates: Frank M. Bainbridge, Birmingham (1996); Larry U. Sims, Mobile (1997); and Susie T. Carver, Tuscaloosa (1998). Alternates: Mark D. Wilkerson, Montgomery (1996); Gregory S. Cusimano, Gadsden (1997); and John D. Clements, Birmingham (1998).

Pursuant to supreme court rules, the bar commission elects the **Board of Bar Examiners,** the members of the **Disciplinary Commission,** the members of the **Disciplinary Boards** and the **Mandatory Continuing Legal Education Commission.** With the exception of the bar examiners, the membership of these bodies is restricted to members of the board of bar commissioners. Current members of these groups are:

Disciplinary Commission: Victor H. Lott, Jr., chair, Mobile (1996); Samuel H. Franklin, Birmingham (1997); Caine O'Rear, Mobile (1998), and W.N. Watson, Fort Payne (1997)

Disciplinary Boards: Panel I: Robert S. Brodgen, Ozark (1996); Jerry C. Porch, Russellville (1996); Max C. Pope, Jr., Birmingham (1997); and Billy C. Bedsole, Mobile (1997)

Panel II: Wanda D. Devereaux, Montgomery (1997); John Hollis Jackson, Clanton (1996); Mac B. Greaves, Birmingham (1998); and Abner N. Powell, Andalusia (1996)

Panel III: Richard B. Garrett, Montgomery, (1998); Cathy S. Wright, Birmingham (1997); Ralph N. Hobbs, Selma (1997); and John S. Key, Decatur (1996)

Panel IV: James E. Williams, Montgomery (1998); Stephen M. Kennamer, Scottsboro (1997); Conrad M. Fowler, Jr., Columbiana (1996); and Edward T. Hines, Brewton (1996)

Panel V: George Higginbotham, Bessemer (1996); Donna S. Pate, Huntsville (1996); J. Tutt Barrett, Opelika (1998); and John A. Nichols, Luverne (1997)

Mandatory Continuing Legal Education Commission: Lynn R. Jackson, Clayton, chair (1998); J. Mason Davis, Birmingham (1996); Samuel A. Rumore, Birmingham (1996); John A. Russell, III, Aliceville (1997); Conrad M. Fowler, Jr., Columbiana (1996); Caine O'Rear, Mobile (1998); James E. Williams, Montgomery (1998); Patrick H. Graves, Jr., Huntsville (1997); and John C. Gullahorn, Albertville (1997)

Board of Bar Examiners: Delores R. Boyd, Montgomery, chair; James A. Byram, Jr., Montgomery; Edgar C. Gentle, Birmingham; Gayle P. Gratton, Birmingham; James N. Walter, Jr., Montgomery; Susan Russ Walker, Montgomery; Sabrina Andry Simon, Birmingham; Zebulon M.P. Inge, Jr., Mobile; W. Roscoe Johnson, III, Gadsden; Romaine S. Scott III, Birmingham; Gwen L. Windel, Birmingham; Billy L. Carter, Montgomery; and Lisa Milner Karch, Guntersville

As you can see, there are numerous areas outside bar committees, task forces and sections for service where your talents can be utilized in furtherance of our public responsibility. The persons noted above represent you and your interests. These are all time-consuming positions but professionally rewarding. If you are interested in serving in any of these capacities, write to me or your bar commissioner. *

**This month's column is an update of the one originally appearing in the November 1991 issue of* The Alabama Lawyer. ■

James Lee Hoover

Pursuant to Rule 16(c), A.R.D.P., notice is hereby given to **James Lee Hoover**, whose last known address is 6 Office Park Circle, Suite 100, Birmingham, Alabama 35223, that he has twenty-eight (28) days from the date of this publication, March 15, 1996, to answer disciplinary charges filed in the Office of General Counsel on January 12, 1996. In the event you fail to answer the charges set forth within the time provided by Rule 12(e)(1), A.R.D.P., the charges will be deemed admitted. [ASB Nos. 95-117, 95-129, 95-136, 95-149 & 95-154]

Disciplinary Board
Alabama State Bar

BAR BRIEFS

Frank Gregory

• Chief Justice Perry O. Hooper, Sr. appointed **Frank W. Gregory** as the administrative director of courts on October 23, 1995.

From 1977-79, Gregory served as Montgomery County's first court administrator under then Presiding Judge Perry Hooper.

Gregory joined the Administrative Office of Courts staff in June 1979, first serving as director of the Research, Planning and Development Division, and later as the director of the State Court Operations Division. He has been instrumental in implementing advanced jury, case and records management systems, as well as institutional educational curriculums for all court employees. Gregory has also played an important role in the development of the state's alternative dispute resolution program. Prior to his appointment as ADC, Gregory served nine years as director of the Alabama Judicial College, a division of the AOC.

Gregory earned his bachelor's and master's degrees from the University of Alabama and served 11 years as a secondary school principal before coming to the court system.

• **J. Mason Davis**, senior attorney with the statewide firm of Sirote & Permutt, has been named "Outstanding Lawyer of the Year" by the Birmingham Bar Association.

Davis has participated in numerous trials in both the state and federal courts, and appellate practice before the Supreme Court of Alabama and the 11th Circuit Court of Appeals.

J. Mason Davis

He is an adjunct professor of law at the University of Alabama School of Law. He has served as secretary of the Alabama Democratic Party, and continues to hold a position on the State Democratic Executive Committee.

He received his bachelor of arts degree from Talladega College, and his law degree from the State University of New York at Buffalo, where he was a member of the *Law Review*. ■

National Center for State Courts

• On October 13-14, about 35 Alabama citizens met at Tuskegee University's Kellogg Conference Center and participated in a national forum with the National Center for State Courts. According to Hillery Efkeman, NCSC research assistant, Alabama was one of ten states featured in a live national videoconference on **"Improving Court and Community Collaboration"**.

The purpose of the project was to encourage the court community and the general public to work together to improve public trust and confidence in the courts, identify strategies for improving court and community collaboration at the local and state levels, encourage efforts by courts and their communities to work together more effectively, and promote a diverse group of effective local approaches to improve the relationship between courts and the communities they serve.

The forum was sponsored by the NCSC and the American Judicature Society and funded by the State Justice Institute. Planning and coordination of Alabama's conference site was provided by the Alabama Judicial College, a division of the Administrative Office of Courts. Among the participants were state bar members **Tori Adams-Burk**, Montgomery; **Carl Chamblee, Jr.**, Birmingham; and **Earnestine Sapp**, Tuskegee.

Judicial system participants included **Circuit Judge Bobby Aderholt**, 25th Judicial Circuit; **Circuit Judge Dale Segrest**, 5th Judicial Circuit; and **District Judge Herman Thomas**, Mobile County. ■

Between the satellite plenary sessions, the Alabama Downlink site divided into small groups to identify strengths and assets of the state's courts.

About Members, Among Firms

ABOUT MEMBERS

Terry G. Key, formerly with Cherry, Givens, Peters, Lockett & Diaz, announces the opening of his office at 170 S. Oates Street, Suite 4, Dothan, Alabama. The mailing address is P.O. Box 758, Dothan 36302. Phone (334) 702-4487.

Rita M. Briles, a former associate with Roden, Hayes & Carter, announces her relocation to Maryland and her position as an associate with **Adkins, Potts, & Smethurst.** The mailing address is One Plaza East, Sixth Floor, P.O. Box 4247, Salisbury, Maryland 21803. Phone (410) 749-0161.

Charles L. Miller, Jr. announces the opening of his office at 150 Government Street, Suite 1000-A, Mobile, Alabama 36602. The mailing address is P.O. Box 2232, Mobile 36652-2232. Phone (334) 433-5080.

E. Wray Smith announces the relocation of his office to 527 Interstate Park Drive, Suite G, Montgomery, Alabama 36109. Phone (334) 244-1935.

Tom F. Young, Jr. announces the relocation of his office to 201 Madison Street, Alexander City, Alabama 35010. Phone (205) 234-0999.

Sandra Lewis, formerly with the Law Office of W. Troy Massey, announces the opening of her office at the Historic Bell Building, 207 Montgomery Street, Suite 1010, Montgomery, Alabama 36104. Phone (334) 269-5930.

A. Vincent Brown, Jr. announces the relocation of his office to 510 N. 18th Street, Bessemer, Alabama 35020. Phone (205) 425-7001.

Vicenta Bonet Smith announces the new location of her office at The Brown Marx Tower, Suite 224, 2000 First Avenue, North, Birmingham, Alabama 35203. Phone (205) 324-1222.

Elizabeth Cowart McAdory announces the relocation of her office to the Hudson Building, 165 E. Magnolia Avenue, Suite 223, Auburn, Alabama 36830. Phone (334) 887-3141.

AMONG FIRMS

Bond, Botes, Thornton & Carlson announces the relocation of their offices to One Court Square, Suite 117, Montgomery, Alabama 36104. Phone (334) 264-3363.

Bryan S. Blackwell announces the relocation of his office to the **Law Offices of Joel M. Nomberg.** Offices are located at 163 W. Main Street, Suite 401, Dothan, Alabama 36301. Phone (334) 793-6493.

Mark R. Ulmer, Charles H. Hillman and **Yancey N. Burnett** announce the formation of **Ulmer, Hillman & Burnett.** Offices are located at Riverview Plaza, Suite 1107, 63 S. Royal Street, Mobile, Alabama 36602. Phone (334) 694-0077.

Wallace, Jordan, Ratliff & Brandt announces that **Cecil H. Macoy, Jr.** and **David L. Selby, II** have joined the firm. Offices are located in Birmingham and Montgomery, Alabama.

Huie, Fernambucq & Stewart announces that **Paul F. Malek** and **Jennifer C. Devereaux** have joined the firm. Offices are located at 800 First Alabama Bank Building, Birmingham, Alabama 35203. Phone (205) 251-1193.

Wilmer & Shepard announces the association of **Evelyn R. Maiben**, former law clerk to the Honorable Robert B. Propst, U.S. District Judge for the Northern District of Alabama, and **Joel R. Hamner.** Offices are located at 100 Washington Street, Suite 302, Huntsville, Alabama 35801. The mailing address is P.O. Box 2168, Huntsville 35804. Phone (205) 533-0202.

David T. Puckett has joined the firm of **Chamblee & Furr.** Offices are located at 5582 Apple Park Drive, Birmingham, Alabama 35235. Phone (205) 856-9111.

Jeffrey A. Foshee and **Edward M. George** announce the re-formation of Jeffrey A. Foshee & Associates into the firm of **Foshee & George.** They also announce that **Deborah G. Knight**, former courtroom deputy clerk, U.S. Bankruptcy Court, has joined the firm as an associate, and that **Albert S. Miles,** professor of education, the University of Alabama, has joined as *of counsel.* Offices are located at 900 S. Perry Street, Suite B, Montgomery, Alabama 36104.

Daniel E. Boone announces that **David S. Furman** has become an associate. Offices are located at 330 W. Tennessee Street, Florence, Alabama 35630. Phone (205) 760-1002.

Lightfoot, Franklin & White announces that **William H. King, III** and **William S. Cox, III** have become associates. Offices are located at 300 Financial Center, 505 N. 20th Street, Birmingham, Alabama 35203. Phone (205) 581-0700.

Gorham & Waldrep announces that **William F. Addison** has joined the firm *of counsel*. Offices are located at 250 Commerce Street, Suite 100, Montgomery, Alabama 36104. Phone (334) 269-0700. The firm's Birmingham office remains at 2101 6th Avenue, North, Suite 700, Birmingham, Alabama 32503. Phone (205) 254-3216.

Rogers, Young & Wollstein announces that **Timothy C. Burgess** has joined the firm. Offices are located at Suite 1100, Williamson Commerce Center, 801-30 Noble Street, Anniston, Alabama 36201. Phone (205) 235-2240.

Cabaniss, Johnston, Gardner, Dumas & O'Neal, with offices in Birmingham and Mobile, announces that **Richard Eldon Davis** has joined the firm.

Jon Ozmint, assistant solicitor for the Tenth Judicial Circuit, announces his appointment as general counsel for the **South Carolina Department of Labor, Licensing and Regulation.** His new address is 3600 Forest Drive, Box 11329, Columbia, South Carolina 29211. Phone (803) 734-9600.

Cartwright & Armstrong announces that **Christopher R. Hood** has joined as an associate. Offices are located at 3800

Colonnade Parkway, Suite 630, Birmingham, Alabama 35243. Phone (205) 969-5900.

Ritchie & Rediker announces that **Christopher B. Harmon** and **Patricia Diak** have joined the firm. Offices are located at 312 N. 23rd Street, Birmingham, Alabama 35203. Phone (205) 251-1288.

Veal & Marsh announces that **Russell Carter Gache'** and **Kenneth M. Bush** have joined the firm. Offices are located at 2001 Park Place, North, Suite 525, Birmingham, Alabama 35203. Phone (205) 324-1524.

Jody W. Bishop and **P. David Matheny,** former Baldwin County assistant district attorneys, announce the opening of **Bishop & Matheny.** Offices are located at 220 Courthouse Square, Bay Minnette, Alabama 36507. Phone (334) 937-5234.

Lloyd, Schreiber & Gray announces a name change to **Lloyd, Schreiber, Gray & Gaines,** and that **Daniel S. Wolter** and **Stephen E. Whitehead** have joined the firm. Offices are located at Two Perimeter Park, South, Suite 100, Birmingham, Alabama 35243. Phone (205) 967-8822.

Dempsey, Pearson & Cummins announces that **Michelle M. Hart** has joined the firm. Offices are located at 29000 Highway 98, Suite 101-C, Daphne, Alabama 36526. Phone (334) 626-2772. ■

Notice of Election

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

President-Elect

The Alabama State Bar will elect a president in 1996 to assume the presidency of the bar in July 1997. Any candidate must be a member in good standing on March 1, 1996. 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, 1996. Any candidate for this office must also submit with the nominating petition a black and white photograph and biographical data to be published in the May *Alabama Lawyer.*

Ballots will be mailed between May 15 and June 1 and must be received at state bar headquarters by 5 p.m. on **July 23, 1996.**

Commissioners

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits: 8th; 10th, places no. 4, 7 and Bessemer Cut-off; 11th; 13th, place no. 1; 17th; 18th; 19th; 21st; 22nd; 23rd, place no. 1; 30th; 31st; 33rd; 34th; 35th; 36th; and 40th. Additional commissioners will be elected in these circuits for each 300 members of the state bar with principal offices therein. The new commissioners positions will be determined by a census on March 1, 1996 and vacancies certified by the secretary on March 15, 1996.

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 26, 1996).

Ballots will be prepared and mailed to members between May 15 and June 1, 1996. Ballots must be voted and returned by 5 p.m. on the second Tuesday in June **(June 11, 1996)** to state bar headquarters.

BUILDING ALABAMA'S COURTHOUSES

RUSSELL 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.*

Russell County Courthouse at Phenix City

Marker on grounds of Seale Courthouse tells the story of Russell County's creation.

RUSSELL COUNTY

Alabamians generally recognize Russell County and its most populous town, Phenix City, as being the area across the Chattahoochee River from Columbus, Georgia and its huge military base, Fort Benning. Phenix City is often thought of only as a continuation of the Georgia metropolis into Alabama and an extension of Eastern time into the Central time zone. Phenix City is the largest town in Alabama which shares a boundary with a city in another state. Yet Russell County and its county seat, Phenix City, have a history uniquely their own, influenced, but not dictated, by their location across the river from Columbus.

Militarily, the importance of the area dates back to 1689 when a group of Spanish soldiers and priests established an outpost on the river near present-day Holy Trinity, Alabama. Though this fort lasted only three years, it marked the northernmost penetration of Spain above its holdings in Florida. The fort, known as Fort Apalachicola, was destroyed by the Spanish when they left the area because of increasing British influence.

Russell County was inhabited primarily by the Yuchi Indians, an important segment of the Creek Indian Confederation. One of their most important towns was Old Coweta, located a half mile west of the Chattahoochee River on the south side of Broken Arrow Creek in present-day Russell County. James Oglethorpe, founder of Georgia, visited the Indian chiefs there in 1739 with the goal of establishing peace and trade with the Indians as well as securing the frontier border of his colony. The Treaty of Coweta that he negotiated marked the first cession of lands by the Creek Confederacy to white men.

After the American Revolution, the area that is Russell County became a part of the United States. Settlers from Georgia began moving westward through the area along an Indian trail which was the oldest route from the Atlantic to what was then called the "Southwest". As early as 1805 this Indian trail became the Federal Road on which pioneers traveled from Milledgeville in middle Georgia to St. Stephens in what would become lower Alabama. Forts were built along the way to protect the settlers from the ever-present Indians.

In 1811, one of these forts was built a mile and a half west of the Chattahoochee River and served at first as a trading center for both the settlers and the Creek Indians. In 1813, General John Floyd of Georgia constructed fortifications and breastworks in anticipation of trouble

with the Indians. He named the fort in honor of Governor David B. Mitchell of Georgia. Subsequently, both during and after the Creek Indian War of 1813-1814, this fort served as an important base of supplies and a United States warehouse. Because of its location it became known as "The Gateway to the West." Today Fort Mitchell is a National Historic Site and contains a National Cemetery.

The Creeks ceded additional lands to the United States by treaties signed in 1814, 1825, and 1832. The final treaty took the remaining Creek lands east of the Mississippi River. On December 18, 1832, the State of Alabama created nine counties from the Creek lands. One was named Russell to honor Gilbert Christian Russell, a soldier and Indian fighter from Tennessee who served with Andrew Jackson during the Creek Indian War.

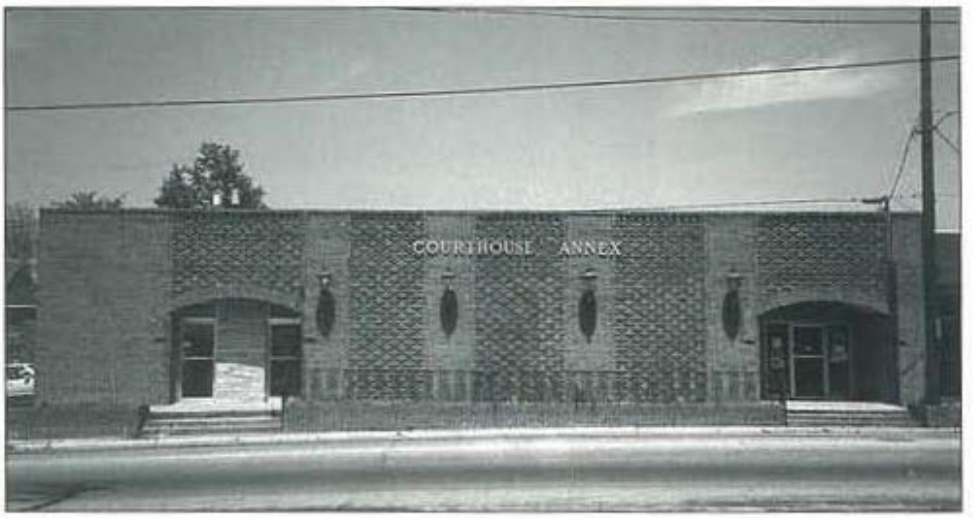
Gilbert C. Russell was born in Abingdon, Virginia on May 18, 1782. His family later settled in Tennessee and he graduated from West Point in 1803. Russell attained the rank of colonel in 1814 and commanded a regiment under Jackson. He served at Fort Bainbridge, Fort Hull, and Fort Mitchell. After the Creek Indian War he resigned his commission on June 15, 1815 and moved to Mobile where he established business interests and reared a large family. He died there in 1855.

The Act creating Russell County provided that three commissioners would be appointed to select a county seat not more than six miles from the center of the Chattahoochee River. They were also authorized to buy sufficient land, up to 160 acres, on which to build a courthouse, jail, and other necessary county buildings. The commissioners selected the little border village of Girard, opposite Columbus, Georgia, as the first county seat.

Girard had been established as a trading post in the Alabama Territory at some time prior to 1820. It was named for Stephen Girard, a Philadelphia philanthropist and slave dealer who had acquired much of the land in the area.

The first elections took place in Russell County on the first Monday in March 1833. The first court convened in Girard on October 14, 1833. Since no public buildings had been erected, this first court was held at the home of John Godwin, a contractor, who, with his slave Horace King, ran a blacksmith and carpentry business. The first circuit judge was Ptolomey Harris. According to the early records, six attorneys presented their licenses at the first court and were admitted to practice after they swore to support the Constitutions of the United States and the State of Alabama and took an oath against dueling.

When Russell County was created, many Indians remained in the area. Also, the territory attracted soldiers, adventurers, travelers, and traders. The west bank of the Chattahoochee River became a haven for those escaping the law in Georgia. Renegades, lawbreakers, and other lawless elements became a significant factor. In its earliest days Girard had a reputation for drunkenness, debauchery, and prostitution. It attracted the unofficial name of "Sodom." (This reputation would be rekindled more than a century later in Phenix City, which today encompasses the site of Girard.)



Courthouse Annex at Phenix City

Although construction of a courthouse was begun in Girard, it was not completed. Because the population was shifting westward, there was a question whether Girard would continue as the county seat. Therefore, the county governing body refused to spend funds for a substantial building.

In 1839, the county seat moved 12 miles west of Girard to the village of Crockettsville. It was named for Davy Crockett who fought in the area during the Creek Indian War and who had died at the Alamo in 1836. Girard remained a significant site due to its location on the river and its proximity to Columbus. However, it would take almost 100 years for the county seat to return there.

The first courthouse building constructed in Russell County was built in Crockettsville by John Godwin, the same man in whose home the first court convened at Girard. Construction began in 1839, and the building was completed in 1841.

Godwin and Horace King, his foreman, became famous as contractors of buildings and as bridge-builders in the area. King was emancipated by a special Act of the Alabama Legislature and later served as a member in that same legislative body during Reconstruction. After Godwin's death in 1859, King erected a memorial marker which still stands over Godwin's grave. It was placed in remembrance of the love and gratitude he felt for his lost friend and former master. This unique tribute by a former slave to a former master was reported by Robert Ripley in his famous "Believe It Or Not" series.

In 1843 the name of Crockettsville was officially changed to Crawford in honor of the family of William Harris Crawford (1772-1834), a distinguished lawyer and statesman from Georgia who ran for president in 1824. Crawford would remain the county seat throughout the Civil War.

No picture or photograph exists of the courthouse building at Crawford. It remained standing for many years after it stopped being used as the courthouse and served as a place of worship for the Methodist congregation. It faced east on the present site of the Crawford Methodist Church. The town limits extended one-

half mile in each direction from this courthouse. When the building was finally demolished in 1901, the bricks were used to construct a new Crawford Methodist Church. This structure is still standing in the town of Crawford.

In the Reconstruction legislature of 1866, a group from the northern part of Russell County sought to form a new county that they could dominate. Also, a group in Barbour County to the south sought to remove from their county their political enemies in the towns of Glennville and Jernigan. The boundaries of Russell County were rearranged so that the northern section, including the town of Opelika, went into forming the new county of Lee, while the southern boundary was extended to take in the Barbour County towns of Glennville and Jernigan. Crawford was left on the northern border of Russell County. The legislature ordered an election so that Russell County could choose a more centralized county seat.

Courthouse at Seale

The election took place in 1868. Only three communities garnered significant votes—Crawford and Girard, both of which had already been the county seat, and Silver Run. The town of Silver Run won the election.

Silver Run arose near the site of the first post office west of Fort Mitchell on the Federal Road, which was located at a community called Peru. No one knows the origin of the name Peru today, but regular mail service was established there in the 1840s.

By 1850, the Mobile and Girard Railroad Company had been incorporated and plans were made to survey a railroad route. The railroad would open Russell County for development. The right of way passed two miles south of Peru, and most of Peru's residents subsequently moved to the area near the railroad site.

A swiftly moving stream gave this area its name—Silver Run. The mill established on Silver Run Creek produced needed lumber for new construction and ground the grain for food. In 1856 the post office was officially moved to the railroad town of Silver Run. For many years Silver Run was the terminus of the railroad from Girard pending acquisition of additional funds for continued construction to Mobile.

One of the railroad developers was Captain Arnold Seale, a native of South Carolina and son of Revolutionary War patriot Thomas Seale. Captain Seale resided at Silver Run when it served as the railroad terminus, and he raised the capital to extend the railroad farther west. The town soon became unofficially known as Seale's Station. When the county seat moved to the town, it was called Seale's Courthouse. Finally, the community became known simply as Seale. When the town was incorporated in 1871, the official name chosen was Seale.

Marker at the Seale Courthouse site recounts struggle between the communities of Seale and Phenix City

There is a significant historical footnote involving the town of Silver Run. When the Confederate government sought a location for a prison, Silver Run was given serious consideration and was almost selected, due in part to its location on the railroad. However, Confederate officials decided not to locate the prison there because of its proximity to Columbus, Georgia, an important manufacturing town which would attract the attention of Federal troops. Instead, they built the prison at the remote location of Andersonville, Georgia. Historians can only speculate that the horrors of Andersonville would have been avoided if the Silver Run site had been selected.

The Russell County records were removed from Crawford and transported by ox cart to the storehouse of William Henry Holland at Silver Run in 1868. Also, in 1868 the site for a new courthouse was selected by Simeon O'Neal and Cicero McBride. O'Neal received a contract to build the courthouse. The total cost was approximately $9,600. John Lewis was the architect. He was the son of Ulysses Lewis, who had served as the first mayor of Columbus, Georgia in 1828, but who moved permanently to Russell County when it was founded a few years later.

The courthouse at Silver Run, now called Seale, is a two-story red brick structure which was originally rectangular, but which was remodeled in 1908 to be T-shaped with wings across the front. The front section is 62 feet by 27 feet with seven windows across the facade and two windows deep. The rear section is 50 feet by 63 feet with four windows across the side and three windows along the rear. The front contains a small balcony located above the central entrance door.

The front of the building features four massive Roman Doric columns that support a triangular pediment. Windows on the front section have flat arches with keystones. Windows on the side of the front section have similar arches, and the sides also contain triangular pediments. In the rear section, only the first floor windows have flat arches with keystones. The rear second floor windows have rounded arches.

The first floor interior is divided by a central hallway. In the front section, one large room is located on the right and two rooms are located on the left. In the rear section, each side contains three rooms. The first room on the left in the

rear was the old vault, and has walls 42 inches thick. The floor plan of the second floor is similar to the first except that the entire rear section consists of one large room which served as a courtroom.

During the 1908 remodeling, the entire building was re-bricked. Mortar was dyed to match the color of the bricks, and from a distance the building appears to be a solid mass of the same color. The 1908 improvements were designed by T. F. Lockwood, architect, and the contractor was E. C. Seiz.

The courthouse at Seale was well constructed. It was built on a height that commands the area. This structure is considered to be the oldest public building in east Alabama, and one of the oldest courthouse structures still standing in the entire state. In 1935 the county seat moved to Phenix City, but Seale retained a branch courthouse until 1943.

The building has seen many uses since it ceased to serve as county courthouse. During World War II, the building housed the local draft board. Later it was used by the school system for storage and for vocational-agricultural classes. The Seale Civic Club used it for meetings. In the 1950s the dignified second floor courtroom was converted to another type of court— a basketball court. By 1958 the building was unused, unoccupied, and deteriorating.

A local group organized as the Old Russell County Courthouse Association became interested in saving and restoring the historic courthouse. On May 23, 1974, the organization was able to get the building named to the National Register of Historic Places. This effort inspired the Russell County Commission to appropriate funds for a new roof which halted any further deterioration of the building.

Thereafter, the Old Russell County Courthouse Association, which now has several hundred members, began celebrating Labor Day each year with a country fair on the grounds that has drawn crowds estimated at as high as 10,000. Each year in April, the courthouse is the scene of a fancy event, organized by the association, which is known as the Starlite Ball. This fund raiser is limited to 200 participants, the maximum allowed by fire marshals, who dance the night away. Proceeds from these annual events have been used for courthouse projects.

Over the years the interior of the structure has been fully renovated. Profits from the fair and ball are now used for upkeep and other improvements such as a gazebo that was added to the grounds. Future plans call for improved landscaping. The citizens of Russell County must be commended for their interest in preservation and for their many innovative projects that have helped to save their historic courthouse landmark.

Crawford Methodist Church — Built with bricks from Crawford courthouses

The two markers above at Phenix City location tell the story of an important battle between Confederate and Union troops.

Even though the county seat was removed from Girard in 1839, that town continued to grow. A post office was established in 1840, and soon afterwards a newspaper. The town was a trading center due to its wharf on the river. And the Mobile and Girard Railroad Company, originating in the town, had received a charter to begin construction. By the 1860s, Girard had a number of mills, factories, and a textile plant. Tragically, much of the town was burned by federal troops as they fought one of the last battles of the Civil War east of the Mississippi River at Girard on April 16, 1865. Still the town survived.

When Lee County was created in 1866, Girard suddenly found itself at the northern border of Russell County. The area directly north of it was made part of Lee County. This area in Lee County housed a mill village for employees of the Eagle and Phoenix mills in Columbus, Georgia. This community had no name. When a name was sought, several were suggested, including West Columbus and North Girard, neither of which received much support.

The name which was finally chosen was Brownville, in honor of Judge Eli Brown, who furnished meat and produce to the mill village and who also gave the workers legal advice. Brownville was incorporated by the legislature in 1883.

When Brownville sought to obtain a post office, the citizens discovered that a community in Tuscaloosa County already had the name "Brownville." So, a new name had to be submitted for the post office.

Local legend describes how a new name was chosen. A number of drinking and bawdy establishments existed on the Alabama side of the 14th Street bridge. Workers leaving the mills in Columbus would walk back toward home across the bridge and frequent these establishments. Things got particularly out of hand once after a Saturday payday. A number of men were watching the excitement when a stranger came by and said, "This sure is a *lively* place." A newspaper reporter overheard him and responded, "Yes, and that would be a good name for this town." A short time later the new post office at Brownville received the name "Lively".

Thus, the official legal name was Brownville and the name of the post office was Lively. To confuse matters even more, the railway depot had long been called "Knight's Station" by the railroad management. Consequently, the area north of Girard found itself with three

different names: Brownville, Lively, and Knight's Station.

The town council realized that something had to be done, and they petitioned the legislature to officially change the name of Brownville to Phenix City, a variant spelling honoring the old Phoenix Mill in Columbus. This change took place on February 19, 1889. The post office department, however, designated the town as "Phoenix, Alabama," which immediately caused confusion with mail directed to Phoenix, Arizona. In 1899, the post office added the word "City" to the name, but still misspelled it as "Phoenix" City. The mistake was not corrected for many years. Even Thomas McAdory Owen, in his monumental *History of Alabama and Dictionary of Alabama Biography* published in 1921, referred to the town of "Phoenix" in the extreme southeast corner of Lee County.

By 1922, the people in Phenix City and Girard had carefully considered a merger of their two communities. However, a problem existed because they were located in different counties. The solution came in the form of several bills passed by the legislature on August 9, 1923 and approved by Governor Brandon. The first Act consolidated Phenix City and Girard into the new town of Phenix City. The spelling was now in its final form. The second provided for a land swap between Lee and Russell County. Russell County gained the Phenix City territory while Lee County was given the area that included the town of Marvin. The map of Lee County today contains this nub of land that juts into Russell County. The third Act established a branch courthouse for Russell County at the newly consolidated Phenix City.

Supporters of this legislation also proposed that the new city receive yet another name. They wanted the town to be called "Brandon" in honor of the governor who supported the changes. After a lawsuit was filed by the "old guard" in Girard, the three Acts were declared constitutional, but the name change to "Brandon" was ruled illegal since the Act consolidating the towns had specified the name "Phenix City" for the new municipality.

Following the land swap, county officials set up a northern division for the Russell County Courthouse. Offices were located on the first floor of the old city hall at the former town of Girard. The city clerk moved his office to the second floor.

By 1935, the voters of Russell County in a county-wide referendum approved a change making Phenix City the official county seat, leaving Seale with a branch courthouse. This election of 1935 was the last change of a county seat in Alabama. There has been no change in county seat designations anywhere in the state since that election, and all county boundary lines have remained the same as well since the Lee-Russell land swap.

The Russell County Commission made an application for assistance to the Federal Public Works Administration (PWA), which operated during the Depression, to build a new courthouse and a new post office. These projects were approved and by October 1938, court was held for the first time in the present Russell County Courthouse. The branch courthouse remained at Seale until 1943 when it was permanently closed.

The new Phenix City Courthouse was designed by architect James J. W. Biggers. The contractor was Murphy Bound. Due to the county's growth, an addition had to be made to the structure in 1949. Again, James J. W. Biggers was architect. J. D. Stillwell served as contractor for this project.

This building is a two-story brick structure with a central Neoclassical facade that is somewhat reminiscent of the courthouse at Seale. The building has four fluted Doric columns that support a triangular pediment. When additional space was required, the county secured the building directly across the street as a courthouse annex.

A story about the law and the courts in Phenix City would not be complete without referring to the troubling times there in the 1950s. Most assuredly the

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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.

town of Girard had had problems in the past, but those problems were not nearly as extensive as the ones in Phenix City, which in the 1950s was called the "Wickedest City in America". It has been reported that there was no boundary between the good and the bad sections in Phenix City at that time. Night clubs, casinos, clip joints, and bawdy houses all existed within blocks of the courthouse. Vices included gambling, prostitution, illegal drugs and liquor, payoff of officials, and similar corrupt practices. Phenix City took in $2 million per month just from the soldiers at Fort Benning. The Chattahoochee River became the dumping ground for bodies. Old Sodom had returned.

The event which caused the turnaround in Phenix City occurred on June 18, 1954. The newly nominated candidate for attorney general, Albert Patterson, who had campaigned to clean up Phenix City, was assassinated on a street there. In the aftermath of this murder, Governor Gordon Persons declared martial law and sent General Walter J. "Crack" Hanna and the Alabama National Guard to take over the city. Hanna named attorney Ray Acton the military mayor of Phenix City. The National Guard troops literally took control of the county courthouse and city hall.

According to John Patterson, son of the slain Albert Patterson, who succeeded his father as the attorney general nominee, became attorney general in 1954 and then Governor of Alabama in 1958, and who is now on the court of criminal appeals, Phenix City was the first and only city in America to be placed under martial law. Armed troops surrounded the courthouse and physically removed certain officials. Gambling equipment was seized, liquor licenses revoked, and more than 700 indictments were rendered by a special grand jury.

When new elections were held within a year, civilian control returned. The citizens rapidly changed their town from a "Sin City" into an "All American City", a designation received in 1955.

Phenix City is today a law-abiding community and Russell County is growing and prosperous. The government and economy of Russell County compare favorably with any other in Alabama.

The author gratefully acknowledges the assistance given to him by bar commissioner Bowen Brassell of Phenix City, who furnished materials used in the preparation of this article, and attorney Tom Estes of Phenix City, who provided other source material.

Sources: *The History of Russell County,* Russell County Historical Commission, 1982; *A People Courageous, A History of Phenix City, Alabama,* Harold S. Coulter, 1976; *Phenix City, The Wickedest City in America,* Edwin Strickland and Gene Worstman, 1955; *Alabama Historical Quarterly*, Volume XXI, 1959. ■

Road Show '96
Back on the Road!

The ASB ROADSHOW presentation is the first step in an overall plan to increase communication between the state bar and local bar associations. Not only is the presentation a way to share the vision and long-range goals of the ASB, but, more importantly, it provides a forum to receive input from members on the issues that concern them most.

Enthusiastically received by over a dozen bars so far, the ROADSHOW '96 team is already "on the road again." Three staff members, Kim Oliver, VLP director; ALF Director Tracy Daniel; and Susan Andres, director of communications, spoke to approximately 40 members of the Bay Minette Bar Association at their January meeting.

The brief program focuses on programs and services of the ASB, and concludes with an excellent four-minute video about the Alabama Bar Foundation Kids' Chance scholarship program. Remaining time is devoted to receiving input and comments from bar members about what the ASB can do to help them. Programs can be tailored to fit a scheduled bar meeting or an informal get-together. Contact Susan Andres at (334) 269-1515 if you are interested in having ROADSHOW '96 at your bar!

Allen Chason, standing, program chair of the Bay Minette Bar, introduced ROADSHOW '96.

Over 40 Bay Minette lawyers attended the January presentation.

Kim Oliver, far right, waits her turn to talk about the VLP and present certificates to the Bay Minette Bar and VLP volunteers.

OPINIONS OF THE GENERAL COUNSEL

By J. Anthony McLain, general counsel

Question:

"This letter is written pursuant to our recent telephone conversation in which I had requested your advice concerning conflicts between the Sunshine Law and the obligation of attorneys to hold inviolate the attorney-client privilege. Our firm represents a number of public sector clients that are subject to the Sunshine Law and are also often involved in legal matters which require confidential discussions with the members of our firm.

"The only real guidance we have had in the past is an advisory opinion from the State Bar Association rendered in May, 1985, until the Supreme Court visited this issue in *Dunn v. Alabama State University Board of Trustees,* 628 So.2d 519 (Ala. 1993). In *Dunn,* the Court appears to carve out an exception to the Sunshine Law which allows attorneys for public bodies to meet with their attorney concerning pending litigation where the public body is actually named as a party in the lawsuit.

"The *Dunn* decision appears to be at odds with certain comments to the Alabama Rules of Professional Conduct which provide that 'the confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.' Ala. R. Prof. Conduct, 1.6, Comment. The Comment further provides that, 'Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, *but a presumption should exist against such supersession'. Id.* (Emphasis added). These comments appear to indicate that an attorney has a duty to protect client confidentiality in regard to all matters and not just those matters relating to present or pending litigation.

"I will appreciate any guidance you can give me regarding this apparent conflict that exists between the decision in *Dunn* and the comments to the Alabama Rules of Professional Conduct. Does a lawyer have to discuss trial strategy with a public body client in an open meeting? If the public body wants to discuss the possibility of filing a lawsuit with its attorney, does this discussion and relative strengths and weaknesses

of the client's case have to be discussed in a public meeting since the lawsuit is not yet filed? In *Dunn,* the Court appears to hold that if there is any discussion of settlement of the case involving a public body that such discussion must occur in a public meeting. Does this mean that if the public body's attorney gives legal advice concerning the settlement in a closed meeting, does the meeting have to be opened to the public if one of the members of the public body asks the attorney a question relative to what he or she thinks of a proposed settlement? Assuming the same facts, if a member of the public body has facts concerning the proposed settlement that should be brought to the attorney's attention, should discussion of these facts occur in a public meeting? As you can see, the questions which arise in this area are too numerous to list, but I believe you get the flavor for the problems we encounter on a fairly regular basis. Again, I would very much appreciate any guidance you can give me.

Answer:

The Disciplinary Commission has previously determined, in RO-85-08, that:

"The provisions of §13A-14-2, Code of Alabama, 1975, to the contrary notwithstanding, if an attorney representing a public entity that comes within the scope of this statute makes a good faith professional judgment that a meeting with his client is for the purpose of imparting legal advice and discussing strategy concerning pending litigation, comtemplated litigation or other purely legal matters, the attorney would not be guilty of violating any of the provisions of the *Code of Professional Responsibility* of the Alabama State Bar by insisting that the meeting be held in closed or executive session and if the attorney is of the opinion that it would be detrimental to the best interest of his client to allow public access to the meeting, he would be guilty of a violation of the *Code of Professional Responsibility* should he not insist upon a closed or executive meeting."

Preamble:

The determination of this ethical inquiry by the Disciplinary Commission is limited to the application of the Rules of Professional Conduct and a lawyer's responsibilities to his or her client pursuant to said rules. The Disciplinary Commission has no authority or jurisdiction to interpret statutes, nor render opinions which require an interpretation of law. The Commission further recognizes that in some instances a lawyer's ethical duty to his or her client may conflict with statutory or case law. The opinion of the Disciplinary Commission grants protection to the lawyer only as it relates to the disciplinary process and enforcement of the Rules of Professional Conduct.

Discussion:

Rule 1.6(a), Alabama Rules of Professional Conduct, requires that a lawyer not reveal information relating to the representation of the client unless the client consents after consultation. This prohibition is carried forward in §12-21-161, *Code of Alabama,* 1975, which states:

"Testimony of attorney, etc., for or against client.

No attorney or his clerk shall be competent or compelled to testify in any court in this state for or against the client as to any matter or thing, knowledge of which may have been acquired from the client, or as to advice or counsel to the client given by virtue of the relation as attorney or given by reason of anticipated employment as attorney unless called to testify by the client, but shall be competent to testify, for or against the client, as to any matter or thing the knowledge of which may have been

acquired in any other manner. (Code 1907, §3962, 4012; Code 1923, §7658, 7726, Code 1940, T.7, §438.)"

The comment to Rule 1.6 states that, "The confidentiality rule applies not merely to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source." This position is an expansion of that previously adhered to under the former *Code of Professional Responsibility,* which more restrictively defined "confidence" and "secret" within the context of confidentiality of information in the attorney-client relationship.

In representation of a public agency, the attorney shall adhere to the provisions of §13-A-14-2, *Code of Alabama,* 1975, which provides:

> "Executive or secret sessions of certain boards.
>
> (a) No executive or secret session shall be held by any of the following named boards, commissions or courts of Alabama, namely: Alabama Public Service Commission, school commissions of Alabama; board of adjustment, state or county tax commissions; any county commission, any city commission or municipal council; or any other body, board or commission in the state charged with the duty of disbursing any funds belonging to the state, county or municipality, or board, body or commission to which is delegated any legislative or judicial function; except, that executive or secret sessions may be held by any of the above named boards or commissions when the character or good name of a woman or man is involved."

In reviewing the attorney's responsibility in such a situation, wherein the ethical requirement of confidentiality appears to conflict with the statutory provision on open meetings, the Commission is of the opinion that the reasons for the confidentiality rule outweigh the statutory requirement as to public meetings. To hold otherwise would abrogate the long-recognized cornerstone of the attorney-client relationship.

In *Dunn v. Alabama State University Board of Trustees,* 628 So.2d 519 (Ala. 1993), the Supreme Court of Alabama adopted the holding of the Supreme Court of Tennessee in the case of *Smith County Education Association v. Anderson,* 676 S.W.2d 328 (Tenn. 1984). Therein, the Supreme Court of Tennessee carved out an exception to the Tennessee "Open Meetings Act." The court held that discussions between a public body and its attorney concerning pending litigation were not subject to the open meetings act, with the caveat that the exception applied only to those situations wherein the public body was a named party in the lawsuit.

A further review of the Supreme Court of Tennessee opinion recognizes the possibility that an overbroad exception to the open meetings act could be abused whereby the public body could meet with its attorney for the ostensible purpose of discussing pending litigation and instead conduct public business in violation of the open meeting act.

In *Dunn,* supra, the Supreme Court of Alabama determined that the "inherent, continuing, and plenary" control of the court over attorneys as officers of the court could not be abridged by legislative action. At p.529, relying upon *Smith* once again, the Supreme Court of Alabama determined that the legislature has no authority to enact a law which impairs an attorney's ability to fulfill his ethical duties as an officer of the court. The recognition of the supremacy of the attorney-client relationship recognized in the Comment to Rule 1.6:

> "In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a *presumption should exist against such a supersession."* (emphasis added).

The Commission would encourage strict adherence to the confidentiality provisions of the Alabama Rules of Professional Conduct. In order for an attorney to effectively represent a client, the client must feel that any and all information imparted to the attorney in the attorney-client relationship will remain inviolate, absent consent of the client or order of a tribunal of competent jurisdiction.

With regard to public meetings and attorneys who should represent public agencies covered by the open meetings law, said attorneys should insure compliance with the confidentiality requirement, and recognize the long-established principle of privileged communications by the client to the attorney. The attorney must make a determination as to whether a particular situation constitutes a true attorney-client discussion and take whatever steps are necessary to guarantee the confidentiality of such communications.

The Commission notes that the Supreme Court of Alabama in the *Dunn* case, adopting the Tennessee

Supreme Court's rationale, dealt with the specific issue involving "present or pending litigation". The Commission concludes that, pursuant to Rule 1.6 and the Comment thereto, this protection would also cover any discussions with the client which would otherwise be deemed attorney-client communications, and thereby privileged.

Finally, the Commission would also note that the *Dunn* opinion and the statute applied therein concerned a governmental entity and its responsibilities under the statute. The Rules of Professional Conduct deal specifically with the lawyer's responsibility to the client which should not in any way be diminished by statutory or case law provisions to the contrary. As the province of the Commission deals only with the ethical responsibilities of the lawyer to the client, the Commission's opinion limits itself to an application of the Rules of Professional Conduct to the factual scenario posed to this inquiry. ■

[RO-95-09]

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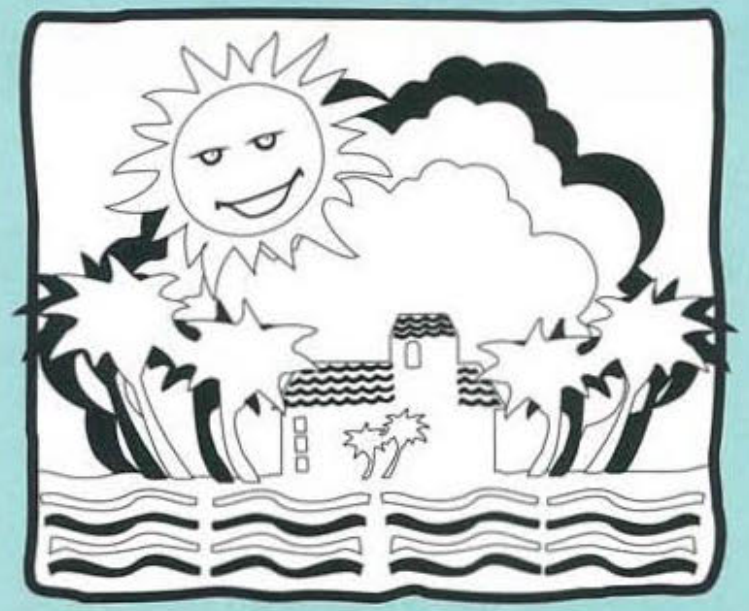

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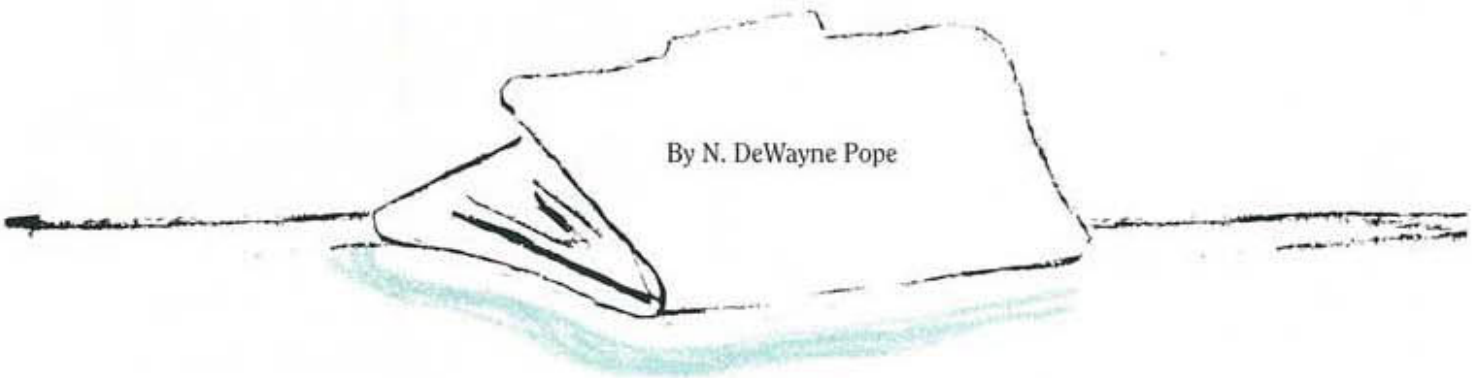
A Practitioner's Guide to Affirmative Defenses in Alabama



By N. DeWayne Pope

To the modern practitioner, an answer under Rule 8 of the Alabama Rules of Civil Procedure serves both to inform the plaintiff and the trial court which allegations in the complaint the defendant intends to contest at trial and permits the defendant to raise additional matters as defenses. The concept of an "affirmative defense" is something instinctively familiar to every practitioner. Curiously, many of us fail to appreciate the wide range of defenses which must be plead under Alabama law. Since the consequences of failing to timely raise an affirmative defense is waiver, it is imperative that defense counsel have a good grasp on the allegations of the complaint, the factual background of the claims, and the law applicable to the claims made in the complaint. Without a full understanding of this information, practitioners may miss the opportunity to raise an affirmative defense. This article is intended as a guide to help practitioners identify affirmative defenses under Alabama law and to know how to properly raise and pursue those defenses.

Interpretation and application of Rule 8

Rule 8 of the Alabama Rules of Civil Procedure provides the guideline in Alabama regarding pleadings.

Rule 8(b) provides that a defendant may assert certain defenses by denying affirmative allegations of a plaintiff's complaint. Defenses so asserted are referred to as denials or "negative defenses."[1] Rule 8(b) is intended to allow a pleader to challenge and place in issue some or all of the factual allegations of the complaint.

Rule 8(c), on the other hand, *mandates* a defendant to assert affirmatively certain defenses when they are properly available under the circumstances of the case.[2] Defenses that must be so asserted are referred to as "affirmative defenses." Rule 8(c) contains a non-exclusive list of the 19 most common affirmative defenses and provides in a catch-all provision that any "matter constituting an avoidance or affirmative defense" must be pleaded.[3]

Rule 8(c) is a descendent of the common law plea in "confession and avoidance," which permitted a defendant who was willing to admit that plaintiff's declarations in the complaint demonstrated a prima facie case to then go on and allege additional new material that would defeat plaintiff's otherwise valid cause of action.[4] Under the common law, however, the defendant could not deny plaintiff's allegations and then assert other defenses by way of avoidance. To permit defendant to do so was incompatible with the common law's quest for isolating a single litigable issue.[5] This imposed election between the right to deny the allegations in the complaint and the right to interpose other defensive matter has been eliminated by Rule 8(e)(2), which allows alternative and hypothetical pleading and permits a defendant to set forth a denial and at the same time assert affirmative defenses.

Defining affirmative defenses

Rule 8(c) does not elaborate on the catchall clause and thus offers no assistance in defining what constitutes "an avoidance or affirmative defense." One of the most obvious methods for determining what constitutes a defense contemplated by the catchall clause is to utilize state statutes and case law.[6] However, when there is no statute or precedent to provide guidance, it is advisable for the defendant to *plead affirmatively any factual assertion that would defeat the plaintiff's recovery but does not controvert a material allegation of the plaintiff's complaint.*[7] To put it another way, *an affirmative defense is a new matter which, assuming the complaint to be true, constitutes a defense to it.*[8] A defendant will not be penalized for pleading affirmatively any matter which might fall within the catchall clause even if the matter may not technically be an affirmative defense. By doing so, the defendant will have the

advantage of immunizing himself against a possible waiver of the defense. However, be aware that affirmative defenses, like other allegations in pleadings, must have some good faith basis in fact pursuant to Rule 11.

Asserting affirmative defenses

Pursuant to Rule 8(c) the defendant *must* assert all applicable affirmative defenses in his responsive pleadings.[9] An affirmative defense can be raised by a pre-answer motion under Rule 12(b) *only* where the face of the complaint shows that the defense is a bar to the action. Where the face of the complaint fails to show that the action is barred by the affirmative defense, it may not be raised by a Rule 12(b) motion, but must be raised by an answer under Rule 8(c).[10] A defendant may also assert an affirmative defense in a pre-answer motion for summary judgment.[11]

Pleading affirmative defenses

The general rules of pleading that are applicable to the statement of a claim also govern the statement of affirmative defenses. Thus, the pleading standards set out in Rule 8(e) must be followed in connection with drafting affirmative defenses. An affirmative defense may be pleaded in general terms and will be held sufficient, and therefore invulnerable to a motion to strike, as long as it gives plaintiff fair notice of the nature of the defense. For example, the allegations that "plaintiff was guilty of negligence which proximately contributed to the accident" or "plaintiff was guilty of contributory negligence" are sufficient to raise the defense of contributory negligence.[12]

The only exceptions to notice pleading are the defenses that fall within the special pleading provisions of *Rule 9*, especially Rule 9(b), which deals with fraud, mistake and condition of the mind. Also, the affirmative defense of *estoppel* must be specially and sufficiently pleaded.[13]

The obligation to plead affirmative defenses is not limited to complete defenses. Partial defenses should also be pleaded affirmatively. The same conclusion follows for matters that tend to mitigate damages.[14]

In keeping with modern procedure's preference for substance over form, Rule 8 provides that when a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court will, as justice requires, treat the pleading as if there had been a proper designation.[15]

Waiver of affirmative defenses

If an answer has been filed and an affirmative defense has not been pleaded, the defense is generally deemed to have been waived.[16] Lack of knowledge of the necessity to plead an affirmative defense is not a justifiable reason for failing to plead the defense.[17]

The courts, however, have recognized several exceptions to the waiver rule:[18]

(1)Rule 15(a) enables a party to amend a pleading without leave of court within 30 days after service on the claimant, if the pleading is one to which a responsive pleading is not permitted.

(2)If the 30-day period has passed, the pleader may amend his pleading to assert an omitted affirmative defense on written consent of the adverse party or by leave of court which "shall be freely allowed when justice so requires."[19]

(3)An affirmative defense that has not been pleaded may be revived if that defense appears on the face of the complaint.[20]

(4)If, during the course of the trial, evidence relating to an unpleaded affirmative defense is introduced without objection, it is deemed to have been tried by express or implied consent of the parties, and the pleadings are deemed amended to conform to the evidence pursuant to Rule 15(b).[21]

Affirmative defenses: a checklist

The following represents an extensive, but not exhaustive, list of affirmative defenses available to the practitioner under Alabama law. *Those items appearing in bold are set forth in Rule 8(c).*

Absolute privilege;[22]

Accord and satisfaction;[23]

Acquiescence;[24]

Arson;[25]

Arbitration and award;

Assumption of risk;[26]

Bona fide purchaser for value;[27]

Business judgment rule;

Coercion;

Collateral estoppel or issue preclusion;[28]

Conditional privilege;[29]

Contributory negligence;[30]

Credit for recovery of damages against third parties (WCA);[31]

Discharge in bankruptcy;[32]

Discretionary function immunity;[33]

Duress;

Estoppel;[34]

Exclusivity of workmen's compensation statute;[35]

Failure of consideration;[36]

Failure to give notice of breach as required by U.C.C.;[37]

Federal preemption;[38]

Foreign corporation's failure to qualify to do business in Alabama;[39]

Fraud;[40]

Holder in due course;[41]

Illegality;[42]

Injury by fellow servant;

In pari delicto;[43]

Intoxication (WCA);[44]

Justification for interference with another's contract or business;[45]

Laches;

Lack of capacity to sue;[46]

Lack of causal relation (AEMLD);[47]

Lack of consideration;[48]

Lack of cooperation;[49]

Lack of intent to injure competition (AMFMA);[50]

Lack of knowledge or consent pursuant to § 20-2-93 (forfeiture statute);[51]

Last clear chance;

License;

Limitations (WCA);[52]

Loaned servant doctrine;[53]

Mental infirmity exclusion in insurance policy;[54]

Minority;[55]

Misrepresentation (WCA);[56]

Mitigation of damages;[57]

Noncompliance with the notice requirements of §§ 11-47-23 and 11-47-192;[58]

Nondelivery and conditional delivery;[59]

Notice (WCA);[60]

Payment;[61]

Payment of Medicare benefits (WCA);[62]

Preexisting injury (WCA);

Product misuse;[63]

Qualified immunity;[64]

Ratification;[65]

Recoupment;[66]

Release;

Res judicata;[67]

Sovereign immunity;[68]

Statute of frauds;[69]

Statute of limitations;[70]

Statutory employer immunity;[71]

Truth of statement;[72]

Unavoidable accident;

Unclean hands;[73]

Unconscionability;[74]

Unconstitutionality of punitive damages;

Undue influence;

Usury;[75]

Violation of Alabama or federal consumer credit statute;[76]

Waiver;[77]

Willful concealment of facts;[78]

Willful violation of company policy (WCA);[79] or

Any other matter constituting an avoidance or affirmative defense.

Conclusion

In conclusion, practitioners should be aware that there are many other affirmative defenses under Alabama law which must be pleaded in addition to those provided in Rule 8(c). Identifying those affirmative defenses comes from a proper understanding of the case and the law. Failure to realize the need to plead certain affirmative defenses in a particular case not only will result in that defense being waived, but poor representation of the client. ■

Footnotes

1. Jerome A. Hoffman & Sandra C. Guin, ALABAMA CIVIL PROCEDURE § 4.21 (1990).
2. The language of Rule 8(c) regarding the pleading of affirmative defenses is mandatory. *Gotlieb v. Collat*, 567 So. 2d 1302 (Ala. 1990). *See also* Jerome A. Hoffman & Sandra C. Guin, ALABAMA CIVIL PROCEDURE § 4.21 (1990).
3. The Committee Comments to Rule 8 provide that "[t]he affirmative defenses listed in Rule 8(c) are only a partial list of defenses which should be set forth affirmatively and the rule provides that 'any other matter constituting an avoidance or affirmative defense' must be pleaded."
4. *Williams v. Nash*, 428 So. 2d 96 (Ala. Civ. App. 1983).
5. Wright & Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1270 (1990).
6. A list of affirmative defenses under Alabama statutes and case law is provided below.
7. *Moseley v. Commercial State Bank*, 457 So. 2d 967 (Ala. 1984). *See also,*

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Kansas City, M. & B.R. Co. v. Crocker, 95 Ala. 412, 11 So. 262 (1892) (Any defense, special in nature, or reaching beyond a mere denial of the material allegations of the complaint was required by ALA. CODE 1940, Tit. 7, § 225 to be presented by a special plea) (now under Rule 8 it can be set forth affirmatively in the answer).

8. *Bechtel v. Crown Central Petroleum Corp.*, 451 So. 2d 793 (Ala. 1984).

9. *Giles v. Ingrum*, 583 So. 2d 1287 (Ala. 1991)("Under Rule 8(c), A.R.Civ.P., a defendant must assert all affirmative defenses in the responsive pleadings. If he fails to assert an affirmative defense in a timely manner, it is deemed waived.").

10. *Wallace v. Alabama Ass'n of Classified School Employees*, 463 So. 2d 135 (Ala. 1984); *Williams v. Nash*, 428 So. 2d 96 (Ala. Civ. App. 1983)("Our supreme court has taken the strict view that an affirmative defense can be raised by motion only where the face of the complaint shows that the defense is a bar to the action. In those instances in which the face of the complaint fails to show that the action is barred by the affirmative defense, it may not be raised by rule 12(b), A.R.Civ.P., motion but must be raised by an answer under rule 8(c), A.R.Civ.P.").

11. *Marlow v. Mid-South Tool Co.*, 535 So. 2d 120 (Ala. 1988) ("[T]his Court has recognized that if a defendant moves for summary judgment before he files an answer, any affirmative defense argued in support of the motion for summary judgment has not been waived. Only if an answer fails to assert an affirmative defense that is argued in a subsequently filed motion for summary judgment is the affirmative defense deemed waived.").

12. *Brown v. Billy Marlar Chevrolet, Inc.*, 381 So. 2d 191 (Ala. 1980). *See also Brad's Industries, Inc. v. Coast Bank*, 429 So. 2d 1001 (Ala. 1983) (An answer stating that a promissory note was signed as part of an agreement which the claimant failed to keep sufficiently raises the defense of failure of consideration).

13. "Every plea in estoppel must be certain in every particular and must allege the facts upon which the plea is predicated, and must allege every material fact which the pleader expects to prove in support of the plea. Conclusions of the pleader, not supported by a statement of the facts from which the conclusions are drawn, will not suffice." *Kimbrell v. City of Bessemer*, 380 So. 2d 838 (Ala. 1980).

14. Matters which tend to mitigate damages should be affirmatively pleaded if the fall within the catchall clause because it introduces a new matter into the case. *McClain v. Brewton Ins. Agency*, 528 So. 2d 335 (Ala. Civ. App. 1988).

15. ALA. R. CIV. P. 8(c); *Goza v. Goza*, 470 So. 2d 1262 (Ala. Civ. App. 1985).

16. *Hayes v. Payne*, 523 So. 2d 333 (Ala. 1987) ("Where an answer has been filed and an affirmative defense has not been pleaded, the defense generally is deemed to have been waived.").

17. *Hayes v. Payne*, 523 So. 2d 333 (Ala. 1987) (Where pro-se defendant was unaware of the necessity of pleading the affirmative defense of the statute of limitations, the court did not deem this to be justifiable reason for failing to raise the defense).

18. *Robinson v. Moore*, 352 So. 2d 1355, 1357 (Ala. 1977).

19. In one Alabama case, the circuit court declined to strike the defendant's amended answer, filed 19 months after the initiation of the action, in which the defendant raised for the first time the affirmative defense of limitations. In affirming, the Alabama Supreme Court acknowledged the apparently mandatory language of Rule 8(c), but looked to Rule 15(a) and found that no prejudice or undue delay had resulted from allowing the amendment. *Piersol v. ITT Phillips Drill Div., Inc.*, 445 So. 2d 559 (Ala. 1984). *See also Bechtel v. Crown Central Petroleum Corp.*, 451 So. 2d 793 (Ala. 1984) (unpleaded affirmative defense improperly raised for the first time on post-answer motion for summary judgment, but could have been properly raised under Rule 15(a)).

20. *Hayes v. Payne*, 523 So. 2d 333 (Ala. 1987).

21. *Bechtel v. Crown Central Petroleum Corp.*, 451 So. 2d 793 (Ala. 1984); *Haynie v. Byrd*, 429 So. 2d 973 (Ala. 1983); *McClain v. Brewton Ins. Agency*, 528 So. 2d 335 (Ala. Civ. App. 1988).

22. *Nelson v. Lapeyrouse Grain Corp.*, 534 So. 2d 1085 (Ala. 1988) (In libel and slander actions, a showing that the alleged defamation was made "on a privileged occasion or under circumstances and conditions which made it privileged in law" constitutes a complete defense; the scope of this defense includes allegedly defamatory statements made during federally recognized labor grievance hearings).

23. *Austin v. Cox*, 492 So. 2d 1021 (Ala. 1986). The elements necessary to establish accord and satisfaction are as follows: (1) proper subject matter, (2) competing parties, (3) assent or meeting of the minds, and (4) consideration. *Id.*

24. *McMillan, Ltd. v. Warrior Drilling & Engineering Co.*, 512 So. 2d 14 (Ala. 1986).

25. *S&W Properties, Inc. v. American Motorists Insurance Co.*, 1995 WL 317675 (May 26, 1995). "In order to establish the affirmative defense of arson to a loss claim on a policy of insurance, the insurer has the burden of proof, and it must present evidence of (1) arson by someone, (2) motive on the part of the insured, and (3) evidence implicating the insured." *Id.* at *3.

26. *Kelton v. Gulf States Steel, Inc.*, 575 So. 2d 1054 (Ala. 1991) ("The affirmative defense of assumption of risk is narrowly confined and is restricted by two requirements: (1) knowledge and appreciation by the plaintiff of the danger he is incurring; and (2) voluntary consent to bear that risk."). Assumption of risk is also an affirmative defense available against a claim under the Alabama Extended Manufacturer's Liability Doctrine. *See Dennis v. American Honda Motor Co.*, 585 So. 2d 1336 (Ala. 1991).

27. *Yeargin v. Donnelly*, 292 Ala. 430, 296 So. 2d 144 (1974).

28. The elements of collateral estoppel or issue preclusion are (1) that the parties in prior action and those in subsequent action are the same, (2) that the identical issue existed in both suits, (3) that issue was actually litigated in the prior suit, and (4) that resolution of the issue was necessary to the prior judgment. *Marshall County Concerned Citizens v. City of Guntersville*, 598 So. 2d 1331 (Ala. 1992).

29. *Nelson v. Lapeyrouse Grain Corp.*, 534 So. 2d 1085 (Ala. 1988) (In a defamation case, "[w]here a party makes a communication, and such communication is prompted by duty owed either to the public or to a third party, or the communication is one in which the party has an interest, and it is made to another having a corresponding interest, the communication is privileged, if made in good faith and without actual malice....").

30. *Jackson v. Waller*, 410 So. 2d 98 (Ala. Civ. App. 1982). *See also, Yamaha Motor Co. v. Thornton*, 579 So. 2d 619 (Ala. 1991) ("'In order to prove contributory negligence, the defendant must show that the party charged (1) had knowledge of the condition, (2) had an appreciation of the danger under the surrounding circumstances, and (3) failed to exercise reasonable care, by placing himself in the way of danger.'"). Contributory negligence is also an affirmative defense to an action under the Alabama Extended Manufacturer's Liability Doctrine (AEMLD). *Hicks v. Commercial Union Ins. Co.*, 652 So. 2d 211 (Ala. 1994).

31. ALA. CODE § 25-5-11(a); *Harrell v. Pet, Inc.*, 1994 WL 195449 (Ala. Civ. App. May 20, 1994).

32. *Blase v. Blase*, 419 So. 2d 599 (Ala. Civ. App. 1982).

33. *DeStafney v. University of Alabama*, 413 So. 2d 391 (Ala. 1981) (affords immunity to public officers acting within the general scope of their authority when engaged in the exercise of a discretionary function); *see also Bell v. Chisom*, 421 So. 2d 1239 (Ala. 1982).

34. *Dobbins v. Gertz Exterminators of Ala., Inc.*, 382 So. 2d 1135 (Ala. Civ. App. 1980). "Every plea in estoppel must be certain in every particular and must allege the facts upon which the plea is predicated, and must allege every material fact which the pleader expects to prove in support of the plea. Conclusions of the pleader, not supported by a statement of the facts from which the conclusions are drawn, will not suffice." *Kimbrell v. City of Bessemer*, 380 So. 2d 838 (Ala. 1980).

35. *Bechtel v. Crown Central Petroleum Corp.*, 451 So. 2d 793 (Ala. 1984)

36. *Smith v. Combustion Resources Engineering, Inc.*, 431 So. 2d 1249 (Ala. 1983).

37. *See* ALA. CODE § 7-2-607(3).

38. *International Longshoremen's Ass'n v. Davis*, 470 So. 2d 1215 (Ala. 1985), *aff'd*, 476 U.S. 380 (1986).

39. ALA. CODE § 40-14-4; *Sanjay, Inc. v. Duncan Constr. Co.*, 445 So. 2d 876 (Ala. 1983).

40. Remember, Rule 9(b) states that *all* averments of fraud shall be stated with particularity. Thus, the practitioner should allege all facts upon which the affirmative defense of fraud is based.

41. ALA. CODE § 7-3-306; *Seier v. Peek*, 456 So. 2d 1079 (Ala. 1984).

42. *Kershaw v. Knox Kershaw, Inc.*, 523 So. 2d 351 (Ala. 1988).

43. *Boykin v. Magnolia Bay, Inc.*, 570 So. 2d 639 (Ala. 1990); *Youngblood v. Bailey*, 459 So. 2d 855 (Ala. 1984).

44. ALA. CODE § 25-5-51; *Blue Water Catfish, Inc. v. Hall*, 1995 WL 63105 (Ala. Civ. App. Feb. 17, 1995). "[I]n order for an employer to successfully defend a workmen's compensation claim with the affirmative defense of intoxication it must appear that the accident producing the injury was proximately caused by the employee's intoxication." *Id.*

45. *Specialty Container Mfg., Inc. v. Rusken Packaging, Inc.*, 572 So. 2d 403 (Ala. 1990); *Polytec, Inc. v. Utah Foam Products, Inc.*, 439 So. 2d 683, 689 (Ala. 1983); *Pakruda v. Cross*, 1995 WL 276778 (Ala. Civ. App. May 12, 1995).

46. *Rikard v. Lile*, 622 So. 2d 413 (Ala. Civ. App. 1993).

47. *Dennis v. American Honda Motor Co.*, 585 So. 2d 1336 (Ala. 1991). "To prove lack of causal relation, the defendant must establish that there is 'no causal relation in fact between his activities in connection with handling of the product and its defective condition.'" *Id.* The affirmative defense of lack of causal relation to a claim under the AEMLD is available only to persons distributing finished products or in the process of distributing products. *Foremost Ins. Co. v. Indies House, Inc.*, 602 So. 2d 380 (Ala. 1992).

48. *Smith v. Combustion Resources Engineering, Inc.*, 431 So. 2d 1249 (Ala. 1983).

49. *Nationwide Mut. Ins. Co. v. Clay*, 525 So. 2d 1339 (Ala. 1987), *cert. denied*, 488 U.S. 1040 (1989); *State Farm Mut. Auto. Ins. Co. v. Hanna*, 277 Ala. 32, 166 So. 2d 872 (1964).

50. *McGuire Oil Co. v. Mapco, Inc.*, 612 So. 2d 417 (Ala. 1992) (under the Alabama Motor Fuel Marketing Act, lack of intent to injure competition is an affirmative defense).

51. *State ex rel v. One Glastron Boat*, 411 So. 2d 795 (Ala. Civ. App. 1982).

52. ALA. CODE § 25-5-80.

53. *Hosea O. Weaver & Sons, Inc. v. Towner*, 1995 W.L. 283486, at * 4 (Ala. May 12, 1995).

54. *Metropolitan Life Ins. Co. v. Sullen*, 413 So. 2d 1106 (Ala. 1982).

55. *Children's Hospital of Birmingham, Inc. v. Kelley*, 537 So. 2d 917 (Ala. Civ. App. 1987) ("minor is not liable on any contract he makes and may disaffirm the same").

56. ALA. CODE § 25-5-51.

57. Matters which tend to mitigate damages should be affirmatively pleaded if they fall within the catchall clause because it introduces a new matter into the case. *McClain v. Brewton Ins. Agency*, 528 So. 2d 335 (Ala. Civ. App. 1988).

58. *Ex parte City of Huntsville*, 456 So. 2d 72 (Ala. 1984), *overruled on other grounds, Diemert v. City of Mobile*, 474 So. 2d 663 (Ala. 1985) ("noncompliance with the notice requirements is an affirmative defense, and if it is not raised by the municipality, recovery is not barred").

59. *Seier v. Peek*, 456 So. 2d 1079 (Ala. 1984).

60. ALA. CODE § 25-5-78.

61. *Tanana v. Alexander*, 404 So. 2d 61 (Ala. Civ. App. 1981).

62. ALA. CODE § 25-5-77; *Kimberly-Clark Corp. v. Golden*, 486 So. 2d 435 (Ala. Civ. App. 1986) (requires reduction of amount of reimbursement by amount of Medicare payments).

63. *Carruth v. Pittway Corp.*, 643 So. 2d 1340 (Ala. 1994). "When asserting misuse as a defense under AEMLD, the defendant must establish that the plaintiff used the product in some manner different from that intended by the manufacturer. Stated differently, the plaintiff's misuse of the product must not have been 'reasonably foreseeable by the seller or manufacturer.'" *Sears, Roebuck & Co. v. Harris*, 630 So. 2d 1018, 1028 (Ala. 1993), *cert. denied*, 114 S. Ct. 2135, 128 L.Ed.2d 865 (1994).

64. *Turner v. Lawson State Community College*, 598 So. 2d 982 (Ala. Civ. App. 1992).

65. *Ex parte Jordan*, 532 So. 2d 1252 (Ala. 1988).

66. *Vester J. Thompson, Jr., Inc. v. Citmoco Services, Inc.*, 371 So. 2d 35 (Ala. Civ. App. 1977) ("[R]ecoupment, being an affirmative defense, should be specially plead"), *rev'd*, 371 So. 2d 42 (Ala. 1978). Later cases discuss recoupment in terms of counterclaim. *See Ex Parte Fletcher*, 429 So. 2d 1041 (Ala. 1983) (Court held that recoupment under Truth in Lending Act is a compulsory counterclaim).

67. *Wilger v. State Dep't of Pensions & Sec.*, 390 So. 2d 656 (Ala. Civ. App. 1980). Res judicata precludes relitigation of an action where four essential elements are satisfied: (1) a prior judgment has been rendered by a court of competent jurisdiction; (2) there is substantial identity of the parties in the two suits; (3) there is identity of issues in the two suits; and (4) the prior judgment was rendered on the merits. *Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176 (11th Cir. 1981).

68. *State Dep't of Revenue v. Price-Williams*, 594 So. 2d 48 (Ala. 1992).

69. *Miller v. Brown-Fikes Ford, Inc.*, 370 So. 2d 1052 (Ala. Civ. App. 1979).

70. *Hughes v. Wallace*, 429 So. 2d 981 (Ala. 1983); *Robinson v. Morse*, 352 So. 2d 1355 (Ala. 1977); *see also Mobile Infirmary v. Delchamps*, 642 So. 2d 954 (Ala. 1994) (Statute of limitations is an affirmative defense which defendant has the initial burden to allege and prove).

71. *Bechtel v. Crown Central Petroleum Corp.*, 451 So. 2d 793 (Ala. 1984).

72. *Nelson v. Lapeyrouse Grain Corp.*, 534 So. 2d 1085 (Ala. 1988) (truth is an affirmative defense in a slander or defamation action).

73. *Lowe v. Lowe*, 466 So. 2d 969 (Ala. Civ. App. 1985); *Bass v. Bass*, 475 So. 2d 1196 (Ala. Civ. App. 1985).

74. *See* ALA. CODE § 7-2-302.

75. *Mobley v. Brundidge Banking Co.*, 347 So. 2d 1347 (Ala. 1977).

76. *See* ALA. CODE § 5-19-1 *et seq.*; 15 U.S.C. § 1601 *et seq.*

77. *Gotlieb v. Collat*, 567 So. 2d 1302 (Ala. 1990).

78. *Great Southwest Fire Ins. Co. v. Stone*, 402 So. 2d 899 (Ala. 1981).

79. ALA. CODE § 25-5-51; *Blue Water Catfish, Inc. v. Hall*, 1995 WL 63105 (Ala. Civ. App. Feb. 17, 1995).

Amendment to Rule 7.3 Alabama Rules of Professional Conduct In the Supreme Court of Alabama

In an order dated January 31,1996, the Supreme Court of Alabama modified Rule 7.3, Alabama Rules of Professional Conduct. The modification, which is to become effective May 1, 1996, places a 30-day moratorium on contact by lawyers with accident victims or members of their family. The rule also places additional requirements on direct mail solicitation letters or brochures utilized by lawyers in seeking potential clients by requiring notification to the recipients of such letters or brochures that the material is "advertising".

ORDER

WHEREAS, the Board of Bar Commissioners of the Alabama State Bar has recommended to this court that Rule 7.3, Alabama Rules of Professional Conduct, the Comment thereto, and the comparative note following the Comment, be amended; and

WHEREAS, the court has considered the recommended amendment and considers that amendment appropriate;

IT IS, THEREFORE, ORDERED that Rule 7.3, Alabama Rules of Professional Conduct, the Comment thereto, and the comparative note following the Comment, be amended to read as follows:

"RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

"(a) A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no familial or current or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. A lawyer shall not permit employees or agents of the lawyer to solicit on the lawyer's behalf. A lawyer shall not enter into an agreement for or charge or collect a fee for professional employment obtained in violation of this rule. The term 'solicit' includes contact in person, by telephone, telegraph, or facsimile transmission, or by other communication directed to a specific recipient and includes contact by any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b) (2) of this rule.

"(b) Written Communication

"(1) A lawyer shall not send, or knowingly permit to be sent, on a lawyer's behalf or on behalf of the lawyer's firm or on behalf of a partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, a written communication to a prospective client for the purpose of obtaining professional employment if:

"(i) the written communication concerns an action for personal injury or wrongful death arising out of, or otherwise related to, an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster giving rise to the cause of action occurred more than thirty (30) days before to the mailing of the communication;

"(ii) the written communication concerns a specific matter, and the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter;

"(iii) it has been made known to the lawyer that the person to whom the communication is addressed does not want to receive the communication;

"(iv) the communication involves coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence by the lawyer;

"(v) the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim or is improper under Rule 7.1; or

"(vi) the lawyer knows or reasonably should know that the person to whom the communication is addressed is a minor or is incompetent, or that the person's physical, emotional, or mental state makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.

"(2) In addition to the requirements of Rule 7.2, written communications to prospective clients for the purpose of obtaining professional employment are subject to the following requirements:

"(i) a sample copy of each written communication and a sample of the envelope to be used in conjunction with the communication, along with a list of the names and addresses of the recipients, shall be filed with the office of general counsel of the Alabama State Bar before or concurrently with the first dissemination of the communication to the prospective client or clients. A copy of the written communication must be retained by the lawyer for six (6) years. If the communication is subsequently sent to additional prospective clients, the lawyer shall file with the office of general counsel of the Alabama State Bar a list of the names and addresses of those clients either before or concurrently with that subsequent dissemination. If the lawyer regularly sends

the identical communication to additional prospective clients, the lawyer shall, once a month, file with the office of general counsel a list of the names and addresses of those clients contacted since the previous list was filed;

"(ii) written communications mailed to prospective clients shall be sent only by regular mail, and shall not be sent by registered mail or by other form of restricted delivery or by express mail;

"(iii) no reference shall be made either on the envelope or in the written communication that the communication is approved by the Alabama State Bar;

"(iv) the written communication shall not resemble a legal pleading, official government form or document (federal or state), or other legal document, and the manner of mailing the written communication shall not make it appear to be an official document;

"(v) the word 'Advertisement' shall appear prominently in red ink on each page of the written communication, and the word 'Advertisement' shall also appear in the lower left-hand corner of the envelope in 14-point or larger type and in red ink. If the communication is a self-mailing brochure or pamphlet, the word 'Advertisement' shall appear prominently in red ink on the address panel in 14-point or larger type;

"(vi) if a contract for representation is mailed with the written communication, it will be considered a sample contract and the top of each page of the contract shall be marked 'SAMPLE.' The word 'SAMPLE' shall be in red ink in a type size at least one point larger than the largest type used in the contract. The words 'DO NOT SIGN' shall appear on the line provided for the client's signature;

"(vii) the first sentence of the written communication shall state: ' If you have already hired or retained a lawyer in connection with [state the general subject matter of the solicitation], please disregard this letter [pamphlet, brochure, or written communication]';

"(viii) if the written communication is prompted by a specific occurrence (e.g., death, recorded judgment, garnishment) the communication shall disclose how the lawyer obtained the information prompting the communication;

"(ix) a written communication seeking employment by a specific prospective client in a specific matter shall not reveal on the envelope, or on the outside of a self-mailing brochure or pamphlet, the nature of the client's legal problem; and

"(x) a lawyer who uses a written communication must be able to prove the truthfulness of all the information contained in the written communication.

"(Amended effective May 1, 1996.)

"COMMENT

"There is a potential for abuse inherent in direct solicitation by a lawyer in person or by telephone, telegraph, or facsimile transmission of prospective clients known to need legal services. Direct solicitation subjects the nonlawyer to the private importuning of a trained advocate, in a direct interpersonal encounter. A prospective client often feels overwhelmed by the situation giving rise to the need for legal services and may have an impaired capactiy for reason, judgment, and protective self-interest. Furthermore, the lawyer seeking to be retained is faced with a conflict stemming from the lawyer's own interest, which may color the advice and representation offered the vulnerable prospect.

"The situation is therefore fraught with the possibility of undue influence, intimidation, and overreaching. This potential for abuse inherent in direct solicitaiton of prospective clients justifies some restrictions, particularly since the advertising permitted under Rule 7.2 offers an alternative means of communicating necessary information to those who may be in need of legal services. Advertising makes it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct personal persuasion that may overwhelm the client's judgment.

"The use of general advertising, rather than direct private contact, to transmit information from lawyer to prospective client will help to assure that the information flows cleanly as well as freely. Advertising is in the public view and thus subject to scrutiny by those who know the lawyer. This informal review is likely to help guard against statements and claims that might constitute false or misleading communications in violation of Rule 7.1. Direct, private communications from a lawyer to a prospective client are not subject to such third-person scrutiny and consequently are much more likely to approach (and occasionally cross) the line between accurate representations and those that are false and misleading.

"Direct written communication seeking employment by specific prospective clients generally presents less potential for abuse or overreaching than in-person solicitation and is therefore not prohibited for most types of legal matters, but is subject to reasonable restrictions, as set forth in this rule, designed to minimize or preclude abuse and overreaching and to ensure the lawyer's accountability if abuse should occur. This rule allows targeted mail solicitation of potential plaintiffs or claimants in personal injury and wrongful death causes of action or other causes of action that relate to an accident, disaster, death, or injury, but only if the communication is not mailed until thirty (30) days after the incident. This restriction is reasonably required by the

sensitized state of the potential clients, who may be either injured or grieving over the loss of a family member, and the abuses that experience has shown can exist in this type of solicitation.

"Common examples of written communications that must meet the requirements of subparagraph (b) of this rule are direct mail solicitation sent to individuals or groups selected because they share common characteristics, e.g., persons named in traffic accident reports or notices of foreclosure. Communications not ordinarily sent on an unsolicited basis to prospective clients are not covered by this rule. Also not covered by this rule are responses by lawyers and law firms to requests for information from a prospective client or newsletters or brochures published for clients, former clients, those requesting it, or those whom the lawyer or law firm has a familial or current or prior professional relationship.

"Letters of solicitation and the envelopes in which they are mailed should be clearly marked

'Advertisement.' This will avoid the perception by the recipient that there is a need to open the envelope because it is from a lawyer or law firm, when the envelope contains only a solicitation for legal services. With the envelopes and letters clearly marked 'Advertisement,' the recipient can choose to read the solicitation or not to read it, without fear of legal repercussions.

"In addition, the lawyer or law firm sending the letter of solicitation shall reveal the source of information used to determine that the recipient has a potential legal problem. Disclosure of the source will help the recipient to understand the extent of knowledge the lawyer or law firm has regarding the recipient's particular situation and will avoid misleading the recipient into believing that the lawyer has particularized knowledge about the recipient's matter if the lawyer does not.

"General mailings to persons not known to need legal services, as well as mailings targeted to specific persons or potential clients, are permitted by this rule. However, these mailings constitute advertisement and are thus subject to the requirements of Rule 7.2 concerning delivery of copies to the general counsel, record keeping, inclusion of a disclaimer, and performance of the services offered at the advertised fee.

"This Rule would not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for its members, insureds, beneficiaries, or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement that the lawyer or the law firm is willing to offer. This form of communication is not directed to a specific prospective client known to need legal services related to a particular matter. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

"There is no comparable rule in the former Alabama Code of Professional Responsibility. Rule 7.3, before its amendment effective May 1, 1996, was a direct counterpart to Temporary DR 2-103, which was substantially adopted from Model Rule 7.3. The amendment effective May 1, 1996, changed the rule substantially from what was Temporary DR 2-103."

IT IS FURTHER ORDERED that this amendment shall be effective May 1, 1996.

Maddox, Shores, Houston, Ingram and Cook, JJ., concur.

LEGISLATIVE WRAP-UP

By ROBERT L. McCURLEY, JR.

First Special Session

1996 Tort Reform

On January 3, 1996, Governor Fob James called the Legislature back into session by proclamation setting forth 16 items that he proposed in a session that he called for tort reform. These items were:

1. Legislation to propose an amendment to the *Constitution of Alabama of 1901*, to provide for punitive damages in civil actions and specific provisions governing punitive damages in the courts of this state.
2. Legislation to amend Section 6-5-391 and 6-5-410, *Code of Alabama, 1975*, relating to wrongful death, to provide that compensatory damages may be recovered in civil actions for wrongful death.
3. Legislation to amend Section 6-5-100, *Code of Alabama, 1975*, relating to a right of action for fraud, to provide further for the right of action by requiring the element of reasonable reliance.
4. Legislation to provide for mandatory mediation prior to trial and at any time where requested by all parties, any party, or by order of the court.
5. Legislation to provide for the recovery of compensatory damages for emotional distress and mental anguish; prohibiting the recovery by bystanders, witnesses, or observers, of a physical injury suffered by another; and providing that the act shall not be construed to grant or create a cause of action or to apply to actions of wrongful death.
6. Legislation to create a privilege known as the "Self-Analysis Privilege" which allows an organization to refuse disclosure of certain information.
7. Legislation to amend Section 6-3-21.1, *Code of Alabama, 1975*, relating to a change or transfer of venue in civil actions, to provide that in exercising its discretion to transfer an action or claim the trial court may give plaintiff's choice of forum a preponderance of weight greater than any other single factor considered alone, but shall not be required to give such choice great weight.

8. Legislation to amend Rule 47 of the Alabama Rules of Civil Procedure, relating to the selection of jurors and alternate jurors, and to provide further for the selection of jurors.
9. Legislation to amend Rule 51 of the Alabama Rules of Civil Procedure, relating to the instructions to the jury by the court, to require that a judge provide the jury with a written copy of all jury instructions to be included in the court's charge.
10. Legislation to provide further for offers of judgment prior to trial in the circuit courts of the state; to amend Rule 68 of the Alabama Rules of Civil Procedure relating to offers of judgment; to provide that an offer or demand by one party to an adverse party to allow judgment to be taken against the offerer may be accepted within ten days after service of the offer or demand or such or other period of time as the offer or demand may state; to provide that such an offer or demand, if not accepted within ten days after service thereof (if the offer is silent as to the time for which it shall remain open), or within any period the offer may state, shall be deemed to have been rejected; to require payment of certain attorney's fees and out-of-pocket expenses if last demand was greater than $50,000 or less, and if the offer is found to have been unreasonably rejected, then upon motion of the opposing party, the trial court may order reimbursement of some or all attorney's fees and out-of-pocket expenses; to require an order on said motions; and to provide for an appeal.
11. Resolution calling for promulgation of a rule by the Supreme Court of Alabama.
12. Legislation providing for revisions to Alabama's laws governing medical malpractice.

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.

13. Legislation providing for revisions to Alabama's laws governing products liability.
14. Legislation to amend the Mini-Code (Sections 5-19-1, *et seq.* of the *Code of Alabama, 1975).*
15. Legislation concerning the liability of a principal for the conduct of an agent.
16. Other legislation to secure reforms in the civil justice system.

The session began January 8th. Within a week, the House of Representatives passed the package of bills that was proposed and written by the Alabama Business Council. The Senate received the bills but another package of bills that was proposed by Governor James was introduced on the same subjects in the Senate and discussed for two weeks in the Senate Judiciary, chaired by Senator Roger Bedford. This committee had approximately 70 House and Senate bills to review concerning tort reform. Most of the bills, if they pass, become effective immediately. However, several of the bills, including the one placing caps on punitive damages, is a constitutional amendment.

Bills that did not pass during the Special Session were introduced again in the Regular Session which began on February 6th.

It is expected that whatever bills do pass will have gone through many revisions. The constitutional amendment concerning punitive caps went through nine revisions while still in committee in the Senate.

Other revisions pending before the 1996 Regular Session

The Alabama Law Institute, after several years of study by committees, has presented to the 1996 Regular Session the following revisions:

- Revised UCC Article 8 "Investment Securities"—Sponsors - Senator Steve Windom, Representative Mark Gaines
- Repeal of Article 6 "Bulk Transfers"—Sponsors - Senator Steve Windom, Representative Mark Gaines
- Partnership with Limited Liability Partnership—Sponsors - Senator Wendell Mitchell, Representative Mike Box

This session, which began February 6th, can last for 105 calendar days which is until May 20th. During that time the Legislature generally meets on Tuesdays and Thursdays and holds committee meetings on Wednesdays. Most of the bills of interest to lawyers go before the House and Senate judiciaries. The Senate Judiciary generally meets Wednesday mornings at 9:00 a.m. in the Finance and Taxation Committee Room on the seventh floor of the State House. The House Judiciary meets at 10:00 a.m. on Wednesdays in Room 601 on the sixth floor of the State House. Serving as counsel to the judiciaries this year for the House of Representatives is Robin Laurie and for the Senate is Mike Hulsey.

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. ■

Notification of the Universal Bar Association

As a result of numerous complaints and an ongoing investigation by the Unauthorized Practice of Law Committee, the Alabama State Bar would like to inform you of the actions of the Universal Bar Association. This organization is formed by several residents of Mobile County who continually hold themselves out to be licensed attorneys, when in fact they are not. The following are names we know to be involved with the Universal Bar Association:

Jerry H. Pogue
Larry D. Simpson
Ocie Pace
Paul Pogue
Charles S. Murray
Betty Hood
Bessie M. Moore

If you come in contact with any of these individuals or if they appear in your courtroom, please notify the Alabama State Bar as soon as possible.

L. Gilbert Kendrick
Assistant General Counsel

...Outlining important aspects and considerations of buying on credit, this informative brochure explains the principal kinds of consumer credit plans as well as the disclosure of credit terms required by federal law. Other issues addressed include the cooling off right; repossession and suit; garnishment; the Fair Credit Reporting Act; denial of credit; and laws that can protect your credit. Also included are specific points to keep in mind in any consumer credit transaction.

Alabama State Bar Publications Order Form

The Alabama State Bar is pleased to make available to individual attorneys, firms and local bar associations, at cost only, a series of brochures on a variety of legal topics of interest to the general public.

Below is a current listing of public information brochures available from the Alabama State Bar for distribution by local bar associations, under established guidelines.

Publications

Lawyers and Legal Fees **$7.00 per 100** **Qty.** _____ **$** _____
...a summary of basic information on common legal questions and procedures for the general public

Last Will & Testament **$7.00 per 100** **Qty.** _____ **$** _____
...covers aspects of estate planning and the importance of having a will

Legal Aspects of Divorce **$7.00 per 100** **Qty.** _____ **$** _____
...offers options and choices involved in divorce

Consumer Finances or "Buying on Time" **$7.00 per 100** **Qty.** _____ **$** _____
...outlines important considerations and provides advice on financial matters affecting the individual of family

Mediation...Another Method for Resolving Disputes **$10.00 per 100** **Qty.** _____ **$** _____
...provides an overview of the mediation process in question-and-answer form

Acrylic Brochure Stand **$4.75 each** **Qty.** _____ **$** _____
...individual stand imprinted with individual, firm or bar association name for use at distribution points. One stand per brochure is recommended.

Name to imprint on stand: _____

Subtotal $ _____

Mailing Address

_____

_____

Shipping & Handling $ 5.00

TOTAL $ _____

Please remit *CHECK OR MONEY ORDER MADE PAYABLE TO THE ALABAMA STATE BAR* for the amount listed on the TOTAL line and forward it with this order form to:
Susan H. Andres, Director of Communications, Alabama State Bar, P.O. Box 671, Montgomery, AL 36101, (334) 269-1515

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 specialty area. Contact the MCLE Commission office at (334) 269-1515, or 1-800-354-6154, and a complete CLE calendar will be mailed to you.

MARCH

15 Friday
EMPLOYMENT LAW
Birmingham, Civic Center
Alabama Bar Institute for CLE
Credits: 6.0 Cost: $185
(800) 627-6514

15-16
LITIGATING THE COMPLEX BUSINESS CASE
Perdido Beach Resort, Orange Beach
Alabama State Bar Business Torts & Antitrust Section
Credits: 8.0 Cost: $150
(334) 269-1515

20 Wednesday
ALABAMA CONSTRUCTION LAW
Birmingham, Holiday Inn Redmont
National Business Institute, Inc.
Credits: 6.0 Cost: $149
(715) 835-8525

21 Thursday
FEDERAL CIVIL LITIGATION
Birmingham
Lorman Business Center, Inc.
Credits: 6.0 Cost: $145
(715) 833-3940

22 Friday
NUTS & BOLTS: A SEMINAR FOR LEGAL PROFESSIONALS
Gadsden, Holiday Inn
SBI Professional Development Seminars
Credits: 6.0 Cost: $129
(800) 826-7681

28 Thursday
HOW TO DRAFT WILLS AND TRUSTS IN ALABAMA
Mobile, Admiral Semmes Hotel
National Business Institute, Inc.
Credits: 6.0 Cost: $149
(715) 835-8525

APRIL

11-13
ENVIRONMENTAL LAW
Orange Beach, Perdido Beach Resort
Alabama Bar Institute for CLE
Credits: 8.0 Cost: $245
(800) 627-6514

12 Friday
NUTS & BOLTS: A SEMINAR FOR LEGAL PROFESSIONALS
Mobile
SBI Professional Development Seminars
Credits: 6.0 Cost: $129
(800) 826-7681

18-20
SOUTHEASTERN CORPORATE LAW INSTITUTE
Point Clear, Marriott Grand Hotel
Alabama Bar Institute for CLE
Credits: 12.0 Cost: $395
(800) 627-6514

26 Friday
NUTS & BOLTS: A SEMINAR FOR LEGAL PROFESSIONALS
Selma, Holiday Inn
SBI Professional Development Seminars
Credits: 6.0 Cost: $129
(800) 826-7681

26 Friday
FUNDAMENTALS OF ADVOCACY
Birmingham, Carraway Convention Center
Alabama Bar Institute for CLE
Credits: 6.0 Cost: $185
(800) 627-6514

MAY

10 Friday
NUTS & BOLTS: A SEMINAR FOR LEGAL PROFESSIONALS
Tuscaloosa
SBI Professional Development Seminars
Credits: 6.0 Cost: $129
(800) 826-7681

17-18
CITY AND COUNTY GOVERNMENTS
Orange Beach, Perdido Beach Resort
Alabama Bar Institute for CLE
Credits: 6.0 Cost: $215
(800) 627-6514

24 Friday
NUTS & BOLTS: A SEMINAR FOR LEGAL PROFESSIONALS
Decatur
SBI Professional Development Seminars
Credits: 6.0 Cost: $129
(800) 826-7681

GENDER EQUITY MEETS *the* SPORTS PAGES

By Victoria J. Franklin-Sisson

Following hearings in 1970, Congress enacted Title IX as part of an attempt to eliminate sex discrimination on college campuses in 1972.[1] Title IX is clear in its statement:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...

20 U.S.C. § 1681(a) (1988).

History

Following its enactment, enforcement of Title IX was shifted to the Department of Health, Education and Welfare ("HEW") which promulgated regulations in 1975.[2] Four years later, in 1979, HEW adopted its first *Policy Interpretation*.[3]

That same year Congress split HEW into two agencies—Health and Human Services ("HHS") and the Department of Education. Both agencies implemented Title IX regulations—HHS implemented its regulations at 45 C.F.R. § 86 and the Department of Education implemented its regulations at 34 C.F.R. § 106. Although jurisdiction was subsequently transferred to the Office of Civil Rights of the Department of Education, HHS still claims jurisdiction and continues to have its own set of regulations.[4]

While the first Title IX lawsuit came in 1980 the Supreme Court, in 1984, held that Title IX applied only to the specific program of the University that received the federal funds. *Grove City College v. Bell*.[5] In response to this, Congress passed the Civil Rights Restoration Act of 1987 which extended Title IX to *all* programs of an institution if any portion of that institution received federal funds.[6] Although the Restoration Act does not explicitly address sports, the floor debate over the Restoration Act shows that at least it was meant to create a more level playing field for female athletes.[7]

Regulations

The intent of the regulations is to "provide equal athletic opportunity for members of both sexes."[8] While the regulations themselves specifically permit separate teams for men and women, a woman must be allowed to participate on a men's team if the sport is a non-contact sport and no woman's team is sponsored in that sport.[9]

When reviewing the athletic program, an investigator from the Office of Civil Rights of the Department of Education looks at the entire athletic program as a whole and not just at one specific aspect of the athletic program. To aid in the investigation, a "laundry list" is provided. There are ten items in this list:

Accommodation of athletic interest and abilities;

equipment and supplies;

scheduling of games and practice times;

travel and per diem allowance;

opportunity to receive coaching and academic tutoring;

assignment and compensation of coaches and tutors;

locker rooms, practice and competition facilities;

medical and training facilities and services;

housing and dining facilities and services; and

publicity.[10]

Accommodation. The first of the laundry list, "accommodation", is the one most frequently cited by courts in determining liability. It has also been interpreted in the regulations, which provide the following questions:

(1) Are intercollegiate level participation opportunities for male and female students provided in numbers substantially proportionate to their respective enrollments?

(2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, can the institution show a history and continuing practice of program expansion?

(3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, can the institution show that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program?[11]

Institutions "pass" this three-part test if only one of the three prongs are met. Conversely, plaintiffs must demonstrate noncompliance with all three before liability can be established. This test has been summarized in the *Investigator's Manual*[12] as follows:

In effectively accommodating the interests and abilities of male and

female athletes, the institution must provide both opportunities for individuals of each sex to participate in intercollegiate or interscholastic competition and for athletes of each sex to have competitive team schedules which equally reflect their abilities.[13]

Safe Harbor. The first of the three-pronged test provides a "safe harbor" for institutions which have distributed athletic opportunities "substantially proportionate" to the gender composition of their student bodies.[14] This can also be subdivided. The first subdivision explicitly covers intercollegiate athletics which are to be distinguished from club sports.[15]

Substantially Proportionate. The second aspect is "substantially proportionate." One court determined that:

> substantial proportionality is properly found only where the institution's intercollegiate athletic program mirrors the student enrollment as closely as possible.[16]

To determine this, one compares the percentage of women in the student population to the percentage of women in the athletic program. Although no figure has been determined to be the cutoff figure as to what is "substantially proportionate," courts have found figures over 10 percent to *not* be in compliance.[17]

Participation Opportunities. The final aspect of the first prong is "participation opportunities." The courts count the *actual participants* on the teams. In doing so, one court rejected the institution's request that it count both the filled *and* the unfilled slots on an athletic team. The court determined that:

> [n]umbers from the *current* or most recent, complete competitive season provide the most representative quantification of participation opportunities *presently* offered.[18]

Program Expansion. The second prong of the accommodation test is "program expansion." The institution must bear the burden of proof on this prong.[19] To succeed in this prong, the university must "demonstrate that it has continued to increase the number of athletes participating in intercollegiate athletics."[20]

Accommodation of Interests and Abilities. Plaintiffs bear the burden of proof as to the third prong.[21] Basically, a college must determine:

> whether there is an unmet need in the underrepresented gender that rises to a level sufficient to warrant a new team or the upgrading of an existing team.[22]

This has been explained in the *Policy Interpretation*[23] which states that a university must:

> take into account the nationally increasing levels of women's interests and abilities.[24]

Most courts have construed this as requiring colleges and universities to see what sports are being played at high schools in their recruitment area and to explore the sports being played at other colleges where intercollegiate competition might be expected.

Equipment and Supplies. While the courts have traditionally focused on "effective accommodation", the "laundry list" actually contains nine other items. The second of these is the provision of equipment and supplies.[25] The *Investigator's Manual* subdivides this into five factors:

(1) quality;
(2) amount;
(3) suitability;
(4) maintenance and replacement; and
(5) availability of equipment and supplies.

This topic looks at the type of baseballs, basketballs, shoes, uniforms, and other types of equipment.

Games and Practice Times. The next of the laundry list is the scheduling of games and practice times.[26] The five subdivided areas of this are:

(1) the number of competitive events per sports;
(2) the number and length of practice opportunities;
(3) the time of day the competitive events are scheduled;
(4) the time of day the practice opportunities are scheduled; and
(5) opportunity to engage in available pre- and post-season competition.[27]

In this area, one would look at when games or practices are scheduled—are the men given "better" times to practice or play? It also reviews the availability of pre- and post-season competition—are some teams not afforded available post-season play while other teams are routinely permitted to participate?

Travel and Per Diem Allowance. Next is an assessment of the equitable treatment during travel—travel and per diem allowance.[28] Like the others, this has five different factors:

(1) modes of transportation;

(2) housing furnished during travel;

(3) length of stay before and after the competitive events;

(4) per diem allowances; and

(5) dining arrangements.[29]

This topic reviews the type of accommodation during travel—is one team forced to sleep four to a room while another team has only two athletes per room? Is one team flown to each game but another team must rent a van? Are some teams provided elaborate pre- and post-game meals and other teams not provided any meals? Are some teams given extra days to enjoy an away site while other teams are given no extra time at that site?

Assignment and Compensation of Coaches. The next aspect is assignment of coaches. To determine compliance the OCR looks at the training, experience and other qualifications of coaches and their professional standing and compensation.[30] This analysis has seven subparts:

(1) rate of compensation;

(2) duration of the contract;

(3) conditions relating to contract renewal;

(4) experience;

(5) nature of the coaching duties performed;

(6) working conditions; and

(7) other terms and conditions of employment.

In this inquiry, one looks at the duties of the coaches—what are they being asked to do besides coach that team? Another aspect is the qualifications of the coaches—do some teams routinely get coaches with little or no experience coaching that sport?

Tutoring. The other aspect is tutoring of the athletes. The opportunity to receive tutoring has two factors—the availability of tutoring and the procedures and criteria for obtaining tutors.[31] The assignment of tutors also has several factors—the qualification, training and experience of the tutors.[32] Finally, an analysis must include the five factors of tutorial compensation:

(1) hourly rate by nature of the subject;

(2) pupil loads per tutoring session;

(3) tutor qualification;

(4) experience; and

(5) other terms and conditions of employment.[33]

Locker Rooms and Practice and Game Facilities. The next item to be reviewed is locker rooms and practice and competitive facilities.[34] There are six factors an OCR reviewer would highlight in an analysis of this aspect:

(1) the quality and availability of facilities for practice and competition;

(2) exclusivity of use;

(3) availability of locker rooms;

(4) quality of locker rooms;

(5) the maintenance of practice and competitive facilities; and

(6) the preparation of the facilities for practice and competitive events.[35]

In this determination, the focus is on the types of facilities. Are athletes given equal locker rooms, and equal practice facilities; are these maintained equally; and is the same care taken in preparing the facilities for practice or competition?

Medical and Training Facilities and Services. The next aspect is the provision of medical and training facilities and services.[36] The OCR investigator would look at five factors:

(1) availability of medical personnel and assistance;

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(2) health, accident and injury insurance coverage;

(3) availability and quality of weight and training facilities;

(4) availability and quality of conditioning facilities; and

(5) availability and qualification of athletic trainers.[37]

Do some teams have team doctors while others do not? Do some teams have elaborate weight and training facilities while others have little or no opportunity to train and condition?

Housing and Dining Services. The ninth of the laundry list is the provision of housing and dining services.[38] This has two factors for analysis—the housing provided and any special services provided as a part of the housing.[39] Are some athletes provided a meal service that is not provided to others? Do some have "perks" at their housing facilities—maid service, laundry, parking—that are not available to other athletes?

Publicity. The final aspect of the laundry list is publicity.[40] The investigator would look at three factors to determine compliance:

(1) availability and quality of sports information personnel;

(2) access to other publicity resources; and

(3) quantity and quality of the publications and other promotional devices featuring men's and women's programs.[41]

One would need to determine what type of sports promotion is being done. Who is provided from the sports information department? What kind of publications does the school put out—does one sport get multi-page color books while other sports get black and white newsprint?

Enforcement

Title IX can be enforced in two ways, by a complaint to the Department of Education or a lawsuit in federal court. If a complaint is lodged with the Department of Education, an investigation of the entire athletic department of the college or university is commenced.[42] Following the *Investigator's Manual*, the investigator will review the entire sports department to ensure that it meets the gender equity requirements. If a violation is found, the OCR may set up a plan to bring the college into compliance.

In the alternative, a complaining party can bring a lawsuit in federal court. Title IX contains no express provision for private party enforcement. However, in 1979, the Supreme Court, in *Cannon v. University of Chicago*[43], held that private party enforcement is implied in the statute. Until 1992, most courts held that courts could not grant monetary damages but only injunctive relief. In 1992 in *Franklin v. Gwinnett County Public Schools*,[44] the United States Supreme Court held that money damages would be available in a Title IX case at least in reference to intentional violations of Title IX.

Title IX in the courts

Following *Cannon* and, more specifically, since *Franklin*, colleges and universities have been brought to court for alleged violations of Title IX.

In *Cook v. Colgate University*,[45] the university refused to grant the women's hockey team varsity status. The Court concluded, under a Title VII employment discrimination analysis, that the institution had discriminated against the plaintiffs through unequal treatment in the "laundry list" areas of expenditures, equipment, locker room facilities, travel, practice times, and coaching, and rejected Colgate's six justifications (the most compelling of which was financial burden). The Court stated that:

> Equal athletic treatment is not a luxury. It is not a luxury to grant equivalent benefits and opportunities to women....Equality and justice are essential elements now codified under Title IX."[46]

The Court ultimately found Colgate to be in violation of Title IX and ordered that it elevate women's hockey to varsity status. The case was later vacated because all of the plaintiffs had graduated.

The first appellate decision was in 1993 in *Cohen v. Brown University*.[47] That case, as stated earlier, was first tried to the District Court in Rhode Island, appealed to the First Circuit, and then remanded back to the District Court where the latest decision was reached in March of 1995.

That same year, in another decision, the Tenth Circuit, in *Roberts v. Colorado State Board of Agriculture*,[48] found that Colorado State University ("CSU") was in violation of Title IX. CSU had sought to discontinue its women's softball and men's baseball programs. The Court found that the elimination of the women's softball team would continue the university's noncompliance. Among its findings, the appellate court found that there was a 10.5 percent disparity between the percentage of female undergraduates (48.2 percent) and those participating in athletics (37.7 percent) which was not "substantially proportionate". The Court further found that CSU had failed to prove a history and continuing practice of expansion of women's athletics. Finally, it held that CSU had not demonstrated that its athletic program fully and effectively accommodated the interests and abilities of women athletes. The Court found that the discontinuance of the women's softball team violated Title IX and ordered that it be reinstated.

In *Kelley v. Board of Trustees*,[49] members of a men's swimming program at a university brought a Title IX action against the university when it terminated the men's swimming program but left the women's program intact. The District Court granted summary judgment to the university and the men appealed. The appellate court held that the decision to terminate the men's but not the women's swimming teams did *not* violate Title IX. The court found that although the university had reached an agreement with the OCR of the Department of Education in 1982 to remedy the disparity, by 1993, while women comprised 44 percent of the student body, they only comprised 23.4 percent of the intercollegiate athletes.[50] The decision to terminate the men's team and not the women's team came as a mixture of budget constraints and the need to comply with Title IX. In fact four teams were cut— men's swimming, men's fencing, and men's and women's diving.

When another institution, as a part of reducing its athletic budget, moved to cut women's sports, women filed suit against the institution. Indiana University of Pennsylvania ("IUP") had sought to eliminate women's gymnastics, field hockey, men's tennis and men's soccer. The District Court, in *Favia v. Indiana University of Pennsylvania*[51], ordered that the two women's teams be restored

to varsity status. Before the cutbacks, the percentage of women undergraduates was 55.61 percent and the percentage of female athletes was 37.77 percent (a difference of 17.84 percent); afterwards, the percentage of female athletes dropped to 36.51 percent (a difference of 19.10 percent). Based on the numbers, the district court found that IUP had failed to effectively accommodate the interests and abilities of its women students.[52]

When Auburn University refused to elevate women's soccer from a club to a varsity sport, female students instituted a class action against Auburn.[53] As a part of the settlement of that lawsuit, Auburn agreed to make women's soccer a varsity sport, to commit $400,000 to the women's varsity soccer program for operating expenses for the 1993 through 1995 academic years, to construct permanent practice and game fields, and to phase in scholarships at a predetermined rate.[54]

The future of Title IX

To alleviate Title IX problems, states and their institutions have begun to come up with innovative solutions. The California State University system "agreed to bring participation opportunities and funding for women's sports in line with men's sports by 1998-99."[55] The Florida State Legislature passed an amendment to the 1984 Florida Educational Equity Act which "required every state-supported educational institution that sponsors competitive athletics to devise a plan to achieve gender equity by 1997."[56] The University of Texas settled out of court, agreeing to "almost double the number of female athletes so that they would make up at least 44 percent of all athletes, and to dramatically increase the number of scholarships for women."[57]

Because of the negative effect many thought Title IX was having on men's athletics, particularly football, on May 9, 1995, Congress held an oversight hearing to consider testimony regarding what Title IX specifically requires of colleges and universities, whether Title IX has generated unintended consequences and whether the Department of Education-OCR has effectively interpreted Title IX.[58] However, no legislation changing Title IX has yet been passed.

While Title IX has been criticized for the supposed negative impact it may have had on college football, football programs continue to operate at most schools. Indeed, Title IX can be seen as having allowed athletics in college to prosper and provide more opportunities for female athletes across the country. ■

ENDNOTES

1 Christopher Raymond, *Title IX Litigation in the 1990's:The Courts Need a Game Plan*, Seattle U.L. Rev. 665, 667 (1995), citing Discrimination Against Women: Congressional Hearings on Equal Rights in Education and Employment, 3-261 (1973).
2. *Cohen v. Brown University*, 991 F.2d 888, 893 (1st Cir. 1993).
3. 44 Fed. Reg. 71, 413 (12/11/79).
4. *Cohen*, 991 F. 2d at 895.
5. 465 U.S. 555, 104 S. Ct. 1211, 79 L. Ed. 2d 516 (1984).
6. 20 U.S.C. § 1687 (1988).
7. *Cohen*, 991 F.2d at 894, citing 130 Cong. Rec. S12, 742; 130 Cong. Rec. S11, 253; 130 Cong. Rec. S2, 267.
8. 34 C.F.R. § 106.41(c)(1994).
9. *Title IX Litigation*, p. 668, citing 34 C.F.R. 106.41(b)(1994). Contact sports include boxing, wrestling, rugby, ice hockey, football, and basketball.
10. 34 C.F.R. § 106.41(c).
11. 44 Fed. Reg. at 71, 418.
12. Office for Civil Rights, Department of Education, *Title IX Athletics Investigator's Manual*(1990) (hereinafter "*Investigator's Manual*").
13. *Investigator's Manual*, p. 21.
14. *Cohen*, 991 F.2d. 881, 897.
15. *Cohen*, 879 F. Supp. at 200.
16. *Cohen*, 879 F. Supp. at 202.
17. *Roberts v. Colorado State University*, 814 F.Supp. 1507 (D.Colo. 1993); on appeal 998 F.2d 824 (10th Cir. 1993) (a 10.5 percent disparity was too great).
18. *Cohen*, 879 F. Supp. at 203.
19. *Cohen*, 879 F. Supp. at 207.
20. *Id.*
21. *Cohen*, 879 F. Supp. at 208.
22. *Cohen*, 991 F.2d at 900.
23. 44 Fed. Reg. 71413 (1979).
24. 44 Fed. Reg. at 71, 417.
25. 34 C.F.R. § 106.41(c)(2).
26. 34 C.F.R. § 106.41(c)(3).
27. *Investigator's Manual*, p. 35.
28. 34 C.F.R. § 106.41(c)(4).
29. *Investigator's Manual*, p. 55.
30. *Investigator's Manual*, p. 55.
31. *Investigator's Manual*, p. 49.
32. *Id.*
33. *Investigator's Manual*, p. 50.
34. 34 C.F.R. § 106.41(c)(8).
35. *Investigator's Manual*, p. 64.
36. 34 C.F.R. § 106.41(c)(8).
37. *Investigator's Manual*, p. 72.
38. 34 C.F.R. § 106.41(9).
39. *Investigator's Manual*, p. 80.
40. 34 C.F.R. § 106.41(c)(10)
41. *Investigator's Manual*, p. 85.
42. An investigation of a high school athletics program is limited to the program components where the complaint makes allegations. *Investigator's Manual*, p. 8.
43. 441 U.S. 677 (1979).
44. 503 U.S. 60, 112 S. Ct. 1028 (1992).
45. 802 F. Supp. 737 (N.D.N.Y. 1992), *vacated as moot*, 992 F.2d 17 (2nd Cir. 1993).
46. *Colgate*, quoted in NCAA's *Achieving Gender Equity*, p. 29.
47. 991 F.2d 888 (1st Cir. 1993).
48. 998 F.2d 824 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 580 (1993).
49. 35 F.3d 265 (7th Circuit, 1994).
50. *Kelly*, 35 F.3d at 269.
51. 812 F. Supp. 578 (W.D. Pa. 1993).
52. See, Crawford and Strope, *Gender Equity in College Athletics: How Far Have We Really Come in Twenty Years?* 104 Education Law Reporter 553, 557 (1995).
53. Civil Action NO. 93-V-474-E (M.D. Ala. July 19, 1993).
54. See NCAA's *Achieving Gender Equity: A Basic Guide to Title IX for Colleges and Universities*, p. 33.
55. *Gender Equity in College Athletics*, 565 (1995); quoting Dave Koerner, *Women are Running Up the Score in Court*, The (Louisville, Ky.) Courier-Journal, December 19, 1993, page D-5.
56. *Gender Equity in College Athletics*, 565; citing Debra E. Blum *Promises of Equity*, The Chronicle of Higher Education, August 10, 1994, page A33.
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58. *Par for the Female Course*, 22 Journal of College and University Law 30 (1995).

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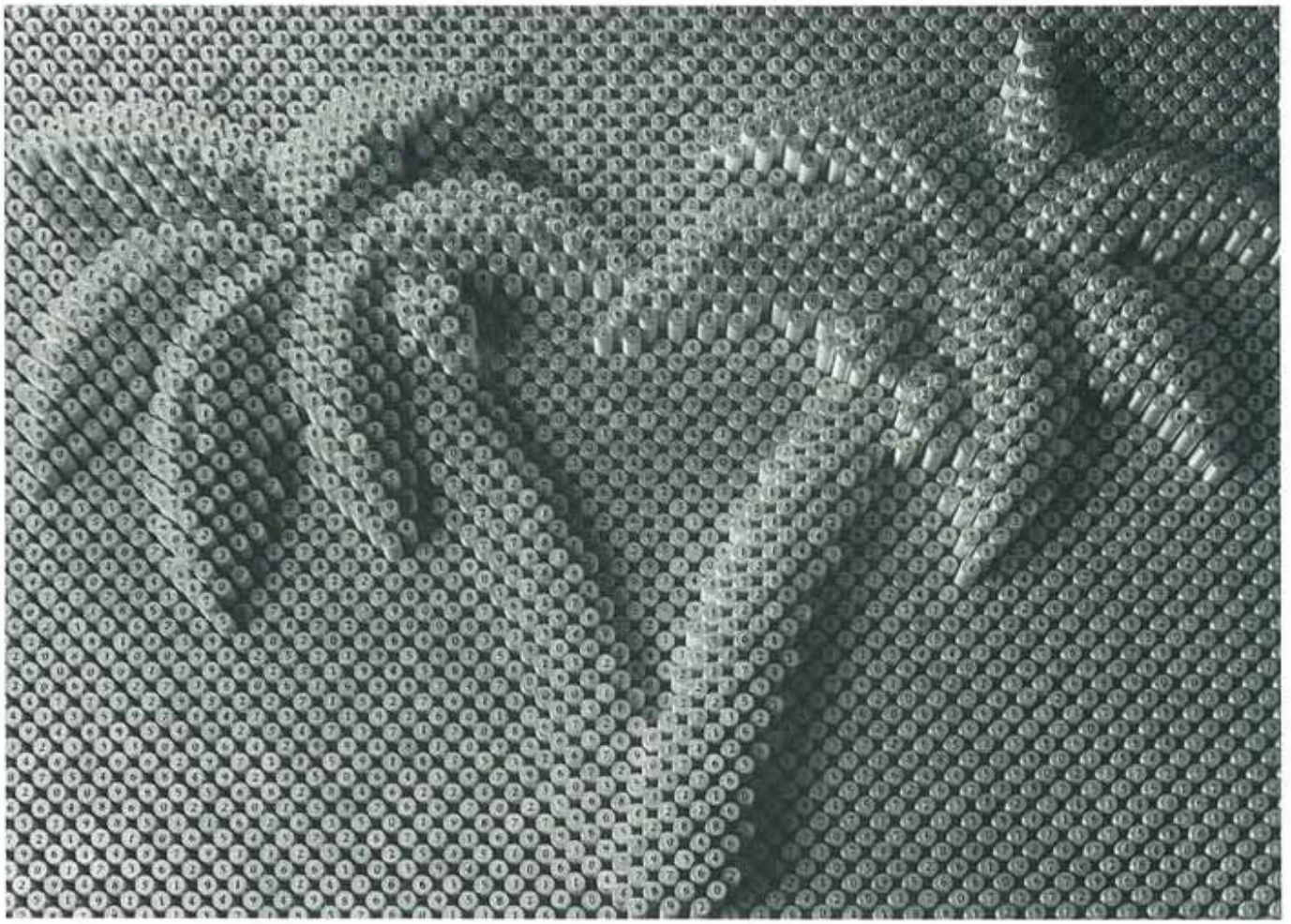

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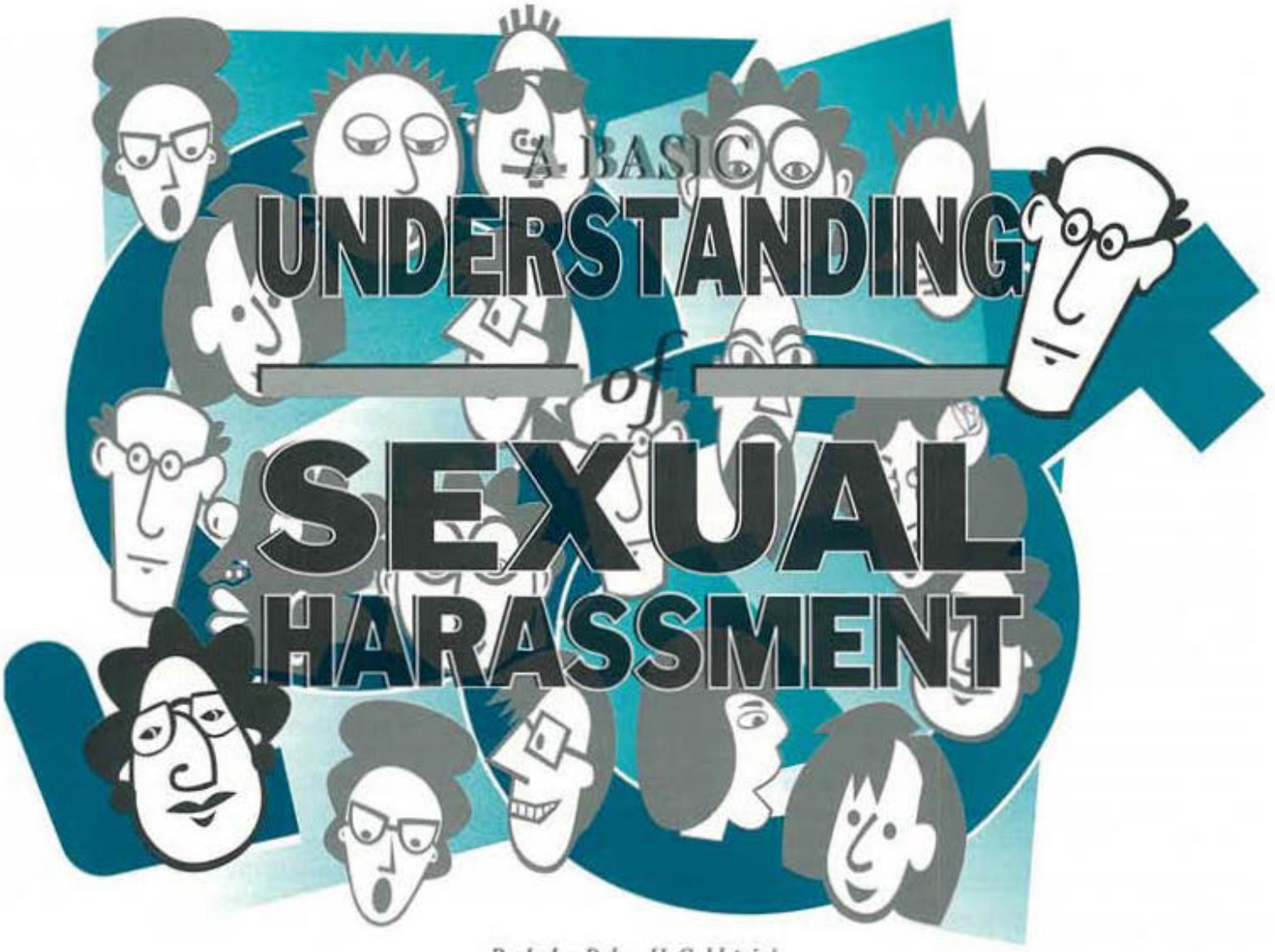

A BASIC UNDERSTANDING of SEXUAL HARASSMENT

By Judge Debra H. Goldstein[1]

On November 3, 1995, Tyson Foods, Inc. was ordered to reinstate, with all accrued benefits, plaintiff Janice Dumas to her former position at the Tyson chicken plant in Blountsville, Alabama and to pay $8,000,000 dollars to Ms. Dumas in punitive damages.[2] In addition to punitive damages, the court ordered payment of $69,000 in compensatory damages and enjoined Tyson Foods, Inc., its officers, agents, managers, supervisors, employees, and those in active concert and participation with them from maintaining the existence of a sexually hostile work environment for the female employees of the Blountsville plant.

Rather than being an isolated example of a large monetary judgment in a case involving sexual harassment, the *Dumas* decision is typical of a growing trend toward awarding additional compensation for sexual harassment.[3] The floodgate of cases involving sexual harassment, whether brought under the traditional Title VII theory, or either as an independent or combined action pursuant to a tort of outrage, worker's compensation statute, or state civil rights statute, reflects the increased familiarity of the public with the term sexual harassment and the greater willingness of individuals to publicly assert their claims.

The purpose of this article is to address what sexual harassment is. Although the term has become common in employment law, it did not actually come into usage to define offensive workplace activity until the mid-1970s. The evolution of caselaw in this area also was slow until the 1990s. Consequently, as media coverage has enhanced familiarity with issues involving sexual harassment, the necessity exists for the practitioner to be more than just familiar with the legal interpretation of sexual harassment.

Historical perspective

Enactment of the Civil Rights Act of 1964 provided a statutory means of using the conciliatory procedures of the Equal Employment Opportunity Commission (hereinafter EEOC) to prohibit all forms of discrimination on the basis of race, color, religion, national origin, and sex. The theoretical concept was that EEOC, or an individual complainant, could seek an equitable remedy if a conciliatory agreement could not be reached with an employer to resolve alleged discrimination. The equitable remedies that could be sought included injunctive relief, reinstatement, back pay, and occasionally front pay. Back pay was limited to a period two years before the date the charge was filed and was mitigated by the amount of earnings the plaintiff had during the lawsuit or the amount of money one reasonably could have earned. Front pay was restricted to the lost wages that occur while an individual restores his or her position in the work force.

In reality, between 1964 and 1974, there was little emphasis on offensive

workplace activity. Any actual definition of sexual harassment, as a term of art, did not come from the legal perspective, but rather was an outgrowth of sociological writings which defined it as being "unsolicited non-reciprocal male behavior that asserts a woman's sex role over her function as a worker," and as the "unwanted imposition of sexual requirements in the context of a relationship of unequal power."[4]

Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. den., 406 U.S. 957 (1972), was the first case to recognize a cause of action based upon a discriminatory work environment. In *Rogers*, the Fifth Circuit determined that an Hispanic complainant's protections under Title VII extended beyond the economic aspects of employment as the defendant optometrists had created an offensive work environment by providing discriminatory service to their Hispanic patients. 454 F.2d at 238.

The first reported employment case including the issue of sexual harassment under Title VII was reported in 1974,[5] but it was not until 1976, in the case of *Williams v. Saxby*, 413 F. Supp. 654 (D.C. Cir. 1976), that sexual harassment was recognized as a legitimate claim of sex discrimination pursuant to Title VII. Unlike earlier cases which had dismissed claims for failure to state a cause of action under Title VII, *Saxby* held that a Title VII sex discrimination action existed when a male supervisor acted in a retaliatory manner against a female employee who had refused his sexual advances. Cases decided during the next three years expanded the concept of liability for discrimination on the basis of sex in the workplace,[6] but they did not distinguish it in terms of sexual harassment. These cases interpreted law from a "differences approach" theory, which considered situations from a male reference point when men and women are similarly situated, as opposed to the more sociological inequality theory that views sexual harassment as the "unwanted imposition of sexual requirements in the context of a relationship of unequal power."[7]

In 1980, using the sociological definitions as a basis, the EEOC issued guidelines on sexual harassment which stated that unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment, when submission is made a term or condition of employment, or the conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[8]

Despite these guidelines, there still was limited development in this area of the law and there was a great deal of criticism of the inadequacy of the equitable remedies available for Title VII claims.

Congress tried to address these concerns in 1990 with passage of an Act which provided for unlimited compensatory damages and capped punitive damages until Title VII, but President George Bush vetoed the bill. In 1991, Congress passed the Civil Rights Act of 1991 which added a new section to Title VII, 42 U.S.C. §1981a, which permitted plaintiffs who bring suit under Title VII for intentional employment discrimination to recover both compensatory and punitive damages in addition to equitable relief. Section 1981a caps the amount of compensatory and punitive damages recoverable based upon the size of the employer: $50,000 for employers with 15 to 100 employers; $100,000 for employers with 101 to 200 employers; $200,000 for employers with 201 to 500 employers; and $300,000 for employers with over 500 employees.[9]

Although there is still an unresolved split of opinion as to whether the caps are applicable per case or per alleged act of sexual harassment, it is agreed that the acts that constitute sexual harassment can be addressed under four categories: quid pro quo, hostile work environment, sexual favoritism, and harassment by nonemployees. No matter which theory is used, causes of action, within the time limits and requirements of each, may be brought under Title VI, tort, worker's compensation, or state civil rights statutes.[10]

Quid Pro Quo

Quid pro quo describes a situation in which an employee is confronted with sexual demands to keep a job or to obtain a promotion. This "You have to do this to get that" pattern has three definite characteristics:

(1) It involves someone in management who has the authority (whether implied or explicit) to act for the organization (i.e., a supervisor, team leader, manager, director, etc.).

(2) The employee suffers a tangible money/economic loss. The tangible aspects of this loss could be the loss of a promotion, detail, transfer, training opportunity, raise, or actual or constructive discharge; and

(3) The organization usually will be liable for the conduct whether it knew or should have known of the conduct based upon the agency concept that an agency is liable for the acts of its agents.

In quid pro quo situations, very little conduct of a sexual nature is needed to support a finding of harassment. A relatively polite request for a date by a supervisor can be the basis of a sexual harassment charge if it appears to be connected to future work assignments, promotions, or raises. Similarly, sexual harassment can occur even if a favorable employment decision is made on behalf of an employee because it is the act or threat of using sexual conduct as the basis for making employment-related decisions

that gives rise to sexual harassment.

Once a prima facie case of quid pro quo sexual harassment has been established, an employer may demonstrate that it had a legitimate reason for its actions. The plaintiff then has an opportunity to show that the reason was pretextual.[11] Because quid pro quo cases require an individual in an authority position, an employee suffering a tangible loss, and attribution of organizational liability, courts have found actions based solely on quid pro quo fairly easy to determine.[12]

Hostile Environment

Defining hostile environment sexual harassment has proven to be more difficult since rather than consisting of things such as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" (29 CFR §1604.11(a) (1985)), it occurs when "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." (29 CFR §1604.11(a) (3)(1985)).

Typical situations include lewd jokes or vulgar comments, displays of explicit or sexually suggestive material,[13] repeated requests for a sexual or dating relationship, innuendoes, or touchings. The U.S. Supreme Court, in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986), held that hostile environment sexual harassment exists when "conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." In *Harris v. Forklift Systems, Inc.*, 111 S. Ct. 367, 370 (1993), the only other Supreme Court case to consider the definition of a discriminatorily abusive or hostile work environment under Title VII, the Court reaffirmed this standard. The Court further held that:

> Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation. *Harris* at 370.

Hostile environment harassment is more difficult to identify because the deciding factor is not the intent of the harasser, but the impact of the harasser's action upon the victim. Unlike quid pro quo, the threat or tradeoff presented in a hostile environment situation is not as blunt. In order to establish a prima facie case for hostile environment sexual harassment, the individual must prove that he or she is a member of a protected group; that he or she was subjected to unwelcome sexual harassment; that sex was the basis for the harassment; that the harassment affected a term, condition, or privilege of employment; and that the employer knew or should have known of the harassment and failed to take prompt remedial action.[14]

Based on Title VII's concept of workplace equality, employees are entitled to work in an environment that is not abusive because of their race, gender, religion, or national origin.[15] When sexually offensive conduct permeates the workplace, making it difficult or unpleasant for an employee to do his or her job, one must look at several factors to determine if hostile environment sexual harassment exists. In an abusive environment, the harasser can be anyone—a supervisor, peer, or nonemployee. The loss is usually intangible. Money damages do not need to be proven. Stress, fear, or discomfort are the more typical things that are proven. The standard of proof is "a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."[16] One does not need to establish that the harassing conduct actually produced a nervous breakdown because a hostile environment, even one that does not seriously affect an employee's psychological status, can have a cause-and-effect relationship which impairs job performance, lowers morale, prevents career advancement, or causes an individual to leave a job.[17]

The key factor in analyzing a hostile

environment case is the severity or pervasiveness of the conduct. The behavior may be so severe that a single occurrence can create an offensive, hostile, or intimidating work environment. Most forms of physical sexual harassment or touching will usually be defined as severe.

If the behavior is not severe, it must be so pervasive that it creates an offensive, hostile, or intimidating work environment. In *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 68-69 (1986), the court specified criteria to help determine if the conduct is pervasive: is the conduct unwelcome; is the conduct repeated; is the conduct unsolicited; and is the conduct of a sexual nature. The *Meritor* case holds that an employee who voluntarily agrees to sexual demands out of fear of retaliation does not forfeit the right to be protected from sexual harassment. The test is whether the individual's "conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary."[18] The plaintiff in *Meritor*, Mechelle Vinson, testified to voluntarily having had sexual intercourse 40 to 50 times, of being fondled in front of other employees, of being followed into the women's restroom, and of having been forcibly raped on numerous occasions by her supervisor. Although the Court found that the issue of whether particular conduct is unwelcome presents difficult problems of proof, the underlying test is one of unwelcomeness and voluntariness.

For the conduct to be of a sexual nature, it does not need to be sexual advances or demands for sexual favors. Threats, ridicule, offensive remarks about sexual parts of a woman's body, dirty jokes, and other acts based on the sex of the victim, have been held to be sufficient for a claim of sexual harassment.[19] Pornographic posters, cartoons, magazines, pictures, and calendars also have been found to contribute to an offensive working environment.[20] The proof must demonstrate that the harassee was affected and offended such that a reasonable person or objective party also would have been offended.[21]

Since 1991, courts in Michigan, Florida, and California have imposed a reasonable woman standard, as opposed to reasonable person, in hostile environment cases. The Ninth Circuit, in *Ellison v. Brady*, 924 F.2d 871 (9th Cir. 1991) examined sexual harassment from a gender-conscious viewpoint. The *Ellison* court stated that the sex-blind reasonable person standard tends to be male-biased and to systematically ignore the experiences of women. The court further commented that "[m]en tend to view some forms of sexual harassment as harmless social interactions to which only overly sensitive women would object." Because of the numeric disparity of more females being harassed than men, other courts have been reviewing the propriety of applying the reasonable woman standard,[22] but in its last test, the Supreme Court has continued to quote the reasonable person standard.[23]

Moreover, the Court has indicated that whether an environment is hostile or abusive only can be determined by examining all of the circumstances. "These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[24] Psychological harm, while relevant, is only one factor to be evaluated in ascertaining if a work environment is hostile.

Finally, courts have held that an organization or employer will be held liable where it knew or should have known of the conduct, unless it can show that it took quick and appropriate action. Promptness and effectiveness of response are key factors for determining whether the actions taken by an employer are adequate.[25] In *Potts v. BE&K Construction Company*, 604 So.2d 398, 401 (Ala. 1992), the Alabama Supreme Court affirmed:

> "the proposition that if the undisputed evidence shows that the employer, as soon as it was practical to do so after learning of the conduct, took steps to stop the tortuous conduct and the tortuous conduct stopped, the steps taken by the employer were adequate, as a matter of law. Conversely, evidence that an employer, after learning of the tortious conduct, failed to stop the tortious conduct of the offending employee presents a question of fact, unique under the circumstances of each case, as to whether the steps taken to stop the conduct were adequate."

The *Potts* case involved two employees who had worked together in an unsupervised tool room. After the company became aware of the alleged harassing behavior, there was a meeting with the accused in which he was given a warning against engaging in any type of improper conduct and there was a meeting with the complainant to assure her that any further allegations would be investigated and to whom she should report any further complaints. The two employees were then returned to their unsupervised assignments in the tool

room. No monitoring was instituted. Two weeks later, the complainant alleged that the behavior had been resumed. She was moved from the tool room to a clerical position and the alleged harasser was suspended for two weeks. After a tort action was filed, summary judgment was entered in favor of the defendant; however, the Alabama Supreme Court reversed and remanded the case holding that a genuine issue of fact existed respecting whether BE&K's actions were adequate and whether BE&K effectively ratified the alleged harasser's conduct by its failure to monitor the situation. It is important to note that in this case, BE&K responded. Thus, the emphasis of the decision is on the need to consider a standard for adequate promptness and effective handling of a situation.

Sexual favoritism and harassment by non-employees

Sexual favoritism exists when a member of management enters into a relationship with an employee who then receives favorable treatment because of the relationship. It should be noted that an isolated and consensual relationship between a member of management and an employee may not be good business, but it is not against the law. The key is when favorable treatment is accorded such that a hostile working environment is created as other employees, who are not participants, get the message that the only ones rewarded with raises and promotions are those who submit to sexual demands.

For example, in *Broderick v. Ruder*, 685 F. Supp. 1269 (D.D.C. 1988), Catherine A. Broderick, an attorney with the SEC, filed suit charging that the agency was being run "like a brothel" as senior attorneys were having affairs with secretaries and junior attorneys and were rewarding them with cash bonuses and promotions. When Broderick complained, she received poor reviews and was threatened with firing. After addressing the issue of how widespread sexual activity was in the office and expressing the view that it provided the basis for employment decisions in this instance, the Court awarded Broderick $128,000 in back pay and a promotion.

An employer also can be held responsible for harassment by people outside the employer's employ such as repairmen, customers, visitors or others. The test is if the employer had control or could have had control over the harasser's actions. The most blatant examples of this type of sexual harassment occur where the employer knows or should have known that he/she was placing the employee in a situation where sexual advances have a high probability of occurring.[26]

Having an effective harassment policy

For an employer, having an effective harassment policy begins by educating management and all employees as to what sexual harassment is. Besides orally communicating with employees, an employer should have a written policy which contains a definition of sexual harassment, a description of the type of conduct prohibited, and an explicit statement against such conduct. This policy needs to be effectively publicized to the entire workforce and must actually be implemented.

In terms of implementation, the policy must provide an adequate procedure or complaint mechanism for making complaints. It is not effective just to have a policy which refers the alleged victim to his or her supervisor, as that individual may be the alleged harasser. Consequently, the policy should afford more than one option for reporting harassing conduct.

Once an allegation is raised, an employer has a duty to investigate the claim promptly and thoroughly. Promptness has been defined as a matter of days. A fairly acceptable rule of thumb is that the investigation should begin within seven days after a formal complaint is made. The process, which needs to be handled as confidentially as possible, should include documented interviews of the complainant, accused, and any potential witnesses. It is recommended that the interviews be conducted by persons outside the accused management structure. After the interviews have been completed, management should be advised as to whether the investigators ascertain if the evidence suggests harassment occurred and, if so, what discipline would seem appropriate. Discipline can range from a verbal reprimand to termination; the criteria is that the discipline or punishment should fit the offense. Once the situation has been resolved, the employer must continue to monitor the workplace to insure that it remains free of sexual harassment and that no retaliation occurs.

If it is found that the allegation is unfounded, this too needs to be addressed. The best alternative is to reiterate the employer's stand against sexual harassment and against false accusations. In this way, all employees, regardless of their company position, are put on notice again of an employer's stance against sexual harassment. It should be noted that a mere denial of the alleged activity by the accused perpetrator is not sufficient grounds to find an accusation to be false. A false accusation needs either to be shown to have been an impossibility or to have been based upon false statements.

Summary

In summary, like courts throughout the nation, the federal and state courts in Alabama are wrestling with the dilemmas posed by the definition of sexual harassment. Although the caselaw in this area is limited, the volume of filings and the dollar award amounts at stake necessitate an understanding of the different types of sexual harassment that can occur and the actions that are necessary to negate this kind of conduct in the workplace. The *Ellison* court expressed the "hope that over time both men and women will learn what conduct offends reasonable members of the other sex,"[27] but the reality is that if eight million dollar awards are to be avoided, the concept of sexual harassment must be understood and communicated, and effective and enforced policies that do not tolerate any element of a quid pro quo or hostile environment must be implemented. ■

Honorable Debra H. Goldstein

Debra H. Goldstein is an administrative law judge with the Office of Hearings and Appeals, Social Security Administration, in Birmingham, Alabama. Prior to her 1990 ALJ appointment, she was a trial attorney for the Office of the Solicitor, U.S. Department of Labor. Judge Goldstein is a 1984 admittee to the state bar and is a member of *The Alabama Lawyer* editorial board and the *ADDENDUM* sub-committee.

ENDNOTES

1. The views expressed herein are those of the author and do not necessarily reflect those of any government department or agency.
2. *Dumas v. Tyson Foods, Inc.*, Civil Action No. 93-C-2688-W (N.D. Al 1995).
3. Christine Whitesell Lewis, Jane R. Goodson, and Renee Daniel Culverhouse, *The Tort of Outrage In Alabama: Emerging Trends in Sexual Harassment*, 55 The Alabama Lawyer 33 (1994).
4. Ruth C. Vance, *Workers' Compensation and Sexual Harassment In The Workplace: A Remedy for Employees, Or A Shield for Employers?*, 11 Hofstra Labor L. J. 141, n. 1, 2, and 3 (1993).
5. *Barnes v. Train*, 13 Fair Empl. Cas. (BNA) 123 (D.D.C. August 9, 1974).
6. *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977); *Miller v. Bank of America*, 418 F. Supp. 233 (N.D. Cal. 1976), rev'd, 600 F.2d 211 (9th Cir. 1979).
7. Beverly J. Ness, *The Road to Respect Which A Reasonable Woman Must Travel: Sexual Harassment in the American Workplace*, 40 Federal Bar News & J. 280, 281-282 (1993) citing C.A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (Yale University Press: 1979)
8. 29 C.F.R. §1604.11 (1991).
9. 42 U.S.C. §1981a(b)(3)(A),(B),(C), and (D).
10. *See* Jane Byeff Korn, *The Fungible Woman and Other Myths of Sexual Harassment*, 67 Tul. L. Rev. 1363, 1373-1384 (1993); Comment, *The Search For Adequate Remedies for the Sexual Harassment Plaintiff in Arizona*, 25 Ariz. St. L. J. 671, 679-693 (1993); Christine Whitesell Lewis, Jane R. Goodson, and Renee Daniel Culverhouse, *The Tort of Outrage In Alabama: Emerging Trends in Sexual Harassment*, 55 The Alabama Lawyer 33 (1994).
11. *See Horn v. Duke Homes*, 755 F.2d 599, 603 n. 1 (7th Cir. 1985); and *Henson v. City of Dundee*, 682 F.2d 897, 909 (11th Cir. 1982).
12. Korn at 1372.
13. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991).
14. *Henson v. City of Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982).
15. *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367, 371 (1993).
16. *Id.* at 370.
17. *Harris* at 371.
18. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 68 (1986).
19. *See generally Bell v. Crackin Good Bakers, Inc.*, 777 F.2d 1497 (11th Cir. 1985).
20. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. FL. 1991).
21. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367, (1993).
22. *Lipsett v. University of P.R.*, 864 F.2d 881 (1st Cir. 1988); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fl. 1991).
23. *Harris* at 370.
24. *Id.* at 371.
25. *See* Joe A. Simmons, *Sexual Harassment - Prophylactic Measures*, 19 Ohio Northern Univ. L. Rev. 661, 668 (1993); *Steele v. Offshore Ship Bldg. Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989); *Potts v. BE & K Const. Co.*, 604 So. 2d. 398 (Ala. 1992).
26. *Thoreson v. Penthouse Int'l, Ltd.*, 563 N.Y.S.2d 968 (N.Y. Sup. Ct. 1990).
27. *Ellison v. Brady*, 918 F.2d 872, 881 (9th Cir. 1991).

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

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 5, 1996.

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

Notice of Additional Amendments to the Rules of the United States Court of Appeals for the Eleventh Circuit

Following receipt and consideration of comments to the proposed amendments to the Rules of the United States Court of Appeals for the Eleventh Circuit, the Court has determined to adopt additional revisions to the Rules as set forth below. The Judicial Council has also determined to adopt the revision to Addendum Four as set forth below. Pursuant to 28 U.S.C. §2071(e), these additional amendments shall take effect on January 2, 1996, at the same time as the other changes to the Rules.

1. New 11th Circ.R.28-2(d) is added: *Certificate of Type Size and Style.* Each brief shall include a statement identifying the size and style of type used in the brief (e.g., 14 point Times Roman).
2. 11th Cir. R. 32-4(b) and (c) is revised to read:
   (b) Typed matter that is not proportionally spaced shall be in 12 point type or larger and shall not exceed 10 characters per inch (10 pitch);
   (c) Typed matter that is proportionally spaced shall be in 14 point Times Roman (or similar) type or larger;
3. Addendum Four § (f)(5) {formerly § (f)(4) is revised to read: If the decision of this court is adverse to the client, counsel shall inform the client of the right to file a petition for rehearing or suggestion of rehearing en banc in this court, or to petition the Supreme Court of the United States for a writ of certiorari. Counsel shall file a petition for rehearing, a suggestion of rehearing en banc, or a petition for a writ of certiorari if requested to do so by the client in writing, but only if in counsel's considered judgment sufficient grounds exist. Sufficient grounds for requesting rehearing en banc do not exist unless the suggestion would satisfy the standards of FRAP 35(a). *See* 11th Cir. R. 35-3. Sufficient grounds for filing a petition for a writ of certiorari do not exist unless in counsel's considered judgment there are grounds that are not frivolous and consistent with the standards for filing a petition under the Rules of the Supreme Court and applicable case law. If counsel concludes that there are *not* sufficient grounds to seek further review of a type requested by the client, counsel shall so inform the client and shall advise the client that such review will not be sought by counsel. In such circumstances, counsel is not required to move to withdraw.
4. Addendum Eight, Rule 13(C), is revised to read: Whenever it appears that an attorney who has been disbarred or suspended by the Court is admitted to practice law in another jurisdiction or before another court, the Clerk shall, within 14 days of such disbarment or suspension, transmit to the disciplinary authority in such other court or jurisdiction as well as to the disciplined attorney as provided in Rule 12., *supra,* a copy of this Court's judgment or order of disbarment or suspension. A copy of a judgment or order imposing discipline other than disbarment or suspension shall not be transmitted to the disciplinary authority in such other court or jurisdiction unless so ordered by the Court.

In addition, minor editorial changes not affecting the substance of the rules were made to 11th Cir. R. 11-3; IOP 3 (p. 22), *Preparation and Transmission of Exhibits;* 11th Cir. R. 22-1 (a); IOP 1 (p.46), *Extensions of Time;* 11th Circ. R. 27-1(a)(5); 11th Cir. R.31-1(b); 11th Cir. R. 36-3; Addendum Four (f)(2); and Addendum Eight, Rule 1(B).

DISCIPLINARY REPORT

Disbarments

• On November 29, 1995, the Alabama Supreme Court entered an order of disbarment on **Major E. Madison, Jr.** Madison received a check for a client in the amount of $6,142.17. The check was inadvertently sent to Madison because of his prior representation of the client in another matter. Madison admitted to the client that the check had been sent to him in error and that he would forward it to the client. Madison never sent the check despite repeated requests that he do so. Much later, for the first time, Madison claimed an interest in the funds over past due attorney's fees. The client disputed owing any additional fees. Formal charges were filed against Madison and he allowed a default to be taken against him on the merits of the complaint. On September 22, 1995, a hearing was held before the Disciplinary Board to determine discipline in the case. The Disciplinary Board determined that disbarment was the appropriate sanction with full restitution prior to reinstatement. The Disciplinary Board considered past similar disciplinary actions in making its decision. [ASB No. 95-044]

• Mobile attorney **Robert Harold Allen** was disbarred by the Supreme Court of Alabama, effective May 11, 1995. The order of disbarment was based upon Allen's consenting to disbarment pursuant to Rule 23, Alabama Rules of Disciplinary Procedure. Allen's consent was submitted based upon his felony conviction in the United States District Court for the Southern District of Alabama, for knowingly and fraudulently embezzling and appropriating to his own use money and property belonging to the estates of bankruptcy debtors, which money and property had come into his charge as trustee of the court, in violation of Title 18, United States Code, Section 153. [Rule 22 (a) (2); Pet. No. 95-04]

Suspensions

• On January 10, 1996, the Disciplinary Commission of the Alabama State Bar ordered that Decatur attorney **William Augustus Catoe, Jr.** be interimly suspended from the practice of law in the State of Alabama pursuant to Rule 20 of the Rules of Disciplinary Procedure. [Rule 20 (a); Pet. No. 95-10].

• Effective January 1, 1996, Fairhope attorney **Timothy P. McMahon** has been suspended from the practice of law for noncompliance with the Mandatory Continuing Legal Education Rules of the Alabama State Bar. [CLE 95-16] ■

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January 15, 1996

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RECENT DECISIONS

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

United States Supreme Court — Criminal

Drug forfeiture-consequences of a guilty plea

Libretti v. United States, No. 947427, __U.S.__(Nov. 6, 1995). Can a federal judge who accepts a guilty plea from a drug defendant forgo any inquiry into the "factual basis" for a stipulated forfeiture of assets embodied in the plea agreement? The Supreme Court answered yes by an eight-to-one vote.

Prosecutors reversed a recent trend of setbacks in forfeiture cases before the United States Supreme Court by winning a case involving forfeitures in plea bargains.

In *Libretti*, the Supreme Court held that Federal Rules of Criminal Procedure 11(f), which requires a judge to find a basis for a guilty plea before entering judgment, does not require a judge to determine whether the assets to be forfeited as part of a plea agreement are related to a defendant's crimes. Justice Sandra O'Conner, writing for the majority, observed that a judge in such circumstances "is not obliged" by Federal Rules of Criminal Procedure Rule 11 to make certain all the assets are forfeitable. The Court reasoned that "forfeiture is an element of the sentence imposed following conviction or, as here, a plea of guilty" and this is outside the scope of Rule 11, thereby rejecting the drug dealers' argument that a factual basis inquiry is essential to insure a forfeiture agreement is knowing and voluntary to protect against government overreaching and to insure the rights of third-party claimants.

The Justices noted that, even though a defendant has a right to a special jury verdict on forfeiture, that right, provided under Federal Rules of Criminal Procedure 31(e), is not covered by the Sixth Amendment's constitutional protection. The Justices said that district courts are not required to advise a drug defendant that a guilty plea will waive his Rule 31(3) right. Accordingly, criminals who plead guilty to drug-related crimes in federal court do not have to be told that they are waiving a separate right to a jury trial before challenging the government's seizure of the assets.

Supreme Court narrows scope of "use" of firearm during and in relation to drug trafficking

Bailey v. United States, Case, No.94-7448 (December 6, 1995); *Robinson v. United States*, Case No. 94-7492 (December 6, 1995). The Supreme Court made it harder to lengthen the present sentence of federally convicted drug dealers who "use" a gun in their illicit activites. A unanimous Supreme Court narrowed the scope of 18 U.S.C.A. §924(c)(1) that adds five years to the prison sentence of anyone who uses a gun while engaged in drug trafficking.

Justice Sandra Day O'Connor held that the government must show active employment of the firearm and that the evidence was insufficient to support the defendants' conviction for "use".

The defendants, Roland J. Bailey and Candisha Robinson, had five years added to their sentences because each defendant had "used a firearm while engaged in drug trafficking." In concluding that the evidence was insufficient to support either Bailey's or Robinson's conviction, the Court observed that the police had stopped Bailey for a traffic offense and arrested him after finding cocaine in the driver's compartment of his car. The police then found a firearm inside a bag in the locked car trunk. There was no evidence that Bailey actively employed the firearm in any way. In Robinson's case, the unloaded, holstered firearm that provided the basis for her §924(c)(1) conviction was found locked in a foot locker in a bedroom closet. No evidence showed that Robinson has actively employed the firearm. The Supreme Court reversed both judgments remanding their cases to the court of appeals for reconsideration and sentencing.

Justice O'Connor, writing for unanimous Court, held that §924(c)(1) requires evidence sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense. Evidence of the proximity and accessibility of the firearm to drugs or drug proceeds is not alone sufficient to support a conviction for "use" under the statute. "The active employment understanding of 'use' certainly includes brandishing, displaying, bartering, striking with, and most obviously firing or attempting to fire a firearm. Thus, a reference to a firearm calculated to bring about a change in the circumstances of the predicate offense is a 'use' just as the silent but obvious enforceable presence of a gun on a table can be a 'use'."

Interestingly, the Court addressed the possibly more difficult question which might arise where an offender conceals a gun nearby to be at the ready for an imminent confrontation. Justice O'Connor responded by saying, "...in our view, 'use' cannot extend to encompass this action. If the gun is not disclosed or men-

Continued on page 113

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Continued from page 111

tioned by the offender, it is not actively employed and is not 'use'. To conclude otherwise would distort the language of the statute as well as creating impossible line-drawing problems."

This case is extremely significant to defense counsel in federal drug trafficking cases by providing a bright-line test, i.e., the government must show active employment of the firearm in relation to the predicate offense.

Criminal law and procedure-in-custody interrogation

Thompson v. Keohane, Case No. 94-6616 (November 29, 1995). Is the question of whether a criminal suspect was "in custody" when interrogated by police a question of fact so that a state court's determination of such is entitled to a presumption of correctness by a federal court on habeas corpus review? The Supreme Court, in a seven-to-two decision, said no.

Justice Ginsburg, writing for the majority, held that whether a criminal suspect was "in custody" is a mixed question of law and fact, and the presumption of correctness therefore does not apply. In short, federal judges should undertake an independent review of the in-custody question without applying the presumption of correctness under §2254(d).

During a two-hour tape-recorded session at Alaska State Trooper Headquarters, Thompson confessed that he had killed his former wife. Thompson maintained throughout that the troopers gained his confession without giving him the warnings required by *Miranda v. Arizona*. The trial court denied his motion to suppress the confession, however, ruling that he was not "in custody" for *Miranda* purposes and, therefore, the troopers were not required to inform him of his *Miranda* rights. After a trial at which the prosecution played the tape-recorded confession, the jury found Thompson guilty of first degree murder. The court of appeals of Alaska confirmed the conviction.

The federal District Court denied Thompson's petition for writ of habeas corpus and the Ninth Circuit affirmed. Both courts held that a state court's determination that a defendant was not "in custody" for *Miranda* purposes qualifies as a "fact" determination which is entitled to the presumption of correctness under 28 U.S.C. §2254(d).

Justice Ginsburg reasoned that the ultimate "in-custody" determination for *Miranda* purposes is a mixed question of law and fact, involving two inquiries as to whether or not there was a formal arrest or restraint on freedom of movement. The first inquiry, i.e., what circumstances surrounded the interrogation, is distinctly factual and state court findings in response to that inquiry attach the presumption of correctness under §2254(d). The second inquiry, i.e., would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave, calls for the application of the controlling legal standard to the historical facts, and, thus,

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presents a mixed question of law and fact qualifying for independent review. Thus, once the historical facts are resolved, the state court is not in an appreciably better position than the federal habeas court to make the ultimate determination of the consistency of the law enforcement officers' conduct with the federal *Miranda* warning requirement. "Furthermore, classifying 'in custody' as a determination qualifying for independent review should serve legitimate law enforcement interest as effectively as it serves to ensure protection of the right against self-incrimination."

Supreme Court of Alabama — Criminal

Acquiescence to police order doesn't equal consent

State v. Tucker,____So. 2d____, (1995). The central issue in *Tucker* is whether the search and seizure of a film canister were contrary to the Fourth Amendment. On the afternoon of October 9, 1992, two officers of the Tuscaloosa Police Department were on a routine patrol in an area of town described by the officers as a "high crime area". The two officers, as well as four other officers and two other patrol cars, stopped in front of a shot house where there were five or six persons gathered. There had been no calls or complaints to the Tuscaloosa Police concerning any illegal activity at the house or pertaining to any of the persons gathered in the front yard. When the police stopped they observed a large bulge in Mr. Tucker's front pants pocket. The officers asked Tucker what was in his pocket and told him to take out whatever it was so that it could be seen. Tucker took from his pocket a black 35mm film canister with its lid closed. Both police officers testified that they knew at this point that the object was a film canister and was not a weapon. Sgt. Hurter asked Tucker what was in the canister. After hearing the question, Tucker stuck the canister behind his back. Sgt. Hurter emphatically asked to see the canister. Tucker handed the canister to Sgt. Hurter who opened it and found five $10-bags of marijuana.

The Supreme Court of Alabama reversed and remanded the case, holding that Tucker had not freely given his consent to surrender the canister.

Consent to search must be knowingly, intelligently and freely given. *Ex Parte Wilson*, 571 So. 2d 1251, 1255 (Ala. 1990). Mere submission to police authority will not suffice for consent. *Martinez v. State*, 624 So. 2d 711, 716, (Ala. Crim. App. 1993).

Justice Almon found from the facts that Tucker showed the canister to the officers in response to their directive. It is apparent that the defendant did not freely consent to the search and seizure of the film canister. Tucker put the canisteer behind his back, obviously intimating that he did not want the police officers to have it. It was only after the police officer asked for the canister in such a way that the defendant knew he should not withhold it, that he handed it to the police.

Moreover, the facts of the case do not indicate sufficient probable cause to open the container. The court critically noted:

The fact that a police officer has firsthand experience with film canisters containing narcotics cannot provide probable cause to open each film canister he may encounter. Nor does the added factor that a film canister is found on a person in a high crime area provide probable cause to open it without a more articulable basis upon which a reasonable person could conclude that the particular canister contained narcotics.

Allowing the search in such a situation without requiring a more aritculable basis would be allowing a warrantless-search based upon mere suspicion. Therefore, the facts known to and the circumstances observed by Sgt. Hurter did not supply probable cause to search and seize the film canister without a warrant.

A deal is a deal

State of Alabama v. Ackerman,____ So.2d____ (September 1995). The Supreme Court of Alabama reversed the court of criminal appeals, thereby enforcing a plea agreement on the State. Ackerman was arrested and charged with unlawful distribution of a controlled substance, i.e., dilaudid. Ackerman, through counsel, entered into plea negotiations with the district attorney in Jefferson County, Alabama. The assistant district attorney offered Ackerman a recommended sentence for two-year imprisonment in exchange for a guilty plea. The district attorney also agreed that he would not object to Ackerman applying for probation immediately following the plea. Ackerman, through counsel, accepted the offer. Thereafter, the trial court conducted a *Boykin* inquiry and accepted the plea agreement. The Court entered a judgment based upon the plea.

Within minutes, the district attorney realized that he had forgotten to consider certain sentence enhancements that would have been applicable. Specifically, the assistant attorney had forgotten to include the five-year additional imprisonment for distribution of a controlled substance within three miles of a public housing project.

The assistant district attorney then

asked the court to rescind the plea agreement by written motion and asked the court to impose the mandatory sentence based on Ackerman's guilty plea, including an additional ten years pursuant to the enhancement provisions of §13A-12-250 and §13A-12-270, *Code of Alabama* (1975).

The trial court held a hearing and ruled that the district attorney's office was bound by the original plea agreement and that the court could not rescind the plea agreement and enhance the sentence by an additional ten years.

Following an appeal, the court of criminal appeals reversed, holding that the district attorney had no authority to make the original plea agreement which called for two years imprisonment because it held that the provisions of §13A-12-250 and §13A-12-270 are mandatory sentence enhancements and that the original plea agreement was made as a result of negligence. The supreme court granted cetiorari. In a *per curiam* opinion, the Alabama Supreme Court reversed the judgment of the court of criminal appeals.

The United States Supreme Court first upheld the constitutionality of a plea bargain in *Brady v. United States, 397 U.S. 742 (1970).* The following year, in *Santobello v. New York*, 404 U.S. 257 (1971), the Supreme Court recognized the enforceability of a negotiated plea. Twelve years later, in *Ex Parte Yarber,* 437 So.2d 1330 (Ala. 1983), the Alabama Supreme Court addressed the issue of plea bargaining and held that the State does not have to enter into a plea agreement. However, if the State chooses to do so, the Alabama Supreme Court held that it should not be allowed "to repudiate that agreement with impunity." The *Yarber* Court reasoned that to allow the State to dishonor its agreements at will would weaken the plea negotiation system.

In *Ackerman*, the Alabama Supreme Court again reaffirmed the principle that no defendant has a constitutional right to a plea bargain. The district attorney may engage in plea bargain negotiations at his sole discretion, or, if he chooses, he may go to trial. If the district attorney makes an offer to an accused and the accused takes no action in reliance on the offer, the State may withdraw the offer. However, if the district attorney makes an offer and the offer is accepted by the accused, *either by entering a guilty plea or by taking action to his detriment in reliance on the offer, the plea bargain becomes binding and enforceable under constitutional law.* It is the due process clause that mandates enforcement of the State's promise when the accused has detrimentally relied on that promise in pleading guilty or in taking action based upon the promise.

Justices Maddox, Houston and Butts dissented.

Supreme Court of Alabama — Civil

Life Insurance Company of Georgia v. Johnson, Ala.Sup.Ct. No. 1940357, 11-17-95; 1995 Ala. Lexis 445; 1995 WL 683857 (Ala.). (Application for rehearing pending.)

In this case the court adopted a new procedure for the determination by the jury of punitive damages and directed that punitive damages be allocated between the plaintiff and the state. In summarizing these holdings the court said:

> I. Bifurcation
>
> The trial of all cases in which punitive damages are sought, excluding causes of action based upon wrongful death, in which a trial commences three months after the certificate of judgment issues in this case, shall be bifurcated. The jury shall first determine liability and the amount of compensatory damages, if any. If the Jury finds the defendant liable, it will also decide, by a special verdict, whether the evidence justifies the imposition of punitive damages. If the jury answers the special verdict in the affirmative, the trial shall resume.

In the second part of the trial, all evidence shall be admitted that is relevant to the question of what amount would be appropriate to accomplish the purpose punitive damages were designed to serve. All evidence that has heretofore been admissible at post-verdict Hammond/Green Oil hearings, can be introduced under this new procedure, before the jury retires to consider its punitive damages verdict. This new procedures is intended to allow the jury to decide, based upon all the evidence that is relevant to that inquiry, the award that the specific defendant before the jury should be required to pay as punishment. If the punitive verdict is challenged in a post-verdict motion as excessive or inadequate, it must still be considered by the trial judge through the procedures set out in *Green Oil Co. v. Hornsby,* supra, and *Hammond v. City of Gadsden,* supra.

> II. Allocation
>
> Hereafter, all punitive damages judgments that have not been paid and satisfied shall be allocated as follows: After any post-verdict review is concluded by the trial court, and after appellate review, if any, the amount of the judgment as finally determined shall be paid into the trial court. The trial court shall order all reasonable expenses of litigation, including the plaintiff's attorney fees, paid. The trial court shall then order the clerk of the court to divide the remaining amount equally between the plaintiff and the State General Fund.

Justice Shores wrote the opinion for the court in which Justices Almon, Houston, Kennedy, Ingram, and Cook concurred. Chief Justice Hornsby concurred in the result. Justices Maddox and Butts dissented to the allocation of punitive damages on the basis that it was a legislative function, not a judicial one.

At the trial, the jury returned a verdict in favor of Mrs. Johnson and against Life of Georgia for $250,000 compensatory damages and $15,000,000 punitive damages. After a *Hammond* hearing the trial judge ordered a remittitur of $2,500,000 to reduce the punitive damages to $12,500,000, an amount equal to the highest ever approved by the Alabama Supreme Court.

On appeal, the court ordered an additional remittitur of $7,500,000 reducing the punitive damages to $5,000,000.

In explaining its holding, the court said:

> We conclude, as did the trial judge, that the conduct of this defendant was egregious and reprehensible and resulted in a great financial hardship to some of the most vulnerable members of our

society. Life of Georgia fraudulently sold policies to people on Medicaid that were totally worthless to the victims of the fraud. Life of Georgia had no risk under these fraudulently sold policies. The practice was a sham and would never have been permitted in this state if the activities of insurance agents were properly regulated. However, as reprehensible as Life of Georgia's conduct was, it is not the most odorous this Court has been required to review. Without in any way condoning the conduct, we nevertheless are compelled, when comparing this conduct with other acts perpetrated upon Alabama citizens, to reduce the award against the defendant Life of Georgia to $5 million.

The court also held that Mrs. Johnson's testimony of her mental condition was sufficient, proof of mental anguish to support the jury's award of $250,000 for compensatory damages.

Smith v. Schulte, Ala. Sup. Ct. No. 1930362, 8-18-95, application for rehearing overruled, 12-15-95.

The court held that *Code of Ala* § 6-5-547, which places a cap on damages in wrongful death actions against health care providers, violates the equal protection and right to trial by jury provisions of the Alabama Constitution.

The court held that placing victims of wrongful death by medical malpractice in a different class from other victims of wrongful death was an unreasonable classification. Section 6-5-547 places a specific value on human life and implies that some lives are worth more than others. The court said:

> The fundamental tenets underlying Alabama's right of action for wrongful death are entirely inconsistent with the imposition of an arbitrating cap on that value.

The court relied on *Moore v. Nichols Informing Associates*, 592 So.2d 156 (Ala. 1991), which held that § 6-5-574(b) violated equal protection as guaranteed by §§ 91, 96 and 922 of the Alabama constitution.

The court also held that § 911 of the Alabama constitution guarantees the right to have a jury assess damages that are due under common law and statutory damages created prior to the adoption of the constitution in 1901.

While Dr. Shulte was treating Mrs. Smith after she was injured in an automobile accident, a tube designed to assist her in breathing was inserted into her stomach instead of her lungs, resulting in her death. The jury returned a verdict for Mrs. Smith for $4,500,000. On post-judgment motion, the court concluded the verdict was supported by the evidence, but reduced the judgment to $1,270,873 in accordance with § 6-5-547. Because Dr. Shulte told Mr. Smith what he had done and put it on his chart, the Supreme Court ordered a remitter of $2,000,000.00 reducing the judgment to $2,500,000.

Bankruptcy

Bic Corp v. Bean Ala. Sup. Ct. No. 1930853, 9-1-95

A judgment based upon an inconsistent jury verdict was affirmed because of the failure of the parties to make timely objection. Bean's children were playing with a Bic butane cigarette lighter when the house caught on fire, killing a four-year-old, injuring a five-year-old, and destroying the house. In an AMELD action against Bic, the jury returned a verdict in favor of the children on their claim, and against the parents on their claim. While they were deliberating, the jury asked if they could render verdicts as they did and were told by the judge that they could. The judge then called the lawyers and told them what had occurred. No objections were made until after the verdict was returned. The supreme court held this was too late.

U.S. Supreme Court rules on debt dischargeability

Fields v. Mans, ____U.S.____, ____ S.Ct.____, Nov. 28, 1995,

Mr. Justice Souter. Code Section 523(a)(2)(A) excepts from a debtor's discharge debts obtained by false pretenses, a

false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition. As to misrepresentations of the debtor's financial condition, Section 523(a)(2)(B) requires that the statement must have been in writing, materially false, reasonably relied upon by the creditor, and published with the intent to deceive.

In this case Mans had mortgaged real property to Fields, with a "due on sale" clause in the mortgage requiring the consent of Fields to any conveyance which would accelerate the mortgage debt upon any unauthorized sale. Nevertheless, Mans conveyed the property; and then unsuccessfully attempted to obtain Fields' consent without advising Fields of the transfer. Three years later and following a precipitous drop in the real estate market, Mans filed bankruptcy. Fields then claimed the mortgage debt non-dischargeable as it should have been accelerated three years previously. Following circuit court precedent, the bankruptcy and district courts ruled that Fields did not reasonably rely upon Mans' misrepresentations. The circuit court affirmed.

The Supreme Court reversed and remanded holding that a debt is not dischargeable under Code Section 523(a)(2)(A) if the creditor establishes *justifiable reliance* on the debtor's fraudulent misrepresentations. The Court rejected the *reasonable reliance* standard of Section 523(a)(2)(B) argued by the debtor. Mr. Justice Souter writing for the majority noted that subsection (A) dealing with common-law fraud did not contain the statutory reasonable reliance language of subsection (B). Under the justifiable reliance standard of the Restatement (Second) of Torts adopted by the Court, the qualities and characteristics of the creditor and the peculiar circumstances of each case are to be considered. The Court further noted that subsection (B) dealing with inaccurate written financial statements was drafted by Congress to moderate the burden on individual debtors because it was aware that some consumer loan companies might encourage the giving of inaccurate statements to make the debt non-dischargeable in bankruptcy.

U.S. Supreme Court holds that remand order not appealable

Things Remembered, Inc. v. Petrarca, ____U.S.____, ____S.Ct.____, Dec. 5, 1995, Mr. Justice Thomas. Petrarca in March 1992 filed suit in an Ohio state court against both Child World to collect rent, and against the predecessor in interest to Things Remembered, Inc. as guarantor. In May 1992, Child World filed a Chapter 11 petition in New York. In September, Things Remembered filed notice of removal in both the U.S. District and bankruptcy court in Ohio pursuant to 28 U.S.C. §1452(a), the bankruptcy removal statute, and also 28 U.S.C. §1441(a), the general removal statute. He also filed a motion in the district court to transfer venue to the bankruptcy court in New York so both of the claims against the debtor and the guarantor could be in the same court. Petrar-

ca responded by filing motions to remand in both courts. All proceedings were consolidated in the bankruptcy court which held the petition for removal under §1452(a), was untimely, but timely under §§1441 and 1446, and transferred the case to N.Y. The case was appealed to the district court which ruled both removal petitions were untimely and reversed and remanded. On further appeal to the Sixth Circuit, that court dismissed the appeal for lack of jurisdiction holding that §§1447(d) and 1452(b) barred appellate review.

On writ of certiorari, Justice Thomas noted that §1447(d) must be read in *para materia* with §1447(c) and ruled that only remands based on §1447(c) are immune from review under §1447(d); that when the removal of the district court is based on a procedural defect or on lack of subject matter jurisdiction, a court of appeals lacks jurisdiction to rule on the appeal of the remand order. Here the district court remanded to the Ohio state court because of untimely removal, and thus the order was not appealable. Justice Thomas then went on to state that the fact that removal could have been on §1452 does not allow §1447 procedural requirements to be countermanded. He reasoned that Congress did not intend §1452 to be the exclusive provision governing removal and remands in bankruptcy, and nothing in §1447(d) exempts bankruptcy cases from its coverage. Therefore,an order remanding a bankruptcy case to state court due to a timely raised defect in the removal, whether under §1452 or §1441, cannot be reviewed on appeal pursuant to §1447(d).

Comment: The majority opinion of Justice Thomas is short and to the point. There are two concurring opinions, one by Justice Kennedy, joined by Justice Ginsberg, and another by Justice Ginsberg joined by Justice Steven. Justice Ginsberg seems to take issue with the wording in §1452(b) as to remand from the court to which a case is removed, on any *equitable* ground, reminding the reader of the abolishment of the distinction between law and equity. She concluded by writing that neither §1452(b) nor §1447(d) permits the assertion of appellate jurisdiction *in this case.* (emphasis supplied). This case is important also for future matters on interpretation of legislation by way of the dicta stating that the meaning of a word or phrase cannot be determined in isolation but rather from the context in which it is used.

"Small Business" exemption to bankrupt carrier does not violate anti-forfeiture provision of Bankruptcy Code

In re Olympia Holding Corp., 68 F.3d 1304 (11th Cir. Nov.15,1995), 188 B.R. 287 (M.D. Fla. 1994). This case concerned the deregulation of the trucking industry in 1980, and the ICC Act mandating that carriers adhere to filed rates. However, many carriers negotiated smaller rates, and then upon bankruptcy, trustees sought to recover the difference between the filed and negotiated rate. In *Maislin*, 110 Sup. Ct. 2768 (1990), the Supreme Court rejected an ICC regulation to uphold negotiated rates, and then Congress in 1993 passed the Negotiated Rates Act (NRA) to provide shippers relief on undercharge claims.

Olympia, formerly P*I*E* Nationwide, filed Chapter 11 in 1990, later converted to Chapter 7. The trustee filed 32,000 cases against former customers for undercharges. Many were removed to the district court, and the instant case was selected as a lead case under a case management order. The defense was that the NRA exempted small businesses from such litigation. The NRA exempts, inter alia, from undercharge liability carriers or freight forwarders which no longer transport property and small business concerns qualified under the Small Business Act. The trustee claimed that this provision violated bankruptcy code section 363(l) which invalidates any laws inhibiting a trustee's right to alienate or transfer property by reason of the debtor's insolvency or financial condition. Further, the trustee contended that §541(c)(1) prevents the enforcement of a law that does not permit property of the debtor from becoming part of the estate. The Eleventh Circuit rejected the arguments of the trustee by reasoning that the statute was based only on the carrier's operational status, not financial condition. Further, the small-business exemption applies to all carriers, not just those no longer transporting property and is not contingent upon such carrier's insolvency or financial condition.

Comment: If this is a *lead case,* it seems that it necessarily would apply to all cases, whether small business or not. Possibly the court was of the opinion that its first reason for rejecting application of §363(l) applied to all the cases of non-operating carriers. ■

Alabama Bench & Bar Annual Mid-Winter Conference

The 1996 Bench & Bar Mid-Winter Conference was held in Montgomery January 17-19 and the focus of this year's meeting was "Ethics for the Bench and Bar." The keynote address was given by the Honorable Gerald B. Tjoflat, chief judge of the United States Court of Appeals for the Eleventh Circuit. Also a featured speaker was the executive director of the American Inns of Courts Foundation, Don Stumbaugh. Afternoon session speakers included Judge Michael Keasler of the 292nd District Court of Dallas, Texas and Judge Suzanne Stovall of Conroe, Texas.

The conference, co-sponsored by the Circuit and District Judges Association and the Alabama State Bar, addressed important issues facing the bar and the judiciary, as well as charted a course for the legal profession in Alabama for the upcoming 21st century.

Approximately 200 judges and attorneys attended the 1996 Bench & Bar Mid-Winter Conference in Montgomery in January.

Chief Judge of the U.S. Court of Appeals, 11th Circuit, Gerald B. Tjoflat speaks to the 1996 conference.

Justice Hugh Maddox, left, vice-chair of the state bar's Task Force on Bench & Bar Relations, and Don Stumbaugh, right, executive director, American Inns of Court, listen to Judge Tjoflat.

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YOUNG LAWYERS' SECTION

By Alfred F. Smith, Jr.

Mark your calendars now for the Alabama Young Lawyers' Section annual seminar at the Sandestin Resort in Florida on May 17 - 18. In many ways, this seminar is the highlight of the year for the Young Lawyers' Section. It offers something for everyone, and provides a unique opportunity for young lawyers to gather in a professional and social setting. The seminar program consistently is rated excellent by those in attendance, and we hope you will join us.

You will be hearing more about the Sandestin seminar in the weeks ahead. However, you may preregister for the seminar by completing the form below and mailing it to the address indicated.

The Sandestin seminar once again is being coordinated by **Gordon Armstrong, Robert Hedge**, and **Judson Wells**. These lawyers spend a great deal of time planning the seminar and related activities with very little recognition. We appreciate their efforts and their extraordinary service to our section of the bar.

In addition to the Sandestin seminar, the section has been busy with other projects. **Tom Albritton**, along with the terrific staff at the Alabama State Bar, coordinates the admissions ceremonies for new admittees to the bar. **Charlie Anderson** and **Chris Hughes** are heading the section's efforts involving the Youth Judicial Program sponsored jointly with the YMCA. This program has been enormously successful over the years and has afforded hundreds of high school students the opportunity to participate in a trial advocacy competition. One of our newer projects, the Minority Participation Conference, is being coordinated by **Fred Gray** and **Elizabeth Smithart**. The program brings together minority students from Alabama's public schools and provides them an opportunity to come to Montgomery and visit with prominent members of the bench and bar. Our goal is to encourage young minority students to consider pursuing legal careers. We believe this will become one of the best such programs in the country. If you would like to assist with any of these projects, please contact one of the project leaders.

Alfred Smith

We look forward to seeing you in Sandestin on the weekend of May 17 and 18. ■

Alfred Smith
Alfred Smith is a partner at Bainbridge, Mims, Rogers & Smith in Birmingham, Alabama. He is a 1986 graduate of the University of Alabama School of Law.

Alabama State Bar Young Lawyers' Section

Registration Form For Sandestin Seminar

May 17-19, 1996

Name _____

Firm _____

Address _____

City/State/Zip _____

Phone Number _____

State Bar I.D. # (Social Security#) _____

☐ Please check if you plan on playing in the Golf Tournament. Spaces are limited and are on a first-come, first-served basis.

Registration Fee:

____on or before 3/15/96 - $120

____after 3/15/96 - $140

____admitted to practice after 5/20/ 94 - $75

$ _____

____ golf (includes green fees & cart) $53.50

$ _____

Requested partner & his/her handicap (no guarantees)

_____

Total Registration Fee & Golf Fee: $ _____

• M·E·M·O·R·I·A·L·S •

Lawrence E. Greer, Jr.

The Birmingham Bar Association lost one of its distinguished members through the death of Lawrence E. Greer, Jr. on October 27, 1995 at the age of 81 years.

Lawrence Greer was a product of the Birmingham School System. Following graduation from Phillips High School in 1931, he attended Howard College in the East Lake area graduating from that school four years later. Following a business career, he attended the University of Alabama Law School. He was admitted to the Alabama State Bar as a member of the distinguished class of 1950.

Forty-five years of general practice included a clerkship with the Honorable Hobart H. Grooms, Sr., United States District Judge.

Lawrence Greer left behind a son, a daughter, a grandson, and an innumerable host of colleagues and friends who mourn his passing.

Whereas, this Resolution is offered as a record of our admiration and affection for Lawrence E. Greer, Jr. and of our condolences to his son, his daughter, his grandson, and the other members of his family.

Now, therefore, be it resolved by the Executive Committee of the Birmingham Bar Association in its regular meeting assembled:

This Executive Committee greatly mourns the passing of Lawrence E. Greer, Jr. and is profoundly grateful for the example that his long and useful life has brought to the membership, both individually and collectively.

That the surviving members of the family of Lawrence E. Greer, Jr. are hereby assured of our deep and abiding sympathy.

That a copy of this Resolution be spread upon the records of the Birmingham Bar Association as a permanent memorial to this departed brother.

That copies of this Resolution be furnished to his son, his daughter and grandson, as our expression to them of our deepest sympathy.

— J. Fredric Ingram
President, Birmingham Bar Association

Tolbert Millard Brantley
Bay Minnette
Admitted: 1977
Died: November 18, 1995

Bryce Scott Davis
Birmingham
Admitted: 1978
Died: December 11, 1995

Richard Dale Durden
Birmingham
Admitted: 1984
Died: December 17, 1995

James Martin Dyer
Huntsville
Admitted: 1970
Died: October 1, 1995

William Kenneth Gibson
Fairhope
Admitted: 1974
Died: December 13, 1995

Clyde McArthur Love
Florala
Admitted: 1934
Died: December 1, 1995

Leonard M. Lowrey, Jr.
Linden
Admitted: 1942
Died: November 19, 1995

William Woodrow Rogers
Bessemer
Admitted: 1975
Died: December 21, 1995

Leon Y. Sadler, Jr.
Camden
Admitted: 1937
Died: December 19, 1995

Ralph Smith, Jr.
Guntersville
Admitted: 1949
Died: October 1, 1995

Robert Jerome Teel
Rockford
Admitted: 1949
Died: November 11, 1995

Homer Vann Waldrop
Tuscaloosa
Admitted: 1955
Died: December 21, 1995

John Campbell Wear
Fort Payne
Admitted: 1949
Died: November 30, 1995

Adolph I. Weil, Jr.
Montgomery
Admitted: 1938
Died: December 12, 1995

Please Help Us

The Alabama Lawyer "Memorials" section is designed to provide members of the bar with information about the death of their colleagues. The Alabama State Bar and the Editorial Board have no way of knowing when one of our members is deceased unless we are notified. Please take the time to provide us with that information. If you wish to write something about the individual's life and professional accomplishments for publication in the magazine, please limit your comments to 250 words and send us a picture if possible. We reserve the right to edit all information submitted for the "Memorials" section. Please send notification information to the following address:

Margaret L. Murphy, *The Alabama Lawyer*, P.O. Box 4156, Montgomery, AL 36101

Not for Women Only

The Women Lawyers Section of the Birmingham Bar Association is sponsoring a symposium for lawyers, spouses, law office administrators and law department heads. This program has been approved by the MCLE Commission for 2.0 hours CLE.

Tuesday, March 19, 1996
3:30—5:30 p.m.
(reception immediately following)
The Harbert Center
2019 4th Avenue
Birmingham

(Complimentary child care is provided at the YMCA, 309 23rd Street, North, with parking across the street. Donations to the YMCA will be accepted.)

Featured speakers:

Jay Foonberg, esq.—noted author of *How to Choose a Lawyer*, *How to Start and Build a Law Practice*, and *How to Get and Keep Good Clients*.

Zora Speert, MSSW, LCSW—licensed psychotherapist who counsels employers and attorneys and their families, concerning problems arising out of the demands of their professions.

In addition, male and female panelists will discuss what works and what doesn't work in satisfying clients and employers while maintaining a healthy home life.

REGISTRATION FEE: $15 per person; $25 per couple

Checks should be made payable to: Women Lawyers Section/P&L and sent to Belinda Masdon Kimble, esq., Hardin & Hawkins, 2201 Arlington Avenue, Birmingham, Alabama 35205. As seating is limited, pre-registration is encouraged.

For additional information, contact Belinda at (205) 930-6900.

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RATES: Members: 2 free listings of 50 words or less per bar member per calendar year EXCEPT for "position wanted" or "position offered" listings — $35 per insertion of 50 words or less, $.50 per additional word; **Nonmembers:** $35 per insertion of 50 words or less, $.50 per additional word. Classified copy and payment must be received according to the following publishing schedule: **March '96 issue** — deadline January 15, 1996; **May '96 issue** — deadline March 15, 1996. No deadline extensions will be made.

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ingham, Alabama 35201-1986, Attention: Hiring Coordinator.

- **ATTORNEY NEEDED**: Associate needed for expanding Baldwin County firm. Superior credentials required. Tax experience a plus. Confidential reply to: Hiring Partner, P.O. Drawer 1509, Bay Minette, Alabama 36507.

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- Commingled client trust accounts must only be interest-bearing if you participate in IOLTA. Attorneys are required to participate in an IOLTA program unless an affirmative "opt out" notice is sent to the secretary of the state bar within six months of their admission to practice or return to active practice. Funds of a substantial amount or which are to be held for a long period of time should be placed in an interest-bearing account for the client's benefit.
- Immediately secure funds received for a client in your client trust account, i.e., take care to deposit funds promptly.
- Lawyers should take care that a sufficient balance is maintained in their trust account to cover all checks written on the account.
- Client trust accounts may not be taken into consideration as part of your overall banking relationship. Lawyers may not benefit, even indirectly, from clients' funds unless the lawyer is specifically authorized to retain any such benefits for himself. The term benefit means not only interest which accrues on any such account, but also any other preferential treatment, rebate, or other reward earned because of such financial arrangement.
- Costs that arise as a consequence of doing business should not be paid from client trust accounts or the interest generated by client trust accounts. Examples of charges are check orders, wire transfers, insufficient funds charges and stop payments.
- Be sure to familiarize yourself with Rule 1.15 of the Rules of Professional Conduct and its comments.

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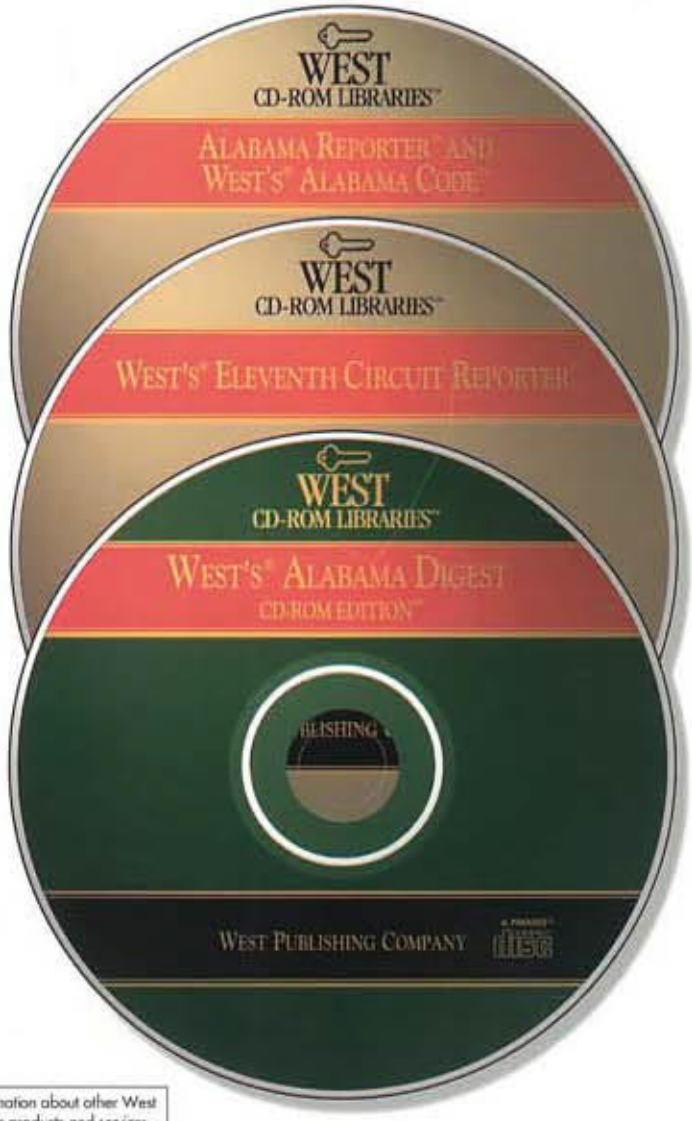

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