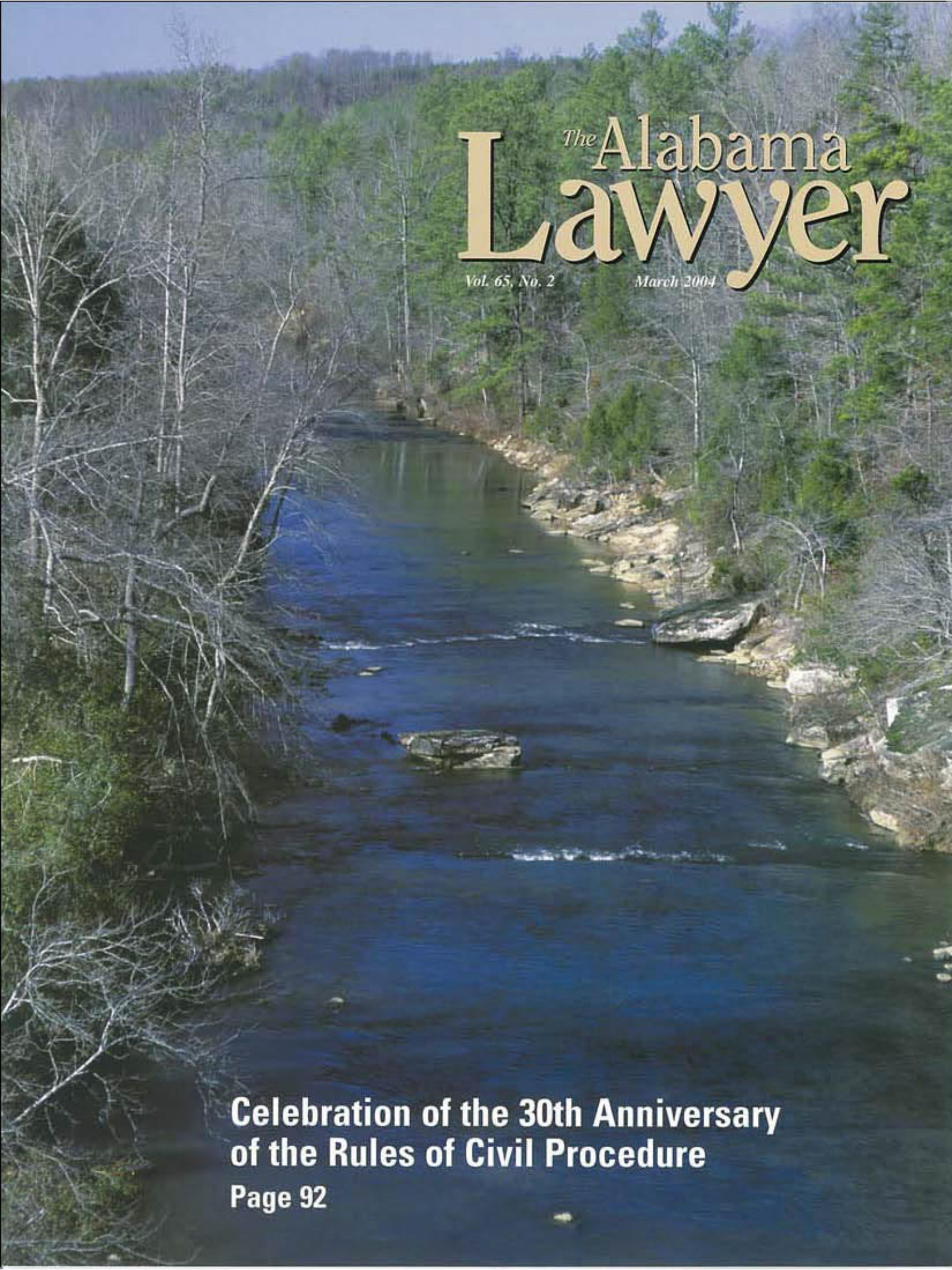
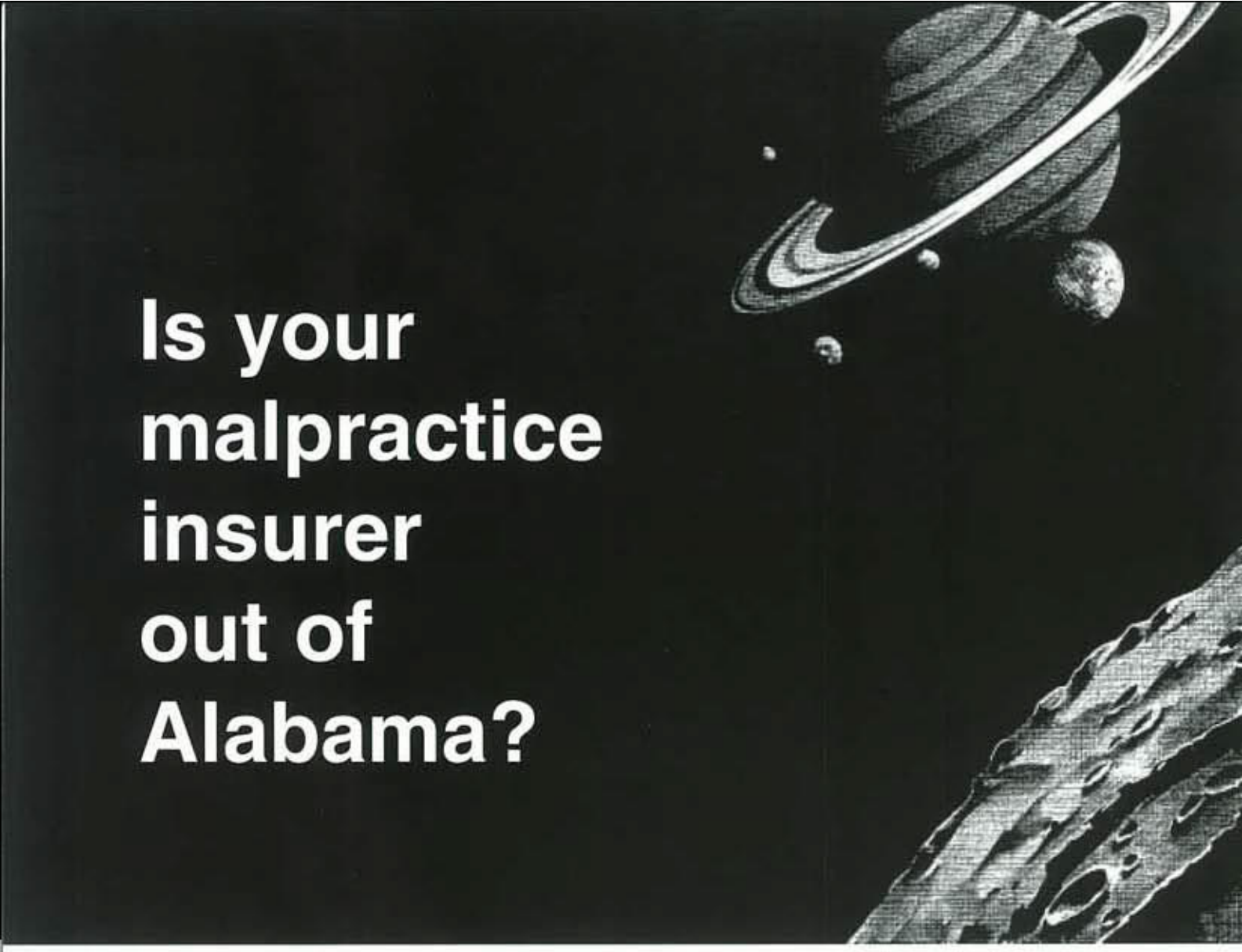


The Alabama Lawyer

Vol. 65, No. 2 March 2004

Celebration of the 30th Anniversary of the Rules of Civil Procedure

Page 92



One malpractice insurer is still here and continues to maintain stable premium rates!

AIM: For the Difference!

Attorneys Insurance Mutual of Alabama, Inc.
200 Inverness Parkway
Birmingham, Alabama 35242-4813

Telephone (205) 980-0009
Toll Free (800) 526-1246
FAX (205) 980-9009

"A Mutual Insurance Company Organized by and for Alabama Attorneys"

www.AttysInsMut.com

Something OLD *is* **NEW** *again*

WE'RE OLD...

old (ôld) ►*adj.* Made or acquired long ago; having lived or existed for a long time*

...AND PROUD OF IT!

ISI, INSURANCE SPECIALISTS, INC currently serves in its fourth decade of Insurance Program Administration to Members of the Alabama State Bar. Established in 1959, ISI entered its affiliation in Alabama in the early seventies. Since then, the Agency has expanded to the West Coast, New England and Atlantic States, but maintains its home in the South where it began. We understand Lawyers and their needs, and strive to maintain the tradition of excellence that sets us apart over time.

We're new...

new (nōō) ►*adj.* Different from the former or old; recent, rejuvenated*

...and bring it to you!

ISI is pleased to announce acceptance of its new Alabama logo. Be sure to look for it in publications and mailings to come as we bring our quality products to your practice.

ISI ALABAMA
INSURANCE SPECIALISTS, INC.SM
EST. 1959

PLANS AVAILABLE THROUGH
ENDORSMENT OF THE
ALABAMA STATE BAR

- **Major Medical**
  New York Life Insurance Company
- **Individual Term Life**
  ING Reliastar
- **Group Term Life**
  New York Life Insurance Company
- **Disability Income**
  Hartford Life and Accident Insurance Company
- **Overhead Protection**
  Hartford Life and Accident Insurance Company
- **Medicare Supplement**
  Transamerica

ISI ALABAMA
CAN ALSO
ASSIST YOU WITH

Lawyers Professional Liability
underwritten by
Westport, a GE Commercial Company

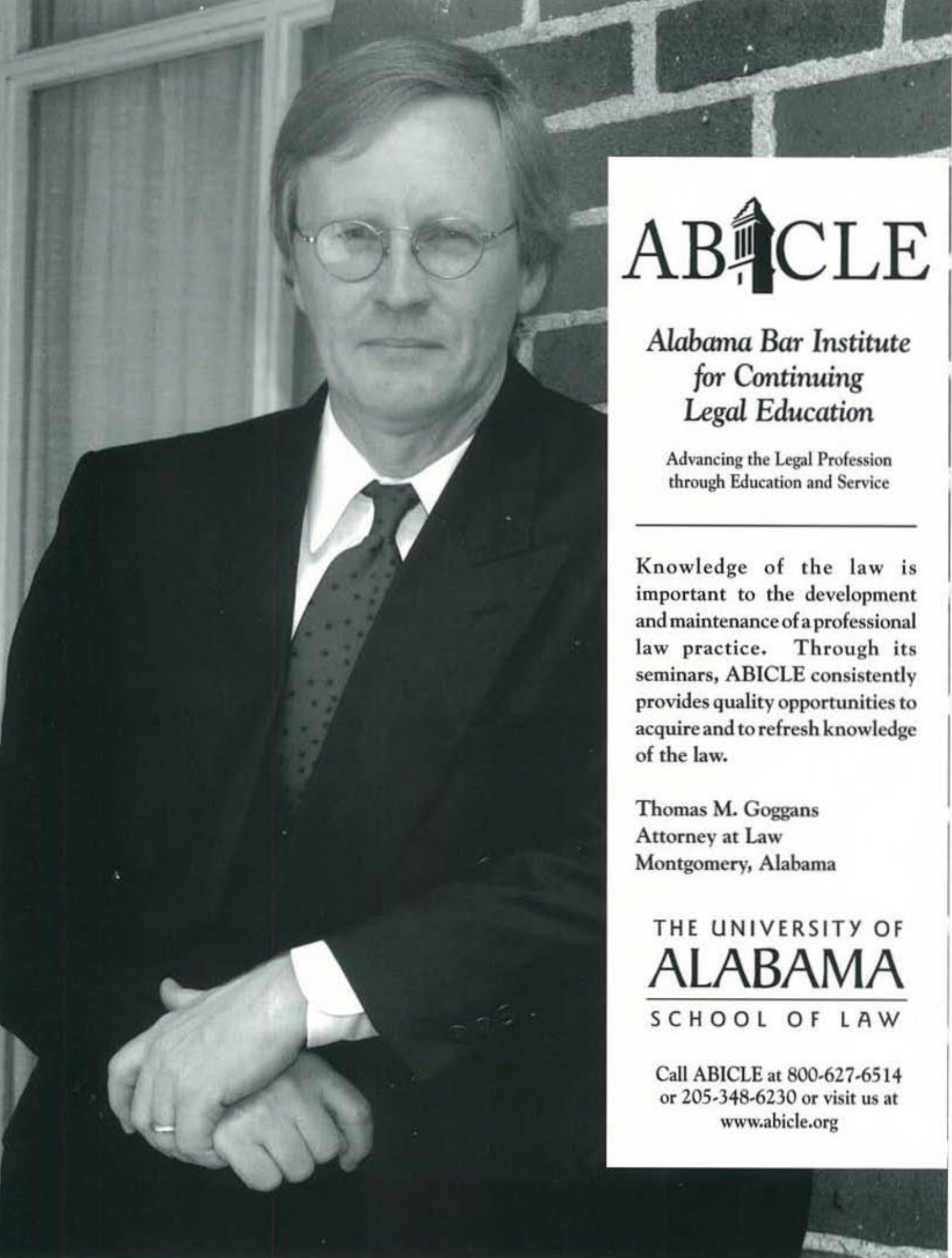
YOU MAY OBTAIN
A QUICK QUOTE FOR COVERAGE
BY

PHONE: ISI SALES DIRECT 1-888-ISI-1959
FAX: 1-404-814-9014
MAIL: ISI ALABAMA
125 LAWRENCEVILLE STREET
P.O. BOX 2827
NORCROSS, GA 30091

ADIAALADBJ

*American Heritage Dictionary

ABBJ100603



ABICLE

Alabama Bar Institute for Continuing Legal Education

Advancing the Legal Profession
through Education and Service

Knowledge of the law is important to the development and maintenance of a professional law practice. Through its seminars, ABICLE consistently provides quality opportunities to acquire and to refresh knowledge of the law.

Thomas M. Goggans
Attorney at Law
Montgomery, Alabama

THE UNIVERSITY OF
ALABAMA
SCHOOL OF LAW

Call ABICLE at 800-627-6514
or 205-348-6230 or visit us at
www.abicle.org

THE ALABAMA LAWYER
Vol. 65, No. 2 / March 2004

On the Cover:
Buttahatchee River in Marion County, Alabama
Photo by Paul Crawford, JD

Features

Departments

THE ALABAMA LAWYER

Vol. 65, No. 2
March 2004

The Alabama State Bar, P.O. Box 4156, Montgomery, Alabama 36101-4156. Phone (334) 269-1515 • *www.alabar.org*

The Alabama Lawyer (USPS 743-090) is published seven times a year by the Alabama State Bar, 415 Dexter Avenue, Montgomery, Alabama 36104. Periodicals postage paid at Montgomery, Alabama, and additional mailing offices. POSTMASTER: Send address changes to The Alabama Lawyer, P.O.Box 4156, Montgomery, AL 36103-4156.

ALABAMA STATE BAR HEADQUARTERS STAFF

415 Dexter Avenue, Montgomery, AL 36104 (334) 269-1515 • FAX (334) 261-6310 • E-mail: *info@alabar.org*
Web site: *www.alabar.org*

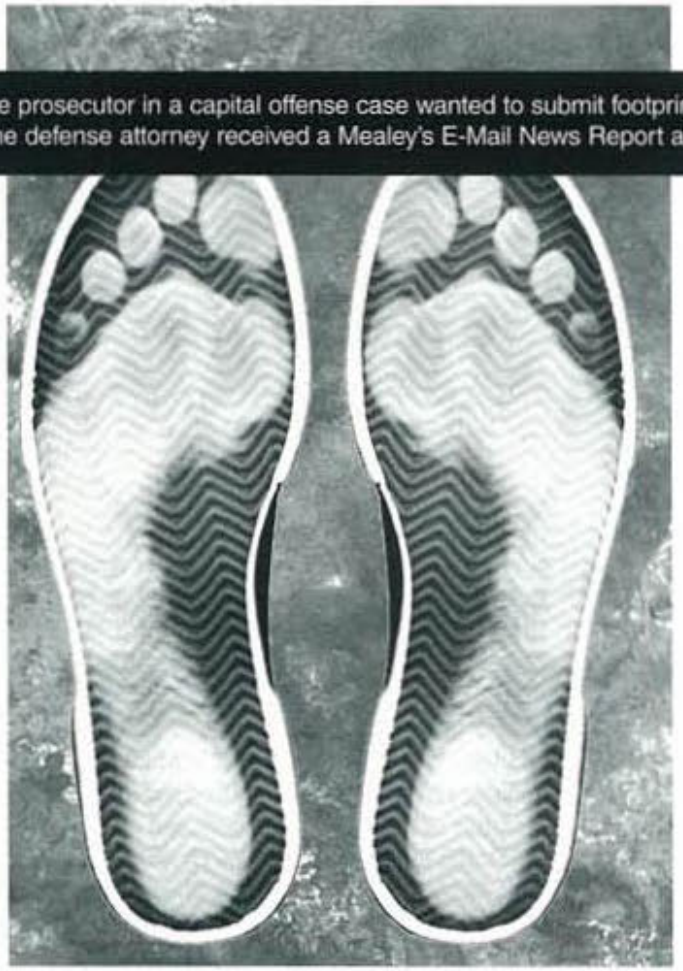
Executive Director ..... Keith B. Norman
Executive Assistant ..... Diane Locke
Systems Administrator ..... Wayne Hughes
Computer Programmer ..... Dolan L. Trout
Director of Programs ..... Edward M. Patterson
Administrative Assistant for Programs ..... Rita Gray
Lawyer Referral Director ..... Carol Thornton
Mandatory Continuing Legal Education Director ..... Kim Oliver Ward
CLE Administrative Assistant ..... Angie Fuqua
CLE Secretary ..... Christina Brewer
Director of Communications & Public Information ..... Susan H. Andres
Publications Director ..... Margaret L. Murphy
Communications and Publications Assistant ..... Kimberly Barnhart
Membership Services Director ..... Mary Corbitt
Membership Administrative Assistant ..... Myrna McHenry
Membership & CPR Clerk ..... Sherry Langley
Pro Hac Vice Assistant ..... Emily McClintock
Volunteer Lawyers Program Director ..... Linda Lund
VLP Administrative Assistant ..... Katherine L. Church
Director of Admissions ..... Dorothy D. Johnson
Admissions Administrative Assistants ..... Heidi Alves, Sonia Douglas
Law Office Management Assistance Program Director ..... Laura A. Calloway
Bookkeeper ..... Gale Skinner
ASB Foundation Assistant ..... Ann Rittenour
Graphics Arts Director ..... Maggie Stuller
Graphics Arts Assistant ..... Roderick Palmer
Receptionist ..... Stephanie Oglesby
Alabama Lawyer Assistance Program Director ..... Jeanne Marie Leslie (834-7576)
LOMAP and ALAP Administrative Assistant ..... Sandra Clements
Alabama Law Foundation, Inc. Director ..... Tracy Daniel
Alabama Center for Dispute Resolution Director ..... Judith M. Keegan (269-0409)
ADR Administrative Assistant ..... Jackie Heartsill

ALABAMA STATE BAR CENTER FOR PROFESSIONAL RESPONSIBILITY STAFF

415 Dexter Avenue, Montgomery, AL 36104 (334) 269-1515 • FAX (334) 261-6311 • E-mail: *info@alabar.org*

General Counsel ..... J. Anthony McLain
Secretary to General Counsel ..... Vivian Freeman
Assistant General Counsel ..... L. Gilbert Kendrick
Assistant General Counsel ..... Milton L. Moss
Assistant General Counsel ..... Robert E. Lusk, Jr.
Complaints Intake Coordinator ..... Kim Ellis
Disciplinary Clerk ..... Bonnie Mainor
Paralegals/Investigators ..... Cheryl L. Rankin, Carol M. Wright
Client Security Fund Coordinator ..... Laurie Blazer
Receptionist ..... Melissa Burgess

Are footprints as foolproof as fingerprints?



The prosecutor in a capital offense case wanted to submit footprints taken inside a shoe as evidence. Two nights before the trial, the defense attorney received a Mealey's E-Mail News Report about a case that questioned the admissibility of this evidence.

The Mealey's E-Mail News Report notified the defense attorney of a recent court decision from the highest court in a neighboring state. He was surprised to find the prosecution's expert witness had also testified in that case. But the court held that footprints from inside a shoe were not a recognized area for expert testimony under the Daubert standard. As the defense attorney continued his search of analytical sources from Matthew Bender®, including *Moore's Federal Practice*® on the LexisNexis™ services, he quickly found further supportive commentary and analysis. When you need to go a step beyond cases and codes in your research, use the LexisNexis™ Total Research System—**It's how you know.**

LexisNexis™

It's how you know ™

For your free trial* on the LexisNexis Total Research System go to www.lexisnexis.com/freeweek or call 877.810.5324

*The LexisNexis Total Research System "free trial offer" is available to law firms in the United States who have not subscribed to the LexisNexis online services within the last 30 days from the date of this publication. Additional restrictions may apply. Current LexisNexis customers should contact their account representative for information.

AL6619

William N. Clark

By William N. Clark

In 1994, as a result of the outstanding work by the Long Range Planning Committee led by **Professor Camille Cook**, the Alabama State Bar adopted the following mission statement:

> The Alabama State Bar is dedicated to promoting professional responsibility and competence of its members, improving the administration of justice and increasing the public understanding of and respect for the law.

Some of my thoughts regarding professional responsibility were included in the last issue of the *The Alabama Lawyer*. The state bar supports improving and maintaining the competency of its members through a very active and effective continuing legal education program. It is the latter two aspects of our mission statement to which my comments are directed here, "...improving the administration of justice and increasing the public understanding of and respect for the law." How in the world does the state bar go about accomplishing the latter portion of its mission?

One of the ways that the state bar has supported improving the administration of justice is through its support of the Alabama Law Institute lead by **Bob McCurley** who is assisted by **Penny Davis**. Through their outstanding leadership over the years, the Alabama Law Institute has truly helped improve the administration of justice in Alabama. Almost 30 years ago, when Bob McCurley became the director of the Institute, there were four employees. The budget of the Institute this year is less than it was in 1991-1992. Today there are still four employees. In my travels as president of the state bar, I have talked to a number of leaders of other states to compare our Alabama Law Institute with what is going on in other states. Our Institute probably has the smallest number of staff members, one of the smallest budgets, and one of the lowest paid staffs in the United States. Despite these shortcomings, the Alabama Law Institute is one of the best in the country. That is so because of the leadership of Bob and Penny, and their very effective use of members of this bar to assist in their projects. The Alabama Law Institute is one of Alabama's treasures. I urge you to encourage your legislator to support an increase to the Law Institute's funding. Since the inception of the Law Institute, Alabama lawyers have generously responded to requests for assistance. According to the Law Institute's recent statistics, the contributions in time which lawyers have made in serving on the various committees which help draft new laws or rewrite old laws amounts to approximately $2,400,000 of donated legal time a year. That is an extraordinary accomplishment. For those of you who have not served, I urge you to volunteer. Those of you who have volunteered your time for this most important function can certainly be proud of your contributions to the efforts to improve the administration of justice in Alabama.

Members of our bar have also diligently worked on committees and task forces of the state bar over the years to improve our tax structure, our indigent defense system and the way we select our judges. In an effort to continue this very important part of our mission, this year we created a **Community Education Committee** under the able leadership of **William Utsey**. One of its tasks is to develop brochures or pamphlets designed to educate the public on important issues. Prior to the state's vote on Governor Riley's tax proposal, the state bar published a pamphlet which presented both sides of the issue. The brochure was extremely well received. One CEO of a corporation wrote that he had provided copies to all of his employees because it was the only publication which presented both sides of the issue in an understandable way.

The committee is in the process of developing brochures presenting both sides of the issues on constitutional reform and a death penalty moratorium. It is a somewhat slow process, but I am convinced one that is very worthwhile. If we are to keep our republic, it will be because our citizens are educated about and understand the law, and respect it.

Our Community Education Committee is also cooperating with the **Alabama Center for Law and Civic Education** headed by **Janice Cowin**. That group has been a leader in bringing back civic education to our public schools. Earlier this year, **Fred Gray** and I wrote letters to Governor Riley encouraging him to keep civic education in our public schools. We have recently learned that it will continue for another cycle.

One very creative program which is helping to educate the public is the state bar's **"Legal Milestones"** program. Permanent markers have been placed in areas around the state to commemorate significant events. Most recently, the state bar joined with the **Jackson Historical Association** to establish an outdoor plaque recognizing the events that occurred some 73 years ago in the "Scottsboro Boys Trials" which led to landmark decisions in our criminal justice system.

We also hope to increase the public understanding of and respect for the law through the new state bar program, **"Athletes, Academics and the Law: Play It Smart!"** As lawyer-athletes go into the public schools to talk about the importance of academics and the role that athletics can play in a young person's life and career, we hope to encourage high school students to take the law seriously and to prepare themselves for a career in law or some other form of service, whether public or private.

We must begin early if we expect our citizens to be sufficiently educated and informed to participate in the election process. Unfortunately, in elections, not only in Alabama but also across the United States, voter turnout is generally very low. We seem to have lost the excitement that should accompany such an opportunity, i.e., to fully and freely participate in the democratic process. On November 1, 1967, I was serving in the Army in the Delta region of South Vietnam. As an advisor, I had very close contact with Vietnamese officers and soldiers. November 1st was the day of the first free elections in South Vietnam. There was a great deal of excitement as people went to the polls for the first time. I do not recall the exact number, but there was a turnout of more than 90 percent. There were some skeptics who questioned the fairness of the elections, but I do know that the people did vote. They voted in great numbers, stood in lines and genuinely seemed excited about the opportunity. One of the young Vietnamese officers with whom I served was extremely pleased that his country was experiencing democracy firsthand for the first time. He truly believed that we were fighting for freedom.

Notice of Election

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

COMMISSIONERS

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits: 1st; 3rd; 5th; 6th, place no. 1; 7th; 10th, place no. 3, place no. 6; 13th, place no. 3, place no. 4; 14th; 15th, place no. 1, place no. 3, place no. 4; 23rd, place no. 3; 25th; 26th; 28th; 32nd; and 37th.

Additional commissioners will be elected in these circuits for each 300 members of the state bar with principal offices herein. The new commissioner petitions will be determined by a census on March 1st, 2004 and vacancies certified by the secretary no later than March 15th, 2004.

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 30th, 2004).

Ballots will be prepared and mailed to members between May 1st and May 15th, 2004. Ballots must be voted and returned by 5 p.m. on the last Friday in May (May 28th, 2004) to the Alabama State Bar.

As I read the newspapers today about our young soldiers in Iraq, and from time to time correspond with them, I am reminded of those elections now nearing 40 years ago. That effort at democracy failed and South Vietnam became part of a communist state. There has, of course, been much debate over the years whether our involvement in Vietnam was just. Today our presidential candidates are again debating whether the United States should have gone to war, but this time in Iraq. This is neither the time nor the place to debate the issue of whether the United States should have attacked Iraq. However, having invaded and won the war against Iraq, the United States now has the opportunity, and most likely the obligation, to stay the course in assisting Iraq in becoming a truly free nation. The American Bar Association is assisting in the effort through its Iraq Initiative in which it has asked for lawyers to volunteer to assist the Iraqis in developing democratic systems. Perhaps some of our members will choose to join in that effort in Iraq. However, we need not go to Iraq to find a system of justice which needs our attention.

The problem, of course, in Alabama is not an absence of democratic systems in place. Often, the real problem is that our citizens do not fully understand the legislative process, the criminal justice system, tax system, etc. And, we do not take the time to be fully informed on important issues, often relying on emotion or tradition or perhaps our own self interests rather than what is best for Alabama. I urge each of you to look in your community and in our state and find a way that you can help carry out our state bar mission. Actively seek opportunities to participate in efforts to improve the administration of justice, and to increase the public understanding of and respect for the law. Should you have an idea as to how the state bar may better fulfill its mission, let us know.

At the conclusion of the Constitutional Convention, a lady asked Benjamin Franklin, "Well, doctor, do we have a republic or a monarchy?"

"A republic, if we can keep it," Franklin replied.

I am convinced that if our republic is to survive, it will be only if our citizens understand our system of government, how it works, and what the issues are, and become intimately involved in ensuring that it grows even stronger for future generations. Perhaps more than any other group in our society, lawyers do more than their fair share in working to "keep" our republic. Thanks to all of you. ■

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 March 15th, 2004. Nominations should be prepared and mailed to:

Keith B. Norman, secretary
Board of Bar Commissioners
Alabama State Bar
P.O. Box 671
Montgomery AL 36101-0671

The Judicial Award of Merit was established in 1987. The award is not necessarily an annual award. It must be presented to a judge who is not retired, whether state or federal court, trial or appellate, who is determined to have contributed significantly to the administration of justice in Alabama. The recipient is presented with a crystal gavel bearing the state bar seal and the year of presentation.

Nominations are considered by a three-member committee appointed by the president of the state bar, which 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.

IF YOU'RE FRUGAL,
CHECK OUT THE RATE.

IF YOU'RE A GOLFER,
CHECK OUT THE COURSES.

IF YOU'RE A FRUGAL GOLFER,
YOU SHOULD BE ON YOUR WAY BY NOW.

$99 NIGHT

For about the same price as other hotels in the Montgomery area, you can enjoy the amenities of a four-star hotel. From the sophistication of our marbled lobby and executive meeting rooms to the warmth and relaxation of our suites and guest rooms, The Legends at Capitol Hill offers a level of intimacy and class unavailable at other comparable hotels. And it's all located on the Robert Trent Jones Golf Trail. For reservations, call 334-290-1235 or visit www.legendsgolfresort.com.

The Legends at CAPITOL HILL

ROBERT TRENT JONES GOLF TRAIL

FOR MORE INFORMATION ON ALABAMA'S ROBERT TRENT JONES GOLF TRAIL, CALL 1-800-949-4444 OR VISIT WWW.RTJGOLF.COM.

All rates are based upon availability.

Melissa Pershing

Legal Services in Alabama Unite and New Executive Director Named

"When I went to law school, it was always my intent to work in non-profit advocacy management because I wanted to do something more meaningful with my life," said **Melissa Pershing**, the new executive director of the newly formed Legal Services Alabama (LSA).

By accepting this challenging position, Pershing will definitely be living up to that goal as she works with other attorneys and professionals across the state's 67 counties to aid Alabama's poor.

On February 1, 2004, Alabama's three, separate Legal Services Corporations united to form a single, comprehensive, statewide program, Legal Services Alabama. Recommended in December 2002 by the **Alabama Task Force on Reconfiguration** and assisted by the **Alabama Law Foundation**, this new, integrated system will position the Alabama civil justice community to better provide equal access to justice for all.

And the improved access to legal services it will provide is long overdue and more than needed. In our state, 698,097 citizens live at or below the poverty level. These individuals and families have approximately 154,644 legal needs a year. Between legal services programs and pro bono programs, just over 16,000 of eligible low-income citizens received legal assistance in 2001--a gap between services needed and services received of over 138,000.

The legal services programs in Alabama have always been supported by the Alabama Law Foundation through its IOLTA (Interest on Lawyers Trust Accounts) grant program. A new vision for delivering legal services to the state's low-income citizens, LSA will improve the coordination of resources, and improve fund raising.

At the helm of LSA, Pershing received her BS from Butler University in Indiana and her JD from Georgia State College of Law. Her extensive previous experience in legal services has prepared her well for this large, but exciting, task. "I have served as the executive director of Legal Services of North Carolina and most recently was program counsel in state planning for the federal Legal Services Corporation where I worked with 15 states as they reconfigured and merged legal services, so I feel ready for this position, " Pershing said.

Pershing also has a background in marketing and public relations that she believes will prove valuable in her new job. "I left the world of corporate marketing and went to law school so I could really help people," she said. "But the things I learned while in the marketing world will be a good fit for this position, too."

Her marketing skills undoubtedly will come in handy as she faces what she sees as one of her new job's biggest hurdles—fund raising. "Even with the consistent financial support from the Alabama Law Foundation, fund raising is going to be vital for Legal Services Alabama to do what it has been designed to do," she said. "It is one of the biggest challenges."

Another challenge will be to take three separate groups and successfully merge them into one. "Building a unified system out of three distinct cultures will not be easy," she said. "We have to create one culture in which everyone feels they are a part of LSA instead of the organization they were previously a part of."

Bobby Segall, with Copeland Franco, is chair of the Transition Committee for LSA and summed up the importance of this new direction in legal aid for the poor. "Three wonderful programs have come together in a spirit of compromise and even sacrifice in order to better serve people who would not otherwise have access to legal services," he said. "I think everyone involved is looking toward the future with a lot of hope and with a commitment to making the provision of legal services better throughout Alabama than its ever been before."

Pershing agreed whole-heartedly with Segall's statement and showed her own passion and dedication to the subject by stressing again the integral role LSA will play in our society. "Without Legal Services Alabama, aided by the bar pro bono programs, people who live below the poverty level would have absolutely no access to the courts," she said. "The government is required to provide attorneys in criminal cases, but that is not so in civil cases, and so many things go on in civil court that have tremendous impact on people's lives. Without us people lose the most basic components of a happy life; they lose health care, they lose their homes, and they even lose their safety."

United All Over Our Land

Everywhere you live in Alabama, you can find a LandAmerica representative nearby. We are where you need us, when you need us. As your source for real estate transaction services, including title insurance, our representatives are knowledgeable, professional and respond with foresight and innovation to your changing needs. Whether your next transaction is complex or simple, call us to experience the LandAmerica difference.

LandAmerica®

Commonwealth Land Title Insurance Company
Lawyers Title Insurance Corporation
Transnation Title Insurance Company

LandAmerica Financial Group, Inc. • 2200 Woodcrest Place, Suite 330, Birmingham, AL 35209
Phone: (800) 831-6807 • Fax: (205) 868-1011 • www.landam.com

Michael E. Riddle • Vice President, Area Manager/Counsel • mriddle@landam.com
Foster Goodwin • Agency Representative • fgoodwin@landam.com
Clark W. Cain • Senior Underwriter • ccain@landam.com
Rebecca E. Crook • Agency Representative • rcrook@landam.com

Keith B. Norman

No Quick Cure for the High Cost of Medical Insurance

By Keith B. Norman

The Alabama State Bar first sponsored an insurance product in the late 1940s. The product was disability insurance. Since then, a number of insurance products have become available to state bar members at favorable professional group rates, including term life, overhead protection, major medical, Medicare supplement, and long-term care.

We regularly receive calls from bar members who are upset with the spiraling price of the state bar's major medical plan and seeking a lower cost alternative. I do not need to explain how expensive medical insurance is or that there is little hope that costs will soon stabilize. The state bar's major medical plan is underwritten by New York Life Insurance Company and administered by our long-time third-party administrator, **Insurance Specialists, Inc.** (ISI). New York Life is among the last large "A"-rated companies that continues to write major medical policies for associations. Although this plan is not inexpensive, it is "guaranteed issue." This means that regardless of a state bar member's preexisting medical condition, New York Life will provide coverage. In doing so, however, the policy is "rated," which means the premiums can be significantly higher.

I have personally contacted Blue Cross/Blue Shield of Alabama to discuss the availability of a lower cost alternative than the current major medical plan. BC/BS is the dominant medical insurance provider in Alabama. According to some reports, BC/BS writes upwards of 70 percent of the medical coverage in Alabama. Officials with BC/BS informed me that although they continue to service policies available through a few statewide associations, they no longer write this type of coverage. Our third-party administrator, ISI, has also made every effort to find other less costly major medical alternatives.

Many will recall the professional liability insurance crisis in the 1980s. A number of major insurers discontinued writing professional liability coverage and pulled out of the market. This left many lawyers and firms in Alabama scrambling for coverage or going bare. The resulting "hard market" was the genesis of **Attorneys Insurance Mutual of Alabama** (AIM). The ASB Insurance Programs Committee spearheaded the effort to create a "captive" insurer owned by the lawyers of Alabama to provide a source of liability insurance and to create a means of competition for the commercial insurers. Over the last 15 years, AIM has succeeded in helping to create a more stable professional liability insurance market for Alabama lawyers.

While creating a captive medical insurance company for Alabama lawyers would be impractical, the **Insurance Programs Committee**, chaired by **Elizabeth Bookwalter**, has not rested. In an effort to provide state bar members with medical insurance options, the committee, with the help of ISI, has identified and recommended two new health products. At its meeting last December, the Board of Bar Commissioners approved to make both available to members. They are a medical indemnity policy and a dental plan. The medical indemnity plan is not a replacement for comprehensive major medical cover-

age because its benefits are limited. No medical underwriting is required. The dental plan provides benefits of up to $1,500 a year for covered procedures. Information about these two new health insurance products is available by contacting ISI at (800) 474-1959.

The Insurance Programs Committee continues to work hard to address the diverse needs of a growing bar membership. There are no quick or inexpensive fixes for the limited choices and high cost of major medical insurance. If there were, I am confident that the committee would have discovered them. ■

CLE Opportunities

The Alabama Mandatory CLE Commission continually evaluates and approves in-state, as well as nationwide, programs which are maintained in a computer database. All are identified by sponsor, location, date and specialty area. For a complete listing of current CLE opportunities or a calendar, contact the MCLE Commission office at (334) 269-1515, extension 117, 156 or 158, or you may view a complete listing of current programs at the state bar's Web site, *www.alabar.org*.

The Alabama Lawyer ***no longer publishes addresses and telephone numbers unless the announcement relates to the opening of a new firm or solo practice. Please continue to send in announcements and/or address changes to the Alabama State Bar Membership Department, at (334) 261-6310 (fax) or P.O. Box 671, Montgomery 36101.***

About Members

C. Scott Johnson announces the opening of his office at 2908 Crescent Avenue, Homewood 35209. Phone (205) 879-2386.

Parker C. Johnston, formerly of Enslen, Johnston, Pinkston & Courtney LLP, announces the opening of his office at 3090 Alabama Highway, Millbrook 36052. Phone (334) 285-1033.

Jeffery N. Lucas announces the opening of his office at 2919 John Hawkins Parkway, Birmingham 35244. Phone (205) 560-0562.

G. Hal Walker, Jr., formerly of Webb, Prescott, Walker, Boyle & Associates LLC, announces the opening of his office at 8312 Crossland Loop, Montgomery 36117. Phone (334) 277-9222.

Among Firms

The **United States Attorney's Office for the Northern District of Alabama** announces that **Lloyd Peeples** has joined the office as an assistant U. S. Attorney, and that **Jim Sullivan** has been selected to serve as criminal chief and **Bill Simpson** will serve as deputy chief of the Violent Crimes Section of the Criminal Division.

Baker, Donelson, Bearman, Caldwell & Berkowitz announces that **Melissa Tapp, Valerie Hose Plante** and **Joy McAfee** have joined the firm as associates in the Birmingham office.

Beasley, Allen, Crow, Methvin, Portis & Miles PC announces that **Scarlette Tuley** has become a shareholder.

Bradford Law Firm PC announces that **A. Mark Bahakel** and **Justin B. Lamb** have become associates.

Brinyark & Nelson PC announces that **P. Douglas Smith, Jr.** has become associated with the firm.

Burr & Forman announces that **Ashley H. Hattaway, Bradley W. Lard, Theodore M. McDowell, Jr., K. Bryance Metheny,** and **Joel A. Price, Jr.** have become partners with the firm.

Capell & Howard PC announces that **George L. Beck, Jr.** has become a member.

The Law Office of Susan C. Conlon announces that **Page Ann Banks** has become associated with the firm.

Deutsch, Kerrigan & Stiles LLP announces that **Kathy B. VanZutphen** has become a partner with the firm.

Eyster, Key, Tubb, Weaver & Roth LLP announces that **Carl Cole** and **Heather L. Necklaus** have been named partners in the firm.

Fisher, Skidmore & Strickland PC announces that **Paul B. Matthews,** previously with Nabors & Matthews LLC, has joined the firm.

Goozee, King & Horsley LLP announces that **Christopher Lee Roark** has joined the firm as an associate.

Hardin, Nomberg & Bates LLP announces that **David P. Nomberg** has joined the firm as an associate. Nomberg formerly served as clerk to Hon. Tom King, Jr.

Haskell Slaughter Young & Rediker LLC announces that **William W. Horton**, formerly with HealthSouth Corporation, has become *of counsel* to the firm. The firm also announces that **Bert S. Nettles, J. Mark Hart, Mark D. Hess, C. Dennis Hughes, Brennan C. Ohme, Joseph L. Cowan, II, Khristi J. Doss,** and **John H. McEniry, IV**, formerly of London & Yancey LLC, have joined the firm in the Birmingham office.

Haygood, Cleveland & Pierce LLP announces that **Gerald A. Mattson, Jr.** and **Philip A. Thompson** have become partners, and that **Mary Bishop Roberson** has become an associate. The firm also announces a name change to **Haygood, Cleveland, Pierce, Mattson & Thompson LLP.**

Helmsing, Leach, Herlong, Newman & Rouse PC announces that **Patrick C. Finnegan, Jason R. Watkins** and **Christopher T. Conte** have become associated with the firm.

Hill, Hill, Carter, Franco, Cole & Black PC announces that **Shawn Junkins Cole** has become a shareholder.

Kenneth Ingram Jr. & Associates PC announces that **Catherine D. Moncus** has become a partner, and the firm name is now **The Ingram-Moncus Law Firm.**

Kee & Selby LLP announces that **Timothy W. Knight** has become a partner and **Cindy L. Self** has joined the firm as an associate.

Killion & Associates PC announces that **John P. Browning** has joined the firm. Browning previously served as clerk to Hon. William H. McDermott.

Knight & Griffith announces a name change to **Knight, Griffith, McKenzie, McLeroy & Little LLP.**

James R. Reeves, Jr. announce the formation of **Lumpkin & Reeves, PLLC.**

Lyons, Pipes & Cook PC announces that **Ashley E. Cameron** has become an associate of the firm.

Miller, Hamilton, Snider & Odom LLC announces that **David F. Walker, Karen B. Johns** and **Jon G. Waggoner** have been promoted to members, **Glennon F. Threatt** has joined as a member, and **Preston B. Davis** and **Lance W. Parr** have joined as associates.

Radney, Radney & Brown PA announces that **Jason M. Jackson** has become an associate.

Ramsey, Baxley & McDougle announces that **M. Hampton Baxley** was recently named a partner.

Rushton, Stakely, Johnston & Garrett PA announces that **Angela R. Cummings** has joined the firm as an associate.

Sadler & Sullivan announces that **William A. Mudd** has joined the firm as a partner.

John D. Saxon PC announces that **Candis A. McGowan** and **Michael G. Graffeo** have joined the firm as members. **Jason B. Tingle** and **Stephen J. Austin** have joined as associates, and **Jennifer L. Soper** is now *of counsel.*

Scott, Sullivan, Streetman & Fox PC announces that **French McMillan** has become associated in the Mobile office.

Dale Segrest, Philip D. Segrest, Jr. and **Michael D. Weldon** announce the formation of **Segrest, Segrest & Weldon.** Offices are located in Tuskegee and Tallassee. Philip Segrest, Jr. will continue to practice *of counsel* as a patent attorney in Chicago.

Starnes & Atchison LLP announces that **J. Scott Dickens, W. Christian Hines, III** and **Joseph L. Reese, Jr.** have become partners with the firm.

Steiner, Crum & Byars PC announces that **Mark D. Caudill** and **Atley A. Kitchings, Jr.** have joined the firm as shareholders, and that **Maria B. Campbell, Robert W. O'Neill** and **James D. Pruett** have become *of counsel.* Steiner, Crum & Baker remains *of counsel.*

The Law Office of Micki Beth Stiller PC announces that **Stephanie A. Willis** has joined the firm as an associate.

The Turner Law Firm PC announces that **Lisa M. Ivey** has joined the firm.

Upchurch Watson White & Max announces that **Mike Walls** has joined the mediation firm, and **Ted Strong** of E.B. Strong & Associates has become affiliated as a contract mediator.

Walston Wells announces that **Shannon L. Barnhill, J. David Moore** and **David B. Ringlestein** have become partners, and that **Guy Nelson, Bufkin K. Frazier** and **Donna M. Glover** have joined the firm as associates in the Birmingham office.

Watson, Jimmerson, Givhan, Martin & McKinney PC announces that **C. Anthony Graffeo** has become a shareholder.

White, Dunn & Booker announces a name change to **White Arnold Andrews & Dowd PC.**

Talladega Superspeedway announces that **Scott Brewer** has been named director of operations. ■

G. Marie Daniels

G. Marie Daniels, born in Corinth, Mississippi and a lifelong resident of Mobile, died at her residence on Friday, July 25th, 2003, after a fearless battle with cancer.

Marie graduated from Davidson High School in Mobile in 1967 and earned a Bachelor's Degree in History from the University of South Alabama. Before attending law school, Marie worked for South Central Bell Company from 1974 to 1982, first employed as a telephone operator, then as one of the first group of women to serve as outside repair technicians. She was an active member of the Communications Workers of America, and served in various offices and as a steward. During Marie's tenure as editor of the union newspaper, it received national recognition and awards.

Marie attended Northeastern University School of Law in Boston, earning her Juris Doctorate degree in 1985. She attended law school with the specific intent to be of service to those in need in her community, and was employed after graduation by the Mobile office of Legal Services Corporation of Alabama. She spent her legal entire career at Legal Services, and dedicated herself to make the goal of Legal Services programs a reality. That goal is for all members of our society to have full and equal access to the justice system. Marie began her career with Legal Services as a staff attorney, was soon promoted to senior staff attorney, and in 1995 was named the managing attorney for the Mobile Region. A recognized expert on a variety of poverty law issues, Marie took a special interest in disability law issues, and developed specialized expertise in this area of the law.

Marie served on numerous bar association committees, both local and state. Her work for and leadership of this association's Volunteer Lawyers Program contributed to its recognition as one of the finest pro bono programs in this state and in the nation. The G. Marie Daniels Award was established this year to recognize a person who has improved the services of the VLP. The first award was made posthumously to Marie at the October 2003 Mobile Bar Association meeting. In addition to serving on committees addressing areas of practice in which she specialized, she worked diligently to promote and support fellow women lawyers, and was an active member of the local Women Lawyers Association and the Alice Meadows Council.

Marie was a dedicated civic and community leader. She was a long-time member of the Mobile County Democratic Executive Committee, and devoted many hours to campaign activities for Democratic candidates to local, state and national offices. She gave generously of both her time and her money to numerous local charitable and service organizations, including Habitat for Humanity, Mobile AIDS Support Services, Penelope House and Salvation Army. Particularly in the last few years of her life, Marie was devoted to the protection of animals, and served on several committees of the local chapter of the SPCA.

Marie is survived by her long-time companion, Ben Sumrall; her mother, Gladys Daniels; her sister, Laura Bearden, and Laura's husband, Robert Bearden; her brother, Andrew Daniels, III; three nephews, Jonathan Bearden and wife Kristin, Benjamin Bearden and William Bearden; two great-nieces, Emma and Mollee Bearden; aunts, uncles, other relatives and numerous friends and professional associates.

—Michael D. Knight, president, Mobile Bar Association

William J. Samford, Jr.

William James Samford, Jr. died on December 29th, 2003 at the age of 53. Although he was taken away from us much too soon, Jimmy's service to his family, friends, church, country, state, and university would fill many lifetimes.

Jimmy was a graduate of Auburn University and served as an officer in the United States Air Force from 1972 to 1975. He graduated from the University of Alabama School of Law and was admitted to the Alabama State Bar in 1978. He then went to work as an attorney with the FDIC in Washington, D.C. until he was appointed by Governor Fob James to fill an unexpired term as president of the Alabama Public Service Commission. Upon completion of that term, he served as legal advisor to Governor James. In 1983, Jimmy entered the private practice of law in Montgomery, where he specialized in public utilities and legislative relations.

In keeping with his family lineage of lawyers who have also made significant public service contributions, Jimmy was appointed to the Auburn University Board of Trustees in 1987 and reappointed for a second term in 1999. He served as president pro tempore of the board for ten years. In recognition of his many years of service, leadership and generosity, the baseball stadium at Auburn University was dedicated to and named for him in 2003. He also served with distinction as a member of the Board of Directors of the Methodist Homes for the Aging and was a lifelong member of the First United Methodist Church of Opelika.

Jimmy, in the great Southern tradition of raconteurs, was an excellent purveyor of stories and was also a skillful listener. He had a great many friends from all walks of life and had a wealth of colorful tales which he loved to share over a libation and a good meal.

He, like all Samfords, had a quick and acerbic wit. He relished telling the story about his minister who accompanied him to an Auburn basketball game, after Jimmy's illness had caused him to occasionally lose his balance. When they reached their seats, his preacher said with concern, "Jimmy, these people will think you're drunk," whereupon Jimmy replied, "What will they think of you, since you're my preacher?"

Jimmy Samford will be missed by the many who knew and loved him, but we will always have so many warm, colorful memories and the many stories to share.

He is survived by his sister, Lucinda Cannon; his nephew, Edmund Rasha Cannon; and Morgan, Tyler and Hudson Rehm.

—William B. Blount, Montgomery

Memorials

Akers, George Martele
Montgomery
Admitted: 1950
Died: December 30, 2003

Berryman, Leo, Jr.
Sheffield
Admitted: 1951
Died: September 29, 2002

Burdine, Robert Lacy, Jr.
Florence
Admitted: 1966
Died: June 4, 2003

Campbell, William Loy, Hon.
Scottsboro
Admitted: 1952
Died: November 6, 2003

Furner, Walter Winford
Bessemer
Admitted: 1971
Died: September 14, 2003

Grissett, John Roger
Birmingham
Admitted: 1983
Died: November 5, 2003

Hale, Buel Don
Cullman
Admitted: 1968
Died: November 27, 2003

Hood, Rita Davonne
Pleasant Grove
Admitted: 1996
Died: December 13, 2003

Jones, George Hursthal, Jr., Hon.
Montgomery
Admitted: 1933
Died: December 4, 2003

Kellett, Joseph Cabot
Fort Payne
Admitted: 1950
Died: December 1, 2003

Ratliff, James Kimble Vardaman
Birmingham
Admitted: 1956
Died: July 22, 2003

Reed, Richard Lee
Mobile
Admitted: 1980
Died: January 22, 2003

Rogers, David Paul, Jr.
Birmingham
Admitted: 1967
Died: December 10, 2003

Smith, Jefferson Davis
Huntsville
Admitted: 1934
Died: December 22, 2003

Thomley, Jerry Jackson
Birmingham
Admitted: 1974
Died: August 8, 2003

Tyler, Cas Benjamin
Birmingham
Admitted: 1953
Died: December 9, 2003

Tyson, James Arthur
Pine Level
Admitted: 1950
Died: December 13, 2003

RESOLUTION

Honoring

Judge Carl L. Evans

Chief Administrative Law Judge

For Outstanding Service to the Alabama Public Service Commission And to the State of Alabama

WHEREAS, the Alabama Public Service Commission is pleased to recognize Judge Carl L. Evans for more than 36 years of distinguished and dedicated service to the citizens of Alabama through his efforts at the Alabama Public Service Commission; and

WHEREAS, Judge Evans, in fulfilling his role as Chief Administrative Law Judge, has achieved an extensive record of consistent, fair and honest balancing of governmental interests against the rights of individuals, setting a standard to which all public servants may aspire; and

WHEREAS, Judge Evans was honored with the prestigious Eugene W. Carter Medallion Award by the Alabama State Bar on July 17, 2003; and

BE IT RESOLVED BY THE ALABAMA PUBLIC SERVICE COMMISSION, that we hereby declare that the hearing complex located on the ninth floor of the Alabama Public Service Commission's offices at 100 N. Union Street in Montgomery is officially named and shall henceforth be known as the Chief Administrative Law Judge Carl L. Evans Hearing Complex in recognition of Judge Evans' outstanding service to the citizens and the State of Alabama.

DONE at Montgomery, Alabama, this 4th day of November 2003.

ALABAMA PUBLIC SERVICE COMMISSION
Jim Sullivan, President
Jan Cook, Commissioner
George C. Wallace, Jr., Commissioner

Alabama PSC Names Hearing Complex for Chief Administrative Law Judge Carl L. Evans

Judge Evans, Montgomery attorney Walter Byars and former ASB President Fred Gray of Tuskegee

Montgomery attorney Wanda Devereaux and Judge Evans

The Alabama Public Service Commission recently named the public hearing complex at its Montgomery office in honor of Chief Administrative Law Judge Carl L. Evans.

Evans began his career with the Public Service Commission as an attorney-examiner in 1967. He was named chief administrative law judge in 1978.

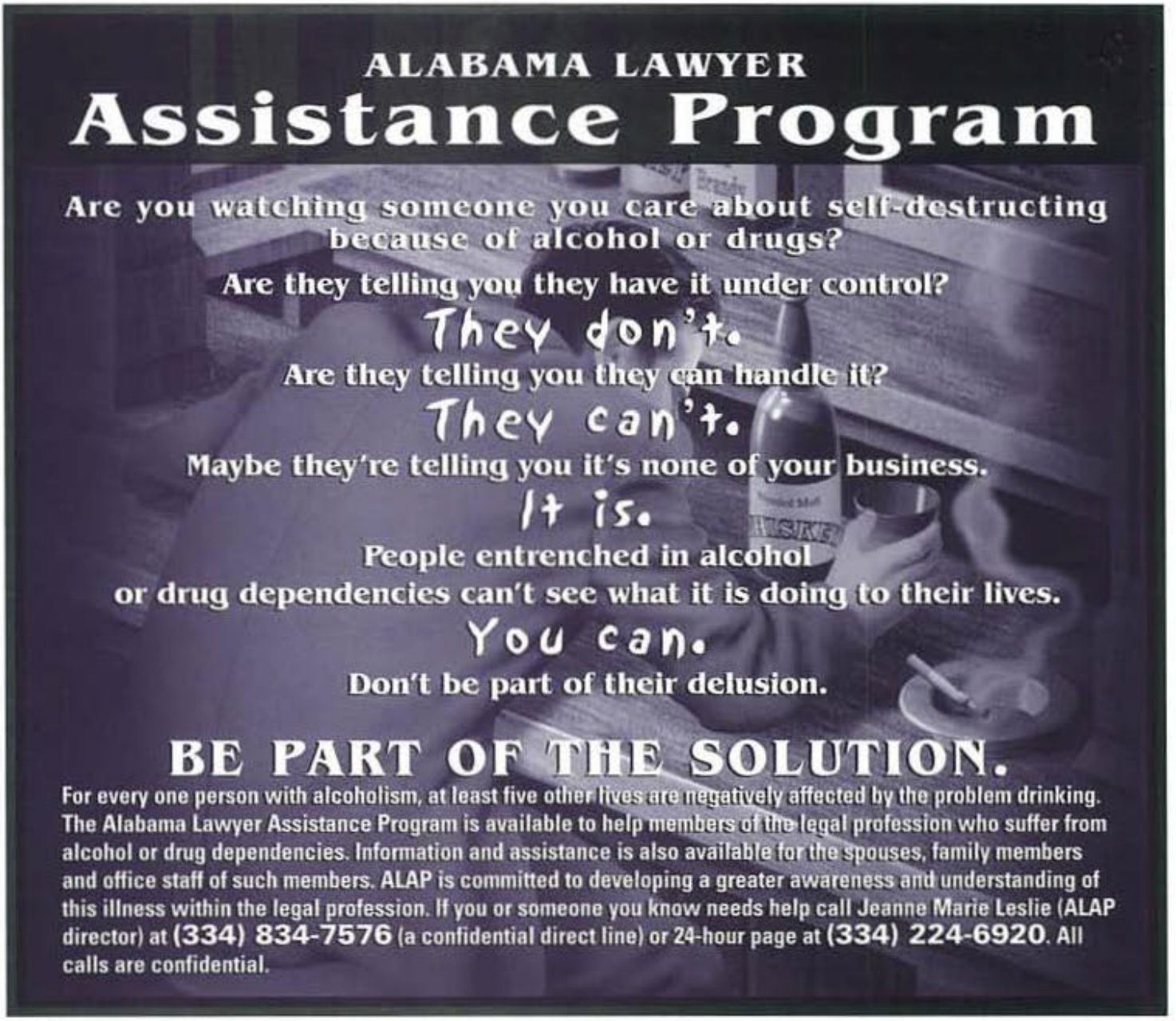
The Alabama State Bar honored Evans with its Eugene W. Carter Medallion Award in at the state bar's annual meeting last year. The award was presented in recognition of his "...extensive record of consistent, fair and honest balancing of governmental interests against the rights of individuals."

It is estimated that Judge Evans has presided over more than 1,000 cases during his career with the PSC. These cases involved rates, regulations, quality of service requirements, and consumer complaint resolution for electricity and natural gas utilities, telecommunications companies, water, and motor carrier services.

"Judge Evans is richly deserving of this honor," said PSC President Jim Sullivan. "In addition to his years of service as chief administrative law judge, he has also served this Commission as a leader, teacher and mentor."

Judge Evans lives in Montgomery with his wife Elaine. They have two sons, Carl, Jr. and Scott, both of Birmingham, and one grandchild.

"I feel extremely fortunate to have experienced such a wonderful career, hopefully not quite over yet, at the Commission," Evans said. "I am humbled and honored by this award from the Commissioners. I share this recognition with the outstanding staff of the Commission." ■



Important Reminder!

Your Continuing Legal Education Requirement

If you had a membership status change at any time during 2003, you may have been required to earn and report 12 hours of CLE credit by December 31st, 2003. Mandatory Continuing Legal Education Rules require attorneys who hold an occupational license (regular membership) any time during the calendar year 2003 to earn 12 hours of CLE credit. If you are not currently a regular member but were a regular member for part of 2003, you are still required to comply with MCLE Rules. (MCLE Rule 2.5)

For example, if you were inactive or held a special membership and converted to a regular membership during 2003, you are required to obtain 12 hours of CLE credit. If you were a regular member during 2003 but converted to special member or to inactive status, you are also required to comply with the 12-hour CLE requirement.

You are not required to obtain 12 hours of CLE credit if you are eligible to claim an exemption from the MCLE Rules. Your exemption, however, must have been claimed on the 2003 CLE reporting form which was mailed to you in early December. If you need to locate approved CLE programs, you may request a calendar of approved CLE programs from the ASB CLE Department or from the state bar's Web site at *www.alabar.org*.

Call the Alabama State Bar's CLE Department at (334) 269-1515, extension 158, 156 or 117, for more information.

Robert L. McCurley, Jr.

By Robert L. McCurley, Jr.

2003 Special Session

With less than two weeks before the end of the fiscal year, the Legislature was called into Special Session to pass a general fund and an education budget. In the two-week period, the Legislature passed an education budget of approximately $4.5 billion and a general fund budget of approximately $1.2 billion and 80 other bills. Of these 80 bills, 30 were local Acts, and 42 bills appropriated funds to non-state agencies that had previously been in the budget, which were funded until the end of 2003. Only three bills of statewide concern affected the general public at large.

Act 2003-415 (HB-3)—The restoration of voting rights of a convicted felon had previously been passed in the 2003 Regular Session and vetoed by the Governor. This new bill was substantially different from the one the Governor vetoed. Nominations to the Pardon and Parole Board, once made only by the Governor from a list provided by the chief justice of the Alabama Supreme Court, the presiding judge of the Court of Criminal Appeals, and the Lt. Governor, may now be nominated by the speaker of the house of representatives and the president pro-tem of the Senate. The bill allows the Governor to appoint four persons to serve as special members of the board through September 30, 2006, thereby expanding the board from three members to seven members and authorizing them to sit in two panels of three each for the purpose of conducting hearings with the chairman of the board serving as an alternate for either panel.

The bill further provides a procedure for restoration of eligibility to register to vote by deleting the requirement that a person must be paroled for at least three years without any parole violation before one is eligible to have their voting rights restored. It shortens the time for the initial application for reinstatement to board members from 60 days to 45 days and deletes the automatic revocation of the certificate of eligibility to register when a person's parole is revoked. However, one convicted of any of 15 crimes listed in the Act are not eligible for restoration of voting rights.

Act 2003-430 (SB-39)—Notification of Suspended Drivers License. *Ala. Code* Section 32-6-17 has been amended to delete the requirement for the Department of Public Safety to notify by "certified" mail any person whose license has been suspended, cancelled or revoked and now permits notification to be made by "mail."

Act 2003-516 (SB-41)—Trailer Parks. Provides a way for the owner of a trailer park to dispose of manufactured housing left on their property when 60 days have elapsed since the termination or expiration of the lease agreement, and the tenant has been absent continuously for 30 days after termination of tenancy by court order that has not been executed. The landlord must give notice personally or by certified mail to the tenant as well as to any lien holder. If the property is not removed, the landlord can remove the manufactured home and all personal property, charge for storage or declare the property abandoned and dispose of it after publishing a notice in the paper. If the tenant does not respond within the time period or does not remove the manufactured home within 45 days, the manufactured home and any personal property will be conclusively presumed to be abandoned. The lien holder may make the monthly payments and leave the trailer at the park for up to 12 months. This Act became effective December 1, 2003.

2004 Regular Session

The 2004 Regular Session began February 3rd.

It is expected that the State again will be in a funding crisis. The 2003-2004 budgets are $75 million less than the prior year's appropriation, but $430 million below the essential needs of the State. The current year's budget was assisted by a one-time $260 million grant to Alabama by the federal government which was part of the $20 billion federal relief effort toward states. There is no expectation that this funding will continue from the federal government.

The Law Institute is expected to introduce the following bills during the 2004 Regular Session, copies of which will be available on the Institute's Web site.

1. The Uniform Residential Landlord Tenant Act (*See AL Lawyer*, March 2003);

2. The Uniform Trust Code (*See AL Lawyer*, May 2003);

3. Uniform Securities Act (See *AL Lawyer*, July 2003); and

4. A revision of Article 7 of the UCC, "Documents of Title." A discussion of this article and the revision of UCC Article 1 will be at a later time.

The Institute is currently studying the Alabama Election Law and Business Entities Laws, however, it is not expected that any recommendation will be available until the 2005 Regular Session for these two projects.

For more information about the Institute, contact Bob McCurley, director, Alabama Law Institute, P.O. Box 861425, Tuscaloosa 35486-0013; fax (205) 348-8411; phone (205) 348-7411; or visit our Web site at *www.ali.state.al.us* ■

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.

PUBLIC NOTICE FOR REAPPOINTMENT OF INCUMBENT MAGISTRATE JUDGE

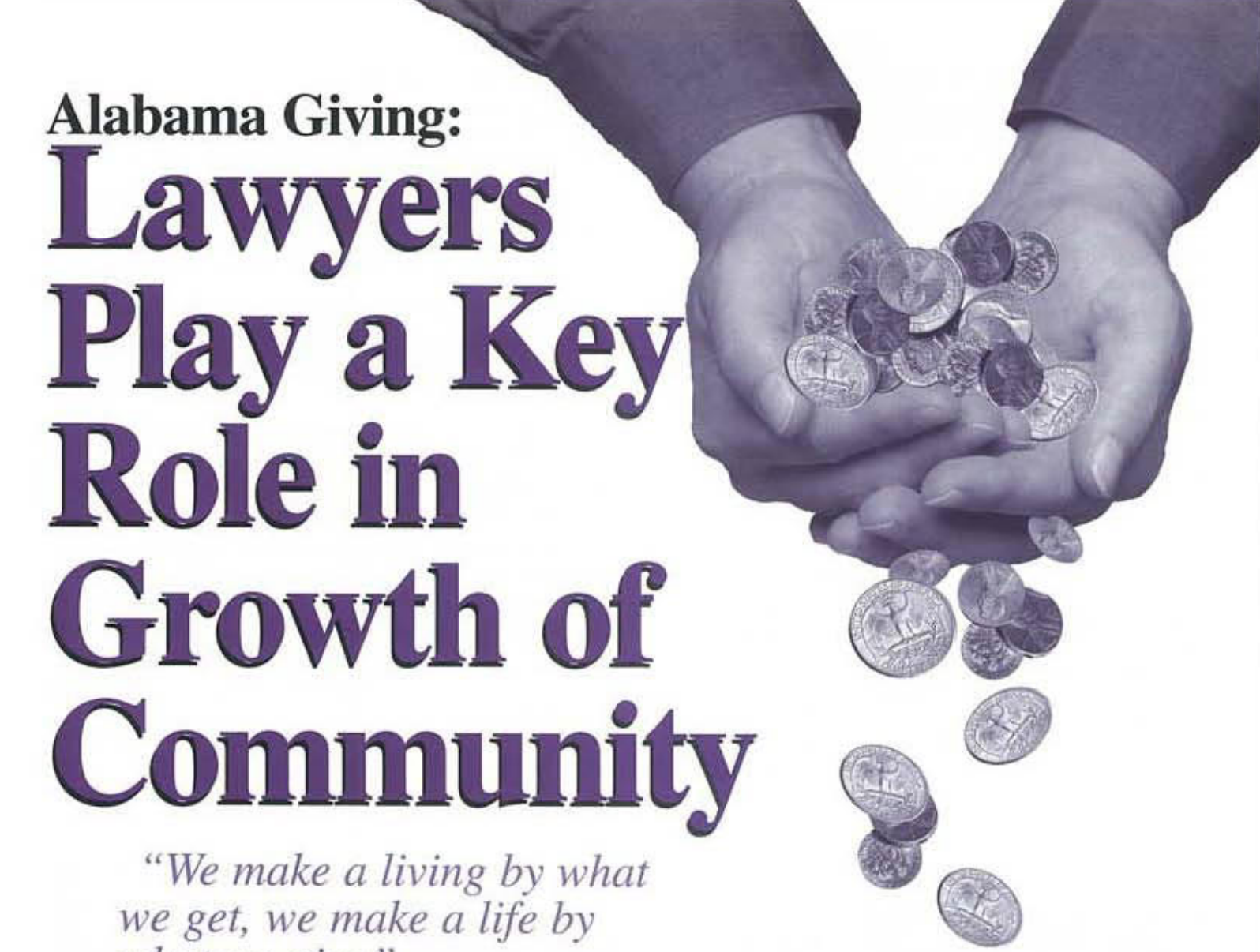
The current term of the office of United States Magistrate Judge Susan Russ Walker is due to expire April 22nd, 2004. The United States District Court is required by law to establish a panel of citizens to consider the reappointment of the magistrate judge to a new eight-year term.

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

Comments from members of the bar and the public are invited as to whether the incumbent magistrate judge should be recommended by the panel for reappointment by the court and should be directed to:

Chair, Merit Selection Panel
c/o Debra P. Hackett, clerk
U. S. District Court
P. O. Box 711
Montgomery, AL 36101-0711

Comments must be received by March 20th, 2004.



Alabama Giving: Lawyers Play a Key Role in Growth of Community

"We make a living by what we get, we make a life by what we give."

—Winston Churchill

BY ELIZABETH DENNIS, executive director, Alabama Giving

Alabama is unrecognizable without the charitable gifts of those who understand that community well-being is deeply relevant to their own well-being. There are many people in this state who give generously of their resources to enhance our communities. In 2001, Alabama residents left total estates of over $2 billion to charitable causes.[1] From museums and theaters to hospice care, from public advocacy to land conservation, the imprint of charitable contributions is everywhere.

Yet, there is so much more that we could do, both as professionals and as individuals. Studies continue to show that Alabama ranks among the most generous states in the nation based on individual per capita income, but among the lowest in organized philanthropy.[2] Such generous gifts are reinvested in the community support organizations serving a wide range of important causes.

The value in reflecting upon our giving nature is to spur action. **Alabama Giving** is working with a dedicated group of lawyers, accountants and financial and insurance professionals to find ways to better engage professional advisors in helping tackle this challenge. Alabama Giving's goals include seeking to ensure that clients are routinely invited to consider charitable trusts, charitable annuities, private foundations, donor-advised funds, direct charitable bequests, or other appropriate planned giving vehicles as part of their estate and financial planning. Participants in this advisor group are the following lawyers, CPAs or financial or insurance advisors: attorneys **Greg Hyde, Robert Ritchey, Greg Watts** and **Liz Hutchins**; accountants Henry Barclay, Beverly Virciglio; and financial advisors Linda Allison, Derrell Crimm and Jim King.

This advisor group has crafted an accredited continuing education course designed to spark the charitable conver-

sation, and the course is growing in popularity as a neutral informational piece for professional advisors, with approval for attorneys, public accountants and certified financial advisors to share with their clients. The course has already been offered by the following county bar associations: Coffee, Jefferson, Tuscaloosa, Mobile, and Pike. Have your local bar association contact Alabama Giving at (205) 313-4830 to offer this course in your community.

Attorneys can play a key role in making clients aware of their charitable options, starting most simply with routinely raising the charitable question. While charitable intent will always be the leading motive for charitable giving, charitable planning techniques may also be especially helpful to assist clients in meeting their financial and tax-minimization goals. Opportune situations in which to suggest clients consider charitable options are when they are about to transfer or sell real estate, a business or other highly appreciated assets, or when they are seeking to enhance lifetime or retirement income.

As individuals, each of us can make a commitment to reinvigorate our own giving through whatever means and to whatever causes move our hearts. As advisors to others, you have a special responsibility to invite clients to consider whether they want to leave a legacy to causes or organizations that may matter deeply to them.

As attorneys, you are uniquely well situated to help your clients connect to the causes about which they care. Helping clients with their charitable planning strengthens your client relationships, deepens your expertise and is good for your business and our communities. ■

Endnotes

1. Data Analysis: Connecticut Council for Philanthropy. 2003. Source: IRS Statistics of Income Division.
2. 2000 Generosity Index for All Returns by State.

ORDER OF RECUSAL

Roy S. Moore v. Judicial Inquiry Commission of the State of Alabama

(Appeal from Court of the Judiciary No. 33)

Order

The eight Associate Justices have been intimately involved in the events surrounding then Chief Justice Roy S. Moore's actions with respect to the injunction entered by the United States District Court for the Middle District of Alabama in *Glassroth v. Moore* for removal of the Ten Commandments monument. On August 21, 2003, one day after the deadline established by said injunction, the eight Associate Justices of this Court ordered "that the Building Manager of the Alabama Judicial Building be, and the same hereby is, directed to take all steps necessary to comply with the injunction as soon as practicable."

The complaint filed by the Judicial Inquiry Commission with the Court of the Judiciary on August 22, 2003, charges that then Chief Justice Moore "willfully failed to comply with an existing and binding court order directed to him." On November 13, 2003, the Court of the Judiciary found that "Chief Justice Moore. . .willfully and publicly defied the orders of a United States district court" and removed him from office. (Order, p. 12.)

Section 6.18(b) of Amendment No. 328 to the Constitution of Alabama of 1901, adopted in 1973, provides as follows:

> "A judge aggrieved by a decision of the court of the judiciary may appeal to the supreme court. The supreme court shall review the record of the proceedings on the law and the facts."

Roy S. Moore filed a Notice of Appeal on Dec. 10, 2003, in which he described the issues as including:

> "Was the decision of the Court [of the Judiciary] supported by clear and convincing evidence?"

The Canons of Judicial Ethics require that a judge should disqualify herself or himself when her or his impartiality might reasonably be questioned. Canon 3C(1). Illustrations of circumstances when impartiality might reasonably be questioned include when a judge "has personal knowledge of disputed evidentiary facts concerning the proceeding." See Canon 3C(1) (b).

If the entire Court were to recuse based on Canon 3C(1) without first providing Roy S. Moore the opportunity to be heard by a tribunal acting according to law as a special Supreme Court, he would be denied a constitutional right secured to him by 6.18(b). Under the common law Rule of Necessity, there are circumstances when a judge must take action in a case in which the judge should be recused "if the case cannot be heard otherwise." *United States v. Will*, 449 U.S. 200, 213 (1980). This Court therefore defers recusal until it has provided a mechanism for affording Roy S. Moore a right to be heard.

Section 6.10 of Amendment No. 328 authorizes the Chief Justice, as administrative head of the judicial system, to "assign appellate justices and judges to any appellate court for temporary service and trial judges, supernumerary justices and judges, and retired trial judges and retired appellate judges for temporary service in any court." Section 6.21(h) of Amendment No. 328 provides, "*Except to the extent inconsistent* with the provisions of this article, all provisions of law and rules of court in force on the effective date of this article shall continue in effect until superseded in the manner authorized by the Constitution." (Emphasis added.) Section 12-2-14, *Ala. Code* 1975, provides that, when "no one of the judges is competent to sit in a case or the number is reduced below six, the fact shall be certified by the Chief Justice, if he is competent to sit, or, if not, by the judge or judges sitting, or, if no one is competent, by the clerk of the court to the Governor, who shall thereupon appoint members of the bar of the Supreme Court to constitute a special court of seven members for the consideration and determination of such case."

Under the unique circumstances of this proceeding, we resolve any potential conflict between sections 6.10 and 6.21(h) of Amendment No. 328 and section 12-2-14, *Ala. Code* 1975, by authorizing the acting Chief Justice to cause the names of 20 judges to be drawn at random from a pool of retired judges who are members of the Alabama State Bar, capable of service. From the 20 judges so drawn, the first seven judges shall constitute the special Supreme Court. In the event any judge so selected is not willing and able to serve, then that judge's place shall be filled by the next judge in order of selection who is willing and able to serve until seven judges willing and able to serve have been selected. The names of such judges shall then be certified to the Governor.

The undersigned Justices, having provided a mechanism affording Roy S. Moore a right to be heard, hereby recuse.

Done this 11th day of December 2003.

Gorman Houston, Jr., Harold Seay, Champ Lyons, Jean Brown, Douglas Johnstone, Bernard Harwood, Thomas A. Woodall, Lyn Stuart

(Appeal from Court of the Judiciary: No. 33)
Order

Whereas, Section 6.10 of Amendment No. 328 of the Constitution of Alabama of 1901, provides, in pertinent part:

> "The chief justice *may* assign appellate justices and judges to any appellate court for temporary service and trial judges, supernumerary justices and judges, and retired trial judges and retired appellate judges for temporary service in any court."
> (Emphasis added.)

Whereas, I consider the verb "may" as designating permissive, not mandatory, action. See *Bowdoin Square, LLC v. Winn-Dixie Montgomery, Inc.*, [Ms. 1011661, June 6, 2003] ____ So. 2d ____ (Ala. 2003).

Therefore, I, J. Gorman Houston, Jr., acting chief justice pursuant to *Ala. Code* 1975, sections 12-2-6 and 12-2-14, having complied with the Order, dated December 11, 2003, entered by the eight Associate Justices of the Supreme Court of Alabama, a copy of which is attached, do hereby decline to assign any judges for temporary for temporary service in the above-styled action.

However, in the event it is contended that the word "may" obliges me to appoint judges for temporary service in the above-referenced case, then I appoint the same judges appointed by the Honorable Bob Riley, Governor of the State of Alabama, namely:

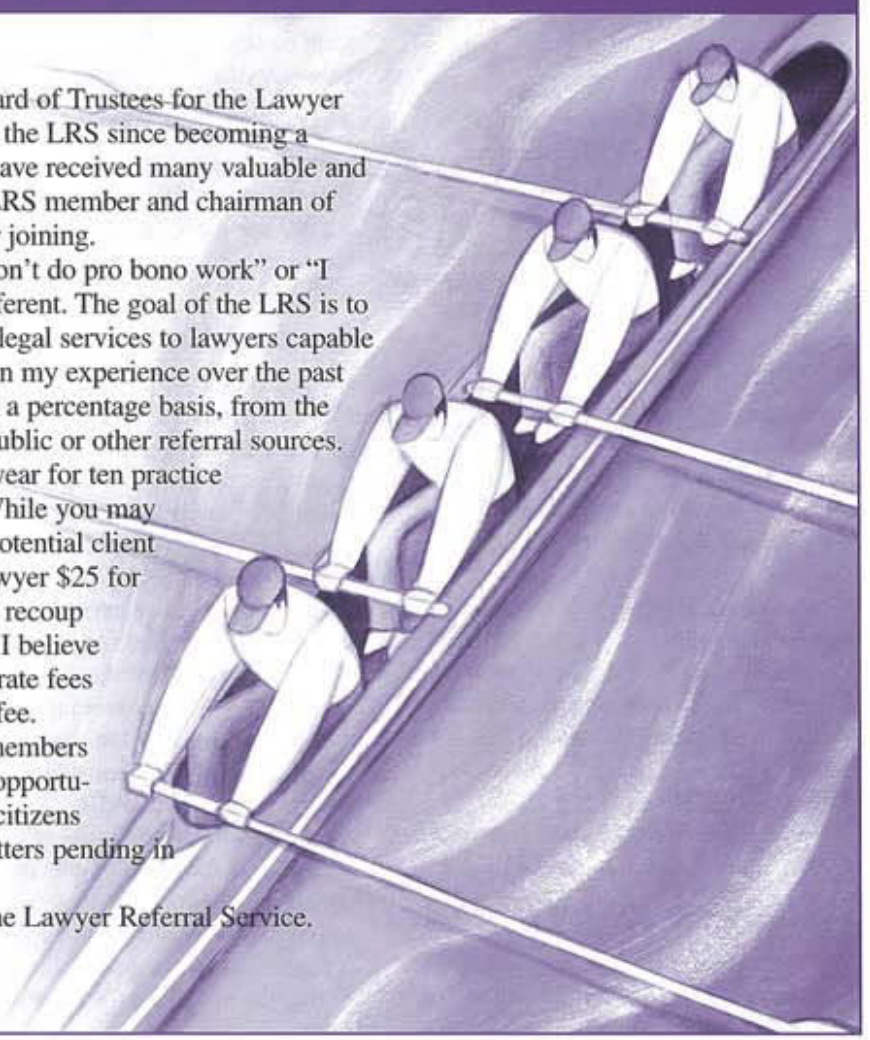
Honorable Harry J. Wilters, Jr.; Honorable Braxton Kittrell; Honorable Janie L. Shores; Honorable J. Richmond Pearson; Honorable John M. Patterson; Honorable Edward Dwight Fay, Jr.; and Honorable Kenneth Ingram.

In witness whereof, I have hereunto set my hand and seal this 16th day of December 2003.

J. Gorman Houston, Jr., acting chief justice ■

"Why It Pays to Join"

Lawyer Referral Service Testimonial



Dear Fellow LRS Members:

Prior to my becoming the chairman of the Board of Trustees for the Lawyer Referral Service (LRS), I had been a member of the LRS since becoming a member of the bar in 1992. During that time, I have received many valuable and challenging cases from the LRS. As a satisfied LRS member and chairman of the service, I strongly encourage you to consider joining.

I have heard many lawyers comment that "I don't do pro bono work" or "I receive too many junk referrals." The LRS is different. The goal of the LRS is to refer clients who are willing and able to pay for legal services to lawyers capable of handling the client's specific needs. It has been my experience over the past 11 years that I actually refuse fewer referrals, on a percentage basis, from the LRS than I do from general inquiries from the public or other referral sources.

The fee for joining the LRS is only $100 per year for ten practice areas, plus $5 for any additional practice area. While you may choose to waive the $25 consultation fee, each potential client understands that they are obligated to pay the lawyer $25 for the initial consultation. Accordingly, it is easy to recoup your initial expenditure for the membership fee. I believe you will find that just one quality case will generate fees substantially in excess of the $100 membership fee.

There are currently several counties with no members of the LRS. Accordingly, there is a tremendous opportunity for lawyers to obtain quality referrals from citizens who live in these counties or who have legal matters pending in these counties.

I hope you consider becoming a member of the Lawyer Referral Service.

Yours truly,
James A. Hoover, Birmingham

Revisions, MCLE Rules and Regulations

In the Supreme Court of Alabama

January 9, 2004 Order

WHEREAS the Alabama State Bar has submitted to this Court proposed revisions to the Alabama State Bar **Mandatory Continuing Legal Education Rules and Regulations**, specifically the addition of Regulation 2.7 to Rule 2, and amendments to Rule 2.C.2., Rule 3, Rule 5.B., Rule 6.A., and Rule 6.B.; and

WHEREAS this Court has considered those proposed revisions to the Alabama State Bar Mandatory Continuing Legal Education Rules and Regulations;

IT IS HEREBY ORDERED that Regulation 2.7 to Rule 2, Alabama State Bar Mandatory Continuing Legal Education Rules and Regulations, be adopted, and that Rule 2.C.2., Rule 3, Rule 5.B., Rule 6.A., and Rule 6.B., Alabama State Bar Mandatory Continuing Legal Education Rules and Regulations, be amended to read in accordance with appendices A, B, C, D, E, and F, respectively, attached to this order;

IT IS FURTHER ORDERED that these amendments and the adoption of the regulation shall be effective immediately;

IT IS FURTHER ORDERED that the following note from the reporter of decisions be added to follow Rules 2, 3, 5, and 6:

"Note from the reporter of decisions: The order adopting Regulation 2.7 to Rule 2 and amending Rule 2.C.2., Rule 3, Rule 5.B., Rule 6.A., and Rule 6.B., effective January 9, 2004, is published in that volume of *Alabama Reporter* that contains Alabama cases from ___ So. 2d."

Houston, See, Lyons, Brown, Harwood, Woodall, and Stuart, JJ., concur.

Appendix A

2.7 An attorney who resides and maintains a principal office for the practice of law in another state that requires Mandatory CLE and who can demonstrate compliance with the Mandatory CLE requirements of his or her principal state of practice is exempt from these rules, except as provided in Rule 5.

Appendix B

2. In any event, however, assistant or deputy attorneys general and district attorneys, assistant or deputy district attorneys, and public defenders are not so exempt, and Rule 2.C.1. shall have no application to them.

Appendix C

Each attorney admitted to practice in this state whose qualification to practice law is subject to *Code of Alabama* 1975, § 40-12-49, shall attend, or complete an approved substitute for attendance, a minimum of 12 actual hours of approved continuing legal education, one hour of which shall be ethics or professionalism, each calendar year, beginning January 1, 2004.

Appendix D

B. An attorney who, for whatever reason, files the report after January 31 shall pay a $100 late filing fee. This payment shall be attached to and submitted with the report.

Appendix E

A. An attorney who fails to earn twelve (12) approved CLE credits by December 31 of a particular year will be deemed not in compliance for that year. A plan for making up the deficiency by March 1 will be accepted if approved courses are listed and if the plan is received by January 31. Completion of the requirement shall be reported no later than March 15, and a $100 late compliance fee shall be attached to the report. Failure to complete the plan by March 1 and to submit the report and fee by March 15 shall invoke the sanctions set forth in Rule 6.B.

A request for an extension of the March 1 deadline for earning credits under a deficiency plan may be considered if: (1) the request is in writing and a good cause is shown, as determined by the Commission, and (2) the request is accompanied by a fee of $100. This fee is in addition to the $100 late compliance fee and any late filing fee that may be due. No extensions will be granted beyond April 1.

Appendix F

B. As soon as practicable after January 31 of each year, the Chairman of the Commission on Continuing Legal Education shall furnish to the Secretary of the Alabama State Bar a list of those attorneys who have failed to file either an annual report for the previous calendar year, as required by Rule 5, or a plan for making up the deficiency as permitted by Rule 6.A. In addition, as soon as practicable after the first anniversary of an attorney's admission to the Bar or of an attorney's being licensed to practice law in Alabama, the Chairman shall furnish to the Secretary of the Alabama State Bar a list of those attorneys who were required to complete, but who failed to complete, the professionalism course required by Rule 9.A.

The Secretary shall thereupon forward these lists of attorneys to the Chairman of the Disciplinary Commission.

The Chairman of the Disciplinary Commission shall then serve, by certified mail, each attorney whose name appears on those lists with an order to show cause, within sixty (60) days (i.e., within 60 days from the date of the order) why the attorney's license should not be suspended at the expiration of the sixty (60) days. Any attorney so notified may within the sixty (60) days furnish the Disciplinary Commission with an affidavit (a) indicating that the attorney has in fact earned the 12 required CLE credits during the preceding calendar year or has since that date earned sufficient credits to make up any deficiency for the previous calendar year, or (b) indicating that the attorney has in fact completed the professionalism course required by Rule 9.A., or (c) setting forth a valid excuse (illness or other good cause) for failure to comply with either requirement. Payment of a noncompliance fee in the amount of $300 must accompany the affidavit.

As soon as practicable after March 15 of each year, the Chairman of the Commission on Continuing Legal Education shall furnish the Secretary of the Alabama State Bar a supplemental list of any attorneys who filed a deficiency plan as permitted by Rule 6.A. but who have failed either to carry out such plan or to meet the reporting requirements of Rule 6.A. The same procedures, requirements, and sanctions applicable to the attorneys on the initial delinquent list shall apply to the attorneys on this supplemental list.

At the expiration of sixty (60) days from the date of the order to show cause, the Disciplinary Commission shall enter an order suspending the law license of each attorney who has not, pursuant to the third paragraph of this Rule 6.B., filed an affidavit that the Disciplinary Commission considers satisfactory.

At any time within ninety (90) days after the order of suspension, an attorney may file with the Disciplinary Commission an affidavit indicating that the attorney has earned 12 approved CLE credits (or the number of credits the attorney was deficient) and wants those credits assigned to the year for which the attorney was in noncompliance with Rule 3, or indicating that the attorney has completed the professionalism course required by Rule 9.A. If the Disciplinary Commission finds the affidavit satisfactory, it shall forthwith enter an order reinstating the attorney.

At any time beyond ninety (90) days from the order of suspension, an attorney shall file with the Disciplinary Board an affidavit like that described in the preceding paragraph, but such an attorney must file with that affidavit a petition for reinstatement (see Rule 28, Alabama Rules of Disciplinary Procedure).

An attorney may appeal to the Disciplinary Board from an order of suspension of an order denying reinstatement entered by the Disciplinary Commission. Additionally, any affected attorney may appeal any action of the Disciplinary Board to the Supreme Court in accordance with the Rules of Disciplinary Procedure. ■

Local Bar Award of Achievement

The Alabama State Bar Local Bar Award of Achievement recognizes local bar associations for their outstanding contributions to their communities. Awards will be presented during the Alabama State Bar's Annual Meeting, July 22nd–24th in Sandestin.

Local bar associations compete for these awards based on their size–large, medium or small.

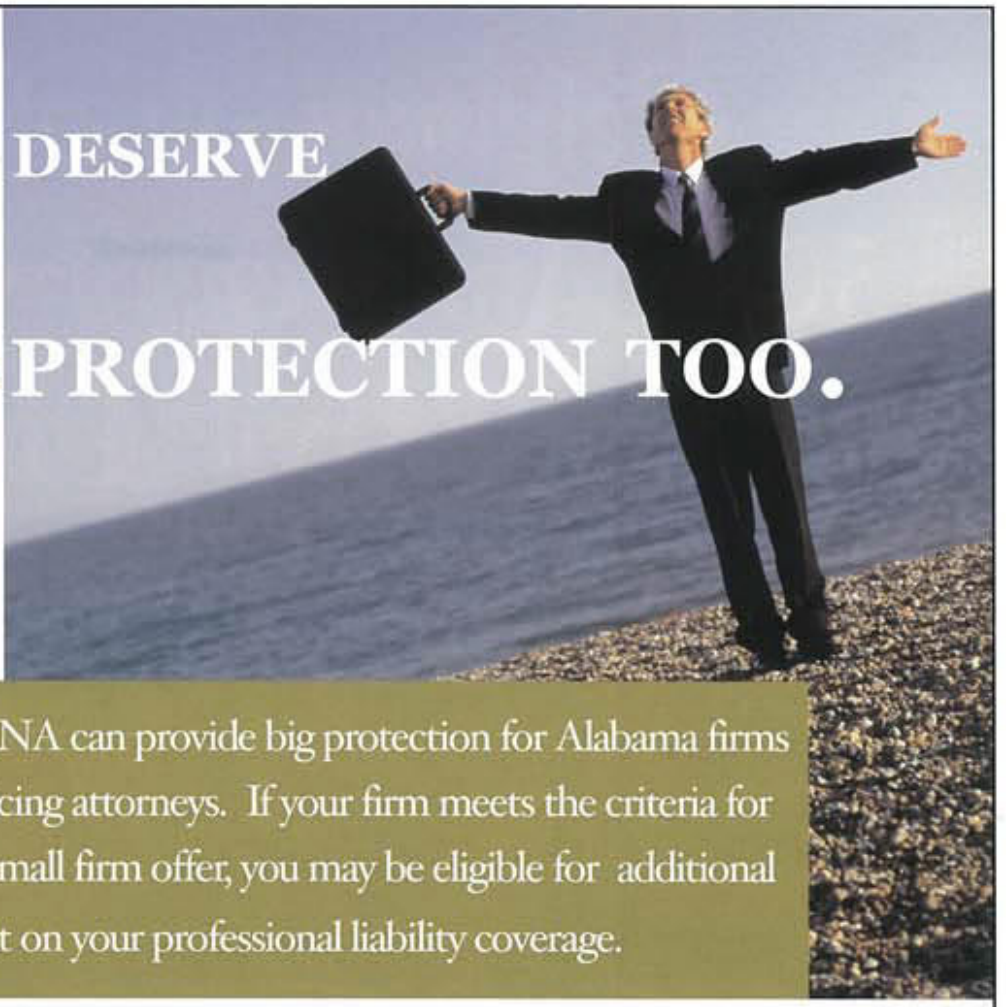
The following criteria will be used to judge the contestants for each category:

- 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 enhancements to the bar's image in the community.

To be considered for this award, local bar associations must complete and submit an award application by June 1, 2004. For an application, contact Ed Patterson, ASB director of programs, at (800) 354-6154 or (334) 269-1515, ext. 161, or P.O. Box 671, Montgomery 36101.

SMALL FIRMS DESERVE

BIG PROTECTION TOO.



Gilsbar and CNA can provide big protection for Alabama firms with 1-4 practicing attorneys. If your firm meets the criteria for this exclusive small firm offer, you may be eligible for additional credit on your professional liability coverage.

In the last 2 years alone, over 200 Alabama law firms have switched to CNA for professional liability coverage...call today and find out why.

1-800-445-7227 ext. 526

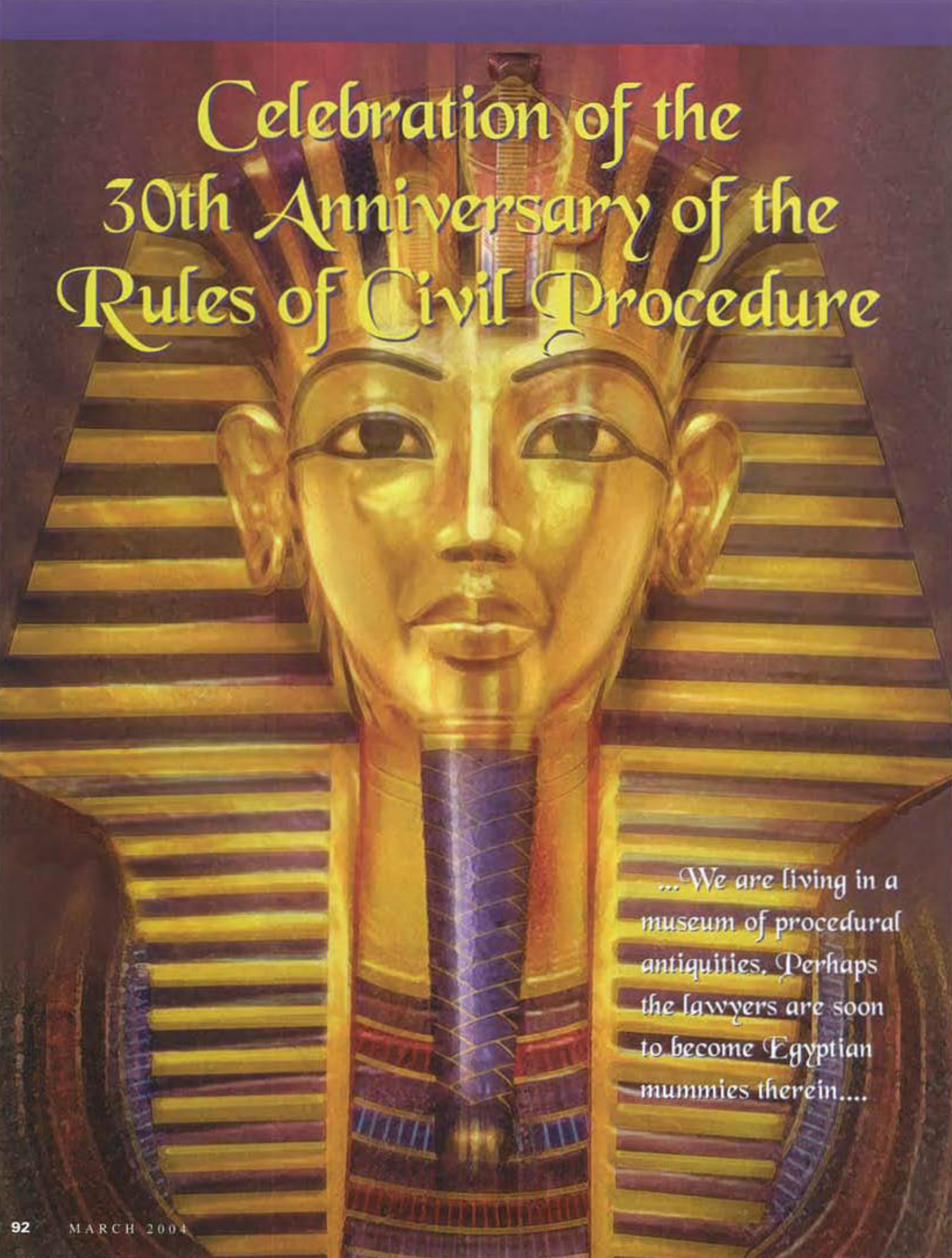
About CNA:

Over 40 Years Experience in Legal Malpractice Coverage
More than 125,000 Attorneys Insured
2nd Largest Writer of Lawyers Professional Liability in the U.S.
Ongoing Risk Management Services and Support

GILSBAR Insurance Services

CNA

Celebration of the 30th Anniversary of the Rules of Civil Procedure



...We are living in a museum of procedural antiquities. Perhaps the lawyers are soon to become Egyptian mummies therein....

REMINISCENCES ON ADOPTION OF THE RULES OF CIVIL PROCEDURE

BY JUSTICE CHAMP LYONS, JR.

Larger groups have gathered in this building, but I dare say there has not been a group more distinguished. Looking out at this audience I see gathered here today some real "face cards" in Alabama legal and political history. This is a joyous occasion to bring — I always call him Judge Heflin — back to the capitol to celebrate the fruits of his leadership. But the story really begins, as far as my research went, at a time when Judge Heflin was serving in the Marines in the South Pacific during World War II.

The year is 1943 and the scene is Birmingham, Alabama, and Jacob Walker, Sr., is concluding his term as president of the Alabama State Bar. These were his remarks on that day. He described himself as a "voice crying in the wilderness." He said:

> "Except for certain modifications made twenty-eight years ago, no attempt has been made within the memory of living men [and of course today we would say "and women"] to revise the practice of our courts at law. We are living in a museum of procedural antiquities. Perhaps the lawyers are soon to become Egyptian mummies therein.
>
> "... A diet of locusts and wild honey and raiment of camel's hair ill becomes me. Neither by temperament, training nor environment am I a reformer or an agitator; but I do know that our State rules of practice devised in circuit-riding days can in the light of present knowledge be greatly improved. The only feasible alternative to our own rules, is the Federal Rules of Civil Procedure...."

Now these words were spoken when the Federal Rules of Civil Procedure were just five years old. The Federal Rules were adopted in 1938 in the federal system. Present today we have Jacob Walker, Jr., the son of the man who spoke those words, and a distinguished practitioner in Opelika. He told me before this morning that he was present on the occasion of his father's remarks awaiting orders for military service. We also have present his son, Jacob Walker, III, a circuit judge in Lee County and grandson of the man who spoke those words. The scene moves forward to 1945 when the Supreme Court of Alabama released *Ex parte Foshee*, 246 Ala. 604, 21 So. 2d 827 (1945), where a majority of this Court held that with certain narrow exceptions the rulemaking power was reposed in the Alabama Legislature. Judge Ed Livingston, then chief justice, dissented because in his view "the power to make rules governing the procedure of courts is inherently judicial, and that this Court has the inherent power to prescribe rules of procedure governing the trial courts." *Foshee*, 246 Ala. at 615, 21 So. 2d at 837. But, Chief Justice Livingston expressed the minority view, and without any power in the Court to do anything to change our procedure, change was up to the legislature. In 1953, Dean M. Leigh Harrison, whom many of us remember fondly from our law school days, wrote this:

> "Alabama has a modified system of common law pleading which has survived the reform movements during the past hundred years without basic change. Most of our important statutes on pleading which are found in the Code of 1940 are also found in the Code of 1852."

M. Leigh Harrison, "Reforms of Alabama Pleading," 6 Ala. L. Rev. 28, 31 (1953).

I might add that in Mobile there was a more pure form of common law pleading in practice than in any other place in the state. When Alabama ultimately abandoned common-law pleading, we were probably the only English-speaking jurisdiction in the world that followed it, and in Mobile it would have just been like going into a time capsule for some student of procedure to come to Mobile County and watch the complaint and then the demurrer and the rebutter and the surrebutter and the rejoinder and the surrejoinder while the rest of the State was pleading in short by consent and saving some steps.

Under common-law pleading the polishing of pleadings became an art form and the framing of the issues through pleadings was the way to reach the ultimate issues. Discovery was not readily available because pleadings sought the refinement otherwise attainable through discovery. One can make a compelling argument that today a lot of people who never studied common-law pleading do not sufficiently appreciate the elements of a cause of action. Such shortcoming can come back to haunt at the conclusion of the trial when a motion for judgment as a matter of law is made for failure of proof.

In 1955, the Legislature, in what we used to call Act No. 375, embraced federal discovery by statute. Prior to that time discovery was unknown. Thomas Skinner of Birmingham, a stalwart for procedural reform, wrote an article stating, "The inquiry was circumscribed to matters which were relevant and pertinent to the issues as made by the party's claim or

defense. Any effort by interrogatories, or otherwise, to obtain a clear picture of the factual situation in any case was met with the ancient hue and cry of 'fishing expedition' with the result that each party and the court were required to enter upon the trial of the case without any knowledge of the factual contentions of the parties." Thomas E. Skinner, "Alabama's Approach to a Modern System of Pleading and Practice," 20 F.R.D. 119, 129-30 (1957). So then we had the worst of both worlds. Beginning in 1955, we had elaborate pleadings and full blown federal discovery.

In 1957, a blue ribbon committee was formed known as the Commission for Judicial Reform and the membership on that committee was most impressive. **Tom Skinner** of Birmingham was chairman. Also serving was **E. T. Brown** of Birmingham; **John Caddell** of Decatur; **James J. Carter** of Montgomery; **Judge Hobart H. Grooms** of Birmingham; **Dean M. Leigh Harrison** of Tuscaloosa; **John D. Higgins** of Birmingham; **Judge Robert M. Hill** of Florence; a young lawyer named **Truman Hobbs** of Montgomery; **Francis Inge** of Mobile; **Judge Walter B. Jones** of Montgomery; **Chief Justice J. Ed Livingston** of Montgomery; **Attorney General John Patterson** of Montgomery, who is here today; **William S. Pritchard** of Birmingham; **Marion Rushton** of Montgomery; **Judge John B. Scott** of Montgomery; **Justice Davis F. Stakely** of this court; **Jacob A. Walker** again shows up as a member of that committee; and **Judge Reuben H. Wright**, a circuit judge in Tuscaloosa.

Tom Skinner had a connection with the Yale Law School through which he learned of a graduating senior who needed a summer job before taking a teaching post starting in the fall in Texas. Alabama was on the way to Texas and so this young man was hired to compile a report for the commission to submit to the Legislature as a vehicle for adopting Rules of Civil Procedure by statute. That promising young legal scholar was none other than **Charles Allen Wright** who would later become the author of widely acclaimed treatises on federal practice, jurisdiction and procedure. He did a masterful job with the help of **Professor Dwight Morgan** of the University of Alabama School of Law, who also taught some of us in law school.

PHOTO BY JIMMY MESSICK

After presentations and comments, honorees and guests were treated to a luncheon in the rotunda and the courtyard of the Judicial Building.

PHOTO BY JIMMY MESSICK

Various versions of Old Glory decorate the rotunda of the Alabama Judicial Building during the ceremonies honoring the A.R.C.P.

A bill adopting rules patterned after the Federal Rules of Civil Procedure was introduced in the Legislature in 1957. It did not pass and, from what I have been told, its defeat was assured when word spread that if the bill passed, civil rights lawyers such as those retained by the NAACP lawyers would know more about our practice than the rest of the bar. That was the death knell and there the matter lay for a few years.

We move toward the mid '60s. I was graduated from the University of Alabama Law School in 1965 and was visiting my grandmother at Point Clear for a few days before I began the trek back up to the north part of the state to begin studying for the bar exam. **Ed Hardin**, a law school classmate, told me that the **Alabama Trial Lawyers Association** was then having their annual meeting at the Grand Hotel. Well, I thought, that's just down the road so I will drop by one evening and see what might be going on. I went to the Bird Cage Lounge, a longtime fixture at the hotel, and was there introduced to a very imposing figure who nevertheless was most congenial named **Howell Heflin**, the then president of the Alabama Trial Lawyers Association. A wonderful relationship thus began.

After a clerkship for **U. S. District Judge Daniel H. Thomas** of Mobile, I came to Montgomery in 1967 with the firm of **Capell, Howard, Knabe & Cobbs**. A cousin of mine, **Lister Hill**, was a young partner there. Lister about that time was elected president of the Young Lawyers' Section of the Alabama State Bar. As the new kid in the office, I was instructed that I was to be the editor of the now defunct YLS newsletter. Once, on what I considered to be a slow news day, I concocted a survey of the young lawyers as to whether they would prefer to have something modeled after the Federal Rules of Civil Procedure to replace common-law pleading. I included a tear-off ballot with a place for comments. Well, it came as no surprise to me that the response was overwhelmingly positive.

So, now it is 1968 or early 1969, and I have this stack of ballots that have been mailed back to me and I do not know what to do with them. Not knowing any better, I went up to the governor's office and asked to see the governor's legal advisor. When you go into the governor's office reception area, way back in the far lefthand corner, there is a small office. The receptionist said I needed to see a Mr. Maddox and took me back to that little corner office where I was introduced to **Hugh Maddox**, with whom I would serve on this court 30 years later. Hugh was most cordial, and I delivered to him my stack of ballots. He didn't give me any great hope that anything was going to happen, but he was very polite.

The two candidates for the office of chief justice in 1970 are present today. Former **Governor John Patterson** and Howell Heflin, then an attorney in Tuscumbia, both sought the Democratic Party nomination. My father, Champ Lyons, Sr., was a wellknown physician who had passed away in 1965. During the height of the campaign, Judge Heflin

called me and said, "Champ, we'd like to run some political ads and have on the bottom of it 'Paid Political ad by Friends of Howell Heflin, Champ Lyons, Jr., Chairman.'" Well, I said, "I don't have any illusions about the reason behind this; I feel something like Nancy Sinatra, but nonetheless you may use my name." And so, there were some ads run along those lines in that campaign, and history, of course, reflects that Judge Heflin was elected to the Office of Chief Justice for the term beginning in January of 1971.

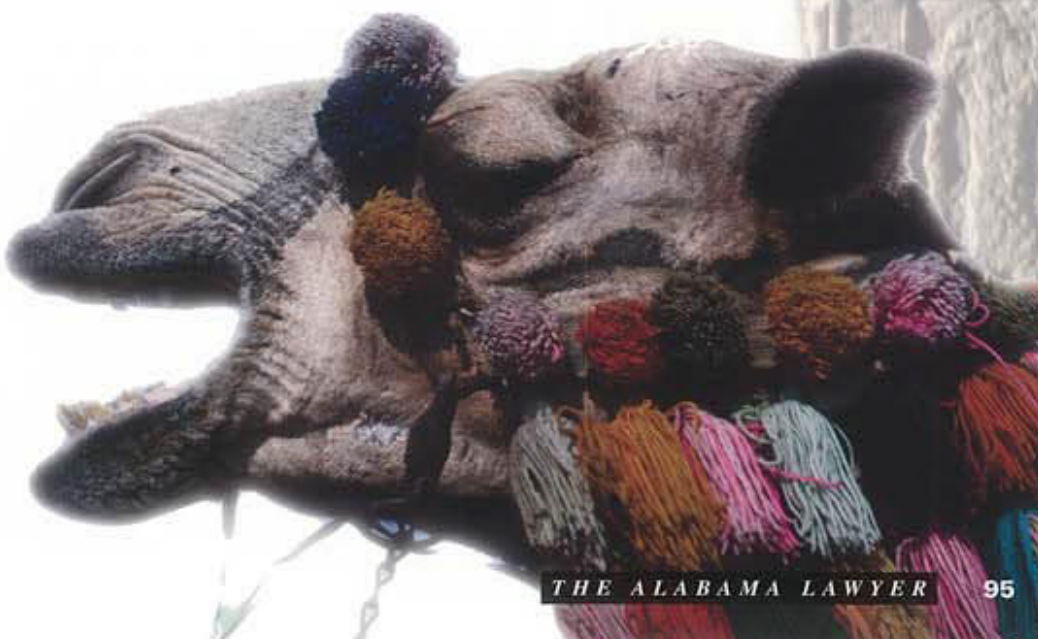
Unbeknownst to me, Judge Heflin soon was quite busy seeking authority for rule-making power from the legislature. His efforts culminated in Act No. 1311, 1971 Regular Session. The sponsors of the act were Senators Dominick, Shelby (that's our U.S. Senator Shelby), King, Vacca, Noonan (that would be Lionel "Red" Noonan of Mobile), O'Bannon, and Cook. Act No. 1311 provided that "for the purpose of simplifying practice and procedure in all civil actions in all courts in Alabama and securing the just, speedy and inexpensive determination of every action upon its merits, the supreme court shall have the power from time to time to adopt general rules, forms of process, writs, pleadings, motions, practice, and procedure in all civil actions in Alabama provided that such rules shall not abridge, enlarge, or modify the substantive right of any party." Act No. 1311 became law on September 17, 1971. The Act further provided that rules promulgated pursuant thereto would take effect six months after their adoption by the Alabama Supreme Court and all laws in conflict therewith would be of no further force or effect.

The supreme court sent out an inquiry to the bar soliciting names of people to be placed on an advisory committee to be charged with responsibility for drafting the rules. Perhaps based upon my previous efforts as editor of the YLS newsletter, I am told that several people suggested that I should serve on the committee and I was appointed as one of the original 15 members. The other members of the committee were **Oakley W. Melton, Jr.**, of Montgomery, chairman; **Timothy M. Conway, Jr.**, Birmingham; **Professor Frank Donaldson**, Birmingham; **J. Foy Guin, Jr.**, Russellville; **Circuit Judge James O. Haley**, Birmingham; **Francis H. Hare, Sr.**, Birmingham; **Circuit Judge Joseph M. Hocklander**, Mobile; **Professor Jerome A. Hoffman**, Tuscaloosa; **James L. Klinefelter**, Anniston; **Jack Livingston**, Scottsboro; **Champ Lyons, Jr.**, Montgomery; **Mayer W. Perloff**, Mobile; **Ira D. Pruitt**, Livingston; **Sam W. Pipes, III**, Mobile; and **Thomas E. Skinner**, Birmingham.

On Friday, November 5, 1971, Oakley Melton called to order the organizational meeting of the newly formed **Supreme Court Advisory Committee on Rules of Practice and Procedure**. Chairman Melton briefed the committee on its purpose and assured us that Judge Heflin would be in to talk to us later after we concluded most of our business. The minutes reflect that **Reginald T. Hamner**, who is also here today, then secretary of the Alabama State Bar, addressed the members and congratulated them on being chosen to serve on this committee, as the ultimate result of the work and accomplishments will be "far reaching and of upmost importance." Then he offered his assistance and that of his staff to the project, which was extremely helpful, because I ended up living in the bar building for about a year.

The next items were the dates and places of meetings and the possibility of setting a tentative date for completion of a draft. Oakley suggested regular meetings on the last Friday of each month for a period of nine months with a possible target date for completion of July 1972. After lengthy discussions, and from reading between the lines of these minutes, there were some skeptics who felt that it could not be done in nine months, we came to a very pivotal moment. Chairman Skinner posed the question as whether it was the intention of the committee to go all the way back with the study of these rules or whether the committee intended to pick up the 1957 rules and work from that point and update the rules in keeping with what had been done in 1957. We would have had to reinvent the wheel without the 1957 work product. Much discussion followed with comments from committeemen Conway, Hare, Pipes, Hocklander, Skinner, Guin, and others dealing with the feasibility of starting from scratch. Following the discussion, a motion was made by committeeman and then practicing attorney Guin, now retired U. S. District Judge Foy Guin, who is also here today. He moved that the committee use the work of the 1957 committee as a basis for beginning and set a nine-month period as a target date for completion and do our very best to adhere to it. Francis Hare seconded the motion and it was adopted unanimously. And so the die was cast.

Discussion about the mechanics of getting assistance then followed. **Hugh Merrill** and **Gerald Gibbons** had been contacted regarding the Law Institute's help. They said if some satisfactory arrangements could be worked out between our committee and the Institute, they might make this one of their projects. It was stressed by the members of this committee that "we need the right man (this is in context of a reporter) to help get this job done, that it would be somebody we could depend on as an accurate source of information, that is the first major decision this committee must make." Committeeman Pipes moved that we "authorize the chairman to investigate the matter and obtain the services of a competent consultant reporter and authorize the chairman to arrange for his compensation



through the Law Institute." This motion was passed. I stated at this point that I thought Dean Harrison would be ideally suited for this task. The committee then broke the rules down into various brackets and assigned members of the committee to each bracket.

Chief Justice Heflin appeared before the committee and expressed his appreciation and the appreciation of the court. He emphasized the importance of the pre-adoption and post-adoption educational program that must accompany to make it understood by the bench and bar. The issue of a nine-month deadline came up again and I remember Judge Heflin saying that he thought nine months was "an acceptable period of gestation."

I found myself blessed to be in the right place at the right time. I got a phone call from Oakley one day not long after the first meeting and he said, "Champ, I'm up here in Judge Heflin's office. Come on up here—we need to talk about finding a reporter for the committee." And I replied, "Well, Oakley, as you know, I mentioned Dean Harrison the other day and I have no other names to suggest." Oakley said, "Well, come on up here anyway." It never entered my mind as I drove from my office at Capell, Howard, Knabe & Cobbs to the Judicial Building that they were about to propose that I become the reporter. When I walked in, I was told that I would be the reporter. I was taken aback and said, "Well, I don't know that I could do that, and they said, "Well, we think you can." So probably by default, from lack of anyone else who was willing to take the task on, that is how I became the reporter to the committee. My participation would not have been possible without the cooperation of the firm of Capell, Howard, Knabe & Cobbs, which continued to pay my salary while I devoted almost all of my time to the work of the committee.

The meetings that followed were extraordinary. Time and again I saw members of our committee who had strongly identifiable interests with certain segments of the practice of law put aside those interests and cast votes for rules they considered to be fair and balanced. It was truly a heartwarming experience. We all had different personalities. We had Judge Joe Hocklander, who had a raspy voice. I remember at one point we were working on something and I said, "Well, Judge Hocklander, what do you think the clerks of the courts will think of this portion of the rules?" and he barked at me, "Champ, they can form their own damn advisory committee."

F. R. Civ. P. 52 provides that findings of fact in a non-jury case are mandatory. The original draft of Rule 52 contained a similar provision. Back then, circuit judges did not have secretaries. I got a phone call one day from Judge Hocklander and in his matter-of-fact way, he stated, "Champ, I will give you an acquittal in the felony of your choice if you will make the finding of fact in Rule 52 discretionary." And so I said, "I will bring it to the committee." Rule 52 was so modified and, fortunately, I never had to call in my chit with Judge Hocklander.

There are so many recollections. Very early on several members of the committee expressed concern that rules patterned after the federal rules could be abused in the hands of disreputable lawyers and malevolent judges. Sam Pipes then made an observation to which we referred several times thereafter concerning the utter futility of writing rules that were incapable of being misused by bad people. He said we will be sitting here 20 years from now still drafting unless we recognize this reality and draw rules that will be fair and reasonable for good lawyers and impartial judges.

Francis Hare, Sr. was one of the most unforgettable characters I ever met. His gift for the apt turn of a phrase was outstanding. Doubtless, this skill served him well during his many triumphs in the courtroom. At one point we considered whether to provide relief in Rule 25 for persons who, while an action is pending, failed to comply with the statute of non-claims (§ 43-2-350). A compromise was reached whereby the bar would not be effective when the estate of the decedent was entitled to assert any right under a contract providing for the payment of the judgment. Mr. Hare, ever the realist, saw a reasonable compromise in this approach while others complained that it did not go far enough and expressed opposition to it. Mr. Hare immediately responded to the critics by stating, "Your attitude reminds me of the drowning man in the swimming pool. As the bystanders frantically consider their options, someone says, 'Here, throw him this life preserver.' To that, the skeptic replies, 'Don't bother, it is just too small to do him any good.'" When the question was considered, the approach supported by Mr. Hare received sufficient votes and it now appears as Rule 25(a)(3).

Oakley Melton is gifted with consummate skills of chairmanship. Without his ability to place matters in perspective, to preside over the presentation of opposing views with great patience, to at all times act with utmost integrity, and to move forward to a consensus with just the right balance of civility and firmness, we could never have produced the result that is now known today as the Alabama Rules of Civil Procedure.

Our nine-month period of gestation elapsed and late on the last night before the bar convention began in Mobile in the summer of 1972, I put together about two dozen copies of the first draft of the rules of civil procedure, got in my car, drove to Mobile and handed them to Judge Heflin

PHOTO BY JIMMY MESSICK

Justice Gorman Houston (left) visits with other attendees of the ceremony honoring the 30th anniversary of the adoption of the Rules.

and other members of the committee and of the court. West Publishing took our draft and published it in pamphlet form and circulated it to the bar for comment in the period between the summer of 1972 and its adoption.

John Wilkerson, clerk of the Court of Civil Appeals, is also here today and he attended most of our meetings over the years. A few minutes ago, John handed me a copy of notes that he says he copied out of Justice James N. Bloodworth's rule book. Justice Bloodworth's notes reflect: "December 1, 1972, rules presented to the court by the committee." A picture was made on that occasion and only two members of the court at that time survive, Justice Maddox and Chief Justice Heflin. Both of them are here today. **Justice Robert B. Harwood** also was a member of that court. He is the father of **Justice Bernard Harwood**, with whom I serve, and who is also here today. Justice Bloodworth's notes reflect that there was a public hearing on December 12, 1972. According to Justice Bloodworth, the court met on December 13th, 18th, 20th, 27th, and 29th.

And then New Year's Day 1973 comes, and I am preparing to leave the next day for the resumption of a lengthy trial in Tuscaloosa that had begun in early December. Alabama played Texas in the Cotton Bowl on January 1, 1973, and I was at home anxiously awaiting the kick off. On this New Year's Day morning my telephone rang and it was Judge Heflin. He had figured out that I was headed for Tuscaloosa for several more days. Judge Heflin said, "We need to get together, Champ, and go over the these rules and work our way through questions that have arisen. How about us getting together?" And I said, "Today?" And he said, "Well, yes." And I said, "Oh, that would be great (what could I say?)." When I suggested that I would simply meet him at his office, I think he must have had some concerns about whether I would show up. Judge Heflin responded, "No, I'll come pick you up." Soon thereafter, my doorbell rang and there stood Judge Heflin. We spent Monday, January 1st, going over the changes. Thereafter he dropped me back off at my house where I learned that the final score in the Cotton Bowl was Texas 17, Alabama 13. Judge Heflin had done me a favor.

On Tuesday, January 2nd, the changes that Judge Heflin and I had gone over were incorporated, and according to Judge Bloodworth's notes, "January 3, 1973, the Court adopted the new rules as of 2:43 p.m. CST by a vote of 9 to nothing to take effect July 3, 1973." As you will recall, Act No. 1311 provided that the rules would not take effect until six months after promulgation. That is why we are here celebrating this anniversary on July 3, 2003, on the eve of the 4th of July.

We then begin the educational portion, and Oakley and I traveled all over the state. We probably made as many speeches as somebody running for governor. The one seminar I recall most vividly coincided with the circuit judges' meeting in Birmingham at the Cumberland Law School. Oakley and Judge Haley and I were on the platform in that auditorium in Cumberland all that day. Judge Haley passed away one year ago this spring. He lent so much credibility to the rules because he could address the circuit judges as "one of them." Having him vouch for what we then called the "new rules" was huge.

We answered questions at that seminar all day long. Seated on the front row was an intimidating figure, Judge J. Russell McElroy. Judge McElroy was the dean of the circuit judges at that time. He was in a different league, and nobody dared address him other than as "Judge McElroy." He sat there with a series of questions that I am sure he had spent hours fine tuning. Every few minutes, one of us would have to say, "Yes, Judge McElroy, what is your question?" At the end of the day, U.S. District Judge and former Alabama **Circuit Judge Seybourne H. Lynne** conducted a live pretrial conference. At the end of the conference he asked for questions. Judge McElroy raised his hand and posed a typically detailed question. I thought, "Oh me, how is this going to come out?" The first two words out of Judge Lynne's mouth just sort of let the air out of the balloon. Judge Lynne paused and began with the words, "Well, Russell..." and you could you hear a pin drop. Then Judge Lynne thoroughly answered his question. That was the beginning of the end of resistance.

After the rules were promulgated, I went to see Judge Eugene W. Carter, who was then the presiding circuit judge in Montgomery and a very gentle man as well as being a gentleman. I was trying to put the best face possible on the situation and I said, "Well, Judge Carter, you know these rules are modeled after the federal rules so it's not like we're offering you something entirely brand new." He smiled and said, "Champ, you must realize that I went on the bench before the Federal Rules of Civil Procedure were adopted in 1938." I thought to myself, you've got a lot to learn—and he did, and he was a good sport about it.

To the extent today that I, as a member of this court, enjoy an elevated view of the Alabama legal landscape, I am standing on the shoulders of giants. Thank you, Judge Heflin, because the people of this state are the beneficiaries of your vision and leadership, and thank you, Judge Heflin, for giving me the opportunity of a lifetime. ■

Justice Champ Lyons, Jr.

Justice Champ Lyons, Jr. received an A.B. from Harvard University and an LL.B. from the University of Alabama. After completing law school, Justice Lyons clerked for a United States District Judge. He practiced in Montgomery for nine years and in Mobile for 21 years. He was appointed to fill a vacancy on the Supreme Court of Alabama in March 1998, and in November 2000, was elected to a full term. Justice Lyons served as chair of the Supreme Court of Alabama Standing Committee on Rules of Civil Procedure until his appointment to the supreme court. He also served as chair of the Supreme Court's Advisory Committee on Civil Rules of Practice and Procedure for District Courts. His treatise on civil procedure, *Alabama Practice*, published by West Publishing Co., is now in its third edition. Justice Lyons is a member of the Alabama Law Institute, the American Law Institute and a Fellow of the American Bar Foundation. He is a former Alabama commissioner for the National Conference of Commissioners on Uniform State Laws and a former president of the Mobile Bar Association, the Mobile Bar Foundation and the Harvard Alumni Association.

ABA TECHSHOW® 2004

PRESENTED BY THE ABA LAW PRACTICE MANAGEMENT SECTION

MARKETING • MANAGEMENT • TECHNOLOGY • FINANCE

Save an additional $100 by signing up through program promoters*

The Alabama State Bar Program Promoter Code is PP6. For more information on TechShow 2004, call Laura Calloway at (334) 269-1515 or go to *www.techshow.com* to register online.

The World's Premier Legal Technology Conference & Expo

March 25-27, 2004
Sheraton Chicago Hotel & Towers
Chicago, Illinois

Eight Exciting Tracks

- Litigation & Electronic Discovery
- Wireless
- Security & Privacy
- Knowledge Management
- Solo & Small Firm
- Strategies & Best Practices
- Advanced IT
- NEW Real Property, Probate & Trust
- And More...

FREE ACCESS TO EXHIBIT HALL

ABA TECHSHOW TRAINING INSTITUTE NEW

WWW.TECHSHOW.COM

Keynote: Visions of the Future

Lou Andreozzi, President and CEO of LexisNexis North American Legal Markets, and Mike Wilens, President of West, will share their respective visions of the future role of legal technology in day-to-day practice in a joint keynote address.

Register online at www.techshow.com.

FEES	Early Bird Fee (On or Before February 26, 2004)	Regular Registration Fee (After February 26, 2004)
Full Registration*	$695	$795
Additional Full Registration**	$595	$695
Full Registration with Program Promoters Discount	$595	$695
One Day Sessions Only	$295	$345
Exhibits Only	$free	$free

*Full Registration includes access to all educational programs and to the exhibit floor for the entire event.

** Additional Full Registration means two or more full registrations from the same organization when submitted together.

The A.R.C.P.: Their Promulgation and Implementation

BY OAKLEY MELTON, JR.

Participating in the adoption of the Rules are the committee members, who researched and drafted them.

Thirty years later, some of the original committee members were on hand for the anniversary celebration.

The history of the promulgation and implementation of the new Alabama Rules of Civil Procedure is certainly most interesting. I still call them the new Rules, even though it's been 30 years since they were originally adopted by the Alabama Supreme Court. It was truly the highlight of my legal career to serve as chairman of the committee, which researched and drafted the Rules and to work with the fine lawyers and judges and law professors on the committee. It was a very balanced committee, as we had practicing lawyers, experienced judges and knowledgeable law professors on the committee. What we did actually changed and modernized the procedural system of civil justice in Alabama.

The 1957 legislature first considered this project when it appointed a **Commission for Judicial Reform**. The work product of the commission passed the House of Representatives by an overwhelming vote, but when the bill went to the Senate, there was a very small number of senators who were adamantly opposed to the bill. Their opposition in some instances was that every Alabama lawyer would have to forget all he knew about civil pleading and procedure, and lawyers would have to buy a lot of new books, and educate themselves all over again. The opposition of a few senators ultimately resulted in the defeat of the bill. However, the work of the commission and the legislative consideration did create public interest in judicial reform, and this led to Chief Justice Howell Heflin and the Alabama Supreme Court appointing our Advisory Committee in 1971. We worked on a regular basis for ten months, and the first preliminary draft of the new Rules was issued in August 1972. Such draft was printed by West Publishing Company and distributed to every lawyer, every judge, every law school, and the Alabama Law Institute for review and comments and suggestions. Thereafter, the new Rules were eventually adopted and became effective on July 3, 1973.

There are really two men who are primarily entitled to the credit for such reform and the modernization of the Alabama judicial system. **Chief Justice Howell Heflin** first organized and provided the leadership for the adoption of the judicial article to our Alabama constitution. This constitutional amendment made Alabama the most modern judicial system in America. He then followed that up with the reform of the Alabama Rules of Civil Procedure. Some of you oldtimers will remember the old common law system in Alabama. You started a lawsuit with a complaint, then you got a demurrer and then you got a plea, then you got a demurrer to the plea, then you got a replication, then you got a joinder, then you got a surrejoinder and a rebutter, and a surrebutter. Pleadings alone would sometimes go on for months and months, and even years, before the parties would eventually join issue for a trial. This awkward, technical, burdensome system had been going on in Alabama for a 100 years or more, and yet you can't imagine the opposition we ran into in trying to change and reform such civil pleading and practice procedure. It was really interesting, but in a way it was unreal, to see and hear some of the reasons that people would oppose such change. Some opposed it because they would have to go to Birmingham to attend a seminar to learn about the new system. They said, "I will have to go to a seminar—that's gonna' cost me a lot of money."

I'll never forget the meeting in the office of Chief Justice Heflin when he and I invited Champ to come and meet with us and when we sort of "hot boxed" him into agreeing to be the reporter for the committee. As a result of his acceptance of the reporter's job, we now know what a wonderful job he did and how outstanding his work was performed. Not only were the new rules adopted, but Champ then wrote and published a textbook on the rules. Such book, in two volumes, is now in its third edition.

In the first edition, West Publishing Company asked Chief Justice Heflin to write a forward for the book. The chief had this to say in that first forward:

"July 3, 1973, was the historic date on which the Alabama Rules of Civil Procedure began governing trial practice and procedure in Alabama. This innovative move forward in the administration of justice in our state has occurred because of the insistence and urgence of forward-looking members of the Alabama bench, bar and legislature. The mandate of the rules is stated succinctly: "[The rules] shall be construed to secure the just, speedy, and inexpensive determination of every action..."

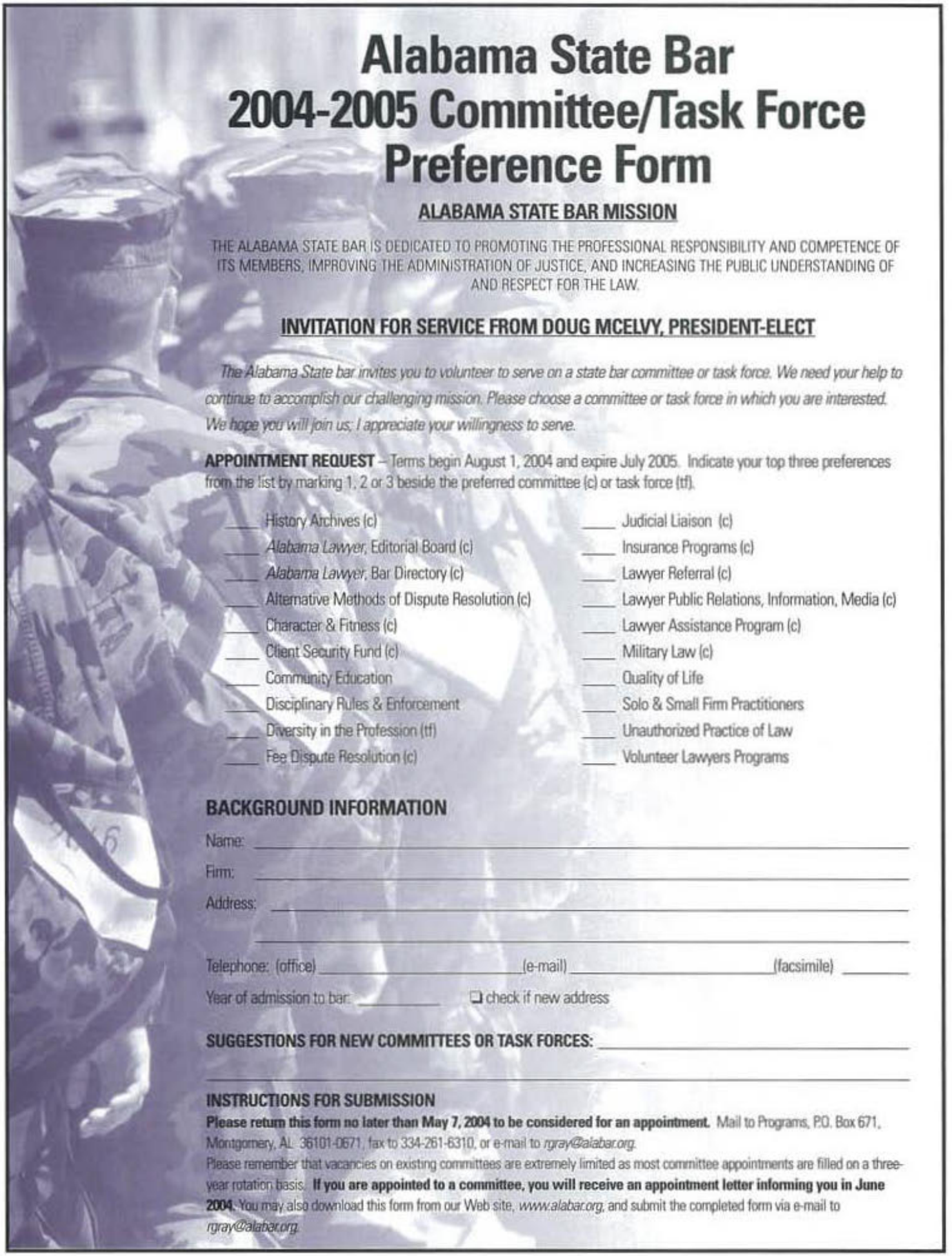
"However, the rules, committee comments, forms and all the many educational efforts cannot begin to give the practicing attorney the information required for day-to-day practice under the new rules. A practice book treating such problems is needed. **Champ Lyons, Jr.**, has written such a book.

"No one is more eminently qualified for this task than Mr. Lyons. He served as Reporter for the Advisory Committee on Civil Practice and Procedure and is now serving as Reporter for the Standing Committee on the Alabama Rules of Civil Procedure. In his capacity as Reporter for the Advisory Committee, he was the chief draftsman of the Committee Comments which accompany each of the rules in the ARCP. In order to accomplish a task of this magnitude, he took a leave of absence from his law firm to devote his full energies to this task. He has also participated in all the major educational efforts held around the state attendant to the inception of the new rules and has spoken at many of the local educational efforts sponsored by the various circuit judges in this state.

"We of the Supreme Court of Alabama go on record that such a book will be of invaluable aid to the smooth transition to the practice under the new Alabama Rules of Civil Procedure. I speak for both the Bench and Bar of Alabama in expressing appreciation to Mr. Lyons for having such a useful book so quickly available to our Bench and Bar. I also want to express our appreciation to his law firm, **Capell, Howard, Knabe & Cobbs, P.A.**, of Montgomery, for exemplifying the highest qualities of professionalism in allowing the absence of Mr. Lyons from his practice for almost two years so that the administration of justice in Alabama might benefit from the influence of this scholarly attorney's unusual blend of intellectual excellence and plain hard work." ■

Oakley Melton, Jr.

Oakley W. Melton, Jr. is the senior partner and president of Melton, Espy & Williams, P.C. in Montgomery. He is a past president of the Alabama State Bar and the Montgomery County Bar Association. He has served on numerous state bar committees and is the recipient of many awards. Melton is a graduate of the University of Alabama and the University's School of Law. He is a member of the MCBA, the ASB and the American Bar Association.



Alabama State Bar 2004-2005 Committee/Task Force Preference Form

ALABAMA STATE BAR MISSION

THE ALABAMA STATE BAR IS DEDICATED TO PROMOTING THE PROFESSIONAL RESPONSIBILITY AND COMPETENCE OF ITS MEMBERS, IMPROVING THE ADMINISTRATION OF JUSTICE, AND INCREASING THE PUBLIC UNDERSTANDING OF AND RESPECT FOR THE LAW.

INVITATION FOR SERVICE FROM DOUG MCELVY, PRESIDENT-ELECT

The Alabama State bar invites you to volunteer to serve on a state bar committee or task force. We need your help to continue to accomplish our challenging mission. Please choose a committee or task force in which you are interested. We hope you will join us; I appreciate your willingness to serve.

APPOINTMENT REQUEST – Terms begin August 1, 2004 and expire July 2005. Indicate your top three preferences from the list by marking 1, 2 or 3 beside the preferred committee (c) or task force (tf).

____ History Archives (c)
____ *Alabama Lawyer*, Editorial Board (c)
____ *Alabama Lawyer*, Bar Directory (c)
____ Alternative Methods of Dispute Resolution (c)
____ Character & Fitness (c)
____ Client Security Fund (c)
____ Community Education
____ Disciplinary Rules & Enforcement
____ Diversity in the Profession (tf)
____ Fee Dispute Resolution (c)
____ Judicial Liaison (c)
____ Insurance Programs (c)
____ Lawyer Referral (c)
____ Lawyer Public Relations, Information, Media (c)
____ Lawyer Assistance Program (c)
____ Military Law (c)
____ Quality of Life
____ Solo & Small Firm Practitioners
____ Unauthorized Practice of Law
____ Volunteer Lawyers Programs

BACKGROUND INFORMATION

Name: _____

Firm: _____

Address: _____

_____

Telephone: (office) _____ (e-mail) _____ (facsimile) _____

Year of admission to bar: _____ ❑ check if new address

SUGGESTIONS FOR NEW COMMITTEES OR TASK FORCES: _____

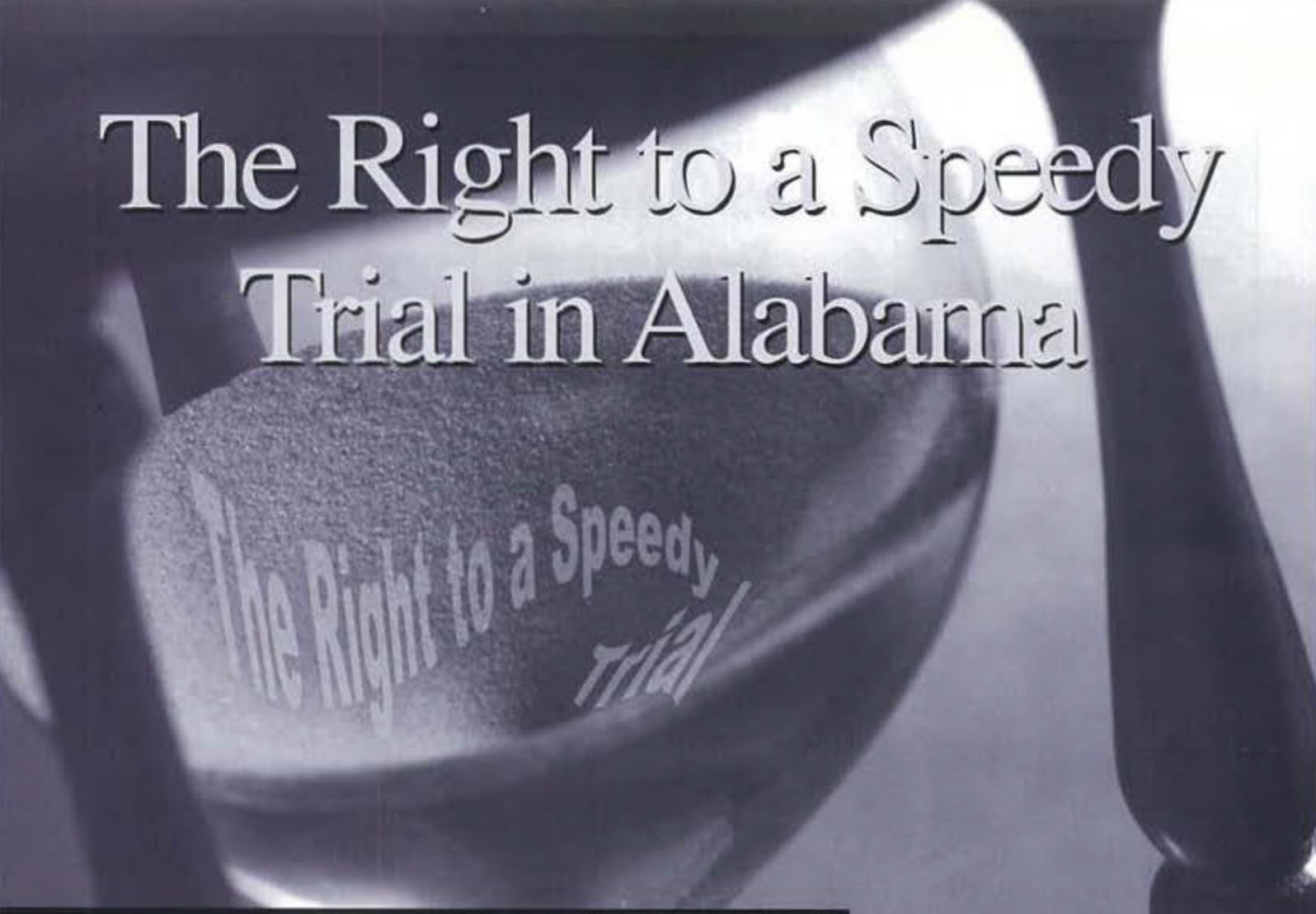
_____

INSTRUCTIONS FOR SUBMISSION

Please return this form no later than May 7, 2004 to be considered for an appointment. Mail to Programs, P.O. Box 671, Montgomery, AL 36101-0671, fax to 334-261-6310, or e-mail to *rgray@alabar.org*.

Please remember that vacancies on existing committees are extremely limited as most committee appointments are filled on a three-year rotation basis. **If you are appointed to a committee, you will receive an appointment letter informing you in June 2004.** You may also download this form from our Web site, *www.alabar.org*, and submit the completed form via e-mail to *rgray@alabar.org*.

The Right to a Speedy Trial in Alabama



BY WILLIAM L. PFEIFER, JR. AND G. RAY KOLB, JR.

Introduction

As funding shortages in the Alabama legal system continue to create greater backlogs in the disposition of criminal cases, the issue of whether a defendant has been denied the right to a speedy trial will likely be addressed by the courts more and more frequently. This article reviews the factors involved in determining whether a violation of a defendant's right to a speedy trial has occurred under Alabama law. While certain federal court opinions are addressed, this article does not deal directly with the particular speedy trial issues that can arise only in federal court prosecutions. Rather, the focus is on speedy trial issues that arise in Alabama state courts.

Background

A defendant's right to a speedy trial is intended to lessen any potential incarceration before a trial, to reduce any impairment of liberty if a defendant is out on bail, and to defuse any disruption in a defendant's attempt to defend himself in any criminal proceeding.[1] In Alabama, a defendant's right to a speedy trial derives from both the Sixth Amendment to the United States Constitution and Article I, Section 6 of the Alabama Constitution. Although the United States Supreme Court affirmed the right to a speedy trial as a fundamental right imposed at the state level by the Due Process Clause of the Fourteenth Amendment in *Klopfer v. North Carolina*,[2] the Court did not provide any real guidance on how to determine whether or not there had been a denial of the right to a speedy trial until the case of *Barker v. Wingo*, where it established a four-prong balancing test.[3]

In *Barker v. Wingo*, the murder trial of the defendant, Willie Barker, was continued 16 times before finally proceeding to trial. Barker's first trial ended in a hung jury. Barker's second trial ended with a conviction, but the conviction was reversed by the Kentucky Court of Appeals. The third trial resulted in another conviction, but the conviction was again reversed by the appellate court. A fourth trial resulted in another hung jury. In his fifth trial, Barker was convicted of murdering one victim, and then convicted of murdering another victim in a sixth trial. The two murders happened in 1958. Barker was not convicted until 1962.

After providing an analysis of the importance of the right to a speedy trial to both a defendant and society, the United States Supreme Court rejected the proposal that a trial must be offered within a specified time period. The Court found that there was no constitutional basis for quantifying the speedy trial right into a specified number of months or days.[4] At the same time, the Court rejected the argument that a defendant must assert the right to a speedy trial before the right exists, holding that there cannot be a presumption that a fundamental right was waived merely by inaction by the defendant.[5] Rather, the Court found that a balancing test must be employed "in which the conduct of both the prosecution and the defendant are weighed."[6] This balancing test consists of four factors: the length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.[7]

The Length of the Delay

The first *Barker v. Wingo* factor is the length of the delay in the prosecution of the case. A court is not required to conduct a balancing of the four factors unless the length of the delay is presumptively prejudicial.[8] In general, the length of the delay is measured from the date of arrest or indictment to the date of trial.[9]

A defendant's Sixth Amendment protection is triggered by the beginning of a criminal prosecution.[10] In *Marion v. United States,* the Supreme Court held that the Sixth Amendment speedy trial guarantee commences upon the filing of an indictment, information, or other formal charge, or when a defendant "has been arrested and held to answer."[11] In *Doggett v. United States,* the Court held that the Sixth Amendment speedy trial protection attached when the defendant was indicted, even though he was not arrested and was apparently unaware of the indictment until more than eight years later.[12] In *Dillingham v. United States*[13], the Court held that the Sixth Amendment speedy trial protection attached when the defendant was arrested and released on bond, even though he was not indicted until 22 months later.

In Alabama, by statute, a prosecution is commenced by the finding of an indictment, the issuing of a warrant, or by the binding over of the defendant to the grand jury.[14] Commencement of the prosecution is the event that triggers the defendant's right to a speedy trial.[15] Thus, a pre-arrest delay (between the time of the alleged crime and the formal commencement of prosecution) is not considered in evaluating whether there has been a denial of the right to a speedy trial, though that delay could give rise to due process issues.[16] Further, in cases involving a retrial, the time period is measured from "the action occasioning the retrial."[17]

Alabama courts have struggled with the issue of what constitutes an unreasonable delay in the prosecution of a case. In *Steeley v. City of Gadsden,*[18] the Alabama Court of Criminal Appeals appeared to adopt the reasoning of the California courts in *Serna v. Superior Court (People)* to address this issue.[19] In *Serna,* the California Supreme Court stated that the statute of limitations for the offense should be "the touchstone for

measuring the reasonableness of a delay between complaint and arrest" because the statute of limitations "reflect a legislative construction of the speedy trial guarantee."[20] In *Steeley*, the Alabama Court of Criminal Appeals agreed with this reasoning, and found that a nearly 14-month delay in the prosecution of a misdemeanor case (which has a 12-month statute of limitations)[21] was presumptively prejudicial.[22] This is consistent with the Supreme Court's analysis in *Barker v. Wingo*, which stated, "[t]o take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge."[23]

Despite appearing at that time to adopt the statute of limitations approach as a guideline to determining what length of time would be presumptively prejudicial, opinions since *Steeley* have ignored that issue or whether the offense was a misdemeanor or felony. The cases often appear unclear and somewhat inconsistent in their reasoning as to why one time period raises a presumption of prejudice while another similar time period does not. Some cases provide no analysis and simply reference time periods cited in other opinions before making a conclusion that a time period is or is not presumptively prejudicial.[24] In *Campbell v. State*, the Alabama Court of Criminal Appeals even took the unusual step of weighing all four of the *Barker v. Wingo* factors to determine whether the length of the delay was presumptively prejudicial.[25] The standard now has simply become that the courts will make the determination on a case-by-case basis.[26]

For example, in *Beaver v. State*, a delay of 16 months was presumptively prejudicial[27]; 19 months was presumptively prejudicial in *Ingram v. State*[28]; 26 months was presumptively prejudicial in *Mansel v. State*[29]; and a delay of over 26 months resulted in a presumption of prejudice in *Broadnax v. State*[30]. A delay of 60 months was presumptively prejudicial in *Ex parte Taylor;*[31] 56 months created a presumption of prejudice in *Wooden v. State;*[32] and a 42-month delay was presumptively prejudicial in *Benefield v. State*[33]. However, in *Ex parte Apicella*, a 14-month delay was not presumptively prejudicial;[34] 26 months was not presumptively prejudicial in *Campbell v. State*;[35] and 19 months on a retrial was not presumptively prejudicial in *Weaver v. State*, despite being preceded by a 24-month delay in the first trial.[36]

Recently, in *Clancy v. State*, the court of criminal appeals addressed a 19-month delay and attempted to determine whether it was presumptively prejudicial to the defendant.[37] The court cited a number of its own previous rulings where a similar delay had created a presumption of prejudice in some cases, but had not created a presumption of prejudice in others. Unable to conclude whether Clancy's 19-month delay was presumptively prejudicial, the court simply decided to go ahead and review the

remaining three factors "in an abundance of caution."[38] However, even though the *Clancy* court did not make a specific finding on the first factor, it should be remembered that other rulings have required a finding that the length of the delay is presumptively prejudicial before requiring an analysis of the other three *Barker v. Wingo* factors.[39]

Reason for the Delay

If a presumption of prejudice has been established in the length of the delay, the second factor to be weighed is the reason for the delay. Not all presumptively prejudicial delays constitute a denial of the right to a speedy trial. However, the burden of justifying any delay rests with the State.[40] The reason for the delay is particularly important in this weighing process, as it involves an assignment of responsibility for the delay. For example, in *Barker v. Wingo*, the supreme court found that the defendant was not deprived of his right to a speedy trial because the record demonstrated he did not want a speedy trial, and had in some ways at least passively contributed to the delay.[41]

Deliberate delay by the State will clearly result in weighing this factor against the State.[42] Some Alabama cases have broadly stated that a defendant must show "purposeful and deliberate delay by the prosecuting authority" to prevail on this issue.[43] However, this phrasing is a somewhat misleading statement of the burden on the defendant. In *Barker v. Wingo*, the supreme court stated that in addition to deliberate prosecutorial delays designed to hamper the defense, neutral reasons such as negligence or overcrowded courts should also be weighed against the State (though weighted less heavily).[44] Other Alabama cases have made it clear that although mere inaction by the State is weighed less heavily against the State than deliberate prosecutorial delay,[45] it still must weigh against the State because the ultimate responsibility for such circumstances is on the government.[46] The State has "a constitutional duty to make a diligent, good-faith effort to bring the defendant to trial."[47] In *Hayes v. State*, the Court of Criminal Appeals held that the State's failure to make a good faith effort to locate a defendant or take him into custody constituted a deliberate delay for purposes of determining whether or not the defendant had been deprived of his right to a speedy trial.[48] In *Clopton*, where the defendant was unaware of his indictment until his subsequent arrest three years later, the Alabama Supreme Court held that the defendant was denied his constitutional right to a speedy trial because the State did not make a good-faith effort to find him.[49]

The State is allowed some leeway for delay in situations where they are actively attempting to secure essential witnesses. The courts have held that a missing witness is a valid reason to justify an appropriate delay, and that delays that would otherwise be excessive may be "tolled" by the unavailability of an essential prosecution witness.[50] However, the State needs to show that a good-faith, diligent effort has been made to find the witness.[51]

Not surprisingly, if a defendant's own actions are primarily responsible for any delays in his case reaching trial, then the courts tend to look with disfavor on a defendant's subsequent argument that the delay denied him his right to a speedy trial. "[D]elays occasioned by the defendant or on his behalf are excluded from the length of delay and are heavily counted against the defendant in applying the balancing test of *Barker*."[52] For example, in *Turner v. State*, there was a 46-month delay between the defendant's arrest and trial.[53] The court pointed out that although the delay was presumptively prejudicial, the reasons for the delay were primarily attributable to the defendant's own actions. After his arraignment, Turner filed more than 30 motions; before the original trial date, it was continued by agreement between both sides; the defendant asked for another continuance which was granted; the initial indictment was dismissed after a successful motion by the defendant; and after he was re-indicted a year later, the defendant again moved for, and was granted, a continuance.[54] This, among other factors, was weighed against Turner in determining he was not denied his right to a speedy trial, despite the excessive delay.

The Defendant's Assertion of the Right

The third factor to be weighed is a defendant's assertion of the right to a speedy trial. The Court in *Barker v. Wingo* held that a defendant does not waive the right to a speedy trial by failing to make a specific request for one.[55]It is clearly established that a defendant has no duty to bring himself or herself to trial.[56] However, when a defendant does not affirmatively assert this right, the failure to do so is a factor that is weighed against him.[57] As the U.S. Supreme Court stated in *Barker v. Wingo*, the "failure to assert the right will make it difficult for a defendant to prove he was denied a speedy trial."[58]

Asserting the right to a speedy trial as quickly and as often as possible is the clearest way for this factor to weigh in a defendant's favor. "Repeated requests for a speedy trial weigh heavily in favor of an accused."[59] In *Roberson v. State*, the Court of Criminal Appeals remarked favorably that the defendant demanded his right to a speedy trial on four different occasions (although the Court found no violation of the defendant's constitutional right to a speedy trial for other reasons).[60] In *Clancy v. State*, the defendant filed a motion to dismiss his indictment on speedy-trial grounds two weeks before his *second* trial. The Alabama Court of Criminal Appeals stated this factor weighed against the defendant and that "[t]he fact that the [defendant] did not assert his right to a speedy trial sooner 'tends to suggests that he either acquiesced in the delays or suffered only minimal prejudice prior to that date."[61] And in *Barker v. Wingo*, the Court noted that the balancing test permits a court "to attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay without adequately informing his client, or from a situation in which no counsel is appointed. It would also allow a court to weigh the frequency and force of the objections as opposed to attaching significant weight to a purely pro forma objection."[62]

The Prejudice to the Defendant

The fourth and final factor to be weighed in a speedy trial analysis is any prejudice to a defendant that may have resulted from the delay. As stated previously, there are three primary interests to be protected by a defendant's constitutional right to a speedy trial: preventing excessive pretrial incarceration, limiting any impairment's on a defendant's liberty while out on bail, and reducing the chances that a defendant's ability to defend himself will be impaired.[63] The *Barker* Court considered the last of these to have the most serious potential for prejudice "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system."[64]

A showing of prejudice to the defendant is not actually essential to finding there has been a deprivation of a defendant's Sixth Amendment right to a speedy trial.[65] The Eleventh Circuit Court of Appeals held in *Ringstaff v. Howard* that it is not necessary for a defendant to show actual prejudice if the length of the delay, the reason for the delay, and the defendant's assertion of the right to a speedy trial weigh heavily against the State.[66] However, there is also some reluctance by the courts to find a speedy trial deprivation where no prejudice exists.[67]

In *Barker v. Wingo*, the Supreme Court provided examples of ways in which a defendant may be prejudiced by the delay in prosecution. The Court indicated that witnesses may die or disappear during a delay, and witnesses may be unable to accurately recall events. Further, the Court stated:

> The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent. Finally, even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility.[68]

In addition to the forms of prejudice described in *Barker v. Wingo*, the Alabama appellate courts have broadened the scope to also include the adverse effects on parole consideration, eligibility for work release and other prison programs, and the particular place of confinement.[69]

Conclusion

No particular factor is conclusive in determining whether a defendant has been denied his right to a speedy trial, and the balancing of the factors can be a

difficult process because the guidelines are not subject to strict definition. The Supreme Court summarized the situation best by stating:

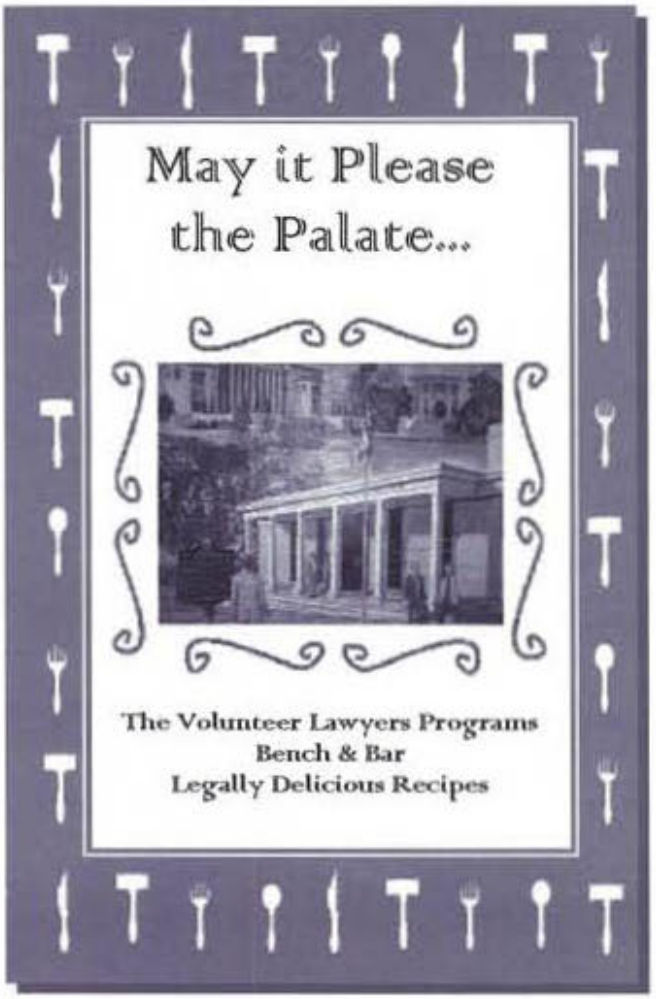
> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.[70] ■

Endnotes

1. *United States v. MacDonald*, 456 U.S. 1, 8, 102 S.Ct. 1497, 1502, 71 L.Ed. 696 (1982).
2. *Klopfer v. North Carolina*, 386 U.S. 213 (1967).
3. *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).
4. Id. at 523.
5. Id. at 525-528.
6. Id. at 530.
7. Id.
8. 407 U.S. 514, 530.
9. *Turner v. State*, [Ms. CR-99-1568, November 22, 2002], ___ So. 2d ___ (Ala. Crim. App. 2002).
10. *Ex Parte Carrell*, 565 So.2d 104 (Ala. 1990), cert. denied, 498 U.S. 1040, 112 L.Ed. 2nd 701, 111 S.Ct. 712 (1991).
11. 404 U.S. 307, 321 (1971).
12. 505 U.S. 647 (1992).
13. 423 U.S. 64 (1975).
14. *Alabama Code* § 15-3-7 (1975).
15. *Steeley v. City of Gadsden*, 533 So. 2d 671 (Ala. Crim. App. 1988); *Mansel v. State*, 716 So. 2d 234 (Ala. Crim. App. 1997).
16. *D.B. v. State*, [Ms. CR-01-0616, January 7, 2003] ___ So. 2d ___ (Ala. Crim. App. 2003).
17. *Weaver v. State*, 763 So. 2d 972, 978 (Ala. Crim. App. 1998), citing *Nickerson v. State*, 629 So. 2d 60, 62-63 (Ala. Crim. App. 1993). See also *Clancy v. State*, [Ms. CR-00-1689, June 27, 2003], ___ So. 2d ___ (Ala. Crim. App. 2003).
18. 533 So. 2d 671 (1988).
19. 40 Cal.3d 239, 219 Cal.Rptr. 420, 707 P2d 793, 806 (1985), cert. denied, 475 U.S. 1096, 106 S.Ct. 1493, 89 L.Ed.2d 894 (1986).
20. 707 P.2d at 802, 801.
21. Under *Alabama Code* § 15-3-2 (1975), the prosecution of a misdemeanor offense must commence within 12 months of the date the offense is alleged to have occurred. *Alabama Code* § 15-3-1 (1975) provides that prosecution of most felony offenses must be commenced within three years of the commission of the offense.
22. *Steeley*, 533 So. 2d 671.
23. *Barker*, 407 U.S. at 531.
24. See, e.g., *Mansel v. State*, 716 So. 2d 234 (Ala. Crim. App. 1997).
25. *Campbell v. State*, 709 So. 2d 1329 (Ala. Crim. App. 1997).
26. *Payne v. State*, 683 So. 2d 440, 451 (Ala. Crim. App. 1995).
27. 455 So. 2d 253 (Ala. Crim. App. 1984).
28. 629 So. 2d 800 (Ala. Crim. App. 1993).
29. 716 So. 2d 234 (Ala. Crim. App. 1997).
30. 455 So. 2d 205 (Ala. Crim. App. 1984).
31. 720 So. 2d 1054 (Ala. Crim. App. 1988).
32. 822 So. 2d 455 (Ala. Crim. App. 2000).
33. 726 So. 2d 286 (Ala. Crim. App. 1998).
34. 809 So. 2d 865 (Ala. 2001).
35. *Campbell v. State*, 709 So. 2d 1329 (Ala. Crim. App. 1997).
36. 763 So. 2d 972 (Ala. Crim. App. 1998).
37. *Clancy v. State*, [Ms. CR-00-1689, June 27, 2003], ___ So. 2d ___ (Ala. Crim. App. 2003); 2003 Ala. Crim. App. LEXIS 169.
38. Id.
39. *Barker v. Wingo*, 407 U.S. at 530; *Zumbado v. State*, 615 So. 2d 1223, 1234 (Ala. Crim. App. 1993).
40. *Barker v. Wingo*, 407 U.S. at 531.
41. Id. at 534-535.
42. *Ex Parte Clopton*, 656 So.2d 1243 (Ala. 1995); *Wheat v. State*, 662 So.2d 1218 (Ala. Crim. App. 1995).
43. *Pierson v. State*, 677 So. 2d 830 (Ala. Crim. App. 1996); *Snyder v. State*, [Ms. CR-99-1356, October 31, 2003], ___ So. 2d ___ (Ala Crim. App. 2003).
44. 407 U.S. at 531.
45. *Smith v. State*, 409 So. 2d 958 (Ala. Crim. App. 1981).
46. *Taylor v. State*, 429 So. 2d 1172, cert. denied, 464 U.S. 950 (1983).
47. *Steele v. State*, 542 So. 2d 1309 (Ala. Crim. App. 1988), citing *Smith v. Hooey*, 393 U.S. 374, 383, 89 S. Ct. 575, 579, 21 L.Ed.2d 607 (1969).
48. *Hayes v. State*, 487 So. 2d 987 (Ala. Crim. App. 1986).
49. *Ex Parte Clopton*, 656 So.2d 1243 (Ala. 1995). See also *Ex Parte Carrell*, 567 So.2d 104 (Ala. 1990).
50. *Austin v. State*, 562 So. 2d 630 (Ala. Crim. App. 1989), citing *United States v. Buffalino*, 576 F.2d 446, 453, (2nd Cir. 1978); *Barker v. Wingo*, 407 U.S. at 531, 92 S.Ct. at 2192; and *United States v. Avalos*, 541 F.2d 1100, 1114 (5th Cir. 1976).
51. *Austin*, 562 So. 2d 630 (Ala. Crim. App. 1989), citing *United States v. Lawson*, 545 F.2d 557
52. *Zumbado v. State*, 615 So.2d 1223, 1234 (Ala. Crim. App. 1993), quoting *McCallum v. State*, 407 So.2d 865, 868 (Ala. Crim. App. 1981), quoting in turn *Walker v. State*, 386 So.2d 762, 763 (Ala. Crim. App), rev.d in part and vacated in part, 860 F.2d 1091 (11th Circuit 1988).
53. *Turner v. State*, 2002 Ala. Crim. App. LEXIS 245 (2002).
54. Id.
55. 407 U.S. 514, 528.
56. *Barker v. Wingo*, 407 U.S. at 528; *Smith v. State*, 409 So. 2d at 962.
57. *Bailey v. State*, 375 So.2d 519 (Ala. Crim. App. 1979).
58. *Barker v. Wingo*, 407 U.S. at 532.
59. *Kelley v. State*, 568 So. 2d 405, 410 (Ala. Crim. App. 1990).
60. *Roberson v. State*, [Ms. CR-00-2405, June 28, 2002], ___ So. 2d ___ (Ala. Crim. App. 2002); 2002 Ala. Crim. App. LEXIS 153 (2002).
61. *Clancy v. State*, [Ms. CR-00-1689, June 27, 2003], ___ So. 2d ___ (Ala. Crim. App. 2003); 2003 Ala. Crim. App. LEXIS 169, 184, quoting *Benefield v. State*, 726 So.2d 286, 291 (Ala. Crim. App. 1997) (quoting *Archer v. State*, 643 So.2d 597, 599 (Ala. Crim. App. 1991), quoting in turn *Lewis v. State*, 469 So.2d 1291, 1294 (Ala. Crim. App. 1984).
62. 407 U.S. 514, 529
63. *Barker v. Wingo*, 407 U.S. at 532.
64. Id. (footnote omitted).
65. *Moore v. Arizona*, 414 U.S. 25, 26, 94 S.Ct. 188,189, 38 L.Ed.2d 183 (1973).
66. 885 F.2d 1542, cert. denied, 496 U.S. 927 (1989).
67. *Broadnax v. State*, 455 So. 2d 205 (Ala. Crim. App. 1984); *United States v. Brown*, 600 F.2d 248, 254 (10th Cir., 1979), cert. denied, 444 U.S. 917, 100 S.Ct. 233, 62 L.Ed.2d 172 (1979).
68. 407 U.S. 514, 532-533.
69. *Ex Parte Archer*, 643 So.2d 601 (Ala. 1992); *Ex Parte Slaughter*, 377 So.2d 632 (Ala. 1979); and *Austin v. State*, 562 So.2d 630 (Ala. Crim. App. 1989).
70. 407 U.S. 514, 533.

William L. Pfeifer, Jr.
William L. Pfeifer, Jr. is a sole practitioner in Foley. He is a graduate of Samford University and the University of Alabama School of Law, where he was a member of the Bench and Bar Legal Honor Society, the John A. Campbell Moot Court Board, and an editor of the *Law and Psychology Review*. He has previously served as a staff attorney for the Alabama Court of Criminal Appeals.

G. Ray Kolb, Jr.
G. Ray Kolb, Jr. is a solo practitioner in Mobile. He received his undergraduate degree from the University of South Alabama in 1990, and his J.D. from the University of Alabama School of Law in 1993. Kolb previously published an article about former Alabama Governor John Patterson in the *Addendum* newsletter.



May It Please The Palate...

the first ever statewide Bench and Bar cookbook.

These beautiful books contain over 570 recipes from members of the legal profession around the state. The book includes wonderfully clever recipes such as Easy Slaw for Men In Overalls and favorites such as Cajun Pecan Armadillo and Padlock Oven-Baked Possum,

Remember the proceeds from the book will help fund Alabama's Volunteer Lawyers Programs, which provide access to justice for Alabama's poorest citizens.

Order Your Cookbook Today!

(Cookbooks are $15.00 each plus $2.50 shipping and handling. Make checks payable to the VLP.)

Name _____

Address _____

City _____ State _____ Zip _____

Number of Books _____

Complete the order form above and mail with your check to:
Volunteer Lawyers Programs Cookbook, P. O. Box 671, Montgomery, AL 36101

ALABAMA STATE BAR

125 YEARS of PROFESSIONALISM

The Journey Continues...

2004 Annual Meeting
July 21-24, 2004
Sandestin

MARK YOUR CALENDARS NOW!

Jury Nullification: The Anti-Atticus

BY JUDGE PAMELA BASCHAB

The jury had been deliberating in the drug case only a matter of minutes when the bailiff handed me a note. I was surprised. A note from the jurors to the judge usually doesn't arrive until they have a question or they are hungry. None of these seemed likely so soon. I read the note: "Judge, Mr. Smith[1] is refusing to deliberate. What should we do?" I was more than a little surprised and confused. After all, I had just spent a day overseeing jury selection, trying the case, and instructing the jury in great detail. What did this juror not understand about his role in this process? I have since realized that what I did not understand was

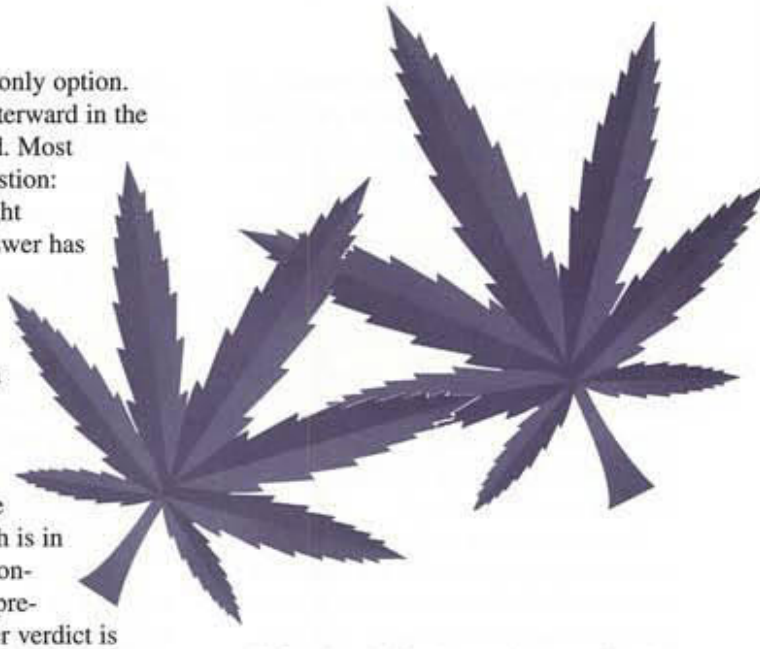
the real issue: jury nullification.

Mr. Smith, an African-American male, had folded his arms across his chest in the jury room and announced that he would not vote to convict the African-American defendant regardless of the evidence or deliberations on that evidence. He felt that Alabama's drug laws are written and enforced in such a manner as to have an unfair impact on the African-American community. He felt he had a right and even an obligation to vote for an acquittal.

What's a judge to do? I brought the parties and the jury back into the courtroom and re-charged on standard instructions such as "my job is the law and your job is the facts. Do not be swayed by sympathy."

The alternate juror had been excused at the end of the trial. Even with renewed instructions, Mr. Smith would not budge. The other jurors were obviously infuriated with him as they filed back into the jury box to tell me the jury was hung at 11 to 1. I recessed, talked to our presiding judge, and ultimately declared a mistrial. That was about my only option.

I spoke to the jurors afterward in the jury room as I always did. Most juries always ask the question: "Judge, did we do the right thing?" and my stock answer has always been the same: "By definition your verdict is correct. Justice is a process, not a product. If we have correctly followed the process, then your verdict cannot be wrong. We seek the truth. When truth is in conflict, to resolve that conflict we follow a certain prescribed process. Whatever verdict is rendered is the truth and is correct by definition."



Now I was stymied. How could I deal with a situation where a key player in the process decides to ignore my instructions? What remedy, if any, was available? I could not give those jurors any reassurance. I began researching the issue and have come to believe that jury nullification is fast becoming a reality in courts across the country, and few judges and lawyers are prepared to deal with it.

Jury nullification in a criminal case occurs when the jury or a juror assumes a right not just to decide whether the defendant committed the crime but also whether he should be convicted of it. The jury goes beyond the question of the

defendant's guilt to a further question of, despite his guilt, should he be convicted? Ordinarily, a finding of guilt automatically leads to a conviction. Standard jury instructions in Alabama even state that if the state has proven the defendant's guilt beyond a reasonable doubt, then the jury has a duty to convict.[2] Nullification is a decision by the jury to provide mercy rather than justice and simply acquit the defendant. Nullification may also take place as it did with my case involving juror Smith where the jury hangs and a mistrial must be declared.

What prompts an individual juror or the entire jury to take the law into their own hands? Nullification falls into two groups or types of rationales. The jury may think the law itself is unfair. Oftentimes this will include vice, liquor laws, gambling or mandatory penalties such as the death penalty.[3] More commonly, though, the rationale is that the law itself is acceptable, but based on the facts presented, it would be inappropriate. That is, in certain cases, applying the law is too harsh or not truly merited. Examples of this rationale are cases where the harm to the victim was minimal, the victim's conduct contributed to the harm, the defendant has suffered enough, or the government may have acted improperly.

The famous case of Marion Barry was one where it was widely believed that the jury nullified based on what it believed to be inappropriate government conduct. Barry was the mayor of Washington, D.C. and had been videotaped using cocaine and yet was acquitted. The jury apparently felt that the government's mobilization to prosecute the mayor was objectionable.[4]

Paul Butler was an Assistant U.S. Attorney in Washington, D.C. during the Marion Barry prosecution. Butler is an African-American and, in an essay written for the *Yale Law Journal* in 1995,[5] advocated jury nullification to combat racism. He cites numerous examples of racism in the criminal justice system, including Alabama's own Scottsboro case, the Rodney King case (white assailants were acquitted by a jury which had seen a videotape of King being beaten), and the Susan Smith case.

He also feels that the disparity in penalties between powder and crack cocaine users is racist. The most frequently cited evidence of racism, according to Butler, is "the extraordinary rate of incarceration of African-American men."[6] Butler encourages jury nullification in certain cases to correct what he perceives as a broken system. His argument in defense of jury nullification is based in part on his observation that the system allows for such subjective decisions to be made by judges in exercising their discretion at trial and by prosecutors in exercising their prerogative to selectively prosecute. True neutrality, he argues, is not possible even for a judge. "The black juror is simply another actor in the system, using her power to fashion a particular outcome; the juror's act of nullification ... exposes the indeterminacy of law, but does not create it."[7]

Professor Alan Dershowitz, in response to the Marion Barry verdict, referred to jury nullification as "a redneck trick."[8] This response was based on the allegedly recurrent history of white juries ignoring civil rights and acquitting lynch mobs. Dershowitz felt this trick was used by "rednecks" because it allowed them to act on racist instincts.[9]

Not all civil rights murders involved black victims. In Lowndes County, Alabama, two white civil rights workers, Viola Luizzo and Jon Daniels, were murdered. It was widely believed that the jury in the Luizzo case acquitted the man who fired the fatal shot based on jury nullification. Jon Daniels was a white Episcopalian seminarian who was shot by a man who was tried and acquitted by an all-white male jury.[10]

We cannot know for certain that nullification has occurred. The O.J. Simpson case illustrated how controversial a verdict can be. It was believed by many that the O.J. jury simply nullified based on his fame and on race. This could never be proven as it also may have been a failure by the State to prove the case beyond a reasonable doubt. What we do know is that O.J. could not be tried again in a criminal court and that no one has been convicted of the murders of the two victims in that case. If a civil jury goes haywire, it is possible for the court to grant a judgment notwithstanding the verdict, direct a verdict, grant a new trial, or even order a remittitur. None of these procedures are available to the state in criminal cases. The unwise decision of the jury is final, cannot be reviewed, does not have to be explained or defended, and provides no recourse for the state or victims. How fair is that? "In virtually no other context is a government-sanctioned decision given such deference, and in no other area would such unfettered decisionmaking be tolerated."[11]

Jurors who nullify may see themselves as rescuers or even heroes. Others may also admire, in a sense, the juror's defiance of the system supposedly to provide a merciful verdict. However, there are three erroneous assumptions which, when examined, reveal the less attractive or honorable aspects of jury nullification. First, juries do not know the whole story and do not have enough information on which to base a nullification. Suppose the jury feels sorry for a clean-cut teenager who was caught with drugs. That same jury may not be told that he had prior convictions or that he had a whole stash of drugs in his car. Suppressed or illegal evidence will not be presented and thus the jury often does not have enough information to justify being merciful and sympathetic. Second, there is just that assumption that the jury is moved by sympathy, compassion or leniency rather than some less legitimate reason such as race or blaming the victim. We cannot assume that the jurors are following their best instincts because, in fact, they may be following their worst and basing their verdict on bias and not sympathy. The third assumption is that the criminal law is too inflexible to allow individual justice so nullification is a kind of safety hatch for the unusual case which may not have been contemplated by the legislature. The problem with this assumption is that numerous safety hatches are already built into the criminal justice system. Prosecutors have discretion and can examine potential defenses and factor in those when deciding to prosecute. The legislature has created numerous defenses such as necessity, entrapment and self-defense that do provide flexibility. Is it not preferable that a democratically elected representative legislature provide for the safety hatches rather than an unelected, undemocratic jury behind closed doors creating its own brand of justice?[12]

Jury nullification, or at least its advocacy, is on the rise. Whether based on race or other perceived unique cases such as gun laws, vigilante acts, abortion clinic protests, mandatory helmet laws, or mercy killings, how does the system react? Legislators, judges, prosecutors and defense attorneys need to educate themselves and prepare for such an eventuality as the one I faced with Mr. Smith. Based on my research, as well as my personal experience, I offer a few observations which I hope may be useful.

One of the first inquiries into the problem seems to be, "Why isn't this problem easily solved during voir dire?" Even though the voir dire process varies widely, the substance usually includes a question such as, "Is there anyone here who feels he cannot adhere to the law even if you don't agree with it?" or "Is there anyone here who thinks we simply shouldn't have such a law on the books?" The reason that this didn't work with Mr.

Smith is because he had no intention of showing his hand in advance. He wanted to be on the jury. As a first defense against a nullification, it is fundamental that such questions should be asked during jury selection. It was my practice to release the alternate juror after the jury retired to deliberate. However, during my research, I found that in many states Mr. Smith would have been replaced with an alternate when he refused to deliberate. Some judges may not choose to replace the nullifier because it is more curative than preventative and comes with another set of considerations. Also, the nullification is usually not discovered, if ever, until the verdict is rendered or the jury has hung.

Many defense attorneys argue for nullification during opening or closing statements. Is it permissible for the jury to be made aware of its power to nullify? Most competent defense attorneys will figure a way to get this issue in front of the jury without going so far as to be held in contempt of court. Such arguments as those aimed at evoking sympathy for the client or reviewing the historical role of the jury or even as "send a message" may be subtle enough to escape detection or judicial consequences. A defense attorney who, based on the facts, has no defense will usually take a plea bargain. If that is not possible, he may throw his client's case on the mercy of the jury.

Then the client's best or only defense is to urge the jury to nullify. Blatant tactics would evoke possible ethical considerations and may also result in contempt. The defense attorney can still walk a thin line and weave the nullification notion throughout his case. That notion is that even though his client did the deed, it would be an injustice to convict him.

In Alabama, unlike several other states, there is no requirement that a jury be instructed that it may nullify. The opposite instruction is given admonishing the jury to follow the law and convict if the state has proven its case beyond a reasonable doubt and to not be swayed by sympathy. The jury is told to consider only the evidence and that the evidence is the testimony and exhibits and not the arguments made by counsel. Juries occasionally shocked me with their verdicts, and I had to wonder if the jurors had understood the jury instructions. There is ultimately nothing that can be done to prevent a jury from voting its conscience, especially if that conscience has not been informed so as to feel guilty if the judge's instructions are ignored. Judges would do well to emphasize, to the extent possible, the proper role of the jury, reliance only on the evidence, what is evidence, and the importance of not being swayed by sympathy.

I read *To Kill A Mockingbird*[13] when it was first published as it was required in my eleventh grade English class. I was so proud because I knew it was based in Alabama and very near my home in Baldwin County. I, along with the rest of the world, was inspired by Atticus Finch's closing argument in which he asked the jurors to not allow their biases to sway them. He was asking the jury to render a true verdict not based on the race of the defendant. It seems to me that attorneys who encourage juries to nullify are the very opposite of Finch. They are the anti-Atticus attorneys. They do not respect the principle of justice or the almost sacred mission of the court. They are pragmatists. They want us to be a government of men and not of laws. One cannot have it both ways. How can you tell a jury to not consider race in convicting the defendant but to consider race in acquitting? How can you tell a jury to not to be swayed by sympathy for the victim but to sway with sympathy for the defendant? Atticus was right when he said there is only one human institution where all men are equal.[14] That is a court. Objective rather than subjective decisions are not easy. There is something satisfying about taking the law into your own hands and deciding based on your own emotions and values. It's like playing God. Justice, however, is not about bending the rules. It is about being sure the rule applies to everyone. Jury nullification, no matter how you slice it, is at bottom a desecration of the basic premise that we are all equal under the law. ■

Endnotes

1. Mr. Smith is not the juror's actual name.
2. *Alabama Pattern Jury Instructions: Criminal*, I-8 (3d. ed. 1994).
3. Andrew D. Leipold, "Rethinking Jury Nullification," 82 *Va. L. Rev.* 253, 298-99 (1996).
4. *Id.* at 302.
5. Paul Butler, "Racially Based Jury Nullification: Black Power in the Criminal Justice System," 105 *Yale L.J.* 677 (1995).
6. *Id.* at 697.
7. *Id.* at 708.
8. Clay S. Conrad, *Jury Nullification: The Evolution of a Doctrine*, 168 (1998).
9. *Id.*
10. *Id.* at 183-85.
11. Leipold, *supra* note 2, at 307.
12. *Id.* at 303-11.
13. Harper Lee, *To Kill A Mockingbird* (1960).
14. *Id.* at 234.

Judge Pamela Baschab

Judge Pamela Baschab attended the University of North Alabama and graduated from the University of South Alabama. She graduated in 1982 from St. Mary's University School of Law in San Antonio, receiving the American Jurisprudence Award for Constitutional Law. After graduation, she served as assistant district attorney in Mobile County and then entered private practice with Chason & Underwood. In 1987, she became Elberta's first attorney.

Judge Baschab then ran for political office and served first as a Baldwin County district judge and then as a circuit judge (becoming the first Republican woman to be elected). In 1996, she was elected to the Alabama Court of Criminal Appeals, and reelected in 2002.

Judge Baschab has received numerous awards and honors, and has served on various committees and boards. She is a published author and MCLE instructor.

CELEBRATE
LAW DAY 2004
"TO WIN EQUALITY BY LAW:
Brown v. Board of Education at 50"

MAKE RESERVATIONS NOW!

for the

ALABAMA STATE BAR

2004 LAW DAY production
of
" SLAYING THE DRAGON: *Brown v. Board of Education* & the People Who Lived It"

Location: Courtroom of the Alabama Supreme Court

Performance Times:

May 6,2004	May 7, 2004	May 8, 2004
11:00 am	11:00 am	2:00 pm
8:00 pm	8:00 pm	8:00 pm

TICKETS AV AILABLE ON A FIRST COME, FIRST SERVE BASIS
FOR TICKET RESERVATIONS & INFORMATION, CONTACT:

The Supreme Court Library 800-236-4069

J. Anthony McLain

Communication Permitted with Represented Government Officials

By J. Anthony McLain, general counsel

Question:

My law firm has been employed to defend employees and officials of the State Board of Education who have been sued by a county board of education. The lawsuit appears to be amenable to settlement and I would like to negotiate settlement possibilities directly with the members of the county board of education.

My question is whether I may communicate with the members of the county board without the consent or approval of the board's attorney?

Answer:

You may, as attorney for the State Board of Education, communicate directly with the members of the county board of education to discuss settlement of the pending lawsuit without obtaining the consent or approval of the attorney representing the county board of education.

Discussion:

Communications with persons represented by counsel are governed by Rule 4.2 of the Rules of Professional Conduct, which provides as follows:

> "Rule 4.2 Communication With Person Represented by Counsel
>
> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

The Comment to Rule 4.2 expands upon the "authorized by law" exception:

> "Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter."

Since members of the county board of education conclusively appear to be "government officials" within the meaning of the above-quoted Comment, communications with the members are permitted pursuant to the "authorized by law" exception quoted above.

Most authorities find justification for the exception in the "petition for redress of grievances" clause of the First Amendment to the United States Constitution. In *The Law of Lawyering*, Professors Hazard and Hodes provide the following analysis:

> "… a lawyer for a private party who is in litigation with the government may seek *ex parte* interviews with relevant government officials. If the normal bar of Rule 4.2 were applied stringently, the government agency's lawyer could veto discussions between private parties and government officials, which is questionable policy, and might raise questions under the 'petition for redress of grievances' clause of the First Amendment."

The Law of Lawyering, Hazard & Hodes, Second Edition, Prentice Hall (1990) §4.2:109.

A similar analysis is found in *Modern Legal Ethics* by Charles Wolfram and Charles Frank Reavis, Sr., professor of law at Cornell Law School:

> "Requiring the consent of an adversary lawyer seems particularly inappropriate when the adversary is a government agency. Constitutional guarantees of access to government[58] and statutory policies encouraging government in the sunshine seem hostile to a rule that prohibits a citizen from access to an adversary governmental party without prior clearance from the governmental party's lawyer.
>
> 58 U.S. Const., amend 1 ('Congress shall make no law respecting . . . the right of the people peaceably . . . to petition the Government for a redress of grievances.')."

Modern Legal Ethics, Charles W. Wolfram, West Publishing Co. (1986), §11.6.2, p. 614, fn 58.

The Annotation to Rule 4.2 in the Fourth Edition of the ABA's *Annotated Model Rules of Professional Conduct*

also references the First Amendment, viz.:

> "When a governmental agency is the represented party, the Comment to Rule 4.2 recognizes that a party may 'speak with governmental officials about the matter'. The First Amendment right of petition brings such communications within the 'authorized by law' exception to Rule 4.2."

Annotated Model Rules of Professional Conduct, Fourth Edition, American Bar Association (1998) p. 411.

After the *Model Rules* were amended by the Ethics 2000 Committee, the ABA employed slightly different language to reaffirm its interpretation of the "authorized by law" exception. The Fifth Edition of the *Annotated Model Rules* addresses the issue as follows:

> "When a governmental agency is the represented party, paragraph [3] of the Comment, as amended in 2002, recognizes 'the possibility that a citizen's constitutional right to petition and the public policy of ensuring a citizen's right of access to government decision-makers may create an exception to this Rule'."

Annotated Model Rules of Professional Conduct, Fifth Edition, American Bar Association (2002) p. 427.

Both state and federal courts have uniformly recognized the right of an attorney suing a governmental entity to communicate directly with the government officials involved in the lawsuit concerning the disposition or resolution thereof. The United States District Court of Maryland has concluded definitively as follows:

> "Insofar as a party's right to speak with government officials about a controversy is concerned, Rule 4.2 has been uniformly interpreted to be inapplicable.
>
> See 2 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 4.2:109 (2d ed. Supps. 1991 & 1994); Charles W. Wolfram, *Modern Legal Ethics* § 11.6.2 (1986)."

Camden v. State of Maryland, 910 F. Supp. 1115, 1118, (D. Md. 1996).

In another representative case, *American Canoe Ass'n, Inc. v. City of St. Albans*, 18 F.Supp.2d 620 (S.D. W.Va. 1998), defense counsel attempted to prohibit plaintiff's attorney from discussing settlement with the members of the city governing body. The Court concluded as follows:

> "... generally, communications with a represented adverse party should proceed through that party's lawyer, pursuant to Model Rule 4.2.
>
> Here, however, both Defendants are government agencies. Government remains the servant of the people, even when citizens are litigating against it. Thus, when citizens deal with government agencies, several sorts of direct contact are 'authorized by law' and permissible. Official comment to Rule 4.2 notes:
>
> > 'Communications authorized by law include, for example, the right of a party to a controversy and a government agency to speak with government officials about the matter.'
>
> As interpreted in an American Bar Association Formal Ethics Opinion, this right to speak with government officials about a matter in controversy refers to the constitutionally protected right to petition the government and the derivative public policy of ensuring a citizen's right of access to government decision makers. *ABA Formal Op.* 97-408." 18 F. Supp.2d at 621-622.

See also, *Norfolk S. Ry. Co. v. Thompson*, 430 S.E. 2d 371 (Ga. Ct. App. 1933); *Wilkerson v. Brown*, 995 P.2d 393 (Kan. Ct. App. 1999). See generally, Lidge, *Government Civil Investigations and the Ethical Ban on Communication with Represented Parties*, 67 Ind. L.J. 549 (1992); Baker, *Ethical Limits on Attorney Contact with Represented and Unrepresented Officials*, 31 Suffolk U.L. Rev. 349 (1997).

The American Bar Association and numerous state bar associations have authored opinions permitting attorneys to contact employees and officials of a government agency without the consent of the agency's attorney. See, e.g., ABA Formal Ethics Opinion 95-396; ABA Formal Ethics Opinion 97-408 (cited in *American Canoe Association, supra);* North Carolina State Bar Association Ethics Committee Opinion 219 (1995); Association of the Bar of the City of New York, Opinion 1988-8; Kentucky Bar Association Ethics Committee, Opinion E-332 (1988).

Additionally, at least one state, California, has codified the exception and expressly included it in California's version of Rule 4.2, as follows:

> "This rule shall not apply to communications with a public officer, board, committee or body." Calif. R. 7-103.

Based upon the above, it is the opinion of the Disciplinary Commission of the Alabama State Bar that you, as attorney for the State Board of Education, may communicate directly with the members of the county board of education to discuss settlement of the pending lawsuit without obtaining the consent or approval of the attorney representing the county board.

[RO-2003-03] ■

Retraction

Formal Opinion RO-01-02 [RO-2001-02], published in volume 63, number 1, of *The Alabama Lawyer* concerning communication with opposing party's expert witness, is hereby withdrawn. Attorneys seeking to communicate with the opposing party's expert should do so only in accordance with the applicable Rules of Civil Procedure governing discovery.

JOIN US!

The Alabama State Bar Lawyer Referral Service can provide you with an excellent means of earning a living, so it is hard to believe that only three percent of Alabama attorneys participate in this service! LRS wants you to consider joining.

The Lawyer Referral Service is not a pro bono legal service. Attorneys agree to charge no more than $25 for an initial consultation, not to exceed 30 minutes. If, after the consultation, the attorney decides to accept the case, he or she may then charge his or her normal fees.

In addition to earning a fee for your service, the greater reward is that you will be helping your fellow citizens. Most referral clients have never contacted a lawyer before. Your counseling may be all that is needed, or you may offer further services. No matter what the outcome of the initial consultation, the next time they or their friends or family need an attorney, they will come to you.

For more information about the LRS, contact the state bar at (800) 354-6154, letting the receptionist know that you are an attorney interested in becoming a member of the Lawyer Referral Service. Annual fees are $100, and each member must provide proof of professional liability insurance.

Birmingham Bar's Solo/Small Firm Section Presents Their Annual "Ott" Dog Luncheon & CLE

(Lunch is included as part of the seminar)

BBA Building, 2nd Floor

Thursday, April 8, 2004

11:30 am - 1:00pm

FREE to Section Members • $25 for Non-Members*

***This $25 will also serve as your 2004 dues if you want to join the Solo/Small Firm Section**

FEATURED SPEAKER AND TOPICS

U.S. Magistrate Judge John E. Ott

"Legal Writing for Federal Court" • "Daubert" • "Title VII Developments"

SPACE IS LIMITED! • SIGN UP TODAY!

Name: _____

Address: _____

Phone: _____ Fax: _____ eMail Address: _____

AL Bar No.: ASB - _ _ _ _ - _ _ _ _ (for CLE Credit)

I am NOT a Section Member; enclosed is my check for $25

❑ Please add me as a member at NO additional cost.

Please submit payment via check or money order to:
SP/SF Section of the BBA
c/o Chris Christ, Attorney at Law, Treasurer
205 20th Street North, Suite. 923
Birmingham, Alabama 35203

SECTION MEMBERSHIP APPLICATION
JOIN the SOLO PRACTICE / SMALL FIRM SECTION of the BIRMINGHAM BAR ASSOCIATION for 2004

Name: _____

Address: _____

Phone: _____ Fax: _____ eMail Address: _____

ANNUAL DUES: $25.00 • Payable to "Birmingham Bar Association"
Mail to: Birmingham Bar Association, 2021 2d Avenue North, Birmingham, AL 35203

MEMBERSHIP BENEFITS include:

- Annual Judges' Reception and Supreme Court Update *
- Monthly Luncheons with Prominent Speakers
- Section Exclusive Internet ListServ Access *
- Business Networking *
- Annual Bar-B-Q Picnic *
- Quarterly Newsletters *
- Free CLE Opportunities including Ott Dog Luncheon
- Annual Technology Seminar
- Sustaining Membership Opportunity
- Social Functions *

* = FREE

Stuart Y. Luckie

The Alabama YLS Helps When Disaster Strikes

By Stuart Y. Luckie

The Alabama State Bar Young Lawyers' Section provides free legal assistance to the survivors of Alabama disasters in coordination with the Alabama State Bar, the American Bar Association and others. The Federal Emergency Management Agency (FEMA) has a contract with the American Bar Association's Young Lawyers' Division (ABA/YLD) to coordinate the provision of free emergency legal assistance after disasters occur. The ABA/YLD appoints young lawyer chairs in various regions and states throughout the United States. Due to the prevalence of disasters in Alabama, ranging from hurricanes to floods and tornadoes, Alabama has its own ABA/YLD disaster chair. As a result, whenever the President of the United States declares a portion of Alabama a national disaster area, FEMA contacts the ABA/YLD to assess the legal needs of survivors and the best way to get such information to them. Once a disaster area has been declared, the Alabama ABA/YLD chair contacts the Alabama YLS to begin the process of providing free legal assistance to survivors. The Alabama YLS then contacts a network of young lawyers throughout the state of Alabama willing to provide pro bono assistance. Typically, this assistance is provided by staffing a toll-free number where survivors can call for consultations. MCI has generously agreed to provide toll-free numbers for this purpose. Young lawyers participating in this program do so pro bono, or free of charge. The young lawyers staffing the emergency legal help lines are prohibited from soliciting any business from disaster survivors. The toll-free number for emergency assistance is activated expressly to respond to a declaration of disaster. As a result, there is no "standing" number. If you need to get this number in an emergency, both FEMA and the Alabama State Bar will be distributing it when it is activated. If you would like to find out how you can get involved in this project, contact Executive Committee Member **Bob Bailey** at Lanier, Ford, Shaver & Payne.

If you haven't already done so, you should register now for our 2004 Sandestin Seminar, to be held May 21st and 22nd. Contact committee members **Norman Stockman** or **Craig Martin** to make sure you are registered. You may call Sandestin directly for room reservations at (800) 320-8115. Please be sure to include our group code: 306100.

This year's program promises to be better than ever! Confirmed speakers are **Judge Judson Wells, Tony McLain, Jere Beasley, Warren Lightfoot, Professor Howard Walthall, John Wilkerson, clerk of the Alabama Court of Civil Appeals,** and **Robert Hedge**. See you at the beach!

ATHLETES, ACADEMICS AND THE LAW

Play It Smart!

is the newest project of the Alabama State Bar. Varsity college athletes, from major Alabama colleges as well as across the country, who are now successful lawyers, speak to students about a career in law. The program focuses on reaching students in the 9th grade and above.

Volunteers like **Steadman Shealy, Charlie Trotman, Kermit Kendrick** and others are making appearances at area schools to talk to high school students about the importance of focusing on academics with an eye toward a future in law or similar professions. Athletics is a great training ground for personal development and can be a stepping stone to many future opportunities and fields of endeavor.

There is no cost to participate: the lawyer/athlete volunteers are contributing their time as a public service to their communities. Help us schedule appearances by contacting your local high schools and encouraging their participation. Then contact Susan Andres, director of communications, at 800-354-6154, ext. 132, or send e-mail to sandres@alabar.org and a registration form will be sent to your local school.

DO YOUR PART — SPREAD THE WORD ABOUT PLAY IT SMART!

ALABAMA STATE BAR

Reinstatements

- Effective August 8, 2003, attorney **Davis Duane Carr**, of Glenview, Illinois, was suspended from the practice of law in the State of Alabama for noncompliance with the 2002 Mandatory Continuing Legal Education requirements of the Alabama State Bar. On October 2, 2003, Carr came into compliance with the MCLE rules and was reinstated to the practice of law in the State of Alabama. [CLE No. 03-07]

- The Supreme Court of Alabama entered an order based upon the decision of Disciplinary Board, Panel I, reinstating Mobile attorney **Gregory B. Dawkins** to the practice of law in the State of Alabama effective November 18, 2003. [Pet. No. 02-07]

Transfer

- Mobile attorney **Jefferson Daniel Morrow** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective January 6, 2004. [Rule 27(c); Pet. No. 02-02]

Disbarment

- The Supreme Court adopted an order of the Disciplinary Board, Panel IV, disbarring Huntsville attorney **Charles Dennis Abbott** from the practice of law in the State of Alabama effective January 14, 2004. On August 28, 2003, Abbott entered a consent to disbarment. Abbott plead guilty in the Northern District of Alabama to a seven-count indictment that alleged he, as a loan closing attorney, misapplied funds placed in his trust account, which were intended and provided for the purpose of satisfying mortgage debts. [Rule 20(a), Pet. No. 03-10, ASB No. 00-48(A)]

Suspensions

- Bessemer attorney **James Minton Cash** was interimly suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar effective January 15, 2004. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Cash had willfully neglected client matters, failed to communicate with clients and failed to account for client funds held in trust, and that such conduct was continuing and causing or likely to cause immediate and serious injury to his clients and the public. [Rule 20(a); Pet. No. 04-02]

- The Supreme Court of Alabama entered an order affirming the order of the Disciplinary Board, Panel

II, suspending Huntsville attorney **Jack Daniel** from the practice of law in the State of Alabama. The suspension was effective January 15, 2004, and runs for a period of 91 days. Daniel was found guilty of violating rules 3.4(c), 8.4(c) and 8.4(g), *Alabama Rules of Professional Conduct*. On or about April 25, 1997, Daniel submitted a conditional plea for a violation of Rule 8(f), *Alabama Rules of Professional Conduct*, in a previous complaint (ASB nos. 93-376(A) and 95-103(A)). Daniel was placed on two years' probation with specific terms and conditions. One of the conditions required Daniel to make restitution to the complainant. Daniel failed or refused to make restitution to the complainant, therefore violating the terms of his probation. On April 4, 2001, Daniel tendered a guilty plea to violating probation. Daniel was to receive a 91-day suspension, to be held in abeyance for a period of six months pending Daniel's refunding of $49,636.63 to the client. More than six months elapsed following the Disciplinary Board's order and Daniel did not repay the money. Daniel appealed his guilty plea to the Board of Disciplinary Appeals and then to the Supreme Court of Alabama, both of which upheld the Disciplinary Board's actions. [ASB No. 00-33(A); BDA No. 02-02; SC No. 1020905]

- Effective November 12, 2003, attorney **Stephen Royce Mills** of Memphis, Tennessee, has been suspended from the practice of law in the State of Alabama for noncompliance with the 2002 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 03-50]

- Mobile attorney **Lewis Daniel Turberville, Jr.** was summarily suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure, by order of the Disciplinary Commission of the Alabama State Bar, effective January 6, 2004. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Turberville had failed to respond to requests for information from a disciplinary authority during the course of disciplinary investigations. [Rule 20(a); Pet. No. 04-01]

Public Reprimands

- Florence attorney **Damon Q. Smith** received a public reprimand without general publication on December 5, 2003, for violating rules 1.1, 1.4(b) and 8.4(a), *A.R.D.P.* Smith was retained to file bankruptcy on behalf of a client who advised that the only reason she wanted to file was because of her student loans. The client advised that Smith "adamantly guaranteed" her that the student loans could be discharged because of the circumstances surrounding her case. Smith concluded the client's bankruptcy and she was discharged. Shortly thereafter, she began receiving calls from a collection agency regarding the loans. Subsequently, the collection agency advised that they had talked to Smith and he had agreed that the student loans were not discharged. The client contacted the bankruptcy administrator who suggested that Smith reopen the case and file an adversary proceeding. Smith did not do so and advised the client that he was not going to file anything else because it would be frivolous. [ASB No. 02-261(A)] ■

Rule Change
In the Supreme Court of Alabama
January 9, 2004

Whereas the Alabama State Bar has submitted to this Court a petition to amend Appendix "A," Alabama Rules of Disciplinary Procedure, and Whereas this Court has considered that proposed amendment to Appendix "A," Alabama Rules of Disciplinary Procedure, It is hereby ordered that the first paragraph of Appendix "A," Alabama Rules of Disciplinary Procedure, be amended to read as follows:

> "Petitions for reinstatement shall be addressed to the General Counsel and eight (8) copies filed with the Disciplinary Clerk of the Alabama State Bar."

It is further ordered that this amendment shall be effective immediately.

It is furthered ordered that the following note from the reporter of decisions be added to follow Appendix "A" to the Alabama Rules of Disciplinary Procedure:

> "Note from the reporter of decisions: The order amending Appendix 'A,' effective January 9, 2004, is published in that volume of *Alabama Reporter* that contains Alabama cases from _____ So. 2d."
>
> Houston, See, Lyons, Brown, Johnstone, Harwood, Woodall, and Stuart, JJ., concur. Robert G. Esdale, Sr., Clerk, Supreme Court of Alabama

RATES

Members: Two 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 2004 issue—January 5th, 2004; May 2004 issue—March 5th, 2004.** NO deadline extensions will be made.

Send classified copy and payment to Kimberly Barnhart, P.O. Box 4156, Montgomery 36101-4156. Make check or money order payable to *The Alabama Lawyer* Classifieds.

Services

- **AUTO ACCIDENT RECONSTRUCTIONIST:** Professional engineer with 26 years' experience. Certified in accident reconstruction by Northwestern University Center for Public Safety. Will provide testimony, calculations, illustrations, etc. I am a "hands-on" engineer with a superb knowledge of automobiles and auto accidents. Plaintiff or defense. Over eight years of expert witness service. Contact Robert T. Tolbert, P.E., (205) 221-3988. E-mail: *robby@rtolbert.com.*
- **BUSINESS VALUATION:** Business valuation/economic damage analysis/forensic accounting services for FLPs and other tax and business purposes; economic damage analysis for wrongful death, employee discrimination, personal injury and commercial damages; forensic accounting and expert testimony services for fraud, divorce and other commercial cases; litigation support services for a variety of cases involving unusual and complex financial and accounting issues. Contact D. Michael Costello, CPA-ABV, Costello Forensic Accounting, P.C., 1100 Tallan Building, Two Union Square, Chattanooga 37402. Phone (423) 756-7100. *MikeCostello@Decosimo.com*
- **TRAFFIC ACCIDENT RECONSTRUCTION:** I have reconstructed over 3,000 traffic accidents in 23 states on highways, streets and railroads, involving trucks, vans, cars, motorcycles, pedestrians, and trains. Computer-generated drawings are prepared to illustrate my opinions. Over 30 years' experience in reconstructing accidents. Board certified by ACTAR. Call John T. Bates toll-free, (800) 299-5950.
- **BILINGUAL COUNSELOR:** I am available to assist law firms involved in litigation with German companies. Contact Dagmar W. Rick, (205) 979-9852 or *dagmar@ponymail.com.*
- **HANDWRITING EXPERT/FORENSIC DOCUMENT EXAMINER:** ABFDE certified, formerly chief, Questioned Documents Division, U.S. Army Criminal Investigation Laboratory. American Society of Questioned Document Examiners. American Academy of Forensic Sciences. Civil and criminal cases accepted. Contact Farrell Shiver, Shiver & Nelson Document Investigation Laboratory, 1903 Lilac Ridge Drive, Woodstock, Georgia 30189. Phone (770) 517-6008.
- **BRIEF WRITING AND LEGAL RESEARCH:** Former staff attorney on the Alabama Court of Civil Appeals provides brief writing services as well as legal research on any legal issue. Call Bert Allen at (205) 941-0356 or send e-mail to *elbertsallen@yahoo.com.*
- **DOCUMENT EXAMINER:** Examination of questioned documents. Certified forensic handwriting and document examiner. Thirty-eight years' experience in all forensic document problems. Formerly, chief questioned document analyst, USA Criminal Investigation Laboratories. Diplomate (certified)-ABFDE. Member: ASQDE; IAI, SADFE; NACDL. Resume and fee schedule upon request. Contact Hans Mayer Gidion, 218 Merrymont Drive, Augusta, Georgia 30907. Phone (706) 860-4267.
- **PRIORITY SERVICE OF PROCESS, INVESTIGATIONS AND SURVEILLANCE:** 100-mile radius of Mobile. Over 6,000 court documents (or hand-delivered mail) personally served. Over 1,500 investigations and surveillance cases completed. Contact Bachus & Associates, P.O. Box 180066, Mobile 36618-0066. Phone (251) 649-4969 (licensed and bonded).
- **DOCUMENT EXAMINATIONS:** Board-certified handwriting and document examiner; over 20 years' experience; testified in state and federal courts. Retired senior document examiner, Alabama Dept. of Forensic Sciences. Member: American Academy Forensic Sciences; Southeastern Assn. Forensic Document Examiners; American Society Questioned Document Examiners (provisional). Contact Richard A. Roper, 7956 Vaughn Road #141, Montgomery 36116. Phone (334) 356-7856. Fax (334) 260-2552. E-mail: *richroper@aol.com.*
- **MEDICAL EXPERT WITNESS:** 2,000 medical malpractice expert witnesses, all specialties, flat rate referrals. Your satisfaction guaranteed. Or choose a powerful case analysis by veteran MD specialists, for a low, flat fee. Contact Med-Mal EXPERTS, Inc., at *www.medmalEXPERTS.com,* or phone (888) 521-3601.
- **QDRO DRAFTING:** QDRO problems? Drafting for ERISA, military, federal and state government positions. Fixed fee of $535 (billable to your client as a disbursement) includes all correspondence with plan and revisions. Pension valuations and expert testimony for divorce and malpractice cases. All work done by experienced QDRO attor-

ney. Full background at *www.qdrosolutions.net*. Contact QDRO Solutions, Inc., 2914 Professional Parkway, Augusta, GA 30907. Call (800) 813-3716 for free brochure.

- **EXPERT WITNESSES:** PEG, Inc. can provide experts for you. Examples: Biomedical and biomechanical; building failures; construction safety and related codes; highway accidents and problems; OSHA issues; slips, trips and falls; product liability; environmental; various other areas. Call or write PEG, Inc. 950 22nd Street North, Suite 632, Birmingham, Alabama 35203-1126. Phone (205) 458-8516. E-mail: *lthpc@aol.com*. Web: *www.peginc.biz*.
- **SECURITY EXPERT:** Acts of violence; premises liability; security negligence consulting expert. Rape, murder, assault, robbery, kidnapping, workplace violence. Extensive experience in case analysis, reports, courtroom/deposition testimony. Policy, supervision, training, hiring, firing-retention-firing, security surveys, notice, foreseeability, data collection and analysis, geographical profiling, contract and proprietary security guards/off-duty police. Former director of Florida police academy, Illinois state violence unit, Minnesota state P.O.S.T., corporate security, real estate, insurance, police and corrections. Published author, peer awards, board appointments. Board-certified professional criminologist, police/security specialist, police/security trainer and supervisor. Contact John Lombardi, Ph.D., MBA, at (800) 628-3496, Montgomery or *www.securitynegligence.com*.
- **PERSONAL INJURY/PRODUCT LIABILITY EXPERT:** Professional engineer with 26 years of industrial, construction, safety, machinery, and pulp/paper experience. "Hands-on" experienced engineer, with an extremely strong mechanical aptitude. Prior experience includes fabricator/machinist, heavy equipment operator and mechanic before pursuing engineering degree. Superb analytical skills, with a thorough knowledge and understanding of machinery, industrial accidents, OSHA, ANSI, ASTM, etc., building codes, automobile accidents, product liability, and defense. Over eight years of expert witness service. Contact Robert T. Tolbert, P.E., at (205) 221-3988, or e-mail *robby@rtolbert.com*.
- **MEDICAL EXPERT WITNESS:** Nineteen years' experience in private and academic practice of pulmonary diseases, critical care medicine, sleep disorders, and internal medicine. Graduate, University of Mississippi School of Medicine (1979). Post-graduate training in internal medicine (1982) and pulmonary and critical care medicine (1985), both at the Mayo Clinic. Board-certified, extensive experience in quality improvement and review. Medical chart review and courtroom witness experience. Initial review of records at a reasonable rate. Opinion will be fair and impartial. CV and references available upon request. Contact J. Keith Mansel, M.D., 606 N. Lamar Blvd., Oxford, Mississippi 38655. Phone (662) 236-7720.
- **ENGINEERING/CONSTRUCTION EXPERTS:** Soils and foundations, structural, drainage, mechanical, roofing, electrical, process chemical, EIFS (stucco), mold and mildew, HVAC for residential housing, industrial and chemical facilities, pipelines, compressor stations, commercial buildings, and port structures. Blasting damage assessment. Provide expert construction claims and dispute analysis. Provide computer animations. Experienced testifying experts with licenses and credentials. PE licenses in AL, MS, LA, FL, SC. Contact Hal K. Cain, Tel: (251) 661-2605. Email *halcain@aol.com*, Web *www.hcain.com*.
- **INSURANCE EXPERT WITNESS:** Forty years' experience, including 25 years' risk-management insurance consulting. Pre-filing evaluation, deposition, testimony. Policy coverage, captives, excess, deductibles, self insurance, agency and direct experience, bidding, exposure, policy review, workers' compensation audit, modification review. Fee-only property loss assistance. Contact Douglas F. Miller, member S R M C, at (800) 462-5602 or (205) 995-0002, Birmingham. E-mail: *erim@speedfactory.net*
- **TITLE ABSTRACTING/ESCROW SERVICES:** Full variety in North Alabama. Foreclosure title services. CV and fee schedule available on request. Contact Tim Shelton, attorney at law, 303 2nd Ave. SE, Suite B, Decatur, AL 35601. Phone (256) 355-2398.
- **LEGAL RESEARCH:** Research on all legal topics. Licensed Alabama attorney since 1997. Yale Law graduate. Call Bobbi Carr at (256) 506-6553 or send inquiry to: *B_Carr@aya.yale.edu*.

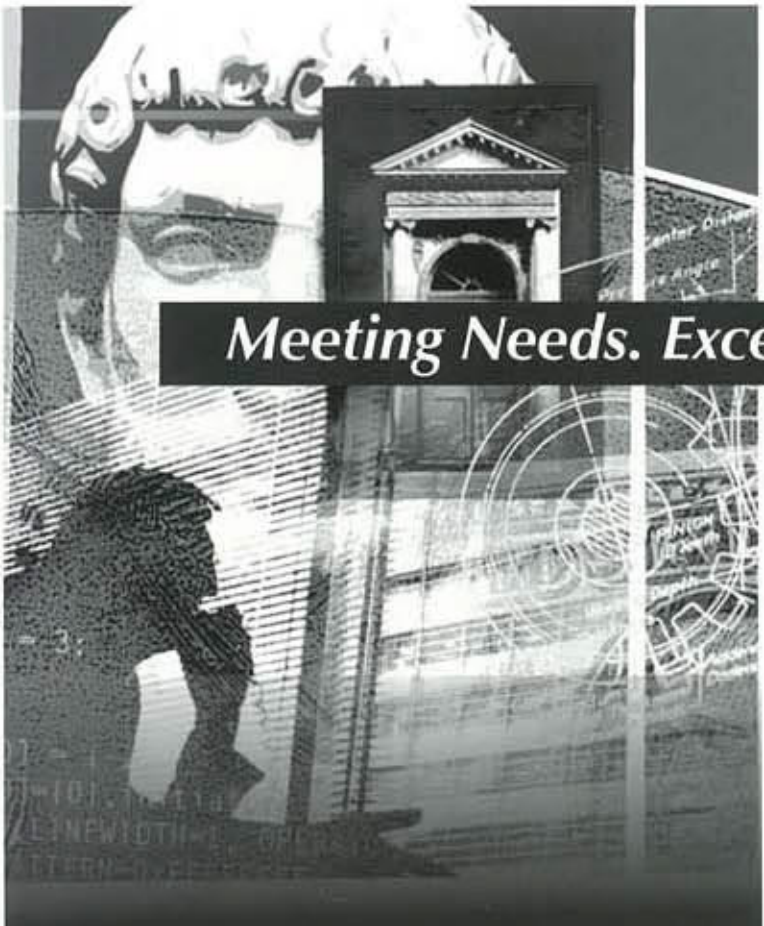
Wanted

- **TRACING FAMILY ROOTS:** My great-great-grandfather, Elcan Heydenfeldt and his brother, Solomon, were in Dadeville by 1840, reading law. On February 4, 1847, Elcan married Angelina Caldwell in Columbia, near Monroe, Louisiana. In 1849, they went to California. By 1851, Elcan became the second president pro tem for the California senate. Solomon became a justice of the California Supreme Court from 1852-1857. I'm looking for information or photographs about Dadeville in the 1840s or the Heydenfeldts (especially Elcan) in Alabama, or transportation between Dadeville and Monroe for an exhibition in Sacramento. Please contact Mary Boehm at (619) 224-6927 or e-mail *mdboehm@cox.net*.
- **LEGAL DOCUMENTS:** The family of the late Eugene Finley of Atmore, Alabama is looking for any and all lawyers who would have performed legal work for him. You can contact us at (256) 714-2545, (404) 272-0374, or e-mail us at *michael.finley@mchsi.com* or *sheila.smith2@comcast.net*.

For Sale or Lease

- **FIVE POINTS SOUTH LAW OFFICE:** Offices available at 1117 22nd Street South. All ancillary services as receptionist, conference room, telephone w/ voice mail, fax machine, copier, networked hi-speed DSL Internet connection, and free parking included. Offices are provided at one flat rate starting at $575. No set-up charges. "Virtual" offices available. Please call Tom Plouff, esq. at (205) 939-0000.

- **DOWNTOWN BIRMINGHAM LAW OFFICE:** Second floor of historic Whilldin Building in downtown Birmingham–two blocks from courthouse. Presently occupied by three attorneys and staff. Available April 1st, 2004. Approximately 3500 sq. feet. Under market rent. For information contact Sylvia at (205) 322-3663 or e-mail *pj@wiringerlaw.com.*
- **LAW OFFICES:** Perfect space for Montgomery legal practice. Large reception/foyer. Four offices, one larger with exit. Large conference room and waiting room/open office area. Back room, exit door, near in-counter sink and two comfortable restrooms. Professional paint colors. Carpet and vinyl installed in mid-February. Handicap accessible. Ten minutes to courthouses. Mid-town professional area. Hillwood Office Center, 2800 Zelda Road. 2400+ sq. ft., only $209,000. Contact/offers Keith Helms for Century 21 at (334) 207-8405.
- **LAW BOOKS:** Save 50 percent on law books. Call National Law Resource, America's largest law book dealer. We buy and sell. Visa/AX. Excellent condition. Your satisfaction guaranteed. Contact (800) 886-1800 or go to *www.nationallaw.com.*
- **LAW BOOKS:** First Edition *ALABAMA DIGEST* (through 1993/volume 21). Good condition. Best offer. Must sell. Contact Lou at (334) 855-4636 or *lferrell1954@msn.com.* ■



Meeting Needs. Exceeding Expectations.

Your clients didn't retain "just any attorney" to represent their legal interests.

Don't retain "just any valuation firm" to advise and assist you.

Put us on your team.

In court or out, business transactions or estate planning, you should always be armed with a reliable business valuation for your client.

For swift response and strict adherence to the profession's highest standards, rely on Dixon Odom's ***Business Valuation and Litigation Services Team***.

We are a nationally recognized accounting, valuation and consulting firm with the strongest credentialed professionals in Alabama.

DO

DIXON ODOM PLLC

Certified Public Accountants and Consultants

The Park Building, Suite 400
2140 Eleventh Avenue, South
Birmingham, AL 35205-2842
205.212.5300 • www.dixonodom.com

When you open your eyes, it will all be in one place ...

westlawlitigator.com

The **Alabama Litigator Library** brings key resources into one place to save you time. You can determine whether to take on the case. Profile attorneys, judges and experts. Search public records, access dockets and more. It's the power of Westlaw® – now for evaluation and investigation. And faster, better, smarter case decisions. **Differences that matter.**

Seeing is believing! Visit **westlawlitigator.com** for a **FREE** offer!
Or call 1-800-762-5272 today.

Westlaw Litigator

THOMSON
WEST

West – part of Thomson since 1996,
bringing information solutions to the legal community.