The Alabama Lawyer

Vol. 52, No. 3 MAY 1991

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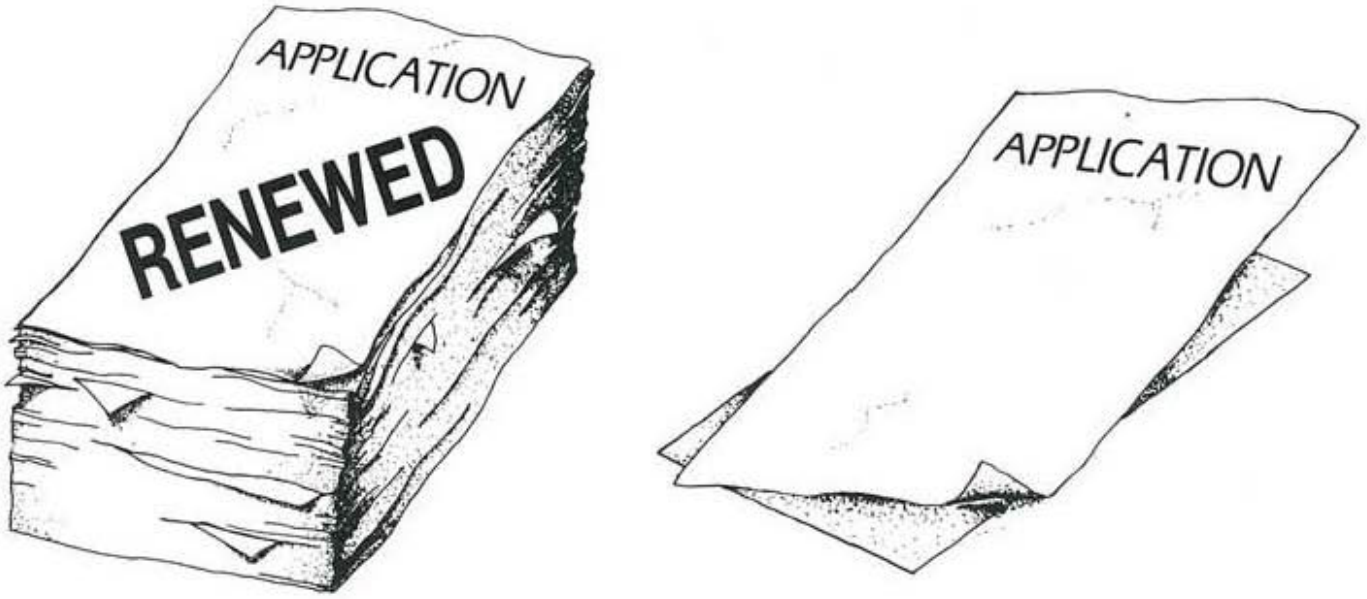

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IN BRIEF

MAY 1991 Volume 52, Number 3

ON THE COVER: Spring heralds new growth as epitomized by daisies and other wildflowers in a field in Montgomery County. *Photo by J.W. Guier, Jr., Montgomery*

INSIDE THIS ISSUE:

The Alabama Lawyer, (ISSN 0002-4287), the official publication of the Alabama State Bar, is published seven times a year in the months of January, February (the bar directory edition), March, May, July, September, and November. Views and conclusions expressed in articles herein are those of the authors, not necessarily those of the board of editors, officers or board of commissioners of the Alabama State Bar. Subscriptions: Alabama State Bar members receive *The Alabama Lawyer* as part of their annual dues payment; $15 of this goes toward subscriptions for *The Alabama Lawyer*. Other subscribers do not receive the directory edition of the *Lawyer* as part of their subscription. Advertising rates will be furnished upon request. Advertising copy is carefully reviewed and must receive approval from the Office of General Counsel, but publication herein does not necessarily imply endorsement of any product or service offered.

The Alabama Lawyer

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

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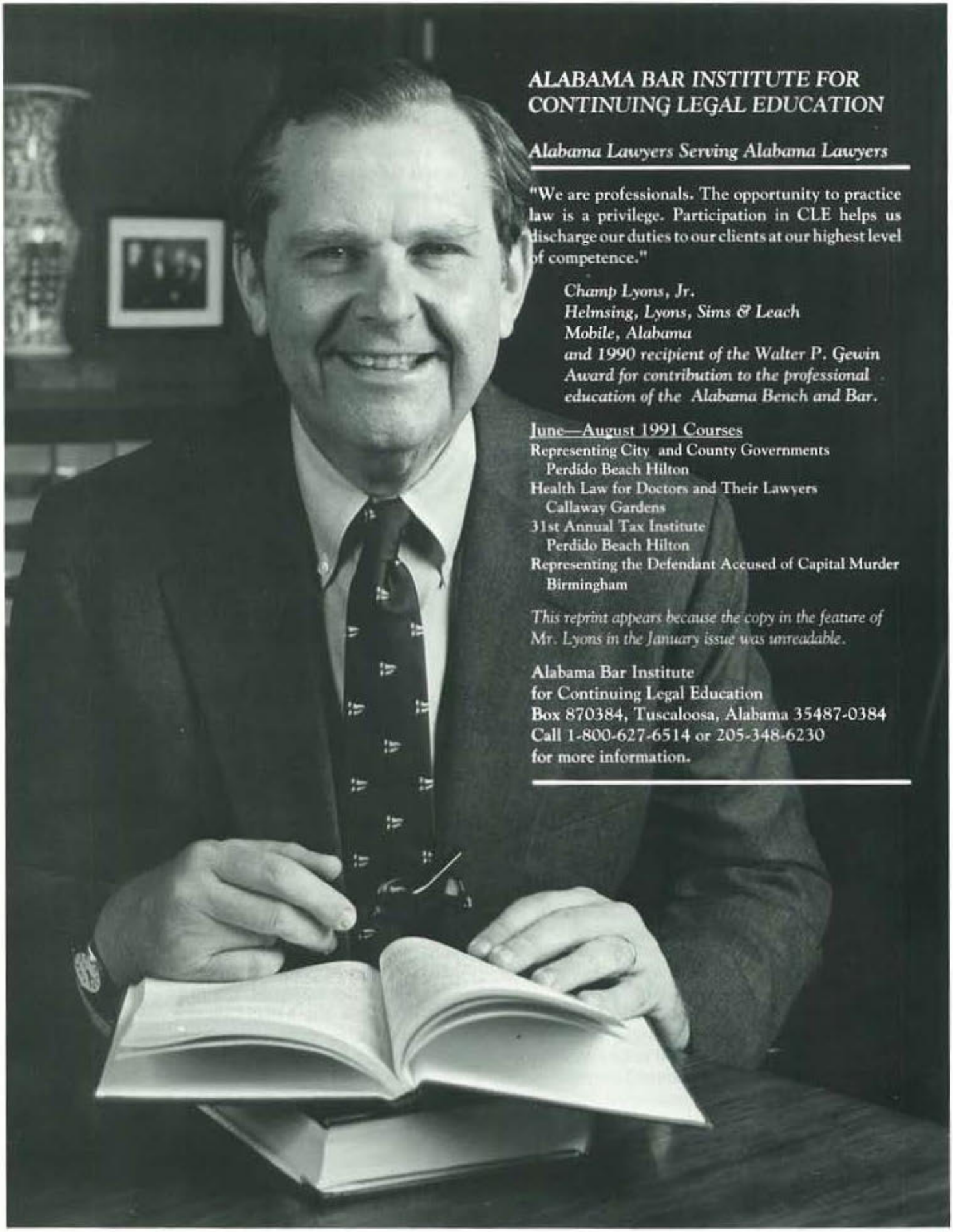

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This reprint appears because the copy in the feature of Mr. Lyons in the January issue was unreadable.

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PRESIDENT'S PAGE

I want to share with you a real success story—the IOLTA program of the Alabama State Bar.

We all learned in law school that a lawyer is ethically prohibited from commingling funds being held for a client with the lawyer's personal or firm accounts. A separate trust account must be established as a repository for client funds. We also learned that it is unethical for the trust account to bear interest which goes to the lawyer, because that, in effect, is taking a client's money.

It is usually impractical to set up separate interest-bearing accounts for the benefit of numerous clients whose money is being held for only a few days. It is equally impractical to attempt to account for small amounts of interest due to separate clients whose money is commingled in a single trust account. So, clients' funds which were being held by lawyers for distribution, with occasional exceptions for large amounts held for significant periods of time, were lumped together in non-interest-bearing trust accounts.

W. Harold Albritton, III

In the 1970s, with the advent of interest-bearing checking accounts, a thought began to take hold in parts of the legal community. While each separate lawyer's trust account might not be able to generate a great deal of interest, a combination of accounts could, and that money might be put to good use. Since lawyers were ethically prohibited from taking the interest, and since with most accounts it was impractical to provide for interest to go to the clients, why not let trust accounts bear interest with the interest being used for charitable purposes related to the law? IOLTA (Interest on Lawyers' Trust Accounts) was born.

The first IOLTA programs were established in Australia and Canada, followed closely by the first U.S. program, adopted in Florida in 1978 and made operational in 1981 after the successful defense of court challenges. The programs have since spread to every state.

In 1984, Alabama State Bar President Walter Byars appointed a task force to study IOLTA and develop a plan for our state. The task force went to work, and in 1986 its chairperson, Rowena Crocker Teague, presented a proposal to the board of commissioners. The commissioners approved the plan and submitted it to the supreme court. In May 1987 the Alabama IOLTA program was approved by the Supreme Court of Alabama and it became operational in January 1988.

Our program is an opt-out program, which means that lawyers who for some reason do not wish to participate may inform the state bar of that fact and they are not required to be a part. If a lawyer does become a part of the program, a simple form is taken to the lawyer's bank and the bank does the rest, remitting interest earned on the lawyer's trust account on a monthly or quarterly basis. No charge is made to the lawyer except what is authorized to come out of the interest.

The Alabama Law Foundation, Inc. was organized to be the recipient of IOLTA funds. It is a 501(c)(3) charitable, tax-exempt organization which is authorized to give grants of these funds for the following purposes: to provide legal aid to the poor, provide law student loans, provide for the administration of justice, provide law-related education to the public, help maintain public law libraries, help maintain a client security fund, and help maintain an inquiry tribunal.

At present, 3,257 Alabama attorneys are participating in IOLTA. This represents 62 percent of those eligible to participate. This is now generating nearly $1,000,000 a year to be used for the foundation's charitable purposes, all at no cost to the participating lawyers.

The Alabama Law Foundation is governed by a board of trustees made up of Alabama lawyers. Ben Harris is the foundation's president. There is a full-time executive director, Tracy Daniel, who works out of state bar headquarters. The foundation receives grant applications which are referred to the Grants Committee, chaired by Harry Gamble and composed of lawyers who are not trustees. The committee studies each application and makes recommendations to the board of trustees. Annually, the board reviews these recommendations and makes grants of IOLTA funds.

In the short time that this program has been in operation the results have been truly amazing. The following are a few of the things that now exist in Alabama that in all probability would not if it were not for IOLTA.

The Capital Representation Resource Center, which was organized in 1988 with former Governor Albert Brewer as its first president, assists attorneys who are appointed to capital cases in the post-conviction stage. It has headquarters in Montgomery, where its full-time director, Bryan Stevenson, and five staff attorneys monitor capital cases and are available to help appointed lawyers throughout the state with their specialized expertise. While the center now receives funds from several additional private and governmental sources, its seed money, which made the organization possible, came from IOLTA.

Appointed attorneys in capital cases in the pre-trial stage

now have two investigators available to them through the Mitigation Program of the Alabama Prison Project, funded by IOLTA.

The problem of child abuse has received much attention from the foundation. Examples of current programs made possible by IOLTA grants include prosecutors assigned to the Child Advocacy Center and the Tuscaloosa Children's Center and Montgomery County's Court-Appointed Special Advocate program through which volunteers are assigned to work as a link between abused children and the court.

It is the foundation's preference to provide funds to organize a worthy program and to assist it until it can become self-sufficient, rather than being the sole source of continued funding. An excellent example of this is the Court Appointed Juvenile Advocate Program of Madison County, which has volunteers who act as advocates in the court cases of physically and sexually abused children so that children will have a constant figure while they are in the court system and not be shunted from one person to another. This program was made possible by an IOLTA grant but now can support itself through a local tax. The foundation recently approved a grant to start a similar program for juvenile delinquents in Madison County.

Domestic violence is another problem which has received special attention from the foundation. IOLTA funds allowed Birmingham's YWCA Family Violence Center to hire an advocate to appraise domestic abuse victims of their rights and help guide them through the legal process. A new grant to the same center will be used to hire a part-time coordinator to train and direct volunteers to help perform this function. The Alabama Coalition Against Domestic Violence will use IOLTA funds to organize workshops explaining laws relating to domestic violence to judges and attorneys. Seven attorneys have been hired with IOLTA funds by Legal Services organizations in various parts of the state to specialize in the handling of domestic violence cases. This is not an authorized use for the organizations' government funds and is made possible only by these grants.

As previously reported in this column, it is IOLTA funding which brought the Alabama State Bar Volunteer Lawyers Program into being. The culmination of a study by the bar's Committee on Access to Legal Services, chaired by Ken Battles and earlier by Anne Mitchell, this program now has a full-time coordinator, Melinda Waters, and will be housed in the expanded bar building in Montgomery. The program will work with existing urban pro bono projects and expand them into rural areas. IOLTA funds are also being used in local pro bono programs sponsored by the Mobile and Montgomery County bar associations.

In 1989, the Alabama Center for Law & Civic Education was established with seed money from IOLTA. The center is in full operation in facilities based at and donated by Cumberland School of Law and is additionally supported by state appropriations. With a full-time director, Jan Loomis, the center serves as a resource, research and training center to promote law-related education in Alabama. Its current programs include the training of teachers, the providing of resource materials to teachers, and the sponsorship of drug education programs in the schools and programs aimed at combating juvenile delinquency.

Public law libraries throughout the state have benefited from IOLTA funds, ranging from the installation of an automated catalog system in the supreme court law library to the purchase of fax machines and other equipment for numerous county libraries.

Other projects which are currently underway in our state because of IOLTA funding include the co-sponsorship of a conference on literacy by the Alabama State Bar Task Force on Illiteracy, chaired by Lynne Kitchens; Alabama Public Television spots and a series on Constitutional issues produced by the Alabama State Bar Law Day Committee, chaired by Fred McCallum; a liability guide for volunteers of non-profit organizations published by the ASB Young Lawyers' Section/ Montgomery County Young Lawyers; the YMCA Youth Judicial Program; and an outreach program of the Alabama Disabilities Advocacy Program to inform disabled Alabamians in several rural counties of their legal rights.

There have been many other IOLTA-funded programs, but this will give a sense of what is being accomplished with these funds.

Look at what lawyers can do! With the unselfish efforts of volunteer lawyers who have been willing to contribute otherwise billable hours to serving as task force members, commissioners, Grants Committee members, trustees and officers of the Alabama Law Foundation, and the willingness of 3,257 lawyers to fill out a simple form to convert their trust accounts to IOLTA accounts, we have done wonders.

This is a project which should make every lawyer in Alabama swell with pride. To all who have contributed to its success, and to all who may, on reflection, decide to do so in the future, I give my heartfelt thanks. Well done! ■

EXECUTIVE DIRECTOR'S REPORT

CLIENT SECURITY FUND

This year marks the 20th anniversary of the state bar's first attempt to establish a viable Client Security Fund. Initially, the fund was created with a seed grant from the Alabama State Bar Foundation and an expectation of sustaining the fund through an annual voluntary contribution from each member of the bar. Our initial claim wiped out the fund, and had the Birmingham Bar Association not paid half of that claim, the injured client would have not been made whole. A voluntary funding mechanism could not sustain such an effort, and Alabama then was one of only a few states without a fund.

In 1987, at the request of the Alabama State Bar, the Supreme Court of Alabama adopted rules for a CSF that included a mandatory assessment of every lawyer holding an active license to practice on January 1 of each year in the amount of $25 until the lawyer had paid $100 into the CSF. The 1991 statements have been mailed, and, to date, 3,501 lawyers have paid their assessment in full. Payment number four was due from another 1,945 members by March 31. Our current fund balance is $646,593.97.

Reginald T. Hamner

Twenty-three claims have been asserted against the fund. In 1989, one attorney repaid the client the money wrongfully taken, even though he was no longer practicing law. The fund paid another client $2,000 which had been stolen by a lawyer who was no longer practicing and the bar was unable to locate. The other claim, for $1,462, predated the rules and was not cognizable. The attorney involved has been disbarred for other offenses.

One attorney is responsible for nine pending files. He is the subject of disciplinary proceedings and not engaged in the practice of law. All of the claims, which total approximately $2,300, represent retainers where no work was ever undertaken. The attorney involved indicated his intention to repay all claimants but has not done so.

A claimant was repaid $2,000 for another 1990 file by the attorney who has subsequently been disbarred. Claims totalling $5,180 are pending against another suspended attorney who took the client's money even though he was suspended. Inasmuch as the rules require the attorney be licensed at the time of the misappropriation, these claims are likely to be denied. One of the claims could conceivably be a debtor-creditor relationship unrelated to an attorney-client relationship.

A now-deceased attorney was the subject of a claim which was denied in 1990. The client actually sought to assert a malpractice action against the fund which is clearly not intended. Two claims filed for inaction predated the rules and the CSF.

Unfortunately, 1991 has begun with the assertion of claims totalling $152,820.33. One now-deceased attorney is responsible for $128,000 of this total. While still practicing, he closed two house sales and kept the money intended to pay off existing mortgages. The CSF liability, under the rules, is a maximum of $20,000 per claim or, in this instance, $40,000. It would appear two other claims totalling slightly over $2,200 will be paid. One attorney is already disbarred and took a $1,500 fee while closing his practice. The other appears to be a failure to pay over collected funds. That attorney has since left Alabama.

Another 1991 pending claim totals $16,000, but preliminary investigation indicates there is no basis for the claim.

Initially, there was significant resentment toward the fund. No small number of dissidents doubted the need for it. From the above disclosed claims, it is easy to see those dishonest among us hurt the entire profession. Most of the claimants can ill afford to be victimized.

The president-elect of the bar chairs the CSF Claims Committee. It will be meeting soon to review pending claims.

It is hoped the fund is on a sound footing for years to come. It draws interest monthly. Please review the CSF Rules which appear in the new bar directory. History has shown that in those states with long-standing CSF activity, this is a meaningful and positive method to help the profession's image when those among us do harm through a dishonest act.

Each claim is required to be documented and then is investigated to ensure that a misdeed has occurred. ■

LEGISLATIVE WRAP-UP

By ROBERT L. McCURLEY, JR.

UCC ARTICLE 2A — LEASES

The Law Institute has approved and presented to the Legislature a new article to the Uniform Commercial Code. Bob Fleenor chaired the committee with Professor Peter Alces serving as the draftsperson. The following lawyers served on the committee: Douglas T. Arendall, Hamp Boles, Andy Campbell, Ralph Franco, John B. Givhan, Bill Hairston, Jr., Neil Johnston, Jim Klinefelter, Barry Marks, Elbert H. Parsons, Jr., Joseph Stewart, and Mike Waters.

The following review of the pending bill is taken from the committee's draft with commentary.

Promulgated in 1987 by the American Law Institute and the National Conference of Commissioners for Uniform State Laws, Article 2A of the UCC is the first comprehensive statutory formulation of the personal property leasing law. In the tradition of the restatements and the UCC, Article 2A does not so much create personal property leasing law as it codifies the better practices in this growing area of the commercial law. The article also continues the commercial law's vindication of freedom of contract principles, assuring the parties to a lease transaction that they may, for the most part, tailor the statute to the exigencies of particular transactions.

The committee took into account the existing bodies of law in considering the efficacy of the formulations effected in the proposed uniform law.

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

A lease is a contract, subject to contract law construction and enforcement principles. And, in Alabama, leases have been construed and enforced in a manner generally consistent with contract

principles. There has been, however, a dearth of case law applying contract law to leases. Therefore, transactors have been left with little guidance in formulating the contours of their lease transactions. While general contract principles developed in other contexts are certainly competent to address and resolve a broad array of leasing issues, it is less clear that the general contract law is the best source of guidance for determining controversies involving considerations fundamental to the commercial law.

To address the vacuum of guidance, the Alabama courts have referred to Article 2 of the UCC, "Sales", as a source of law to govern controversies involving personal property leases.

Article 9 of the UCC, "Secured Transactions", insofar as it concerns the rights and liabilities of parties with interests in the same personal property, also supplies a source of law that would be available for use by analogy to lease transactions.

In Alabama, UCC Article 9 governs secured transactions and Article 2 governs sales. Insofar as Article 24 draws on analogues from Articles 2 and 9, the operation of many Article 2A provisions will be immediately accessible to those already familiar with the commercial law in the state. Issues of lease contract formation, performance and default are generally treated by Article 2A provisions that are based on Article 2 analogues; issues concerning the priority of claims to the lease property draw, for the most part, on Article 9 analogues.

The lease is closer in spirit and form to the sale of goods than to the creation of a security interest. While parties to a lease are sometimes represented by counsel and their agreement is often reduced to a writing, the obligations of the parties are bilateral and the common law of leasing is dominated by the need to preserve freedom of contract. Thus, the drafting committee of the Uniform Act concluded that Article 2 was the appropriate statutory analogue.

The drafting committee of the Uniform Act then identified and resolved several issues critical to codification:

Scope

The scope of the Article was limited to leases (Section 2A-102). There was no need to include leases intended as security, i.e., security interest disguised as leases, as they are adequately treated in Article 9. Further, even if leases intended as security were included, the need to preserve the distinction would remain, as policy suggests treatment significantly different from that accorded leases.

Definition of lease

Lease was defined to exclude leases intended as security (Section 2a-103[1][j]). Given the litigation to date, a revised definition of security interest was suggested for inclusion in the act. (Section 1-201[37]). This revision sharpens the distinction between leases and security interests disguised as leases.

Filing

The lessor was not required to file a financing statement against the lessee or take any other action to protect the lessor's interest in the goods (Section 2A-301). The refined definition of security interest will more clearly signal the need to file to potential lessor of goods. Those lessors who are concerned will file a protective financing statement (Section 9-408).

Warranties

All of the express and implied warranties of the Article on Sales (Article 2) were included (Sections 2A-210 through 2A-216), revised to reflect differences in lease transactions. The lease of goods is sufficiently similar to the sale of goods to justify this decision. Further, many courts have reached the same decision.

Certificate of title laws

Many leasing transactions involve goods subject to certificate of title statutes. To avoid conflict with those statutes, this article is subject to them (Section 2A-104[1][a]).

Consumer leases

Many leasing transactions involve parties subject to consumer protection statutes or decisions. To avoid conflict with those laws, this article is subject to them to the extent provided in Section 2A-104(1)(c) and (2). Further, certain consumer protections have been incorporated in the article.

Finance leases

Certain leasing transactions substitute the supplier of the goods for the lessor as the party responsible to the lessee with respect to warranties and the like. The definition of finance lease (Section 2A-103[1][g]) was developed to describe these transactions. Various sections of the article implement the substitution of the supplier for the lessor, including Sections 2A-209 and 2A-407. No attempt was made to fashion a special rule where the finance lessor is an affiliate of the supplier of goods; this is to be developed by the courts, case by case.

Sale and leaseback

Sale and leaseback transactions are becoming increasingly common. A number of state statutes treat transactions where possession is retained by the seller as fraudulent per se or prima facie fraudulent. That position is not in accord with modern practice and, thus, is changed by the article "if the buyer bought for value and in good faith" (Section 2A-308[3]).

Remedies

The article has not only provided for lessor's remedies upon default by the lessee (Sections 2A-523 through 2A-531), but also for lessee's remedies upon default by the lessor (Sections 2A-508 through 2A-522). This is a significant departure from Article 9, which provides remedies only for the secured party upon default by the debtor. This difference is compelled by the bilateral nature of the obligations between the parties to a lease.

Damages

Many leasing transactions are predicated on the parties' ability to stipulate an appropriate measure of damages in the event of default. The rule with respect to sales of goods (Section 2-718) is not sufficiently flexible to accomodate this practice. Consistent with the common law emphasis upon freedom to contract, the article has created a revised rule that allows greater flexibility with respect to leases of goods (Section 2A-504[1]).

Though the Alabama act occasionally may differ in its formulation, the act is generally consistent with the approach of the Uniform Act, with regard to the critical issues.

Anyone wishing a copy of this proposal may obtain one by writing Bob McCurley, Alabama Law Institute, P.O. Box 1425, Tuscaloosa, Alabama 35486. ■

BAR BRIEFS

ABA nominates 11 persons to board of governors

Eleven persons were nominated in February 1991 to serve on the Board of Governors of the American Bar Association, which represents 380,000 lawyers nationwide.

The nominees were selected during the 1991 ABA Midyear Meeting in Seattle. Their names will be presented for a vote when the association convenes for its 1991 annual meeting in August in Atlanta. The 33-member board of governors meets five times a year and oversees management and administration of the ABA. Terms on the board of governors last three years.

Huckaby

Among the nominees is Gary C. Huckaby of Huntsville, Alabama. Huckaby was president of the Alabama State Bar from 1988-89 and is with the firm of Bradley, Arant, Rose & White. He was admitted to the state bar in 1962.

Escambia County Bar Association receives award

The Escambia County Bar Association recently received notice from the American Bar Association that it had been selected to receive a Certificate of Recognition in the ABA's 1990 Law Day U.S.A. Public Service Award competition.

According to William R. Stokes, Jr., of Evergreen, who is president of the bar association, activities included having all area high school seniors participate in the trial of two criminal cases. These trials were held April 30 and May 1, 1990. The trials were of defendants charged with driving under the influence of alcohol; the defendants and their attorneys consented to be tried by these students.

Members of the association went to each school the week prior to the week of Law Day to speak with the seniors. It was arranged for a deputy to go also, at which time jury summonses were served on each senior student.

Prior to the trials each day, the entire group of seniors was given an orientation talk by a member of the association, who explained the purpose of Law Day, the theme of this year's observance, and how the association was making this observance.

In addition to the trials, members of the association participated on radio talk shows at two radio stations in the county.

Friend elected

Friend

Edward M. Friend, III of Sirote & Permutt, P.C. has been elected to a second term as chairperson of the Birmingham Area Chamber of Commerce. The Chamber represents 4,700 members in Jefferson, Shelby, Walker, St. Clair and Blount counties.

Friend is a graduate of the University of Alabama and the University's School of Law.

Harris elected

James D. Harris, Jr., formerly a partner in the Montgomery firm of Harris & Harris, has been elected president of the Bowling Green-Warren County Bar Association. Harris was also a member of the Alabama House of Representatives from 1970-78.

He currently is a partner with the firm of Harlin & Parker in Bowling Green, Kentucky, and a colonel in the USAR.

Shepard elected

Tazewell T. Shepard, III was sworn in as a new member of the Alabama State Board of Education in January. He received 62 percent of the total vote.

The board of education implements education laws and sets academic standards for all elementary and secondary public schools. It acts as the board of control for Alabama's 39 two-year colleges and also oversees all vocational education, adult education, teacher in-service centers and children's and adult rehabilitation services in the state.

Shepard was admitted to the Alabama State Bar in 1979.

Johnson and Lazenby chosen

Alabama Chief Justice Sonny Hornsby recently named Circuit Judge Leslie G. Johnson of Florence as administrative director of courts for the state of Alabama. Johnson will fill the vacancy left when former director Allen Tapley became director of The Sentencing Institute in Montgomery.

Johnson

Judge Johnson was serving as presiding judge of the 11th Judicial Circuit when chosen. Johnson has been a circuit judge since 1977. Prior to that, he was a special circuit judge, a deputy district attorney and in the private practice of law.

Johnson is a 1967 graduate of Vanderbilt University, and a 1969 graduate of Cumberland School of Law. In 1979 he received his master of law degree from the University of Mississippi, and in 1984 he earned a master of science degree in criminal justice from the University of Alabama.

Johnson's extra judicial service includes serving as chairperson of the judicial system's Employee Appeals Board from 1987-90; as a member of the Prison Review Task Force since 1987; as chairperson of the State Records Retention Committee since 1985; as a member of the State Information System Review Committee since 1989; and as chairperson of the Community-Based Sentencing Policy Task Force, a position which he accepted last year at the request of the chief justice.

The primary duty of the Administrative Director of Courts is to assist the

chief justice in his duties as the administrative head of the judicial system by seeing to it that the business of the courts of this state is attended to with proper dispatch and court dockets are not permitted to become congested and that trials and appeals are not unreasonably delayed.

John L. Lazenby, the circuit clerk of Elmore County, has been appointed deputy administrative director of courts.

Lazenby served as circuit clerk for Elmore County since 1982. Prior to that, he served as assistant circuit clerk and magistrate.

Lazenby

Lazenby has been president of the State Association of Clerks and Registers twice and earned the association's President's Award three times and its Ambassador's Award once.

He is a member of the National Association of Court Management and has served as the following: chairperson of the State Court Cost Collection Committee; member of the system's Legislative Council, the Weighted Caseload Committee and the Child Support Forms Committee; member of the faculty of the Alabama Judicial College; and vice-chair of the Alabama Criminal Justice Information System Commission.

AAA-CPA educates

The American Association of Attorney-Certified Public Accountants is attempting to educate the public regarding the organization and its purpose. It was formed over 25 years ago by the joining of California and New York state associations which had begun independently. It now has membership in all 50 states and several foreign countries.

Membership is limited to those individuals who hold licenses as attorneys and as certified public accountants, although a majority of the members practice primarily in one discipline or the other. The organization represents the interests of dually qualified professionals on national and state levels.

For more information about AAA-CPA, contact Joe Brotherton at (206) 325-3537.

Gaede elected

In the January issue of *The Alabama Lawyer*, it was reported that Edward P. Myerson has been elected as the "first member from the state of Alabama" to the American College of Construction Lawyers. Unfortunately, that information was not completely correct. Birmingham attorney A.H. Gaede, of the firm of Bradley, Arant, Rose & White, was also selected in the same group of 41 attorneys constituting the inaugural group of Fellows. The *Lawyer* regrets this omission.

Smith elected

John Joseph Smith, Jr. of Birmingham was selected recently as a member of the Labor Panel of the American Arbitration Association. Smith has served as an arbitrator since 1983 and is also a member of the Labor Panel of the Federal Mediation and Conciliation Service. He was admitted to the state bar in 1970.

Portrait needs identification

The Alabama Supreme Court Library needs the help of the citizens of Alabama identifying the portrait above, which is included in the library collection.

In their efforts to update the portrait collection, library officials believe they have successfully identified all portraits except this one. All efforts to date to identify it have been unsuccessful.

If anyone can identify the picture, please contact Bob Warren of the Alabama Supreme Court Library at (205) 242-4347 or write Supreme Court and State Law Library, Judicial Building, 445 Dexter Avenue, Montgomery, Alabama 36130, ATTN: Bob Warren. ■

ABOUT MEMBERS, AMONG FIRMS

ABOUT MEMBERS

Richard D. Horne, formerly a partner in the firm of Hess, Atchison & Horne, announces that he is relocating his office to One South Royal Street, 4th floor, Mobile, Alabama, and will be practicing as **Richard D. Horne, Attorney-at-Law**. Phone (205) 432-4421.

Sharon D. Hindman has become associated with **First State Bank of Franklin County** as general counsel. Offices are located at 1000 Highway 43, North, P.O. Box 1223, Russellville, Alabama 35653. Phone (205) 332-5600.

Richard T. Davis announces the opening of his office at 3800 Colonnade Parkway, Suite 650, Birmingham, Alabama 35243. Phone (205) 969-3433.

L.F. Hilbers announces that he has relocated to The Mayfair Center, 3401 Independence Drive, Suite A, Homewood, Alabama 35209-5620. The mailing address continues to be P.O. Box 19393, Homewood, Alabama 35219-9393. Phone (205) 871-1939.

Steven R. Sears announces the removal of his office to 655 Main Street, P.O. Box 4, Montevallo, Alabama 35115-0004. Phone (205) 665-1211. (An E911 street renumbering program caused the change, but the office's physical location remains unchanged.)

Theresa A. Tkacik announces the opening of her new office at 2162 Highway 31 South, Pelham, Alabama 35124. Phone (205) 987-9126.

Douglas K. Dunning, P.C. announces the relocation of his office to 1659 Government Street, Mobile, Alabama 36604. Phone (205) 473-2666.

Tony S. Hebson announces the relocation of his offices to 1250 Park Place Tower, Birmingham, Alabama 35203. Phone (205) 322-2022.

Harmahinder Singh Bagga, Ph.D., announces the opening of his office at 3800 Colonnade Parkway, Suite 100, Birmingham, Alabama 35234. Phone (205) 967-4649.

AMONG FIRMS

Sandefer, Sandefer & Francis, P.C. announces that **William H. Roe** has become a partner in the firm. Offices are located in Mountain Brook, Pinson and Oneonta, Alabama.

Colee & Tucker announces the change of the firm name to **Colee, Tucker & Cromer, P.C.** The firm also announces that **Terry M. Cromer** has become a partner, with offices in Birmingham and Leeds, Alabama.

The Office of Robert A. Jones, Jr. announces that **Laverne Davis** has become a partner in the firm, and **Joan Y. Davis** has become an associate, and the firm name is now **Jones & Davis, P.C.** Offices are located at 1205 North 19th Street, Birmingham, Alabama 35234. Phone (205) 324-6021.

The firm of **Lyons, Pipes & Cook** announces that **Joseph J. Minus, Jr.** has become a member of the firm. Offices are located at 2 North Royal Street, Mobile, Alabama 36602. Phone (205) 432-4481.

The firm of **Rushton, Stakely, Johnston & Garrett, P.A.** announces that **Frank J. Stakely** and **William S. Haynes** have become members of the firm. Offices are located at 184 Commerce Street, Montgomery, Alabama 36104. Phone (205) 834-8480.

Ernest O. Spencer, III, John Foster Tyra, John C. Crecink, Jr., Kathy L. Marine and **Linda K. McKnight** announce the formation of a partnership in the name of **Spencer, Tyra, Crecink, Marine & McKnight.** Offices are located in Jackson, Mississippi, and Tuscaloosa, Alabama.

Bill Bowman and **Kirk S. Samelson** announce that **Frank S. Dodge** has joined their firm, and the firm will be known as **Bowman, Samelson, & Dodge, P.C.** Dodge is a 1977 admittee of the Alabama State Bar. Offices are located at 540 N. Cascade Avenue, Suite 102, Colorado Springs, Colorado 80903. Phone (719) 634-5100.

The firm of **Gaiser & Barineau** announces that **Leslie R. Barineau** has joined the firm as a partner. Offices are located at 2021 Third Avenue, North, P.O. Box 531144, Birmingham, Alabama 35253. Phone (205) 251-2392, 2380.

Drew, Eckl & Farnham announces that **Lucian Gillis, Jr.** has become associated with the firm. Offices are located at 880 West Peachtree Street, P.O. Box 7600, Atlanta, Georgia 30357. Phone (404) 885-1400. Gillis is a 1977 admittee to the Alabama State Bar.

Hand, Arendall, Bedsole, Greaves & Johnston announce that **J. Burrus Riis, Thomas G. McCroskey** and **Harry S. Pond, IV** have become associated with the firm. Offices are located in Mobile, Alabama, and Washington, D.C.

Coale, Helmsing, Lyons, Sims & Leach announces that the name of the firm has been changed to **Helmsing, Lyons, Sims & Leach, P.C.**, and that **Harwell E. Coale, Jr.** remains *of counsel* to the firm. The mailing address is P.O. Box 2767, Mobile, Alabama 36652. Phone (205) 432-5521.

Balch & Bingham announces that **T. Kurt Miller, J. Thomas Francis, Jr.** and **Timothy J. Tracy** have become partners. Offices are located in Birmingham, Montgomery and Huntsville, Alabama, and Washington, D.C.

Capell, Howard, Knabe & Cobbs, P.A., announces that **H. Dean Mooty, Jr.** has become a member of the firm, and that **W. Holt Speir, III, Jim B. Grant, Jr., Peter M. Crofton, Chad S. Wachter,** and **Ellen M. Hastings** have become associated with the firm. Offices are located at 57 Adams Avenue, Montgomery, Alabama 36104-4045.

The firm of **Greene, Buckley, Jones & McQueen** announces that **James C. Frenzel** has become a member of the firm, and **B. Kyle Childress, H. Lee Pruett, Leslie C. Ruiter, Rose E. Goff,** and **H. Worthington Lewis** have become

associates of the firm. Offices are located at The Hurt Building, 50 Hurt Plaza, Suite 1300, Atlanta, Georgia 30303. Phone (404) 522-3541.

The firm of **Boyd, Pate & Fernambucq, P.C.** announces that **Randall W. Nichols** became associated with the firm, effective April 1, 1991. Offices are located at 2801 University Boulevard, Suite 302, Birmingham, Alabama 35233. Phone (205) 930-9000.

The firm of **Redden, Mills & Clark** announces that **Maxwell H. Pulliam** has become associated with the firm. Offices are located at 940 First Alabama Bank Building, Birmingham, Alabama 35203. Phone (205) 322-0457.

Parsons & Eberhardt announces that the firm's street address has changed from 111 Jefferson Street to AmSouth Center, Suite 703, Huntsville, Alabama 35801. The mailing address remains the same.

The firm of **White, Dunn & Booker** announces that **Linda G. Flippo** is now associated with the firm. Offices remain at 1200 First Alabama Bank Building, Birmingham, Alabama 35203. Phone (205) 323-1888.

The Law Offices of Bert P. Taylor announce that **William F. Smith, II** has become associated with the firm. The firm's address is 300 North 21st Street, 710 Title Building, Birmingham, Alabama 35203. Phone (205) 252-3300.

The firm of **Scholl & Scholl** announces that **Jon M. Turner, Jr.**, formerly of Prince, Baird, Turner & Poole, P.C. of Tuscaloosa, has become associated with the firm. Offices are located at #4 Office Park Circle, Suite 315, Birmingham, Alabama 35223. Phone (205) 871-6004.

Douglas I. Friedman, P.C. announces that **John M. Pennington** has become associated with the firm at Suite 535, 2000-A Southbridge Parkway, Birmingham, Alabama 35209. Phone (205) 879-3033.

Michael M. Fliegel and **David Elliott Hodges** announce the formation of their partnership in the name of **Fliegel & Hodges**, with offices located at 2026 Second Avenue, North, Suite 1101, Birmingham, Alabama 35203. Phone (205) 328-2644.

George M. Barnett and **Tameria S. Driskill** announce that **Claude E. Hundley, III** has withdrawn as a partner in the firm of **Barnett, Hundley & Driskell**, and that the firm name has been changed to **Barnett & Driskell**, with offices located at 431 Gunter Avenue, P.O. Box 93, Guntersville, Alabama 35976. Phone (205) 582-0133.

Robert Burdine, Jr., Keith M. Collier and **Gregory Keith Burdine** announce the formation of a partnership to be known as **Burdine, Collier & Burdine,** with offices located at 412 First Federal Building, Florence, Alabama 35630. Phone (205) 767-5930.

Hogan, Smith, Alspaugh, Samples & Pratt, P.C. announces that **Ron Crook, Don Word** and **Rick Stratton** have become members of the firm. Offices are located at 2323 Second Avenue, North, Birmingham, Alabama 35203. Phone (205) 324-5635, 1-800-223-2535.

Gayle H. Gear announces her association with the **Law Offices of William M. Dawson**, effective February 1, 1991. Offices are located at Park Place Tower, 2001 Park Place, North, Suite 490, Birmingham, Alabama 35203. Phone (205) 323-6170. Gear is a former law clerk to Chief Judge Sam C. Pointer, U.S. District Court, Northern District of Alabama.

The firm of **Russell, Straub & Kyle** announces that **Cynthia Lee Almond** has become an associate of the firm. Offices are located at 804 Bank Street, P.O. Box 327, Decatur, Alabama 35602. Phone (205) 353-7641.

The firm of **W. Troy Massey, P.C.** announces that **Sandra Holston Lewis,** former assistant district attorney, has become associated with the firm. Offices are located at 4216 Carmichael Court, North, Montgomery, Alabama. Phone (205) 272-0083.

The firm of **Lammons & Bell** announces that **Miles L. Brandon** and **Edward E. Blair** became associated with the firm in October 1990. Offices are located at 132 West Holmes Avenue, Huntsville, Alabama 35801. Phone (205) 533-2410.

Sirote & Permutt announces the opening of its office in Montgomery. **Fredrick Simpler, Jr.** has joined the firm and will manage the new office. Temporary offices will be located at 207 Montgomery Street, 12th floor, Bell Building, Montgomery, Alabama.

The firm also has offices in Birmingham, Huntsville and Mobile.

First Alabama Bank of Birmingham announces that **Paula D. Levitt** has been made a personal trust officer. She is a graduate of The University of Alabama School of Law and the Southern Trust School. She is a member of the Alabama State Bar and the Birmingham Bar Association.

Walter Henley, P.C. announces that **Clifton E. Slaten** has become a member of the firm, and the firm name has been changed to **Henley & Slaten, P.C.**, effective October 25, 1990. Offices are located at 2101 Bridge Avenue, Northport, Alabama 35476. Phone (205) 339-5151.

Mark G. Montiel and **Algert S. Agricola, Jr.** announce the formation of their firm, **Montiel & Agricola, P.C.**, with offices at 407 South McDonough Street, Montgomery, Alabama 36104. The mailing address is P.O. Box 11576, Montgomery, Alabama 36111-0576. Phone (205) 832-9900. ■

ALTERNATIVE DISPUTE RESOLUTION

AN · INTRODUCTION

By JACK CLARKE

The purpose of this article is to discuss Alternative Dispute Resolution or "ADR", the features of some of its forms, and the potential for its application by Alabama lawyers. ADR essentially is a group of procedures designed to settle disputes. It may be viewed as a continuum of settlement techniques ranging from the consensual processes of negotiation, mediation and other neutral assisted, binding-only-if-agreed-to systems to the adjudicative procedures of arbitration and private judging.

The techniques of ADR are not new phenomena. It is likely that human beings began negotiating only shortly after they began communicating. Few lawyers would claim to be unfamiliar with negotiating settlements. Arbitration has been used to resolve commercial disputes for hundreds of years and after World War II became the most commonly accepted procedure to resolve grievances which arose under collective bargaining agreements.[1] And agreements to arbitrate other types of disputes are common today. But the current interest in ADR is rooted in the litigation explosion which began in the 1960s. One response was a search for alternatives to courts.

Jack Clarke
Jack Clarke is a graduate of the University of New Mexico School of Law and a former associate professor of the University of Alabama School of Law. He began arbitrating in 1974, and for the last ten years has practiced almost exclusively in arbitration and mediation. In 1987 he was awarded the Whitney North Seymour, Sr. Arbitration Medal by the American Arbitration Association.

SOME ADR PROCEDURES[2]

Negotiation has been, and continues to be, a routine professional activity for many lawyers. One may ask why it should be viewed as part of ADR. The answer is that interest in finding ways to resolve disputes outside of courtrooms resulted in serious study of the negotiation process.[3] Realization of the potential for resolving problems both before and after the filing of complaints, realization that negotiating skills can be studied and learned, and realization that in some situations a lawyer can best serve his or her client by negotiating have led to the addition of negotiation courses to law school and continuing legal education curricula. The Alabama State Bar Commission on Mandatory Continuing Legal Education, for example, has approved negotiation courses for CLE credit for a number of years. Interest in negotiation within the business community is evidenced by the regular appearance of advertisements in some publications for negotiation seminars.

Negotiating a settlement has all the client benefits associated with agreeing to a mediated settlement mentioned by Keith Watkins and Noah Funderburg in their article beginning on page 133. Negotiation maximizes control of a client's destiny. In the event of an early negotiated settlement, no third party, neither judge nor jury nor arbitrator nor mediator nor other neutral, is given an opportunity to influence the final decision. Early negotiation of a settlement not only minimizes litigation-related costs as discussed below, but also avoids the cost of a neutral's services. And, again as in the case of a mediated settlement, any disadvantages one might perceive in a negotiated settlement, for example, a less favorable outcome than might be obtained in court, must be weighed against the advantage that the settlement is binding only if agreed to.

Mediation and arbitration, from time to time, have been combined in a process known as "med-arb" in labor and some commercial disputes. The parties empower the med-arbiter to act as a mediator and, if no settlement is reached, to arbitrate the dispute. The process has been criticized as confusing essentially different roles in that as a mediator, the neutral is likely to hear information which if presented to a regular arbitrator would be found irrelevant but which the med-arbiter will be unable to ignore if called upon to arbitrate the dispute.[4]

A closely related criticism is that there is in med-arb "a considerable risk that the more clever or sophisticated participant may distort or manipulate the mediation in order to influence the mediator's opinion" in the event of an arbitral decision.[5] Sometimes a good mediator has to let a party know that its expectations are unrealistic. A med-arbiter may be less inclined to engage in that function in order to avoid being perceived as communicating his or her arbitral decision ahead of time.

On the other hand, an experienced proponent of med-arb argues that even if a settlement is not reached during the mediation phase, the differences between the parties will have been so narrowed during that phase that a more reasoned and more predictable result is likely in med-arb than in typical arbitration. He contends that parties in med-arb know or come to realize that in the event they

do not honestly confide in the med-arbiter during the mediation phase, they run the risk of the arbitration decision they wish to avoid.[6] It must be remembered, of course, that participation in med-arb is consensual; absent an agreement, a lawyer's client cannot be required to participate in the process. One subject to be covered in any agreement to participate in med-arb would be the selection of the med-arbiter. One would certainly exercise considerable care in the selection of a med-arbiter. It should also be noted that a non-jury trial or arbitration wherein the judge or arbitrator attempts to mediate a settlement before rendering a decision is functionally identical to med-arb. Such a judge or arbitrator may be less skilled as a mediator and less aware of problems inherent in such mediation than a person specifically selected as a med-arbiter.

A variation on med-arb popularized by Professor Stephen B. Goldberg of Northwestern University School of Law to resolve disputes under labor contracts provides that in the event mediation fails, the mediator issues an advisory, nonbinding opinion regarding the likely outcome of the dispute.[7] The process utilizes mediators experienced in arbitrating labor contract grievances. This procedure has all the advantages of mediation and med-arb, including an early expert opinion, yet avoids the problems perceived with med-arb. If either party believes the mediator's advisory opinion resulted from his or her consideration of inappropriate evidence, that party may simply decline to be bound by the opinion. Although this process has been used primarily to resolve disputes under collective bargaining agreements, it should be useful in other arenas in situations wherein the mediator has not only mediation expertise but also expertise in the area of the dispute.

Perhaps because of its non-descriptive name, the "mini-trial" process is sometimes confused with that of the summary jury trial described by Robert W. Bradford, Jr. in his article beginning on page 150. As Bradford points out, a summary jury trial has many of the earmarks of a trial; a mini-trial may look less like a real trial. The precise procedures of a mini-trial are determined by the parties themselves and may be set out in a procedural agreement, but at the core of a mini-trial are presentations by the parties' lawyers of their best cases in a predetermined amount of time to a panel, usually of three persons. The mini-trial is most often used to resolve business disputes; the typical panel consists of high level representatives of the parties and a neutral advisor. The parties' representatives usually are persons who have not previously been involved in creating or trying to resolve the underlying dispute but who have at least persuasive power regarding settlement.

. . . at the core of a mini-trial are presentations by the parties' lawyers of their best cases in a pre-determined amount of time to a panel, usually of three persons.

Each party usually retains discretion regarding how it will use its allotted time. A party's presentation may consist entirely of comments by its lawyer similar to an appellate argument or it may consist of such comments coupled with the presentation of any type of evidence, including views of pertinent areas. Because rules of evidence do not apply, testimonial evidence tends to be narrative under informal questioning. The procedural agreement may provide for rebuttal and/or informal cross-examination and even for questioning one party's lawyer by the other's. The goal of any mini-trial presentation is to communicate the strengths of one's client's case and the weaknesses of the other party's in a short time. The parties' representatives on the panel and the neutral advisor may ask questions during the presentation. Following the presentation, the parties' representatives negotiate to resolve the dispute. The neutral advisor may be called upon not only to chair the mini-trial but also to mediate and facilitate, and if the parties' representatives' negotiations are unsuccessful, to give his or her opinion regarding the likely result if the case should go to trial. With this information, the parties' representatives may continue their negotiations.[8]

A major advantage of the mini-trial is that it places primary responsibility for settlement in the hands of the parties themselves. From the perspective of a business client, the client regains control of business decisions from its lawyer. From a lawyer's perspective, a mini-trial, while providing an opportunity to make a client's best case, allows reliance on the opposing party to act as reality's agent. Counsel for the opposing party should educate clients regarding the strengths of the opposing party's case and the weaknesses of its own.

Cost and time savings are advantages of the mini-trial. While the costs of preparing for and presenting a mini-trial are substantial, lawyers' fees and related expenses are generally much less than the fees and expenses associated with completing discovery and trying a case. Moreover, in the event the mini-trial does not result in a settlement, most of its costs will be recoverable in the reduction of trial preparation expenses. Achieving a quicker end to a dispute may present an even more important litigation cost reduction. For example, while the right to use or the obligation to pay substantial sums of money and/or the right to manufacture a major product are in doubt, the orderly and profitable operation of a business may be extremely difficult. In a worst-case scenario the pendency of a major lawsuit may have a negative impact on a business' credit worthiness. At a minimum, considerable amounts of executives' time will have to be diverted from running the business to preparing for trial. Early settlement of a dispute through a mini-trial will reduce these expenses, of course.[9]

Early Neutral Evaluation or ENE, a procedure typically made available through a court, was not designed primarily to facilitate settlements but, rather, to reduce litigation costs.[10] ENE utilizes the services of volunteer lawyers expert and respected in particular fields to meet with parties and their lawyers and give them a frank assessment of the

value of their cases. Although assigned by the court, the ENE evaluator's opinions are confidential and may not be submitted to the court without the concurrence of both parties. ENE requires the presence of lawyers and clients, or in the case of a corporate client, the presence of someone with decision-making authority. Both sides make brief presentations, and the evaluator asks questions to identify both common ground and the areas of disagreement central to the case. Outside the presence of the parties and their lawyers, the evaluator then writes his or her assessment of the case and, if appropriate, ascribes a range of damages. The evaluator returns to the conference, and without revealing his or her evaluation, asks if the parties would like to further discuss settlement. If so, they may do so. If the parties opt to not discuss settlement, the evaluator presents his evaluation, explains his or her reasoning to the clients, and outlines a case development plan.

ENE educates unrealistic clients and sets in motion a process for the exchange of information which, if necessary, can be continued after the ENE session. By identifying areas of agreement and disagreement, ENE also focuses discovery.

Another court-annexed ADR process is the settlement conference. Rules 16 of the Federal and Alabama Rules of Civil Procedure for some time have provided for pretrial conferences. Although the federal rule more clearly refers to settlement as a proper topic of discussion, the discussion of settlement possibilities clearly falls within the scope of Alabama Rule 16.

The settlement conference as an ADR procedure is generally perceived as being quite different from the pretrial conference many lawyers and judges are used to, however. The settlement conference discussed herein contemplates a judge's or magistrate's, or in an exceptional case, a special master's actively engaging in mediation, sometimes with the aid of other ADR processes, for example, the use of a neutral expert to give advice on technical issues. Some judges require the attendance or at least the telephone availability of clients or their representatives with settlement authority. At least one federal judge uses the process to determine what he considers a fair settlement.[11] Some trial judges—with the consent of the parties—conduct settlement conferences of cases over which they will preside.[12] In other courts in which settlement conferences are frequently used, it is customary for someone other than the judge who will hear the case to preside over the conference.[13]

During a settlement conference the judge or magistrate will provide the lawyers and, perhaps more importantly, their clients with feedback regarding the strength of their cases. Such an appraisal should be especially helpful to a lawyer representing a client with grossly unrealistic expectations. Such an objective appraisal also should assist the lawyer in evaluating the settlement potential of his or her case. A settlement conference like mediation allows for the consideration and evaluation of evidence which, although inadmissible at trial, would be very important in deciding whether to settle a case, for example, the potential for the defendant's bankruptcy if faced with a judgment in excess of a certain amount. During the course of a settlement conference as is

true in negotiation and every other consensual ADR process, the parties may explore a much wider range of remedies than would be possible in a typical trial. This is true in more complex cases where the parties will likely continue to do business with each other. It is also true in simpler cases as evidenced by the potential for the use of a structured settlement to resolve a personal injury claim. The presence of the judge or magistrate not available in negotiations between the parties' counsel should facilitate the parties' continuing to talk through points which might otherwise prevent settlement.

The last ADR process to be discussed here, private judging (or "rent-a-judge"), popularized in California, could not be used to decide a case in Alabama without constitutional amendment.[14] Attention paid to private judging elsewhere coupled with the potential for constitutional change here warrant inclusion of private judging in this discussion. Under the California Constitution and Rule 244 of the California Rules of Court, parties to a dispute may agree that their case be presided over by a temporary judge.[15] A stipulation to use a temporary judge must be in writing, must set out the name and address of the proposed temporary judge, and must be submitted to and approved by the presiding or supervising judge of the appropriate court; the proposed temporary judge must consent to the appointment and take an oath of office. A temporary judge has the same authority relative to the case for which he or she was appointed as a sitting judge and has the power to administer that case until its final determination. Absent a stipulation to the contrary, proceedings before a temporary judge are conducted in accordance with all rules and procedures applicable to trials before regular judges. But, apparently as a result of the atmosphere or mood of accommodation among counsel who agree to the use of a temporary judge, stipulations to alter one or more procedures, for example, to closely regulate discovery or alter the customary order of proof, are common. Trials and hearings may be conducted in counsel's office or the temporary judge's office or in public courtrooms. A temporary judge's jurisdiction over a case terminates at the same time an active trial judge's would, and the parties to a case heard by a temporary judge have the same right of appeal they would have had if the case had been heard by an active judge. Temporary judges are compensated by the parties at rates mutually agreeable to them and the temporary judge.

Private judging has the advantage of allowing litigants to choose the third party who will decide their dispute. This can be very advantageous in complex cases. As in arbitration, lawyers and clients on all sides will know the temporary judge's technical background; estimations of the extent to which a judge will have to be educated before he or she could reasonably be expected to understand the dispute should be easier and more accurate. As in arbitration, proceedings before a temporary judge are private, but unlike arbitration, private judging enables parties to use all the procedures common to a trial and retain the right to appeal the decision reached. Especially in jurisdictions with crowded dockets, private judging should result in quicker decisions. Parties could reasonably expect that a temporary judge would not accept such an appointment unless he or she could devote sufficient time to the case to closely monitor pretrial procedures, including discovery, to schedule hearings and a trial within reasonable periods of time and conduct them as scheduled, and to render a decision expeditiously after trial.

Private judging, along with other forms of ADR, has been criticized as creating a "rich man's justice".[16] The criticism, if it has any validity at all, must be leveled not only at private judging and ADR, but also at the judicial process. In our state courts other than probate, the value of one's claim determines the appropriate court for filing in the first instance, and in many civil appeals the amount of the judgment appealed from determines the first appellate court. The minimum dollar limitation necessary for a federal court to exercise its diversity jurisdiction makes the presentation of many smaller claims difficult if not impossible. Furthermore, the removal of some cases from trial courts' dockets to those of temporary judges cannot have a negative impact on parties whose cases are not removed. On the contrary, such

removals can only allow regular judges more time to attend to the remaining cases. The amount of time made available will vary directly with the complexity of the case removed. Removing cases to temporary judges also has a favorable impact on the utilization of other resources of regular trial courts. As noted above, temporary judges are compensated by the parties and not from tax monies; the salaries of judges and other court personnel whose services would otherwise be used to attend a case presented to a temporary judge are saved for application to remaining cases.

The private nature of private judging also has been criticized.[17] It is said that matters of public importance ought to be resolved in public and that private judging denies public access and public knowledge. This criticism ignores the fact that in virtually all civil actions wherein all parties in interest are represented (thus excluding actions in family courts wherein the court itself retains the obligation to assure that the interests of children are protected), trial courts routinely enter judgments which effectively adopt settlements between the parties. Similarly, federal and Alabama statutes provide for the entry of judgments in accordance with arbitration awards.[18] Certainly arbitration is at least as "secret" as private judging.

Finally, to the extent a decision reached in the private judging process is likely to have an impact beyond that particular case and the parties to it, private judging is not secret. It is unlikely that a temporary judge's decision would have precedential effect unless and until that decision was affirmed on appeal. Decisions of temporary judges are appealable in the same manner that decisions of regular judges are; the appeal process of temporary judges' decisions is as public as that of regular judges'.

EVALUATION OF ADR

Unfortunately, the absence of adequately controlled studies leaves open the question whether consensual ADR procedures produce more settlements than would otherwise occur.[19] Despite anecdotal evidence that non-binding ADR procedures "work" in the sense of producing settlements, a reasonable lawyer would probably conclude that "the jury is still out" on that question.[20]

But quantity of settlements is not the only criterion by which ADR should be evaluated. Some studies suggest that ADR procedures produce results which are more acceptable to the participants than the results of litigation.[21] It should not be surprising that a client finds a settlement in which he or she participated to be more agreeable than even an identical settlement imposed by some third party, including a jury. The consensual ADR procedures and, to a lesser extent, the adjudicative procedures of arbitration and private judging are less formal and fearsome to clients than trials. On the other hand, a client in mediation or some other essentially non-testimonial process may feel deprived of the opportunity to vent his or her feelings against the opposing party by testifying in court. But a skillful settlement judge or other neutral third party may perceive that providing one or another person an opportunity to express his or her feelings will facilitate settlement and provide such an opportunity.

. . . to the extent a decision reached in the private judging process is likely to have an impact beyond that particular case and the parties to it, private judging is not secret.

Savings to clients possible from the use of a mini-trial were previously discussed. All ADR procedures can produce the same types of savings. The amount of such savings in any settled case will depend upon the type of ADR procedure used and when it is invoked. For example, settling a dispute by negotiation prior to the filing of a complaint not only will maximize lawyers' fee and direct litigation costs savings but will also minimize time lost to prepare for litigation and may completely avoid the negative effects of the outcome of a lawsuit's being uncertain for some period of time.

At the other extreme, the only such savings which result from settlement of a case after it has gone to a jury are those associated with any appeal which might otherwise have been taken. Because of the greater similarities of arbitration and private judging to regular trials, savings derived from the use of ADR adjudicative procedures tend to be less than those which flow from the consensual processes. Nonetheless, the use of such adjudicative processes tends to produce savings for clients.[22] Last-minute rescheduling of cases because of docket congestion is rare, and the expenses associated with repreparing for trials are avoided. Lawyers using private judging often agree to limited discovery, thereby effecting savings for their clients. Although discovery is generally not provided for in arbitration, its use in commercial arbitration is not uncommon.[23] Even when permitted, discovery in arbitration is usually (but not always) less extensive and therefore less expensive than would be had for a comparable case in a court. The amount of time saved by a dispute's being resolved more quickly through ADR depends on the time a case typically takes to reach trial and will vary from one jurisdiction to another.

As suggested above, time savings can be maximized by early use of a consensual ADR procedure, but even if one opts for an adjudicative ADR procedure some such savings are likely. That relatively speedy decisions are likely when parties use a private judge was previously discussed. Although entirely credible reports of counter-examples can be heard, on the average, cases should be resolved more quickly in arbitration than in courtroom litigation. This is especially true where the arbitrator or agency responsible for administering the case is experienced in case management. In short, use of ADR is likely to result in significant savings for clients.

Lawyers must be concerned not only with their clients' pocketbooks but also their own. Lawyers may reasonably ask if use of ADR will work to their financial detriment. The impact of a settlement reached through ADR on the fee of a lawyer handling a case on a contingent fee basis is no different than the impact of any other settlement. Assuming no change in the settlement figure over time and a settlement in excess of zero, earlier settlement results in the lawyer's being compensated sooner and increases his or her rate of compensation per time. Use of a consensual ADR process does not change the trade-off involved in money damages settlements. The chance for a significantly higher recovery at some future date is given up in exchange for a sum certain to be paid within the near future. Assuming identical outcomes from the use of adjudicative ADR procedures and trials (an assumption many lawyers would disagree with especially with respect to arbitration), the effects of the use of such a procedure on contingent fee income will be positive. Because earlier decisions are likely, earlier payment is likely. And, to the extent discovery is diminished, use of an ADR adjudicative procedure will increase the rate of compensation derived from a single contingent fee and free the lawyer involved to work on another case.

Positive effects of ADR on the gross income of a lawyer working on a case on an hourly rate fee basis are more difficult to identify. Earlier settlement and less work mean fewer billable hours, and if one assumes a constant hourly rate the result is less income from a given case. If one further assumes a finite amount of legal work available, the result may be reduced gross income. On the other hand, at least one law firm has altered the assumption regarding a constant hourly rate and has begun premium billing for ADR services.[24] The rationale underlying the higher rate is the additional value to the client of ADR services.

Another factor favoring a law firm's offering ADR services is the acquisition of new clients.[25] That ADR is available and that its use may reduce the cost of litigation is becoming well-known in business circles including corporate boardrooms and offices of general counsel. More than 500 of the country's largest corporations have subscribed to a pledge to consider the use of ADR before commencing litigation against another pledge subscriber.[26] Selection of a firm in part because it included ADR among services offered and requests by clients for evaluation of their cases for resolution by ADR have been reported.[27] In other words, the legal services marketplace may coerce law firms into offering ADR services. If law firm X's offering ADR services threatens law firm Y's client base, Y may feel compelled to offer the same type of services. In short, client pressures may force even reluctant law firms to offer ADR services.

You may ask whether ADR is appropriate for all cases. The simple answer is "No". For example, except in those jurisdictions wherein private judging is available, a client who needs a precedential interpretation of a new clause in a frequently used contract form will likely be best served by use of a summary judgment or other pretrial, case dispositive judicial procedure. Other examples of cases inappropriate for resolution to ADR could be given. A full discussion of the limits of all ADR procedures is beyond the scope of this article. But unless a lawyer is familiar with ADR, he or she cannot fairly evaluate its potential to efficiently resolve a client's case.

The last questions to be addressed are how can a lawyer become more familiar with ADR and how can he or she obtain the services of a mediator or other neutral? The Alabama State Bar has established a Task Force on Alternative Dispute Resolution. The task force can provide a bibliography on ADR to lawyers who ask for it.

Some members of the task force and other lawyers have expressed their willingness to address bar and business groups regarding ADR. A number of profit and not-for-profit organizations offer ADR educational courses and/or maintain lists of neutrals and/or will assist in the administration of ADR procedures. The oldest and best known of such not-for-profit organizations is the American Arbitration Association which, despite its name, offers a full range of alternative dispute resolution services. A number of Alabama lawyers (and non-lawyers) have been trained as neutrals and are willing to provide such services. To date, in Alabama there are no licensing or minimum training or experience requirements necessary for a person to act as a mediator, arbitrator or other third-party neutral, but parties considering using a person as a neutral may certainly inquire about his or her training and experience in that arena. ■

Footnotes

1. S. Goldberg, E. Green & F. Sander, *Dispute Resolution* 3 (1985) [hereinafter cited as *Dispute Resolution*].
2. Most of the forms of ADR referred to in this article are discussed in greater detail in *Dispute Resolution*.
3. A seminal book in the modern study of negotiations to resolve conflicts is *Getting to Yes* by Roger Fisher and William Ury first published in 1981 and published in paperback in 1983.
4. Fuller, *Collective Bargaining and the Arbitrator*, in Collective Bargaining and the Arbitrator's Role, Proceedings of the 15th Annual Meeting, National Academy of Arbitrators 8, 32 (M. Kahn ed. 1962), *reprinted in Dispute Resolution* at 247, 249.
5. J. Folberg & A. Taylor, *Mediation* at 278 (1984), *reprinted in Dispute Resolution* at 268.
6. Kagel, Comment, *New Techniques in Labor Dispute Resolution* at 185-90 (H. Anderson ed. 1976), *reprinted in Dispute Resolution* at 264-67.
7. *See generally* Goldberg, *Grievance Mediation: A Successful Alternative to Labor Arbitration*, 5 Negotiation J. 9 (1989); Kolb, *How Existing Procedures Shape Alternatives: the Case of Grievance Mediation*, 1989 J. Dir. Res. 59.
8. The American Arbitration Association has adopted and promulgated a set of "mini-trial procedures" for mini-trials conducted under its auspices. Parties may use these procedures as guidelines for conducting mini-trials not held under the AAA's auspices, of course. And the AAA's procedures specifically provide that any of them may be altered by agreement of the parties.
9. The first mini-trial is interestingly described by Eric D. Green, then counsel for one of the parties, in *First Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, Remarks of Professor Eric Green*, 100 FRD 499, 513-20 (1983) (*reprinted* in L. Kanowitz, *Alternative Dispute Resolution* 127.
10. For a more complete discussion of ENE, its usefulness and associated problems see the report of the March 14, 1990, winter meeting of the District of Columbia Bar in *Practice and Perspective*, 4 ADRR (BNA) 124 (April 12, 1990).
11. Zampano, Supplement: *Judicially Supervised Settlement Conference*, in *Alternative Dispute Resolution: A Handbook for Judges, Dispute Resolution Monograph* No. 3 A.B.A. Standing Comm. on Dispute Resolution 12, 16-17 (1987). Judge Zampano conducts no settlement conferences unless counsel and their clients expressly consent to the ground rules ahead of time.
12. *Id.* at 13.
    There is some evidence that judges' participation in pretrial conferences negatively influences the clearing of cases. *See* Note, *Heileman Brewing Co. Inc. v. Joseph Oat Corporation: Defining the Perimeters of Judicial Involvement in the Settlement Process*, 5 Ohio St. J. on Dir. Res. 115, 137-38 (1989).
13. Remarks by Wayne D. Brazil, Magistrate, U. S. District Court for the Northern District of California, in *Practice and Perspective*, 4 ADRR (BNA) 157, 159 (May 10, 1990).
14. Section 6.01(a) of the Constitution of Alabama of 1901 (adopted as Amendment No. 328) provides in part: "[T]he Judicial power of the state shall be vested *exclusively* in a unified judicial system which shall consist of a supreme court, a court of criminal appeals, a court of civil appeals, a trial court of general jurisdiction known as the Circuit Court, a trial court of limited jurisdiction known as the district court, a probate court and such municipal courts as may be provided by law." (Emphasis added).
15. The California Code of Civil Procedure provides for a similar but distinct "general reference" procedure which will not be discussed here. For a brief comparison of the two procedures see the article by Richard Chernick, Esq. in *Practice and Perspective*, 3 ADRR (BNA) 381 (October 26, 1989) and 3 ADRR (BNA) 397 (November 9, 1989).
16. *See* Green, *Avoiding the Legal Logjam - Private Justice, California Style*, 1982 Corp. Dis. Mgmt., 65-82 (1981), *reprinted in Dispute Resolution* at 285, 290-92.
17. Green, *supra* note 17 in *Dispute Resolution* at 292-93; article by Richard Chernick, Esq. in *Practice and Perspective*, 3 ADRR (BNA) 397, 398-400 (November 9, 1989).
18. *See*, 9 U.S.C. sections 9 and 13; *Alabama Code* section 6- 6-15 (1975).
19. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. Chi. L. Rev. 366 (1986), *reprinted* in L. Riskin and J. Westbrook, *Dispute Resolution Procedures and Lawyers* 34419 and *in* S. Goldberg, E. Green, & F. Sander, *Dispute Resolution, 1987 Supplement with Exercises in Negotiation, Mediation and Mini-Trials* 92 (1987); article by Wayne D. Brazil, Magistrate, U. S. District Court for the Northern District of California, in *Practice and Perspective*, 4 ADRR (BNA) 157, 160 (May 10, 1990).
20. For an analysis of a study of the efficiency, effectiveness, and acceptability of ENE in one court see Levine, *Early Neutral Evaluation: The Second Phase*, 1989 J. Dis. Res. 1. For a report on the effectiveness and acceptability of child custody mediation in another court see Comment, *Child Custody Mediation: A Proposed Alternative to Litigation*, 1989 J. Dis. Res. 139, 147-55. For a brief summary of the literature regarding the effectiveness and efficiency of mediation see Tomain and Lutz, *A Model for Court - Annexed Mediation*, 5 Ohio St. J. on Dis. Res. 1, 5-11 (1989).
21. *See*, Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 Just. Sys. J. 420-41 (1982), *reprinted in Dispute Resolution* at 524-33; *see also* note 1 in *Dispute Resolution* at 534-35.
22. For an interesting dialog regarding time and other cost savings in the arbitration of a "big" (126 days of hearings) case see Gorske, *An Arbitrator Looks at Expediting the Large, Complex Case*, 5 Ohio St. J. on Dis. Res. 381 (1990); Hedlund & Paskin, *Another View of Expediting the Large Complex Case: A Response to Arbitrator Gorske from Counsel for the Defense*, 6 Ohio St. J. on Dis. Res. 61 (1990); Gorske, A Reply, 6 Ohio St. J. on Dis. Res. 77 (1990).
23. Discovery may be available as a matter of right in the arbitration of certain types of claims; *see, e.g.*, 29 U.S.C. section 21(a)(2) which provides for arbitration of withdrawal liability claims under the Multiemployer Pension Plan Amendments Act of 1980, PL 96-364, in accordance with procedures of the Pension Benefit Guaranty Corporation and 29 C.F.R. sections 2641.6(a)(2) and 2641.13(a) and (b)(3) which specifically provide for discovery in such arbitrations.
24. Remarks by James E. McGuire, Esq., of Brown, Rudnick, Freed & Gesmer, Boston, Mass. to the Mediation Seminar, Program of Instruction for Lawyers, Harvard Law School, Cambridge, Mass. (summer 1989).
25. *See* Coombe, *Dispute Resolution in the Corporate Law Firm: Toward a Full-Service Legal Practice*, Arb. J., March 1990 at 29, 33-34; *see generally*, Freyer, *The Integration of ADR Into Corporate Law Firm Practice*, Arb. J., December 1990 at 3.
26. Freyer, *supra* note 24, at 5.
27. McGuire, *supra* note 23.

MEDIATION IN ALABAMA

By KEITH WATKINS and J. NOAH FUNDERBURG

INTRODUCTION

"I would use mediation, but none of my clients' cases would be right for mediation." This hypothetical quote could have been uttered by a majority of the members of the Alabama State Bar. Maybe you do have such a case and do not even know it. Perhaps it is the case that just will not go away, or the one in which your client "botched" the deposition. It may be the one in which your client will play poorly before a rural jury, or the one in which unreasonable expectations have overtaken your client. Maybe it is the case that is quickly reaching the financial limits of your client's ability to litigate, or a case built on the testimony of an admittedly unreliable witness. Whether it is "the mother of all battles" over .0083 acres of swamp in a land line dispute or a personal injury case with problems on both sides, all lawyers have had cases which seem to defy movement, usually for lack of motivation by the client, attorney or both. Mediation may be just the solution to the case suffering from the malaise of legal lethargy.

Mediation has many applications beyond "problem" cases. It has been used successfully and effectively for many years throughout the United States in a wide range of disputes, both large and small. As an Alabama lawyer, have you ever considered mediation as a possible recourse in *any* case? Chances are, you have not. Has a judge ever suggested or encouraged mediation in a case you are handling? Probably not. Should mediation be promoted among the Alabama bench and bar as a viable, effective method of resolving cases? Absolutely.

This article is designed to focus the attention of Alabama lawyers and judges on the advantages offered by mediation in resolving disputes. Although mediation has been in use formally and informally for many years across the country, mediation has not yet enjoyed widespread use in Alabama. This article addresses what mediation is and is not, why and how it works, and why it should be given an opportunity to prove its worth.

MEDIATION DEFINED

Mediation is the process through which a neutral third party assists parties to a dispute in reaching a mutually acceptable agreement as to some or all of the issues in dispute. The neutral third party, the mediator, presides over a session or series of sessions with the parties to facilitate discussion designed to identify issues, reduce misunderstandings, clarify priorities, explore areas of potential compromise and ultimately find points of agreement. Simply put, a mediator helps the parties find their own solutions to their problems.

The mediator does not take sides nor does he/she attempt to formulate the solutions. A mediator is not a decision-maker and cannot impose a solution on any party; what the mediator does is facilitate discussion between the parties. A mediator attempts to get the parties to realize their common interests and bargain cooperatively to find a solution to their dispute which maximizes to the fullest extent possible the goals and objectives of each party.

MEDIATION DISTINGUISHED FROM ARBITRATION AND CONCILIATION

The terms mediation and arbitration are frequently confused by laypersons and lawyers as being similar processes, and some people even think they are synonymous. They are similar in some respects, but they are not synonymous. Both are non-judicial methods for resolving disputes. The essential difference between the two is that mediation attempts to resolve a dispute through a cooperative problem-solving approach by the parties while arbitration resolves a dispute in a private adversarial proceeding. One commentator distinguishes the two as follows: "The one [mediation] involves helping people decide for themselves, the other [arbitration] involves helping people by deciding for them."[1]

Arbitration is a non-judicial fact-finding and adjudicatory process. Parties to a dispute present their facts and arguments to an arbitrator, or panel of arbitrators, who then resolve the dispute by applying to the facts the statutes, regulations or rules which govern the controversy. The decision by the arbitrator is usually drafted in writing and given to the parties. Arbitration may be binding or non-binding. If binding, the decision rendered is usually the final decision resolving the dispute. If non-binding, the parties have available whatever post-arbitration relief is provided by the contract, regulation or rule which authorized the arbitration process.

Conciliation is another process involving a neutral party which is sometimes confused with mediation. Commonly used in the domestic relations context, conciliation is an attempt to assist the parties in resolving the marital differences in order to save the marriage relationship. Conciliators are usually court employees and have some powers to make interim orders to preserve the integrity of the family. By contrast, domestic relations mediators are not trying to save the marriage, though that result would not be discouraged. Mediators work to reduce the hostility between the parties to enable the parties to negotiate or create a better atmosphere for a lasting agreement. They do not, however, formally attempt to get the parties back together.

APPLICATION

A. Situations in which mediation works

Most attorneys, especially non-specialists, could find in their files an active case in which mediation would work well. The following are a few possible examples:

1. Time-critical disputes which "cannot wait" for judicial decision, such as a dispute over the quality of goods manufactured under an executory contract when time and sequence of delivery are essential to the buyer.

2. Cases involving a continuing relationship, such as domestic relations cases, controversies among partners or business associates, disagreements among beneficiaries of an estate, disagreements among family members in any type of matter, and neighbors embroiled in a contest over a boundary line.

3. Cases in which both sides are fearful of a court's decision, with its all-or-nothing effect for one side, because each side has some problems in obtaining certain victory. The common type of case is the small-to-medium personal injury suit in which the plaintiff was probably speeding and the obviously negligent defendant is a popular local personality or perhaps a large employer of potential jurors and their families. In these types of cases both parties have something to gain, and little if anything to lose, by mediating.

4. Cases in which one or more parties has an underlying, hidden agenda. Frequently there are feelings which need to be expressed, or perhaps one party has a need for vindication. For instance, suppose you represent a businessman whose partner has provided the partner's spendthrift son extensive credit without your client's knowledge or assent. The son lands in a drug treatment facility and out of sorts with his father while the business ends up with an uncollectible account receivable. The father refuses to make the debt good, and your client is ready to sue to collect the debt. Neither partner really wants to liquidate the business, but communications between them have reached an impasse. Your client may understand that the father was concerned about his son, but he resents that his partner would do something underhanded, no matter how important the reason.

This scenario presents a classic example of a case which can benefit from mediation. Litigation would not allow the parties to vent their underlying feelings and then work constructively to overcome the problem. By working toward an agreement in private, the parties are more likely to reach a negotiated settlement and preserve both their relationship and the business.

B. Situations in which mediation may not work

1. Mediation may not be appropriate or effective in all types of cases. Mediation would generally be inappropriate in cases involving primarily issues of law. Mediation also may be difficult in cases involving highly technical matters, although sometimes mediators trained in the area of expertise involved in the controversy can be used effectively.

2. Mediation would probably not be appropriate in domestic disputes in which one of the parties is dominated by the other party. This may especially be true in cases involving spousal abuse. While the presence of attorneys may help balance the power between the parties, many abused spouses would bargain away property or other rights just to avoid future abuse.

3. Mediation may also be unworkable when a client is unreasonable by nature and unwilling to work toward settlement.

ADVANTAGES OF MEDIATION

1. Time savings—Mediation usually resolves a case more quickly than litigation. Not only is the caselife shorter, but the amount of time required of a party is lessened. This can be particularly important to clients residing great distances from the forum or business executives or professionals.

2. Cost savings—Complaints by parties in all types of disputes over the high costs of attorneys fees and costs of litigation have become commonplace. Mediation offers the advantage of resolving the dispute without engaging in a full-scale trial. While the savings in legal fees are obvious, there may also be, depending on how early mediation is attempted, lower costs of discovery and fees for experts.

The success rate of mediation in totally resolving disputes is high. Even if all issues are not resolved, mediation may bring the parties closer to an ultimate settlement or result in agreement on some of the disputed issues. Perhaps an even more important cost savings is the savings of future litigation costs. Parties in mediation create their own solutions as opposed to the solution being imposed by a court or other third party.

They are, therefore, more likely to be satisfied with the results and willing to abide by the terms of the agreement. This reduces the need for post-settlement litigation brought about by non-compliance with a court order.

3. Preserving relationships—Another important advantage of mediation is that it is a more effective method of preserving relationships than that created by the general atmosphere of litigation. This is particularly desirable when the parties will have a continuing relationship, as in child custody disputes, land line contests between neighbors and disagreements between business partners. Meeting with a neutral fact-finder, under the format described below, also allows a venting of feelings by the parties in a manner not available or practical in court. Mediation is an effective process for defusing emotional issues in a dispute.

4. Reality testing—Another advantage is that mediation can permit unreasonable parties, and in some cases, unreasonable attorneys, to engage in some "reality testing". A client with wild expectations about the measure of damages to which he is entitled may be brought down to earth in a face-to-face session with the other side.

5. Public goodwill—Mediation increases the level of individual client and overall public satisfaction with the legal process. It has been said, ". . . [t]he common law is hostile to compromises: decisions are all-or-none, winner take all."[2] This always places the interests of one, and often both, parties at a high level of risk if litigation is followed to its natural end. When disputants reach their own agreement, greater satisfaction ensues, not only with the result, but with the process and its participants. This would seem to be an added benefit for the bench and bar as a whole, considering the oft-repeated barbs of the public and press about lawyers and the judicial system. Additionally, in principle at least, removing a greater number of matters from the dockets by alternative methods of dispute resolution should free the courts to handle the remaining caseload in a more timely, efficient fashion, again resulting in higher public satisfaction with, and confidence in, the system.

DISADVANTAGES OF MEDIATION

1. Loss of control of decision-making—The disadvantages of mediation are more perceived than real. The most common misconception is that someone else is making a decision for the client. This simply is not true. The mediatory process, if successful, results in the parties reaching their own agreement. If not successful, the parties are back to the full range of litigation possibilities to resolve their dispute.

2. Loss of income for lawyers—Another perceived disadvantage is that lawyers will not be able to bill as much per matter. This is not necessarily true because most civil cases settle during the course of preparing the case, and mediation is just another means to that end. Even in those instances where fees are less, the lawyer may not be at a disadvantage.

The time saved by an expedient resolution of one case should leave more time available for other pending cases. Finally, the possible loss of fees may be largely overcome by the increased level of client satisfaction achieved. The client who pays less would certainly be expected to speak kindly of the lawyer who saved the client money through the use of mediation.

3. Increased costs for clients—Mediation is not a panacea for all disputes. Just as all cases are not settled, all cases which go to mediation will not be resolved. An unsuccessful mediation will produce increased costs for the client and additional time which the client will have to devote to the case. This should not be an indictment of the process but should reflect instead on the unwillingness of clients to settle some disputes. Most cases which eventually go to trial are generally preceded by extensive efforts by the lawyers to settle the case. If mediation were not attempted, the same costs might be incurred through the lawyer's time spent in negotiation. The simple fact is that some cases only can be resolved to the client's satisfaction by a trial before judge or jury.

4. Uncertainty about procedures—Mediation in Alabama is still in its infancy. Lawyers and judges are not yet sold on the process as an improvement over tried and true methods of negotiated settlement and trial. This lack of support tends to stymie the potential growth of mediation as an effective tool in a broad range of cases. In the same vein, the bench and bar are not sufficiently educated about the process to play their respective roles, hampering the ability of mediation to operate efficiently. Judges are not trained to identify cases in which mediation would be an appropriate "suggestion" to counsel and lawyers may take a more adversarial approach than is called for in the mediation process, thus reducing its effectiveness.

THE MEDIATION PROCESS—HOW IT WORKS

A. General issues

1. Qualifications of mediators—Who serves as a mediator? The qualifications of mediators vary greatly from state to state. In general, mediators are not exclusively lawyers or exclusively non-lawyers. Some states do restrict mediators to persons with either a legal background or training in a specific field, such as psychology, counseling or social work. Most states also have some minimum requirements for the amount of training in mediation techniques mediators must have before being licensed, certified or otherwise officially recognized by the state. Alabama, however, is one of the few states which has not dealt with the issue of mediator training. Therefore, mediators must be selected by the parties on a case-by-case basis.

2. Costs of mediation—The cost of a mediator's services varies depending upon the type of matter being mediated, and the background, training and experience of the mediator, and whether the mediation is public or private. Many states now have a court-connected mediation program, frequently in domestic relations matters but also in a wide range of other legal areas, which are subsidized by state or local funds. Costs vary widely from a low of $20 per person for mediation in domestic cases in Mississippi[3] to as much as $20,000 in complex commercial cases.[4]

3. Length of mediation—There is no certain limit to mediation sessions. Like negotiation, how long it takes depends upon the complexity of issues and the willingness of the parties (and sometimes their lawyers) to bargain. A simple dispute may be resolved in an hour or less. More complex cases may take ten to 20 hours to complete. While there are not many reported statistics on the average length of mediation sessions, at least one source reported an average of 4.4 to 12 hours for mediations in domestic relations cases.[5] The number of separate sessions and the length of each session also will depend upon the style or technique of the mediator and the desires of the parties.

4. Participation by lawyers—One fear of lawyers should be put to rest; mediation does not necessarily mean that lawyers will be precluded from the mediation sessions. Most programs do not ban lawyers from sitting in or participating in the mediation sessions. In fact, in many mediations lawyers are very actively involved in the process. Some mediation programs do exclude lawyers from being physically present during the mediation sessions. These programs, however, generally allow lawyers to be close by and always permit the parties to recess the session at any time to consult with the party's lawyer. Many lawyers choose not to attend and leave the negotiating up to the client.

One problem with having lawyers conducting the mediation bargaining is the inability of many lawyers to adapt to the less adversarial nature of the mediation process. Lawyers trained as advocates sometimes find it difficult to bargain cooperatively as opposed to defeating the other side. While lawyers should zealously represent their clients, they also should be sensitive to the client's true desires and needs. For instance, the client may prefer less money now in exchange for a more stable and long-lasting agreement. The owner of a shopping center may be better off resolving a dispute with a tenant for less than the owner might receive at trial in order to keep the tenant for a longer period of time.

5. Confidentiality—Confidentiality of statements made by parties during mediation is imperative to promote open and frank communication between the parties. If a mediator could be compelled to testify at a subsequent trial between the parties, the parties might be unwilling to disclose any information which could be used against them. Most states which have mediation statutes either provide for the confidentiality of the mediation proceedings or create a privilege between each party and the mediator as to disclosures made during mediation.

Alabama does not currently have a confidentiality statute, but the state bar's Task Force on Alternative Dispute Resolution is studying the issue and expects to propose such a statute for consideration by the board of bar commissioners.

B. Summary of the mediation process

The precise manner in which mediation sessions are carried out depends on a variety of factors. Court-connected programs may vary slightly from private mediations, and private mediations may differ depending upon the training of the mediator and the type of case involved. The court-connected programs are frequently conducted at the courthouse or in some other dispute resolution center. Private mediations may be conducted in the mediator's office or some other neutral location. The following example, however, is fairly representative of the mediation process.

Mediations generally begin with the mediator's giving an opening statement which explains the mediation process and the ground rules under which the mediator and parties will agree to operate. Each party then is given the opportunity to give a statement of issues and a summary of the facts of the case. At the conclusion of the statements of the parties, the mediator will summarize the claims and positions and obtain any clarification necessary to be sure that he/she has a fair grasp of the relationships, issues and facts.

The mediator then conducts the caucus process. The parties ordinarily will be separated, and the mediator will speak individually with each party. Then, either the mediator will conduct "shuttle" diplomacy between the two parties, who are in separate rooms, or the parties will reconvene in one room and commence the bargaining process. In the shuttle approach, the mediator carries the various suggestions and proposals between the parties until either an agreement or impasse is reached. When the parties are in the same room, the mediator serves as a moderator, allowing the parties to engage in some head-to-head negotiation and, at times, serves as a facilitator of ideas generated by one party for consideration by the other party.

When an agreement is reached, the mediator generally reduces the agreement to writing and both parties sign the written agreement. The agreement normally is not enforceable until it has been officially presented to the court and adopted or ratified by the court. Occasionally, the mediator is requested to monitor the agreement for a period of time to ensure compliance by the parties.

AMERICAN PLAYHOUSE PRESENTS

THE STORY OF CLARENCE DARROW

FRIDAY, JUNE 7 AT 9 P.M.

Clarence Darrow's name is legendary in the annals of the American legal system from the late 19th century through the early decades of the 20th century. He has been portrayed on stage and screen by such famous and respected actors as Spencer Tracy, Henry Fonda, Melvyn Douglas, Paul Muni and Orson Welles. His most famous cases have been documented in history books and law journals, as well as in plays and movies.

For the first time, Darrow's life as a man, as well as a public figure, will be dramatized in a two-hour biographical film entitled "Darrow," which will premiere on **AMERICAN PLAYHOUSE** on *Friday, June 7 at 9 p.m. on Alabama Public Television.*

Kevin Spacey, the acclaimed actor who recently portrayed evangelist Jim Bakker in the NBC movie "Fall From Grace" and is currently starring on the Broadway stage in Neil Simon's comedy hit "Lost in Yonkers," depicts the legendary labor lawyer in this drama directed by John Coles ("Signs of Life")

Filmed on location in Pittsburgh, Pennsylvania, "Darrow" co-stars Rebecca Jenkins and Erin Cressida Wilson. Chris Cooper is featured in the role of the great socialist labor leader Eugene Victor Debs.

Darrow was one of the most important figures in the American legal system at the turn of the 20th century. His historic legal defenses involving the Pullman Railroad Strike, the Leopold/Loeb murder trial and the Scopes monkey trial (which challenged the teaching of Charles Darwin's theory of evolution in the Tennessee public school system) elevated him to the ranks of an authentic American folk hero.

The drama delves into the personal life, as well as the public persona, of Darrow, a complex and charismatic man, a rural Ohio farm-boy, who, at an early age, discarded his farm tools in order to practice law. With Chicago as his base for more than 50 years, Darrow became the nation's most famous defense attorney, addressing the issues of civil rights, capital punishment, and freedom of speech and ideas in courts across the land.

The drama, co-written by William Schmidt and Stephen Stept, probes the public and private man, at home and in the courtroom, in triumph and in defeat. The drama is the result of extensive historical research and makes use of many actual courtroom transcripts.

Spacey plays Darrow over a 30-year period of his life. The actor prepared for his role by reading everything he could find dealing with Darrow. His mannerisms and courtroom delivery are a result of that investigative process.

Spacey has previously starred in such feature films as "Henry & June," "Dad," "Working Girl," "See No Evil, Hear No Evil" and "Heartburn." His television acting credits include "Wiseguy," "The Ballad of Mary Phagen," "The Equalizer" and "Fall From Grace," in which he co-starred with Bernadette Peters.

For more information, contact:
Roger Hepburn at 1-800-239-5233

THE MEDIATION PROCESS IN ALABAMA

A number of lawyers in Alabama have been using mediation for some time. Also, more and more lawyers and others are seeking training as mediators. The increased use of mediation nationwide, coupled with the heightened interest in mediation techniques in Alabama, led the Alabama State Bar to charge the Task Force on Alternative Dispute Resolutions to study the issue of mediation and make recommendations to the state bar about how to proceed in this area. In 1990, the task force developed and presented to the state bar a revision to Rule 16 of the Alabama Rules of Civil Procedure. The revision to the rule is slight, but is accompanied by a set of Mediation Rules which would govern the conduct of mediations in civil cases in Alabama. The proposed revision is to add to subsection (c) of Rule 16 the following language:

> (c) In any action the court may on its own motion, or shall on timely written notice by any party to the cause, direct and require the attorneys for the parties to appear before it, ... for a conference to consider and determine: ...
>
> (7) The possibility of settlement or the voluntary use of extra-judicial procedures to resolve the dispute pursuant to the Alabama Civil Court Mediation Rules.[6]

The guiding principle in the formulation of the Mediation Rules was to promote a voluntary process encouraging parties to attempt to settle disputes in a manner novel to many lawyers and disputants. The Mediation Rules provide that mediation can be initiated on the motion of the parties or by the court. If the court orders mediation and one of the parties does not want to engage in mediation, the mediation can be cancelled prior to the first session with the mediator. If a party wants to decline to mediate, but does not want the court to know which party terminated the mediation, the party simply advises the mediator that the mediation is terminated. The mediator then notifies the court that mediation has been terminated without a resolution of the problem.

A single mediator is appointed unless the parties agree otherwise. The selection of the mediator is in the court's discretion, but the court will select anyone upon whom the parties mutually agree. The court determines the qualifications of the mediator depending upon the subject matter of the mediation. To protect confidentiality, the Mediation Rules provide that all disclosures to the mediator may not be divulged by the mediator. The mediator cannot be compelled to testify, by either party, in any adversary proceeding or judicial forum. The rules further provide that the parties shall not rely on or introduce as evidence in any proceeding:

> (a) Views expressed or suggestions made by the other party with respect to a possible settlement of the dispute;
>
> (b) Admissions made by the other party in the course of the mediation proceeding;
>
> (c) Proposals made or views expressed by the mediator;
>
> (d) The fact that the other party had or had not indicated willingness to accept a proposal for settlement made by the mediator; and

(e) The court shall neither inquire nor receive information about the positions of the parties to, the facts elicited in, or the responsibility for termination or failure of the mediation.[7]

Each party may bring legal counsel to the mediation sessions and any party unrepresented by counsel may bring a representative of his/her choice. The mediation sessions are private; persons besides the parties and their representatives can only attend with the permission of the other parties and the consent of the mediator. There is no stenographic record taken of the mediation proceedings.

The mediator's fee shall either be agreed upon by the parties or set by the court. The cost of fees and other necessary expenses, such as travel and other expenses of the mediator, will be borne equally by the parties unless the parties agree otherwise or the court orders otherwise.

J. Noah Funderburg

J. Noah Funderburg serves as associate director of the University of Alabama School of Law Clinical Program. He is a 1977 graduate of the University's School of Law and was admitted to the Alabama State Bar that year.

Keith Watkins

Keith Watkins is with the firm of Calhoun, Faulk, Watkins, Clower & Cox in Troy. He received his undergraduate degree in political science from Auburn University in 1973, and his law degree from the University of Alabama School of Law in 1976. He has been trained as a mediator by the American Arbitration Association and is serving on the Alternative Dispute Resolution Task Force of the Alabama State Bar.

CONCLUSION

Regardless of whether lawyers agree in principle with mediation, a number of pressures are coming to bear on the judicial system which mandate consideration of new means for resolving disputes. The Alabama Supreme Court's time standards for disposing of cases will make mediation more attractive in our busiest circuits. In federal courts, each federal district court has been required by the Civil Justice Reform Act,[8] passed in late 1990, to examine ways to improve timely resolution of cases before those courts. Each district court is required by the act to develop a civil justice expense and delay plan. The courts must appoint advisory groups to study methods to reduce costs and decrease delays in the completion of cases. The act specifically encourages advisory groups to consider the utility of alternative dispute resolution methods including mediation, mini-trials and summary jury trials.

Clearly, mediation offers advantages in many types of cases for resolving disputes quickly, less expensively and with greater satisfaction by the parties in the present and in the future. Many of the disadvantages can be overcome by the growth and development of a broad-based mediation program in Alabama. Reflecting upon public dissatisfaction, the ever-increasing number of disputes, the length of civil dockets and decreasing judicial resources, it is submitted that the future of mediation in Alabama is not "if", but "when". ■

Footnotes

1. Meyer, "Function of the Mediator in Collective Bargaining",13 Indus. & Lab. Rel. Rev. 159 (1960), as quoted by Cody in "Arbitration vs. Mediation-Explaining the Differences," *Judicature*, Vol. 69, No. 5, Feb.-Mar. 1986, at note 8.
2. Coons, "Approaches to Court Imposed Compromises-The Uses of Doubt and Reason" (1964), 58 Northwestern L. R. 750, as quoted by Galanter, ". . .A Settlement Judge, not a Trial Judge: Judicial Mediation in the United States, (Sp. 1985) *Journal of Law & Society*, Vol. 12, No. 1.
3. The mediation program in Mississippi was initiated by Chancery Judge George Warner of Lauderdale County, Mississippi. The mediators serve as independent contractors in a court-sponsored mediation program. The mediators charge $20 per person regardless of the length of the mediation.
4. Peter Lovenheim, *Mediate, Don't Litigate*, 182 (1989).
5. Unpublished report of Champaign, Illinois, domestic relations mediation program.
6. Proposed revision to ALA. R. CIV. P. 16(c).
7. Proposed Rule 11, Alabama Civil Court Mediation Rules.
8. Judicial Improvements Act of 1990, Pub. L. 101-650, 104 Stat. 5089 (1990).

• M·E·M·O·R·I·A·L·S •

GEORGE WILLIAM MCBURNEY

George W. McBurney of Florence, Alabama, died August 11, 1990, at Baptist Memorial Hospital in Memphis, Tennessee. He was 73 years old.

He spent much of his early life in Tuscaloosa where his father was a professor at the University of Alabama School of Medicine. He was admitted to the Alabama State Bar in 1940, following graduation from the University's School of Law. He practiced in Tuscaloosa prior to World War II. During the war, he attained the rank of major while serving with the 30th Infantry Division in Europe.

Following his marriage to Martha Roberts of Florence, he began practice with the Florence firm of McBurney & Coleback. He later joined the firm of Poellnitz, Cox, McBurney & Jones, from which he retired several years ago.

A skilled lawyer, his interest was in real estate development and the development of the Florence community. He briefly served as vice-president of First Federal Savings and Loan Association of Florence. He developed numerous residential and commercial properties.

His greatest contribution, however, came from the use of his legal training and inspiring leadership in the civic development of Florence and north Alabama. He was instrumental in the development of Joe Wheeler State Park and Turtle Point Yacht and Country Club, where he served as a founding member and first president. He served as president of both the Florence Chamber of Commerce and the Florence-Lauderdale Industrial Expansion Committee. He was responsible for the restoration of the W.C. Hancy Home and the development of Pope's Tavern. He was the first chairperson of the Tennessee Valley Exhibit Commission and was involved in the planning and early construction of the Renaissance Tower and TVA museum. He was founder and first president of the Alabama Mountain Lakes Association and served on the Alabama Automobile Association Board of Directors. He was a member of the First Presbyterian Church of Florence and a past chairperson of its board of deacons. His name has been entered in the Book of Golden Deeds of the Florence Exchange Club.

Survivors include his wife; two brothers, Dr. Robert P. McBurney of Memphis, and Charles W. McBurney of Columbia, Tennessee; and several nieces and nephews, including Shaler S. Roberts, III, attorney and director of the Florence Housing Authority, Robert L. Marshall, attorney and reference librarian at the University of Alabama School of Law, Marjorie Roberts, a Virgin Islands attorney, and Charles W. McBurney, Jr., a Florida attorney.

An endowed scholarship fund in his name has been established at the University of Alabama School of Law by an anonymous gift from a member of his law school class. An editorial in the *Florence Times Daily* stated that, "Friends remember him as unselfish, always interested in improving Florence" and "as a civic leader who captured the spirit of volunteerism needed to move a community forward." I remember him as a next-door neighbor and one of the best friends I've ever had. He was a skillful lawyer, a great leader and a truly marvelous man. His judgment and zeal for developing the community were outstanding. He will be greatly missed.

William H. Mitchell
Florence, Alabama

W. RAMSEY MCKINNEY

W. Ramsey McKinney died December 6, 1990, in the prime of his life and legal career; and

Whereas, the Mobile Bar Association desires to remember his name and recognize his significant contributions to our profession and to this community;

Now, therefore, be it known, that McKinney was born in Montgomery, Alabama, October 19, 1941. He attended the Virginia Military Institute and Vanderbilt University where he received his undergraduate degree with honors in 1962, having earned admission to Phi Beta Kappa. He received his law degree from the University of Virginia Law School in 1965, at which time he moved to Mobile and joined the firm of Hand, Arendall, Bedsole, Greaves & Johnston. Ramsey was a distinguished member of that firm from 1965 to the day of his untimely death. He was widely recognized by the bench and bar as an outstanding practitioner in securities and corporate law. He was a founder and director of the Bank of Mobile and its holding company, Mobile National Corporation.

Ramsey was also active in civic and community affairs throughout his career. He was past director of Wilmer Hall and an active member of Trinity Episcopal Church, where he served on the vestry, as treasurer and senior warden. He is survived by his wife, Virginia K. McKinney, and three daughters, Shannon Amanda McKinney, Holly Stuart McKinney and Christen Walton McKinney.

Champ Lyons, Jr.
President, Mobile Bar Association

WILLIAM H. ARMBRECHT, JR.

William H. Armbrecht, Jr. died in Mobile, Alabama, February 2, 1991.

It is the desire of the Mobile Bar Association to recognize and memorialize his exceptional record as a prominent attorney, distinguished citizen, and honored civic and community leader.

Armbrecht was born in Mobile, Alabama, November 1, 1908, and earned his undergraduate degree at Spring Hill College in 1929, and law degree from the University of Alabama in 1932.

He was a member of the Mobile Bar Association, of which he served as president in 1954, the Alabama State Bar, the American Bar Association, the Maritime Law Association of the United States, and the International Association of Defense Counsel. He was a senior partner in the firm of Armbrecht, Jackson, Demouy, Crowe, Holmes & Reeves.

During the 58 years of his legal career, he served as a member of many civic and community organizations. He served as vice-president and director of the Alabama, Tennessee & Northern Railroad from 1944-50, when he was promoted to president, which he served as for 19 years. He served as director of the First National Bank of Mobile from 1960-79, chairperson of the board from 1969-74 and chairperson of the executive committee from 1974-78. From 1973 to 1979, he served as a director of First Bancgroup-Alabama, Inc. and chairperson of the finance committee from 1973-78. He served as director emeritus of AmSouth Bank from 1979 until his death. He also served as secretary and director of Robinson Land & Lumber Company, Inc. for some time in his active career.

Armbrecht served as director of many business and civic organizations, including the Industrial Development Board of the City of Mobile; Point Clear, Inc. (formerly known as Grand Hotel Company); the Mobile Area Chamber of Commerce Foundation, Inc.; the Dauphin Island Property Owners Association; Southern Industries Corporation; the Mobile County Foundation for Public Higher Education; the Mobile Industrial Parks Board; Title Insurance Company of Mobile; Lake Forest, Inc.; Lake Forest Utility Corporation; Lake Forest Property Owners Association; Diamondhead Manufacturing, Inc.; and the United Fund of Mobile County.

Armbrecht was a member and trustee of St. Paul's Episcopal Church, a member of the Mobile Kiwanis Club, the Mobile County Club, the Athelstan Club, Alpha Tau Omega Social Fraternity, the Phi Delta Phi Legal Fraternity, and the Board of Regents of Spring Hill College.

He is survived by his wife, Katherine; two sons, William Armbrecht, III, and Conrad Armbrect, II; and three daughters, Katherine A. Brown, Anna Bell A. Bru and Clara L. Armbrecht.

Champ Lyons, Jr.
President, Mobile Bar Association

BROOX GRAY GARRETT, SR.
Brewton
Admitted: 1939
Died: February 13, 1991

PERRY HUBBARD
Tuscaloosa
Admitted: 1945
Died: March 11, 1991

THOMAS E. HUEY, JR.
Birmingham
Admitted: 1933
Died: March 11, 1991

JAMES LEWIS HUGHES, JR.
Birmingham
Admitted: 1940
Died: December 30, 1990

HUGH KAUL
Birmingham
Admitted: 1934
Died: February 23, 1991

FEES CHARGED FOR CERTAIN COURT PROCEEDINGS

According to United States Marshals Walter J. Bamberg, Middle District of Alabama, and Thomas C. Greene, Northern District of Alabama, there has been a change in fees charged for certain court proceedings. The following schedule of fees and commissions became effective April 1, 1991, in accordance with 28 USC 1921(b). Payment of service fees prior to service of process will be required.

SCHEDULE OF FEES AND COMMISSIONS

Legal process

- For *each item* served by mail or forwarded for service in another judicial district—**$3.00**
- For *each item* served (*or service attempted*) in person:
  - Within two hours, *commencing during* published duty hours—**$40.00**
  - And, if necessary, for *each associated* additional hour, or portion thereof—**$20.00**
  - Within two hours, *commencing after* published duty hours—**$50.00**
  - And, if necessary, for *each associated* additional hour, or portion thereof—**$25.00**
  - **Plus**, *actual, associated* round-trip mileage (at federal travel regulation rates) and out-of-pocket expenses, e.g., tolls, parking, keeper's fees, insurance premiums, advertising costs.

Commissions

- On the first $1,000 collected, or portion thereof—**3 percent**
- On the amount in excess of $1,000—**1.5 percent**
- *Except* that the minimum commission collectible is $100, and the maximum commission collectible is $50,000.

OPINIONS OF THE GENERAL COUNSEL

*By ALEX W. JACKSON**

Question:
Must a lawyer or law firm operating under a trade name, such as "AAA Legal Clinic", include that trade name in all permissible communications made pursuant to Canon 2 of the *Code of Professional Responsibility* or Rule 7 of the Rules of Professional Conduct?

Answer:
Rule 7.5(a) of the Rules of Professional Conduct states in pertinent part as follows, to-wit:

"Rule 7.5***

(a) A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable organization and is not otherwise in violation of Rule 7.1 or Rule 7.4."

Rule 7.1 says in pertinent part as follows, to-wit:

"Rule 7.1***

A lawyer shall not make or cause to be made a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; . . ."

Lawyers are permitted to advertise and to communicate with the public regarding legal services in a variety of ways including, but not limited to, public media such as a telephone directory, legal directory, newspaper or other periodical, outdoor display, radio, television, mailed circulars, brochures, or "Shapero letters". In addition, lawyers may, and by tradition do, utilize business cards and letterhead/legal stationary as a means of communicating with the public. With recent amendments to the ethical rules governing lawyer advertising, it has become permissible for Alabama lawyers to render legal services under a "trade name", as long as the name of one or more lawyers responsible for the content of the communication relating to those services is a part of, or accompanies, the use of a trade name.

The purpose of all bar regulation of attorney advertising content is to protect the public and insure that information about legal services, and communications made by lawyers about services are truthful, non-deceptive and informative.

Accordingly, the aforenamed (mythical) "AAA Legal Clinic" is permissible, as long as any communications regarding services rendered by "AAA", such as permissible advertisements, letterheads or business cards (all being communications permitted pursuant to the rules), include not only the name "AAA Legal Clinic", but also the name of a lawyer responsible for the content of the communication. In the context of "AAA Legal Clinic", such a communication might state "AAA Legal Clinic, John Doe, Attorney". Such a listing is not the only form permissible, but is merely illustrative of the connection between trade name and attorney name required by the rules.

The Commission also must consider whether an attorney, operating under a trade name, should continue use of that trade name in connection with all permissible communications made pursuant to the rules. In our opinion, it is both reasonable and proper for an attorney, operating under a trade name, to continue to utilize that trade name in all permissible communications, including letterhead and business card communications, and also in legal advertising permitted by the rules.

The purpose of all bar regulation of attorney advertising content is to protect the public and ensure that information about legal services, and communications made by lawyers about services, are truthful, non-deceptive and informative. The rules directly address misrepresentations made by both commission and omission [Rule 7.1(a)]. In our opinion, for an attorney to practice under a trade name and hold himself out under a trade name in one instance, and then to abandon that trade name when it suits his convenience, creates an omission that falls below the standard mandated by Rule 7.1.

Accordingly, not only must an attorney, practicing under a trade name, include in all permissible communications the name of a lawyer responsible for the content of the communication, but it is our opinion that this rule also requires that the connection between lawyer and trade name be consistent and uniform such that the connection becomes inseparable and a part of all public communication made on behalf of either. A lawyer using a trade name has made an election and, thereby, has determined how he must be identified in public communications. His trade name has become his firm name, by choice, and his use of this trade name precludes the use of any other firm name or trade name in permissible public communications. John Doe, of the mythical "AAA Legal Clinic", cannot have an alternate identity as a partner in "Doe, Roe & Moe, Attorneys", unless the

usage is "Doe, Roe & Moe, Attorneys, d/b/a AAA Legal Clinic".

The use of the trade name, together with the name of the lawyer, in pleadings and the like is a matter beyond the scope of this opinion, but it is nonetheless our opinion that, unless otherwise precluded by court rule, the use of the trade name should be carried forward into such pleadings and all permissible communications regarding the same.

A further effect of this opinion will be that lawyers or law firms who have adopted trade names selected or designed to provide an alphabetical advantage in "Yellow Page" directory listings will have to be consistent in the use of that trade name in all permissible communications. To allow the use of a trade name in one context, while to permit its omission in all other respects, would be to make a sham of the rule and permit misleading communications, either by the use of the trade name in one context or by its omission in another. Consistency and uniformity are the only remedy, and it is our opinion that a trade name, once adopted, and once used in connection with communications with the public pursuant to Rule 7, must be used in all contexts and all permissible public communications. Application of this standard will insure that the bench, the bar and the public will be afforded complete and accurate information regarding the lawyer or law firm offering legal services, and that everyone will know with what lawyer and what entity they are dealing.

[RO-90-100] ■

**Jackson now is in private practice in Montgomery, but served as assistant general counsel for the Alabama State Bar for ten and a half years.*

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

Following receipt and consideration of comments to the proposed amendments to the Rules of the United States Court of Appeals for the Eleventh Circuit, the Court has determined to adopt the following additional revisions to the Rules. Pursuant to 28 U.S.C. @2071(e), these additional amendments shall take effect on April 1, 1991, at the same time as the other changes to the Rules. (The additions are in bold type, and deletions are lined through.)

1. Add the following parenthetical to the first sentence of the I.O.P. titled "Extensions of Time" which accompanies FRAP 26: (e.g., court dockets or calendars which establish insoluble conflicts, medical evidence of illness).

2. Add an I.O.P. to accompany FRAP 28: *Briefs in Consolidated Cases.* Unless the parties otherwise agree or the court otherwise orders, the party who filed the first notice of appeal shall be deemed the appellant for purposes of FRAP 28, 30, and 31, and the accompanying circuit rules.

3. Add the following sentence at the end of paragraph 4 of 11th Cir. R. 32-3: The court may reject or require recomposition of the brief for failure to comply.

4. Revise the second sentence of the I.O.P. titled "Time for Oral Argument" which accompanies FRAP 34: ~~Typically 20 minutes~~. The time specified is *per side* ~~is permitted~~.

5. Revise the first sentence of the I.O.P. titled "Judicial Council" which accompanies FRAP 47: The judicial council established by 28 U.S.C. @332 is composed of ~~all judges of the court in regular active service plus six district judges from within the circuit~~ nineteen members: one active judge from each of the nine district courts, nine active circuit judges, and the circuit chief judge.

6. Add words in bold type and strike words that are lined through in sentences 4 and 5 of revised Addendum IV, Section (d)(2):

Unless approved in advance by this court, the district court is not authorized to appoint counsel on appeal to represent a defendant who was represented in the district court by retained counsel without first conducting an in-camera review of the financial circumstances of the defendant and of the fee arrangements between the defendants and retained trial counsel. ~~Applications for~~ Appointment of counsel on appeal ~~in such circumstances~~ may be ~~made by filing~~ requested in this court by filing an appropriate motion supported by an affidavit which substantially complies with Form 4 in the Appendix to the FRAP Rules.

7. Strike the last sentence of Addendum V, Section (d)(3): ~~Counsel shall file such petition if requested to do so by the party in writing.~~

JUDICIAL AWARD OF MERIT NOMINATIONS DUE

The Board of Commissioners of the Alabama State Bar will receive nominations for the state bar's Judicial Award of Merit through May 31. Nominations should be prepared and mailed to Reginald T. Hamner, Secretary, Board of Bar Commissioners, Alabama State Bar, P.O. Box 671, Montgomery, Alabama 36101.

The Judicial Award of Merit was established in 1987, and the first recipients were Senior United States District Judge Seybourn H. Lynne and retired Circuit Judge James O. Haley.

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

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

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

C·L·E OPPORTUNITIES

The following programs have been approved by the Alabama Mandatory Continuing Legal Education Commission for CLE credit. For information regarding other available approved programs, contact Diane Weldon, administrative assistant for programs, at (205) 269-1515, and a complete CLE calendar will be mailed to you.

MAY

15 WEDNESDAY
Major Land Use Laws in Alabama
Huntsville
National Business Institute, Inc.
Credits: 6.0 / Cost: $108
(715) 835-8525

17 FRIDAY
Trial Advocacy in Alabama
Montgomery
National Business Institute, Inc.
Credits: 6.0 / Cost: $108
(715) 835-8525

17-18
Oil & Gas
Tuscaloosa
Alabama Bar Institute for CLE
Credits: 6.0
(205) 348-6230

Annual Seminar on the Gulf
Sandestin Beach Resort, Destin
Alabama Bar Institute for CLE
Credits: 6.0
(205) 348-6230

21 TUESDAY
Major Land Use Laws in Alabama
Mobile
National Business Institute, Inc.
Credits: 6.0 / Cost: $108
(715) 835-8525

22 WEDNESDAY
Major Land Use Laws in Alabama
Montgomery
National Business Institute, Inc.
Credits: 6.0 / Cost: $108
(715) 835-8525

MAY 28-JUNE 1
Judges Speak Out and Listen
Grand Hotel, Point Clear
Tulane Law School
Credits: 12.5 / Cost: $500
(504) 865-5900

30 THURSDAY
Criminal Law
Atlanta
Atlanta Bar Association
Credits: 6.0 / Cost: $95
(404) 521-0781

MAY 31-JUNE 1
Health Law
Pine Mountain, Georgia
Alabama Bar Institute for CLE
Credits: 6.0
(205) 348-6230

City and County Governments
Orange Beach
Alabama Bar Institute for CLE
Credits: 6.0
(205) 348-6230

JUNE

4 TUESDAY
Advanced Workers' Compensation in Alabama
Birmingham
National Business Institute, Inc.
Credits: 6.0 / Cost: $108
(715) 835-8525

6-8
Tax Seminar
Orange Beach
Alabama Bar Institute for CLE
Credits: 10.0
(205) 348-6230

7 FRIDAY
Advanced Workers' Compensation in Alabama
Huntsville
National Business Institute, Inc.
Credits: 6.0 / Cost: $108
(715) 835-8525

8-13
Trial Skills College: Premier Trial Advocacy
Miami
Association of Trial Lawyers of America
(202) 965-3500

12-14
ERISA Basics
Sheraton Grande, Los Angeles
American Bar Association
Credits: 20.0 / Cost: $500
(312) 988-6195

19-21
Hazardous Waste Litigation
Hotel del Coronado, Coronado, CA
Federal Publications, Inc.
Credits: 16.3 / Cost: $925
(202) 337-7000

JULY

11-12
ERISA Workshop
Denver
Pension Publications of Denver, Inc.
Credits: 13.0
Cost: $390
(303) 759-1004

18-21
Annual Convention
Perdido Beach Hilton,
Orange Beach
Alabama State Bar
(205) 269-1515

M·C·L·E NEWS

A brief look at Continuing Legal Education in 1990

By KEITH NORMAN

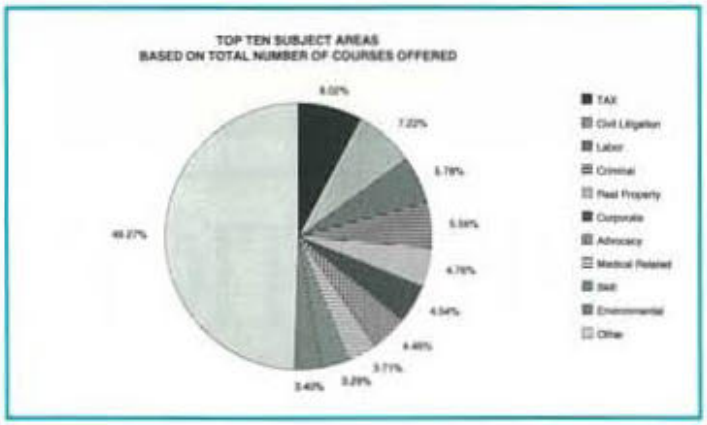

FIGURE I

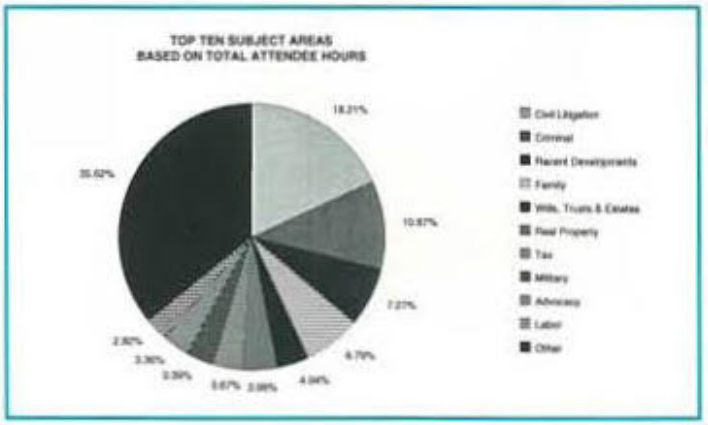

FIGURE 2

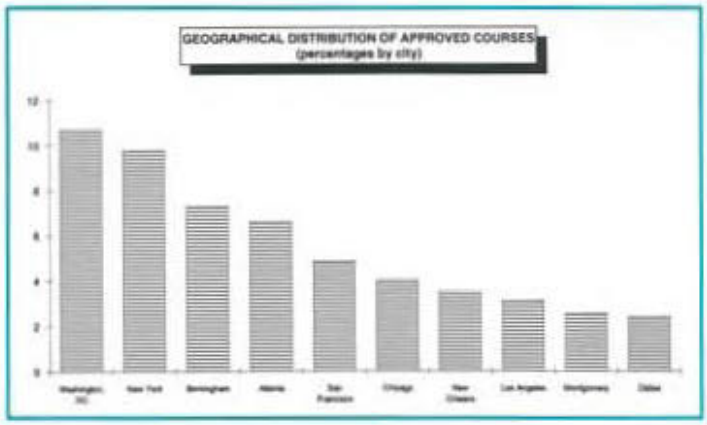

FIGURE 3

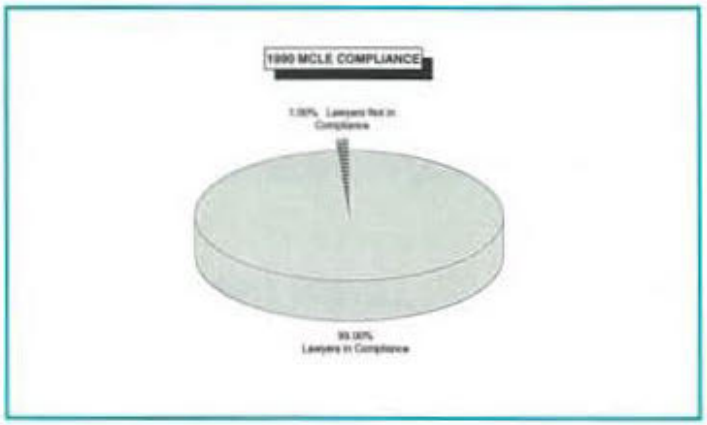

FIGURE 4

Keith Norman

In 1990, the Mandatory Continuing Legal Education Commission reviewed a total of 2,645 programs seeking CLE accreditation with 2,574 programs being accredited. Of the 2,645 programs offered, 406 were offered by in-state sponsors and 2,239 by out-of-state sponsors, 15 percent and 85 percent respectively. Yet, six in-state sponsors accounted for 52.3 percent of the total CLE hours attended by state bar members in 1990.

Figure 1 indicates the ten top subject matter areas of CLE courses based on the total number of courses offered, while **Figure 2** shows the top ten subject matter areas based on lawyer attendance hours.

Over 54 percent of all CLE programs accredited in 1990 were held in the ten cities listed in **Figure 3.**

Finally, in 1990, 6,188 or 99 percent of the lawyers subject to the CLE rules and regulations complied with the MCLE Rules and Regulations in a timely fashion or filed a deficiency plan as permitted under Rule 6 of the rules and regulations. Only 43 lawyers' names were certified to the Disciplinary Commission for noncompliance. **(Figure 4)**

ALABAMA STATE BAR
ANNUAL MEETING
JULY 18-21, 1991
ORANGE BEACH
TECHNOLOGY IN THE LAW PRACTICE

Learn tactics for using technology to increase the productivity and efficiency for your practice.

◆

Discover how lawyers employ the latest document assembly, database spread sheet and substantive applications in their work.

◆

Learn the latest in technology systems and how to decide what is right for you.

◆

A three-hour symposium—what every lawyer should know about computers—will cover the basics of the entry level microcomputer—what you need and do not need and what it costs; what you should expect from wordprocessing, timekeeping, accounting, etc., software; how many software packages can you use effectively—which ones should you choose, where do you get service and support and many other subjects.

Workshops:

Among the several workshops to be offered will be how to select a law office management consultant, computer kindergarten — a primer for those who have little or no knowledge of computers, document assembly, and free LEXIS® training.

ALABAMA STATE BAR
OFFICE OF THE PRESIDENT

Dear Alabama Lawyer:

1991 IS DIFFERENT! IT'S THE BEACH!

The decision to hold the 1991 Annual Meeting of the state bar on the Gulf at the Perdido Beach Hilton dictates a new pre-registration procedure to maximize our use of this beautiful property.

We must register early to ensure the bar's exclusive occupancy of the Hilton. The addition of the inaugural Alabama State Bar Open Golf Tournament also necessitates an advanced registration.

A more detailed program of the educational opportunities, our legal technology expo, and the best-ever entertainment social itinerary will be mailed in early June. At that time you will be able to order tickets to all of the convention events. A sneak preview of some of the program activities is included in this mailer.

The pre-registration fee applicable through May 31 is $100. After that date the 1991 Annual Meeting registration fee will be $125. Your room request must be accompanied by the appropriate convention registration fee.

Use one registration form per attorney.

The golf tournament will be played on the Perdido Bay Golf Course on Friday, July 19, and will be limited to the first 72 registrants. Will Matthews of Ozark is tournament chairman.

The Perdido Pals children's program will be available to registered hotel guests only during the convention. This program provides organized children's activities during the day — as well as evening hours with meals included.

Registered hotel guests will have on-premises parking preference.

The activities begin Thursday morning, July 18, and will conclude with the Hilton's Jazz Brunch on Sunday, July 21. Hotel rooms need to be reserved early. Pre-registrants will receive an order for ticketed events prior to the general convention mailing in early June. Your early registration will facilitate a smooth 1991 annual meeting. We are operating under severe space constraints, and this early planning will make for a smoother and happier event for all.

W. Harold Albritton, III
President

ALABAMA STATE BAR ANNUAL MEETING

July 18-21, 1991 • Perdido Beach Hilton • Orange Beach

P • R • E • V • I • E • W

Group Breakfasts • Alumni Luncheons • Alabama Law Institute
Sand, Sun & Saltwater • Fishing, Golf & Tennis • and more !

Thursday, July 18

8:30 a.m. - Noon
Section Showcase Programs*

12:30 p.m.
Bench and Bar Luncheon
Hon. Jerry L. Buchmeyer
U.S. District Judge, Dallas, Texas
Judge Buchmeyer is a noted humorist and heard on National Public Radio.

2:00 - 3:00 p.m.
Section Business Meetings

3:00 - 4:30 p.m.
Bench/Bar Beach Olympics
Family Fun on the Beach

7:30 - 9:30 p.m.
Reggae Beach Party

Friday, July 19

7:45 - 8:30 a.m.
Computer Kindergarten
Breakfast

9:00 a.m. - Noon
Plenary Session*
Features computer hands-on demo presented by Robert P. Wilkins and Richard T. Rodgers

1:30 p.m. Tee Time
Golf Tournament
Limited to 72 players

2:00 - 3:00 p.m.
Law Office Workshops*
Computer Usage/Law Office Management Consultants

3:00 - 5:00 p.m.
Section Business Meetings

7:30 p.m.
Dinner and Entertainment
"An Evening with Shearen Elebash"

Saturday, July 20

8:00 a.m. Committee Breakfast

9:30 a.m. - Noon
Grande Convocation*
Impaired Lawyers Program
Chief Justice Hornsby
Volunteer Lawyer Program
Annual Business Meeting

7:30 p.m. 'til -
Harold and Jane's Club '91
Dinner, Dancin' & Cabaret
Mandy Beason, vocalist

Sunday, July 21

Jazz Brunch

ALABAMA STATE BAR EXPO

Thursday, Friday, & Saturday

Hilton Exhibition Hall

REFRESHMENTS
PRIZES

THURSDAY: 8:30 a.m. - 4:30 p.m.
FRIDAY: 8:30 a.m. - 4:30 p.m.
SATURDAY: 8:30 a.m. - 1:00 p.m.

GOLF TOURNAMENT

Friday, July 19, 1991 / Perdido Golf Club

- Field limited to 72 players
- Based on handicaps
- Shotgun start at 1:30 p.m.
- Men play from men's tees.
- Ladies play from ladies' tees.
- Teams established by committee
- Each player drives; players select best drive and so on until ball is holed out.
- Prizes will be awarded to winning teams and for closest to pin on selected par 3 holes on Saturday night.

BOX LUNCH WILL BE SERVED.

ENTRY FEE: $50.00
(Includes 1/2 cart, green fee, & lunch)

Alabama State Bar Annual Meeting

July 18-21, 1991 / Orange Beach, Alabama

ADVANCE REGISTRATION

Please Print — One Form Per Lawyer-Registrant / Registration fee must accompany this form.

Make check payable to Alabama State Bar. Mail registration form and check to:
1991 Convention, Alabama State Bar, P.O. Box 671, Montgomery, AL 36101.

Pre-registration forms MUST BE RECEIVED NO LATER THAN MAY 31, 1991.
Cancellations with full refunds may be requested through noon, Friday, July 12, 1991.

For information concerning registration, call (205) 269-1515.

Name _____
(as it is to appear on convention badge)

Phone (Business) _____ (Home) _____

Address _____

City _____ State _____ ZIP _____

Name of Spouse or Other Guests _____
(as it is to appear on convention badge)

Registration Fee (if received by May 31, 1991) ..... $100.00 $_____

Golf Scramble (complete entry form below) ..... $50.00 $_____

Total Due Alabama State Bar ..... **$** _____

Appropriate payment must accompany registration form; payment by check is requested.

All pre-registrants will receive an advance mailer ticket order form for other convention activities after June 1, 1991.

☐ Check here for free LEXIS® training.
(Training sessions limited to the first 50 attorneys who register.)

ENTRY FORM FOR GOLF SCRAMBLE

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THE MINI-TRIAL AND SUMMARY JURY TRIAL

By ROBERT W. BRADFORD, JR.

The mini-trial and the summary jury trial are designed to aid parties in objectively analyzing their positions and resolving a controversy short of a lengthy trial which would be costly to the litigants in terms of legal fees, expenses, time and the uncertainty of the final outcome. Both are effective forms of alternative dispute resolution which give litigants the opportunity to present their best case in a short period of time, usually in one-half to two days. The beauty of these proceedings is that neither is binding and if a resolution is not possible, the parties may proceed to a full trial.

There is a major difference between the two. A mini-trial is generated by an agreement between the parties and is outside the judicial process. An SJT is ordered by the court.

The mini-trial and the SJT are particularly beneficial in cases which are unlikely to settle, will require large amounts of pre-trial preparation, and will require a lengthy trial. Both aid the parties in overcoming entrenched perceptions regarding the merits. The mini-trial accomplishes this by making a presentation to executives of the litigants who have not been "tainted" by involvement in the suit or the controversy giving rise to it. The SJT aids objectivity by presenting litigants with a non-binding verdict from a randomly chosen jury. Confidentiality of the process may be assured by an agreement between the parties or by court order.[1]

Robert W. Bradford, Jr.
Robert W. Bradford, Jr. is a member of the Montgomery firm of Hill, Hill, Carter, Franco, Cole & Black, P.C. He received his undergraduate degree from David Lipscomb College and his law degree from Vanderbilt University, where he served as associate editor of the *Vanderbilt Law Review*.

THE MINI-TRIAL

The mini-trial is a procedure which allows the parties to quickly present their "best case" as a prelude to settlement discussions. The mini-trial is possibly best suited for complex litigation which is factually difficult for the layman to easily understand. It has been utilized most frequently in patent, antitrust, government/contractor, and other complex litigation. The mini-trial format is useful in preserving an ongoing relationship between the parties by avoiding the "bloodletting" and animosity which often accompany full-blown litigation.

A successful mini-trial is a voluntary, confidential and non-binding procedure. It consists of an informal summary presentation before top management representatives by the lawyers and experts for each party. A rebuttal and questions concerning the presentation follow. The presentation is presided over by a jointly selected "neutral advisor" or moderator who, if desired, advises the parties as to the strengths and weaknesses of their positions. After the presentation, the representatives for the parties meet, without counsel, to discuss the possibility of settlement.

The purpose of the mini-trial is to permit executives or other knowledgeable persons representing the parties to have a quick, in-depth look at the strengths and weaknesses of the positions of the parties. It is hoped that an analysis of the facts presented will lead to settlement. The primary benefit is converting a typical lawyer's dispute back into a businessman's problem to be solved in a businesslike manner by persons who may be much more skilled and flexible in negotiating than are legal counsel and who certainly have a better grasp of what is in the best long-term interest of their companies.

The mini-trial process can be understood best by considering a situation in which it was successfully utilized. Its first widely recognized application involved a complex patent infringement case between Telecredit, Inc., the owner of a number of patents relating to computerized check verification and charge authorizations systems, and TRW, Inc., the manufacturer of a number of such systems for banks and retail outlets.[2] After three years of preparation and the expenditure by both sides of several hundred thousand dollars in legal fees, traditional dollar negotiations had failed. Counsel and management of the parties developed the mini-trial concept.

The procedure consisted of a six-week pre-presentation schedule that provided for an expedited, limited exchange of documents, short depositions of key witnesses and the exchange of position papers and exhibits. During the six-week pre-trial period, all non-essential judicial pre-trial discovery was postponed. Briefs in the form of short introductory narrative statements were exchanged and provided to the neutral adviser beforehand.

The procedure culminated in a two-day mini-trial. At the mini-trial, the formal rules of evidence were suspended. Each side orally presented its best case to top management of both companies. Corporate representatives were permitted to question the persons who made the presentation. During the mini-trial, when difficulties arose, the neutral observer facilitated discussion with his questions and commented on serious

problems he believed existed for each side.

After the presentation, if a settlement did not occur during the initial meeting of the corporate representatives, the neutral adviser was to pen a non-binding opinion regarding the relative strengths and weaknesses of the parties' positions and the likely outcome at trial. The two management teams were to meet again after reviewing the opinion to discuss settlement. This process was not necessary. Immediately after the mini-trial ended, representatives of TRW and Telecredit met privately without lawyers and within one half-hour resolved the dispute.

For the mini-trial process to be successful, counsel and parties must be imaginative and flexible in tailoring the wide variety of available procedures to their particular situation. While a mini-trial may eliminate a lengthy trial, it requires intensive preparation. Otherwise, corporate representatives will not have sufficient information upon which to base a wise decision. To avoid problems, the procedure to be utilized should be spelled out in detail in an agreement between the parties. Model agreements regarding mini-trial procedures are available from the American Arbitration Association.

There are many variations of the mini-trial. The parties may agree to make the decision of the neutral observer binding. A binding mini-trial may be attractive when the issues between the parties are very narrow and the facts are not seriously disputed. A binding mini-trial is especially useful if the jurisdiction permits the use of a "private judge". In California, litigants may avail themselves of a provision of the Code of Civil Procedure, Paragraph 638, that permits litigants to have their case heard privately and quickly by a judge of their choosing. Appeal rights are preserved.

A mini-trial also may be conducted within the regular litigative process, rather than secretly and apart from the court, by utilizing the court's powers under F.R.C.P. 53 (Masters), or the court's authority to appoint a neutral expert on disputed issues. Rule 16 of the Federal and Alabama Rules of Civil Procedure arguably is broad enough to permit such a procedure.

Another permutation of this form of ADR is "mini-trial by contract". Contracts could require the parties to participate in a mini-trial procedure in the event of disagreements during the course of the contract. It is not clear if such contractual provisions are legally enforceable.

In appropriate situations, the use of a mini-trial has great potential and is basically risk-free. Professor Eric D. Greene

For the mini-trial to be successful, counsel and parties must be imaginative and flexible in tailoring the wide variety of available procedures to their particular situation.

succinctly summarized reasons for utilizing a mini-trial in appropriate circumstances:

> Why should not anyone take advantage of a process like this in a case that they have in which they are at an impass with the other side and they both have a good faith belief in their case? I can't see any reason why you shouldn't try it. It's virtually risk-free. First of all, all of the time and money that you put into preparing for this concentrated mini-trial, and it requires a great amount of preparation, is fully recoverable if the case does not settle and you go to trial. You prepare your case in the same way. You just boil it down to the crux issues which is a beneficial process in its own right. It's confidential and inadmissible so you don't give up anything that can be used against you at trial. With the rules of discovery the way they are today, you can't hide very many surprises anyhow. If you have a chance of saving substantial money for your client, it seems that it would be worth the risk in virtually any case.
>
> I'm asked, is it an indication of weakness to call up the other side and say, "Let's try something like this?" I think that's a good question. I think it is a sign of weakness to call up the other side and say, "Do you think we might be able to do something about this case?" and then engage in traditional settlement discussions....I do not think it's a sign of weakness to call up the other side and say, "We think our case is great and we're willing to put on our case in four hours or for an hour and expose it to your cross examination and your questions if you'll put on your case and we'll do the same thing. Let's bring our chief executive officers down and let them listen and then let them negotiate. If they can't decide it, you pick the person, pick a retired judge."...I think that's a sign of strength. I don't think there's any risk there.
>
> Judicial Conference—Federal Circuit, 100 F.R.D. 499, 517 (1983).

There is no need to teeter on the brink of a mini-trial; plunge in. There is little to lose and much to gain in the process.[3]

THE SUMMARY JURY TRIAL

The SJT is a judicially ordered procedure which provides a no-risk, non-binding method by which the parties may obtain the thoughts of jurors on the merits of their case in an abbreviated proceeding normally lasting from one-half to two days. Unlike mini-trials, SJTs have been utilized in cases ranging from personal injury to contract disputes.[4] SJTs are most often utilized in suits which will involve lengthy trials and in which settlement appears unlikely because of the often mutually unrealistic expectations of the parties as to the potential of liability and/or the probable verdict range.

Although normally utilized in large cases, the SJT could be useful in technically complex suits in which the amount in controversy often does not exceed the cost of full-blown litigation. Small construction claims are an example. To avoid expense, the parties could agree that the SJT decision would be binding.

The SJT was developed in 1980 by Judge Thomas D. Lambros, a federal

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DISCIPLINARY REPORT

Disbarments

Mobile lawyer **S. Robert Brooks, III** was disbarred by order of the Supreme Court of Alabama, said disbarment effective March 20, 1991. The disbarment of Brooks was based upon his conviction in the Mobile County Circuit Court of theft of property in the first degree. (Rule 14[b] 90-02)

Sylacauga attorney **James J. Clinton** was disbarred by order of the Supreme Court of Alabama, effective 12:01 a.m., February 12, 1991. The disbarment of Clinton was based upon his conviction of various violations of the Code of Professional Responsibility of the Alabama State Bar. (ASB No. 86-234)

The Supreme Court of Alabama entered an order January 22, 1991, disbarring Birmingham lawyer **Bert L. Lindbergh,** effective 12:01 a.m., January 22, 1991, based upon Rule 14(b), Rules of Disciplinary Enforcement, disbarment order of the Disciplinary Commission. (ASB No. 88-02)

Suspension

Eddie Lee Lewis has been temporarily suspended from the practice of law, pursuant to Rule 20, Rules of Disciplinary Procedure, effective March 15, 1991.

Mobile attorney **John A. Courtney** was temporarily suspended by order of the Disciplinary Commission of the Alabama State Bar. The suspension was ordered pursuant to Rule 20(a), Rules of Disciplinary Procedure of the Alabama State Bar. (ASB No. 91-01)

Birmingham lawyer **Elaine McDuffie** was suspended from the practice of law in the State of Alabama for a period of 90 days, with automatic reinstatement, by order of the Supreme Court of Alabama dated March 5, 1991. Said suspension, effective the date of the order, was based upon McDuffie's plea of guilty to disciplinary charges pending against her, specifically, that she engaged in conduct that adversely reflected on her fitness to practice law.

Said conduct involved McDuffie's preparing a will for a male client wherein she was designated as the executrix and sole primary devisee, and also her preparation of a will for said client's mother, that will including a provision that the entire residual estate would go to McDuffie in the event the son predeceased the mother. (ASB No. 89-662)

In an order dated February 4, 1991, the Supreme Court of Alabama suspended Montgomery attorney **Gerald Oscar Wallace** from the practice of law for a period of 91 days, said suspension to become effective February 4, 1991. Said suspension was based upon Wallace's having been previously convicted of two felony counts involving moral turpitude. (ASB No. 89-03)

Public Censure

On February 1, 1991, Mobile lawyer **Richard D. Yelverton** was publicly censured for having engaged in conduct that is prejudicial to the administration of justice, in violation of DR 1-102(A)(5) of the Code of Professional Responsibility. Yelverton defended a client on robbery charges, and falsely represented to the jury, the prosecutor and the court that the whereabouts of an alibi witness were unknown, and that he would need to read for the jury the prior testimony of that witness given at the preliminary hearing in district court. In fact, Yelverton knew the whereabouts of the witness and had served the witness with a subpoena. (ASB No. 89-189)

On February 1, 1991, Daphne lawyer **James Harold Sweet** was publicly censured for having violated DR 1-102(A)(6) and DR 2-111(B)(2) of the Code of Professional Responsibility of the Alabama State Bar. Sweet was discharged by a client who was dissatisfied with his representation of the client in a civil suit. Nonetheless, Sweet filed a pleading on behalf of the client three days after he was discharged.

The client filed a complaint with the state bar, which requested Sweet to explain his having filed a pleading for the client after having been discharged. Despite repeated requests, sent by certified mail and personally served on him by the sheriff's department, Sweet failed to provide the state bar with any explanation of his behavior. (ASB No. 90-331)

On February 1, 1991, **Richard Lee Taylor** was publicly censured for willful misconduct, conduct adversely reflecting on his fitness to practice law, willful neglect of a legal matter entrusted to him, and intentional failure to carry out a contract of employment entered into with a client for professional services.

Taylor was retained and paid by a Columbus, Ohio, resident to review a will and advise the client as to her rights under the will. Taylor did not communicate with the client about the matter for 13 months, during which period he ignored an inquiry from the Chief Justice of the Ohio Supreme Court and two inquiries from the Grievance Committee of the Birmingham Bar Association. (ASB No. 90-2)

Disciplinary Proceedings

James Stephen Oster, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of May 20, 1991, or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB Nos. 88-426, 89-186 and 89-405 before the Disciplinary Board of the Alabama State Bar. ■

Notice of Investigation

James Stephen Oster, whose whereabouts are unknown, must answer the complaint filed against him within 30 days of May 20, 1991, or the factual allegations contained in the complaint shall be deemed admitted and submitted to the Disciplinary Commission of the Alabama State Bar in ASB No. 91-132.

The Mini-Trial and Summary Jury Trial

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judge for the Northern District of Ohio. Judge Lambros predicated his authority to order parties to submit to SJTs on Rule 16, F.R.C.P. He also relied upon the Seventh Circuit's opinion in *O'Malley v. Chrysler Corp.*, 160 F.2d 35 (7th Cir. 1947). Although *O'Malley* did not involve an SJT, it discussed a district court's power under the discovery and pre-trial rules to simplify a suit prior to trial. The Seventh Circuit held:

> The Federal Rules of Civil Procedure . . . provide, not only for discovery but for pre-trial conference. (Rule 16). Under these rules we think the court has the wide discretion and power to advance the cause and simplify the procedure before the cause is presented to the jury. *The District Court had the power to issue such orders as in the exercise of its sound discretion would advance and simplify the cause before trial.*
>
> 160 F.2d at 36 (emphasis added).

The 1983 amendment to Rule 16 F.R.C.P. makes the power of the federal courts to order an SJT even more apparent. Amended Rule 16(c) provides that: "The participants at any conference under this rule may consider and *take action* with respect to:...(6) the advisability of referring matters to a magistrate or master; (7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute; ... and (11) such other matters as may aid in the disposition of the action." (emphasis added).

All courts considering the issue, with the exception of the Seventh Circuit, have held that a district court has the authority to compel participation in an SJT.[5] *See, e.g., Arabian-American Oil Co. v. Scarfone*, 119 F.R.D. 448 (M.D. Fla. 1988); *McCay v. Ashland Oil, Inc.*, 120 F.R.D. 43 (E.D. Ky. 1988); *Homeowner's Funding Corp. of America v. Centry Bank*, 695 F. Supp. 1343 (D. Mass 1988); *Federal Reserve Bank v. Carey-Canada*, 123 F.R.D. 603 (D. Minn. 1988). *But see Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1988).

The future use of the SJT will depend on the proclivity of various courts to require such proceedings in an effort to narrow the issues and/or procure settlement prior to trial.

It should be noted that Rule 16 of the Alabama Rules of Civil Procedure which empowers circuit courts to require a pre-trial conference requires the courts:

> [To] consider and determine: ....
> (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
> (6) Such other matters as may aid in the disposition of the action.

Thus, it may be argued that Alabama courts have the power to order an SJT to "aid in the disposition of the action". As the SJT verdict is non-binding, it does not fun afoul of Alabama's revered right to a trial by jury. Regardless of the court's power to initiate SJTs, litigants may voluntarily consent to an SJT if the court approves.

Judge Lambros' SJT procedures have been largely adopted by courts utilizing SJTs.[6] For the SJT to be successful, the case should be substantially ready for trial with discovery completed and no motions pending. An SJT is conducted by a judge or a magistrate. Normally, the procedure only permits the presentation of relevant facts and theories to the jury by an attorney. All statements' relations to facts must be predicated upon deposition, affidavits or other evidence which would be admissible into evidence at trial. The necessity for objections to inadmissible evidence and/or argument can be dealt with at an intensive pre-SJT conference with the judge. Parties generally are required to submit a trial brief and simplified jury instructions before an SJT is commenced.

Under the Lambros model, a jury venire of ten persons is provided. A short personl history is taken from each of the jurors, and the court conducts a brief voir dire of the jury based upon questions submitted by counsel. The parties have two strikes each, resulting in a six-person jury.

The proceedings are not open to the public and, unless ordered by the court, the proceedings are not recorded. The time allotted to each side may be broken up so that rebuttal time is available if desired. All evidence is presented by attorneys who may incorporate arguments into their presentations.

Following the presentation, the jury is given an abbreviated charge and retires for deliberation. In addition to a verdict, the parties may request that the jurors answer written interrogatories. Counsel may interview jurors after the verdict. Although the verdict is not binding, the

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PROFILE

CLARENCE MERILTON SMALL, JR.

President-elect, Alabama State Bar, 1991-92

Pursuant to the Alabama State Bar's rules governing the election of the president-elect, the following biographical sketch is provided of Clarence Merilton Small, Jr. of Birmingham, Alabama. Small is the sole qualifying candidate for the position of president-elect of the Alabama State Bar for the 1990-91 term.

Clarence M. Small, Jr. was born July 24, 1934 in Birmingham, Alabama. He received his undergraduate degree from Auburn University in 1956 and law degree from the University of Alabama School of Law in 1961, graduating with honors. He is a member of Omicron Delta Kappa and Farrah Order of Jurisprudence.

Small served as an officer in the United States Army Artillery Corps. from 1956 to 1958 and was honorably discharged.

In 1961, he joined the firm of Rives & Peterson where he is now a senior partner.

Small is a member of the Birmingham Bar Association, Alabama State Bar and American Bar Association. He is a member of the bar of the Supreme Court of the United States.

In 1989, Small was elected a Fellow of the American Bar Foundation, whose membership is limited to one-third of 1 percent of the lawyers in the United States whose professional, public and private careers have demonstrated outstanding dedication to the welfare of the community and the traditions of the legal profession. He is a member of the Association of Trial Lawyers of America, International Association of Defense Counsel and the Alabama Defense Lawyers Association.

Small was elected president of the Birmingham Bar Association in 1979. He also served as chairperson of its Grievance and Law Day committees, president of its YLS, a member of the executive committee and other committees. He was a member of the ABA House of Delegates from 1983 to 1990. He was appointed by the Supreme Court of Alabama to serve on the court's Appellate Rules Committee and the Committee on Alabama Rules of Evidence.

Since 1985, Small has been listed in the "The Best Lawyers in America." He currently serves as a member of the Farrah Law Society Board of Trustees and as a member of the Jefferson County Judicial Commission, nominating candidates for judgeships in Jefferson County.

He is married to the former Jean Russell, and they have three children. They are members of Brookwood Baptist Church. ■

The Mini-Trial and Summary Jury Trial

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parties may agree to make it so.

The benefits of an SJT are myriad. It permits counsel and the parties to see firsthand a capsulized version of their opposition's best arguments, a jury's reaction to these arguments, and, if settlement results, the parties receive the attendant benefits of avoiding a lengthy trial.

The effectiveness of the SJT as a "predictor", however, has been questioned. For instance, in *Muehler v. Land o' Lakes, Inc.*, 617 F. Supp. 1370 (D. Minn. 1985), two panels of six people each heard the same SJT presentation. One panel found for the defendants; the second panel returned a $2.292 million "verdict" for the plaintiff. Similarly, in *Compressed Gas Corp. v. United States Steel*, 857 F.2d 346 (6th Cir. 1988), *cert. denied*, 490 U.S. 1006, 109 S. Ct. 1641 (1989), an SJT resulted in a $200,000 "verdict" for the plaintiff. The regular jury at trial returned a verdict in the amount of $1.7 million. The verdict was reversed on appeal for reasons unrelated to the SJT. Nevertheless, an SJT verdict may be used as a harbinger of verdicts from other juries by assessing whether the SJT jury was plaintiff or defendant oriented or was simply a "garden variety" group from middle America.

Opponents to mini-trials and SJTs assert that if a settlement does not occur, one has revealed his trial strategy. Realistically, however, if the parties have engaged in the thorough discovery permitted by the Rules of Civil Procedure, few, if any, surprises occur at trial. Others fear that while they may expose all of their theories in a presentation, the opposing party may not, rendering the abbreviated presentation a one-way "pregame preview". These fears can be eliminated by an agreement or a court order forbidding the presentation of theories or facts at trial which were not forwarded in the non-binding proceeding.

Other objections to SJTs may be generally summarized as these: (1) there is not opportunity for jurors to judge the veracity of the witnesses: (2) there is not opportunity for the impeachment of witnesses: (3) and there is not opportunity to have witness or client input to prepare an effective rebuttal to evidence or cross examination.[7]

The future use of the SJT will depend on the proclivity of various courts to require such proceedings in an effort to narrow the issues and/or procure settlement prior to trial. Even if authorized in a jurisdiction, it is unlikely an SJT would be utilized except in cases which would require a significant amount of trial time and settlement otherwise seems very unlikely. The voluntary use of the SJT should increase. If the parties are extremely far apart in settlement negotiations, it would appear, as with mini-trials, that there is little to lose and much to be gained by utilizing an SJT if one is confident of the outcome before a jury.[8] ■

Footnotes

1. *See, e.g., Cincinnati Gas & Elec. Co. v. General Electric Co.*, 854 F.2d 900 (6th Cir. 1988) (SJT is not open to the public). *But see Grumman Aerospace Corp. v. Titanium Metals Corp.*, 91 F.R.D. 84 (E.D.N.Y. 1981). (Trial court permitted a third party to discover the report of a neutral fact-finder not withstanding a confidentiality agreement covering the report); *Bennett v. LaPere*, 112 F.R.D. 136 (D.R.I. 1986) (Non-settling defendant allowed to discover settlement documents despite confidentiality provision).
2. Judicial Conference—Federal Circuit, 100 F.R.D. 499, 513-17 (1983).
3. Other articles concerned with the mini-trial include:
   (a) Borvoy and Janicke, "The Mini-Trial Approach to Resolving Patent Disputes", 11 APLA *Quarterly Journal* 258 (fall 1983).
   (b) Davis and Omlie, "Mini-Trials: The Courtroom in the Boardroom", 21 *Willamette L. Rev.* 425 (summer 1985).
   (c) Edelman, Lester and Caroll, Frank, "The Mini-Trial: An Alternative Dispute Resolution Procedure", 42 *Arbitration J.* (Mar. 1987).
   (d) Franklin, "The Mini-Trial: What It is and What It Isn't; What It Can Do and What It Can't Do", 4 *Construction Lawyer* 1 (fall 1983).
   (e) Greene, Eric D., "Growth of the Mini-Trial", 9 *Litigation* 12 (fall 1982).
   (f) Page, Reba and Lees, Frederic J., "Roles of Participants in the Mini-Trial", *Public Contract Law* J. 54 (October 1988).
4. SJTs have been utilized by federal courts in Ohio, Massachusetts, Oklahoma, Pennsylvania, Kentucky, Florida, and Michigan, among others. The 31-judge Alameda County Superior Court in Oakland, California, has adopted a Trial in Preview Program which is patterned after the AJT. There is also an empirical assessment of the use of SJTs in Florida. Alfini, *Summary Jury Trials in Florida: An Empirical Assessment* (ABA KFF J37 A95 1989).
5. For a discussion of this issue, *see* Kautzman, Andrea J., "Incongruity in the Seventh Circuit: Do Federal Courts Have the Authority to Order Summary Jury Trials", 6 *Ohio State Journal on Dispute Resolution* 131 (1990).
6. For a detailed description of the Lambros' SJT procedures, see Lambros & Shunk, "The Summary Jury Trial," 29 *Clev. St. L. Rev.*, 43 at 46 (1980). The ABA has published "Alternative Dispute Resolutions: A Handbook for Judges" which contains recommended SJT procedures.
7. Questions have also been raised about the court's authority to require citizens summoned for "traditional" jury service to serve on a summary jury and the potential velatorious effects of the practice, assuming the power exists. The Northern District of Ohio has opined that: "Federal judges . . . have no authority to summon citizens to serve as settlement advisors, just as they would have no authority to summon citizens to serve as hand servants for themselves, lawyers, or litigants." *Hume v. M&C Management*, 129 F.R.D. 506, 510 (N.D. Ohio). *See, United States v. Exum*, 748 F. Supp. 512, 513 (N.D. Ohio 1990).
8. Numerous articles have been written regarding summary jury trials which include:
   (a) Craco, William V., "Compelling Alternatives: The Authority of Federal Judges to Order Summary Jury Trial Participation", 57 *Fordham L. Rev.* 483 (1988).
   (b) Jacoubovitch and Moore, *Summary Jury Trials in the Northern District of Ohio*, May 1982 — a report to and available from:The Federal Judicial Center, Dolley Madison House, 1520 Eighth Street, N.W., Washington, D.C. 20005.
   (c) Lambros, Thomas V., "Summary Jury Trials,"*Litigation*, Vol. 13, No. 1, P. 52 (fall 1986).
   (d) Lambros, Thomas V., "Lambros, The Summary Jury Trial and Other Alternative Methods of Dispute Resolution," 103 F.R.D. 461 (1984).
   (e) Lambros, "The Federal Rules of Civil Procedure: A New Adversarial Model for a New Era," 50 *U. Pitt L. Rev.* 789 (1989).
   (f) Lambros, Thomas V. and Shunk, Thomas A., "The Summary Trial", 29 *Cleveland St. L. Rev.* 43 (1980).
   (g) Morgan, Anne C., "Affording Judicial Power to Order Summary Jury Trials in Federal District Court: *Strandell v. Jackson County*, 40 *Case Western Reserve L. Rev.* 491 (1989-90).
   (h) Mullroy, Jr., Thomas R. and Friedlander, Andrea V., "Trial Techniques: A Discussion of Summary Jury Trials and the Use of Mock Juries", XXIV, No. 2, *Tort and Insurance Law Journal*, 563 (winter 1989).
   (i) O'Toole, Daniel K., "The Catch-22 of Mandatory Summary Jury Trials", *Journal of Dispute Resolution*, Vol. 1990, No. 1, P. 135.
   (j) Peterson, "Summary Jury Trial Strategies", *Litigation*, Vol. 16, No. 3, p. 31 (spring 1990).
   (k) Posner, "The Summary Jury and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations", 53 *U. Chi. L. Rev.* 366 (1986).
   (l) The Summary Jury Trial and Other Alternative Methods of Dispute Resolution, 103 F.R.D. 461 (1984).

NONPARTISAN JUDICIAL ELECTIONS AND THE STATE BAR

By DAVID A. BAGWELL

Should Alabama judges be nominated by political parties and elected in partisan political races? They have not always been,[1] and they are not always even now in our big cities, and the Alabama State Bar has twice in this century called for separate election of judges, not linked to the straight ticket. Why should judges be elected in partisan primaries? Should judges be elected from particular neighborhoods? Should judges be elected at all?

The state bar asked a group of us[2] to wrestle with those questions, and to give the board of bar commissioners some guidance. The bar put no restrictive preconditions on us.

Right now, our strong thinking is that partisan election has no business applying to the courts. The bar commissioners agree; at our suggestion, on December 14, 1990, they again[3] adopted a resolution calling for nonpartisan judicial elections. The bar needs your help; give us your thoughts,[4] and also talk to or write your legislators, asking them to support this improvement.

COMMITTEE BACKGROUND

About three years ago, the method of judicial selection in Alabama was suddenly a hot topic, in the state legislature, in the courts and among the judges. In the federal courts in Alabama, a suit had been filed in the Middle District in Montgomery,[5] seeking judicial elections from single-member districts. In the legislature, a bill had been introduced for nonpartison judicial elections. And our outgoing Chief Justice, C.C. Torbert, was talking about the need for some kind of "merit" or non-elective judicial selection or retention, in whole or in part. State judicial selection was a timely question.

The bar figured it should have some say in all this, or at least should think about it some. President Gary Huckaby appointed an Alabama State Bar Task Force on Judicial Selection, chaired initially by Drew Redden of Birmingham, and now by Robert Denniston of Mobile. We are what "Alabama's own" Judge Pat Higginbotham of the Fifth Circuit, in another context, has called "a Noah's Ark Committee: two of each species". We are prey to the usual ills of bar task forces: we are too diverse to have an easy consensus, too busy to meet often, and from such far-flung parts of the state that there is no practical place to get together. We have done the best we can.

SINGLE-MEMBER JUDGESHIP DISTRICTS

Everybody has known for years about reapportionment and the "one person,[6] one vote" requirement. Most of us have never really thought about it in the context of judges, because about the time the first plaintiff did think of that, the supreme court said the rule did not apply to election of judges.[7]

The single-member district question—a different issue—has not been quite so simple, for anybody. In the early and mid-1970s, so-called "vote dilution" cases were filed under the Fifteen Amendment and the Voting Rights Act of 1965, claiming that at-large elections "diluted" the vote of the minority voters because, if people voted by race, the majority candidates could always win. In 1980, the United States Supreme Court held[8] that under both the Constitution and the Voting Rights Act, plaintiffs in vote dilution cases—like certain other constitutional cases[9]—had to prove a discriminatory *intent* in adoption or maintenance of the electoral system, not just a discriminatory *effect*. Then, in 1982, Congress overruled the Supreme Court's *Bolden* rule, in amendments to the 1965 Voting Rights Act,[10] thus allowing proof only of discriminatory effect, not necessarily intent. The clearest thing about the 1982

amendments was that political races ordinarily[11] had to be from individual districts. That answered most of the questions for legislative and executive officers. But, at no point in any of this had *anybody*—the Congress, the Courts or the litigants— thought very much about the effect of this body of law on the election of judges sitting on multi-judge courts, such as trial courts in the cities, and maybe even appellate courts.

Then, the Fifth[12] and Sixth[13] circuits waded into the murky statute and murky legislative history, holding that the 1965 Voting Rights Act covered *judicial* elections, and required single-member judicial positions. Since then, however, the Fifth Circuit has held *en banc* that the Voting Rights Act does not apply to judges,[14] and the Supreme Court has granted certiorari on that case and also on several other similar cases.[15]

Considering those developments, and since the litigants in the Alabama case seem to have little, if any, interest in compromise at this point and prefer that the bar stay out of the remedy phase of a pending lawsuit, and since there is no groundswell in the bar or the public for action now, the task force, like everybody else, is simply awaiting a Supreme Court decision and further clarification or development.

Anyway, the only way to keep Alabama out of that statutory morass at this point would be to adopt an appointive judiciary,[16] and there seems little support for that.

"MERIT SELECTION" PLANS

☑ There has been a good bit of study in the committee about so-called "merit selection" of judges. Statistics change monthly and state judicial selection nationwide is changing with incredible rapidity, but it seems to be rough truth, at least, that Alabama is one of only maybe five to eight or so states still having "pure partisan election of judges".

It is not even fully accurate to say that Alabama has an elective judiciary. Though our judicial article says "[a]ll judges shall be elected by vote of the electors within the territorial jurisdiction of their respective courts",[17] more than half our "elected" judges from all counties are initially selected by *appointment* by the Governor,[18] and then usually "run" without opposition. In recognition of the fact of appointment—and reflecting less than complete satisfaction with it—in Jefferson,[19] Madison,[20] Mobile,[21] and Tuscaloosa[22] counties, there are county "judicial commissions" which substantially limit the Governor's nominating power. They generally report to the Governor a slate of three persons, from whom he may nominate one. Fifteen[23] of the 67 counties also have the constitutional power to adopt *local laws* for the filling of judicial vacancies,[24] and two counties have done so.[25]

If a judge in Alabama had never been a politician, and had been appointed to his position, he immediately becomes a creature of politics.

There is a wide variety of whole or partial "merit selection" plans. There is significant (if not unanimous) support in our committee for —and also some vehement opposition to—the concept of whole or partial "merit selection" of judges, depending on exactly what is intended by the concept. There are many levels of "merit selection", some or all of which could be chosen cafeteria-style: commission selection, commission appointment, "yes/ no" retention elections, and the like.

But, until the situation stabilizes with respect to the applicability of the 1965 Voting Rights Act to judicial elections, our task force membership detects no clear mandate for adoption of a "merit selection" plan for Alabama.

Therefore, we have "put it on our back burner", making a deliberate decision to stay away *at this point* from what may turn out to be the remedy phase of a pending lawsuit.

NONPARTISAN ELECTION

☑ Nonpartisan election is a different question. We see a need for immediate action on it.

In the 1964 "Goldwater Sweep", if there had been state supreme court slates from both Republicans and Democrats, chances are quite high that the entire supreme court slate would have been voted out of office by an electorate among which maybe not one in 100 voters could name a single sitting appellate court judge or justice. Justice Pelham Merrill of Alabama's Supreme Court, who served then, said later that if the Republican Party had nominated a slate of judges in 1964, "I firmly believe that three of us on the Supreme Court and the entire Court of Appeals, who were candidates for election in 1964, would have been defeated".[26]

Will there be a "George Bush Sweep" in 1992, riding the wave of "Operation Desert Storm"? If there is, how many fine judges will it hit? How many of them will be on the street, hanging out a shingle at the end of outstanding public service careers? It is long past time to think about it.

In the Legislature, nonpartisan judicial election bills have been introduced the last couple of sessions. They have not gotten to first base, in part because neither the bench nor the bar had expressed any position, and also because the Democratic Party and/or strong Democratic officeholders, in the past, have declined to embrace the concept. The Democratic Party's past reluctance to endorse the concept has apparently stemmed from reluctance to give up its substantial income from filing fees for judicial candidates,[27] and reluctance to abandon the prestige deemed to flow from a virtually all-Democratic bench.

To steer clear of the filing fee income problem, recent drafts of the legislation have contained a provision splitting judicial filing fees in nonpartisan races between the parties in accordance with the result in the actual vote. Sponsors have expressed a willingness to tinker with the formula.

Whether there will be a 1992 "Bush sweep", there are good reasons why it seems inappropriate to most people that

judges, of all things, should be elected in a partisan election. Not long ago, a Mobile newspaper, in its "Opinion" section, asked its readers: "In an effort to keep politics out of the state judiciary, should all candidates for state court judgeships have to run as independents instead of running as Democrats or Republicans? Why or why not?" All the readers' answers published were that judicial elections should be nonpartisan, and this one catches the flavor:

> Yes! I believe all judges, whether elected or appointed, should be independent. Suppose you have to settle a case in Court and you are a dyed-in-the-wool Democrat, and the Judge is a dyed-in-the-wool Republican, the other party is a Republican and his lawyer is a Republican. Would you feel safe in a setting like this? Or turn it the other way around.[28]

Do not take if from us, though, take it from a fine elected judge himself, former Justice Pelham J. Merrill of the supreme court:

> If a judge in Alabama had never been a politician, and had been appointed to his position, he immediately becomes a creature of politics. He must win nomination by his own political party, and then stand for reelection in November. In strong two party states, fine Republican judges have been defeated in a Democratic sweep, and fine Democratic judges have been defeated in a Republican sweep[29]

Most likely the overwhelming majority of the citizens feel that way, if they think about it. If we are going to have an *elective* judiciary, it does not have to be a *partisan* election. What are the issues in a partisan election? Free trade? Arms control? Tax reform? Military preparedness? Our judges have no business being voted in, or voted out, based on those questions, which have little if any relevance to the judiciary.

We are fooling ourselves if we think that our citizens are making knowledgeable choices in our partisan judicial elections. Listen to one former Missouri Supreme Court Justice:

> I was elected in 1916 because Woodrow Wilson "kept us out of war." I was defeated in 1920 because Woodrow Wilson "did not keep us out war." In both elections, not more than five percent of the voters knew I was on the ticket.[30]

The obvious reason is that except maybe in rural counties, most voters just do not know their judges. There have not been any studies here, but promptly after the 1954 elections, the Bar Association of the City of New York employed a well-known pollster to make a public opinion analysis in all parts of New York State, including New York City, a smaller city (Buffalo) and a semi-rural area. Their results showed that:

- not more than 1 percent of those polled in New York City could remember the name of the man who had just been elected to that state's highest judicial post;
- in Buffalo, not a single voter polled could remember the name of that judicial officer; and
- in the rural area, only 1 percent remembered.[31]

Are we different in Alabama? Maybe so for circuit judges and probate judges in some rural counties, but ask a layperson to name four of the justices of the Alabama Supreme Court. It is no reflection on the sitting justices that most citizens have never even heard of most of them. A judge performs his work in the courtroom or in chambers, and not on television. That very trait, though, makes them "ground zero" for partisan sweeps.

If there is a "Bush Sweep" in 1992, Alabama's judiciary may well have a judicial train wreck. Is there something in the water of Alabama that makes us take no action until there is a train wreck?

Let's fix this now. Why should any Alabama judge be voted in, or voted out,

because the Tomahawk missile worked extraordinarily well, our soldiers were wonderful, some Democrats in Congress were timid, and several national television newsmen have been jerks? Judicial competence and judicial careers ought not to depend on that kind of thing.

The Board of Bar Commissioners of the Alabama State Bar is doing its part. On December 14, 1990, it adopted a resolution, reprinted at the end of this article, favoring adoption of nonpartisan election of judges.

Alabama deserves better than we have now. So do our judges. Talk to your legislators about it; they will listen to their county's lawyers. Tell them you want nonpartisan election of Alabama judges, if we are going to elect our judges.

Otherwise, we may all be sorry, and in pretty short order.

RESOLUTION

Adopted by the board of commissioners December 14, 1990

Whereas, the Alabama State Bar appointed a Task Force on Judicial Selection from its membership, and that task force has reported to the board of commissioners favoring the nonpartisan election of judges to the judicial offices of the appellate courts, circuit courts and district courts; and

Whereas, a majority of the bar commissioners, after consideration of the reasons given by the task force for nonpartisan election of judges, are in favor of the nonpartisan election of judges; and

Whereas, the bar commissioners are persuaded to their position for the following principal reasons:

1. Alabama is one of only eight states that continues to have partisan political judicial elections.

2. Nonpartisan elections should help reduce the cost of elections and help ameliorate the demeaning necessity of judicial candidates and sitting judges accepting, and even seeking campaign contributions from lawyers, potential litigants and special interests.

3. Judicial decision-making is not a political function and party affiliations should not be a factor in determining the qualifications of a candidate for judicial office, nor should a judge be beholden, or give the appearance of being beholden, to a political party by reason of its support of his candidacy.

4. Nonpartisan elections should encourage quality candidates to run for a judicial office that otherwise would not offer themselves as candidates; and

Whereas, the task force deems it advisable for a copy of this resolution to be sent to the Alabama Circuit Judges Association and the Alabama District Judges Association, and to the Chief Justice of the Alabama Supreme Court, for their review and considertion.

Now, therefore, the Board of Commissioners of the Alabama State Bar resolves as follows:

Be it resolved, that the Board of Commissioners of the Alabama State Bar is in favor of the nonpartisan election of judges to the appellate, circuit and district courts in the State of Alabama, and recommends and encourages the Legislature of the State of Alabama to pass an act at the next session of the Alabama Legislature making nonpartisan the election of judges to these positions.

Be it further resolved, that a copy of this resolution be sent to the Alabama Circuit Judges Association and the Alabama District Judges Association, and to the Chief Justice of the Alabama Supreme Court, for their review and their consideration. ■

David A. Bagwell
David A. Bagwell is a partner in the Mobile firm of Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves. He is a graduate of Vanderbilt University and the University of Alabama School of Law. He served five and a half years as a United States magistrate before returning to private practice in 1985.

Footnotes

1. *See generally* Bagwell, *Bench and Ballot in Alabama*, 33 Ala. Law. 58 (1972).
2. This is the state bar's Task Force on Judicial Selection, currently chaired by Robert Denniston, and vice-chaired by Carol Sue Nelson, and from time to time, helped out by Drew Redden (former chairperson), Jim Barton, Richard Ogle, David Bagwell (former vice-chairperson), Judge Charles Crowder, Norborne Stone, James Baker, John David Snodgrass, Oakley Melton, Delores Boyd, Michael Figures, Neal Pope, James Klinefelter, Judge L.E. Gosa, Julian Butler, Wayman Sherrer, Fairley McDonald, Judge Conrad Fowler, Carol Ann Smith, Alyce Manley Spruell, Jim Pruett, Rick Manley, and Gunter Guy. This entire article does not necessarily represent the views of all those members, but, then, none of them volunteered to write the article, either, so if they complain to you, do not listen.
3. The Alabama State Bar also proposed such a change in 1928. See 1928 Ala. Bar Proc. 86.
4. If you have ideas or suggestions, write chairperson Robert P. Denniston, Box 16818, Mobile, Alabama 36616.
5. The case was assigned to Hon. Joel F. Dubina, then a district judge (now on the 11th Circuit); one ruling in the case is reported as *Southern Christian Leadership Conf. v. Siegelman*, 714 F. Supp. 511 (M.D. Ala. 1989).
6. Look, I am not being trendy. That is what the Supreme Court has always called it. *Reynold v. Sims*, 377 U.S. 533, 588 (1964).
7. *Wells v. Edwards*, 347 F.Supp. 453 (M.D. La. 1972) (three-judge court), aff'd, 409 U.S. 1095 (1973).
8. *City of Mobile v. Bolden*, 446 U.S. 55 (1980).
9. *Washington v. Davis*, 426 U.S. 229 (1976).
10. P.L. 97-205.
11. There are exceptions for mayoral offices and the like, individual offices which, of necessity, cannot be "districted".
12. *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 390 (1990).
13. *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988).
14. *League of United Latin American Citizens v. Attorney General of Texas*, 914 F.2d 620 (5th Cir. 1990), *cert. granted*, ___ U.S. ___, 59 U.S.L.W. 3500 (U.S. Jan. 18, 1991) (No. 90-974).
15. *Chisom v. Roemer* (No. 90-757); *U.S. v. Roemer* (No. 90-132), and *Houston Lawyers Assn. v. Attorney General of Texas* (No. 90-813), all at 59 U.S.L.W. 3500 (U.S. Jan. 1991).
16. Under the 1965 Voting Rights Act, this might well need either to be approved by the Justice Department, or made the subject of declaratory judgment in the United States District Court for the District of Columbia. Our task force is pretty proud when we can take off a day and go to Birmingham to meet; we did not volunteer to litigate free in Washington, D.C.
17. Ala. Const. 1901, Anot. 328 (judicial article), § 6.13.
18. A study of *100 years* of elective judges in Alabama showed that even prior to the adoption of commissions in the major cities, 57 percent of all Alabama judges were initially appointed, not elected. Martin, *Selection and Tenure of Judges*, 8 Ala. Law. 131 (1947); Martin, *Alabama Judges Under Elective System*, 10 Ala. Law. 5,7 (1949). Since the adoption of commission plans in Jefferson, Madison and Mobile counties, the percentage is probably even higher, maybe much higher.
19. Ala. Const. 1901 Amdt. 110.
20. *Id.*, Amdt. 334.
21. *Id.*, Amdt. 406.
22. See note 24 below.
23. Shelby, Madison, Wilcox, Monroe, Conecuh, Clarke, Washington, Henry, Etowah, Walker, Tallapoosa, Pickens, Greene, Tuscaloosa, and St. Clair. 24. Ala. Const. 1901, Amdt. 328, §6.14.
25. Madison County, under this authority, has put its district judges under the commission. Tuscaloosa County also has used it to adopt a Judicial Selection Commission, covering both circuit and district judges.
26. Merrill, *The Facts About Alabama Courts and Judges Today*, 28 Ala. Law. 139, 144 (1967).
27. Incidentally, these are not tax-deductible by the judges.
28. *The Mobile Press Register*, July 6, 1988.
29. Merrill, *The Facts About Alabama Courts and Judges Today*, 28 Ala. Law. 139, 144 (1967).
30. Schroeder and Hall, *Twenty-five Years' Experience with Merit Judicial Selection in Missouri*, 44 Tex. L. Rev. 1088, 1092-93 (1966).
31. Rosenman, *A Better Way to Select Judges, in Judicial Selection and Tenure*, 103-04 (Winters, ed. 1967).

YOUNG LAWYERS' SECTION

By PERCY BADHAM

Alabama young lawyers are on the move!

This article is dedicated to the local young lawyer organizations throughout Alabama that are making a difference in their communities.

Percy Badham

There are four established local organizations: Birmingham Young Lawyers, Montgomery Young Lawyers, Mobile Young Lawyers and West Central Young Lawyers (includes a four-county region between Birmingham and Decatur). We are in the process of establishing three new local affiliates: Huntsville (Madison County), Northwest Alabama and Tuscaloosa. These local organizations elect their own officers and carry out local service projects.

Front row, left to right: Duane Wilson, Jim Sasser, Les Hayes, Jay Smith, Russell Eason, Laura Crum, Percy Badham, Amy Slayden, and Keith Norman. Back row: Hal West, Charles Anderson, Rebecca Bryan, James Anderson, Sid Jackson, Judson Wells, Frank Potts, Trip Walton, John Herndon, Barry Ragsdale, Buddy Smith, Robert Baugh, and Frank Woodson.

In February, the Alabama State Bar Young Lawyers' Section Executive Committee held its quarterly meeting at Point Clear, Alabama. The committee invited the president of each local affiliate to attend the meeting for the purpose of opening up statewide communication among these various groups. The meeting provided a forum for exchanging ideas and discussing the needs of young lawyers throughout the state. The meeting was a tremendous success and laid a solid foundation for future cooperation between the local YLS chapters.

The Point Clear meeting emphasized the need for statewide communication and the sharing of projects and ideas. In recognition of those needs, I will highlight the officers and specific projects of each of the local affiliates.

Birmingham YLS

President.....John Herndon
President-elect.....Peter Bolvig
Vice-president.....Ferris Richey
Secretary.....Tim Smith
Treasurer.....Robert Baugh
Assistant treasurer.....Betsy Champlin

The Birmingham YLS was involved in several projects: a band party for the Alabama Epilepsy Foundation; meals and scholarship program for the downtown firehouse mission program; a 5K race to raise money to send underprivileged children to camp; a YLS speaker's bureau; and a new lawyers seminar organized to orient new lawyers to all aspects of practice at the courthouse.

Local affiliate officers: Les Hayes, Montgomery; Charlie Anderson, Montgomery; Laura Crum, Montgomery; Russell Eason, Haleyville; John Herndon, Birmingham; Duane Wilson, Tuscaloosa; Frank Potts, Florence; Jim Roberts, Mobile; and Judson Wells, Mobile.

Montgomery YLS

President.....Laura Crum
Vice-president.....Les Hayes
Secretary-treasurer....Charlie Anderson

The Montgomery YLS is heavily involved in an Alternative Sentencing Program. This project recently received national recognition by placing first in the ABA/YLD 1989-90 awards of achievement competition. This project involves

placing people convicted of non-violent crimes in temporary or permanent jobs as an alternative to jail. Initially, the Montgomery YLS, along with volunteers from Montgomery's retired community, served as liaisons between the employer and the program. Later, the Montgomery YLS focused on soliciting additional employers to participate in the program.

Mobile YLS

President .....James V. Roberts, Jr.
Vice-president .....Mark C. Wolfe
Secretary-treasurer .....Judson W. Wells

Over the past year, the Mobile YLS has sponsored or cosponsored the following activities:

1. Anti-drug messages on local radio stations aimed specifically at local school children;

2. Annual golf and tennis tournament and dinner;

3. With the Executive Committee of the ASB YLS, a party on the USS Alabama battleship in Mobile during the state bar's annual meeting;

4. With the Boy Scouts, a Law Explorers Post, conducting nine meetings during the school year. This program is run by young lawyers and has approximately 120 participants; and

5. Participated in the United Way Campaign, donating $500 in 1990.

West Central YLS

President .....Russ Eason
Past president.....Kim Chaney

The West Central YLS, in conjunction with the Cullman County Bar Association, sponsored a seminar on appellate practice. In February 1990, Alabama Supreme Court Justice John Patterson conducted a seminar on criminal appellate practice.

Amy Slayden is leading the Huntsville group, Frank Potts, the Northwest Alabama group, and Duane Wilson, the Tuscaloosa group.

The local affiliates are very involved in their respective communities, and deserve recognition and thanks for their time and effort.

There are some great things being done by Alabama young lawyers. I encourage you to take the time to get involved. Please contact your local leaders, and make a difference! ■

BUILDING ALABAMA'S COURTHOUSES

CLEBURNE COUNTY COURTHOUSE

By SAMUEL A. RUMORE, JR.

The following continues a history of Alabama's county courthouses—their origins and some of the people who contributed to their growth. ***The Alabama Lawyer*** *plans to run one county's story in each issue of the magazine. If you have any photographs of early or present courthouses, please forward them to: Samuel A. Rumore, Jr., Miglionico & Rumore, 1230 Brown Marx Tower, Birmingham, Alabama 35203.*

Cleburne County Courthouse

The area that is now Cleburne County came under the control of the United States by the Creek Indian cession of 1832. In December of that year, several counties in Alabama were created from these lands. Among these were present-day Calhoun, Talladega and Randolph counties. The first settlers soon came from Georgia and the Carolinas. Land records show settlements as early as 1834. In 1835, five brothers of the Edwards family from North Carolina established Edwardsville.

In the 1840s, gold was discovered in the area and the territory surged with a gold rush. Boom towns such as Arbacacoochee and Chulafinnee appeared overnight as prospectors came to claim their fortunes. However, no sizeable amount of gold was found and soon the gold rush in California lured away Alabama's prospectors. Boom towns became ghost towns in what was to become Cleburne County.

Following the War Between the States, the Alabama legislature created several new counties. On December 6, 1866, Cleburne County was created principally from Calhoun County with a portion taken from Randolph and Talladega. The act establishing the county appointed commissioners to organize it. These commissioners set an election in July 1867. The communities of Edwardsville, Story and Salem vied to become county seat. Edwardsville received the highest number of votes and was declared the winner.

Cleburne County was named for General Patrick R. Cleburne. Cleburne was born in Balincog, Ireland, in 1827, the son of a doctor. He received a good education and, at age 22, entered the British Army. He served until he was 25. He later came to America and practiced law in Helena, Arkansas.

With the outbreak of war, Cleburne volunteered as a colonel in the 15th Arkansas Infantry. Within two years, he rose to the rank of major general. He served with the Confederate Army from Bowling Green to the Battle of Franklin. He was killed in an assault at Franklin, Tennessee, on November 30, 1864. His name was suggested for the new county by Jere Smith of Oxford, Alabama.

William Edwards, one of the five brothers who settled Edwardsville, donated land to the new county for the site of the courthouse. A public square was laid out, and a log building was constructed. Court was held as early as April 15, 1868. The courthouse building contained only one large room. Each corner was divided into "stalls" for use by the officials.

This log courthouse served the county for approximately 11 years until a two-story red brick building was erected. Its dimensions were approximately 60 feet by 40 feet with a T-shaped hall on the first floor, and a larger courtroom and

antechambers on the second floor. The bricks for this building were made on the site.

Around 1883, the town of Heflin was established in Cleburne County. It was named for Dr. Wilson L. Heflin, an early settler whose family has been very prominent in Alabama politics over the years. Dr. Heflin was the father of J. Thomas ("Cotton Tom") Heflin, United States Senator from 1920 to 1931. Present Alabama Senator Howell T. Heflin is the great-nephew of the town's namesake.

In 1905, a group of Heflin citizens began a movement to remove the courthouse from Edwardsville to Heflin. On March 16 of that year, they presented a petition to Governor William Jelks requesting an election on the question of moving the courthouse to Heflin. Governor Jelks ordered the election, but this order precipitated a legal battle that went all the way to the Alabama Supreme Court to decide whether the election would take place.

The people of Edwardsville knew that their thriving town would wither if it was no longer the county seat. They produced a petition which purported to withdraw the signatures of 170 persons who had previously requested the governor to call a county seat election. Finally, on November 29, 1905, in the case of *State ex rel. Brown v. Porter et al.*, 40 So. 144, 145 Ala. 541, the supreme court ruled that the election could take place. On December 11, 1905, Heflin won the election by 88 votes out of about 1,300 cast. More litigation ensued but Heflin won on each occasion.

For one year following the county seat election, Edwardsville refused to give up the courthouse to its neighbor eight miles away. In the general election of 1906, Edwardsville ran a slate of county officers pledged to retaining the courthouse. However, the candidates favoring Heflin all won by an average of 85 votes. As late as July 1907, a mandamus requesting a recount was still pending.

The battle continued when officials in Edwardsville refused to turn over the county records to the officials in Heflin. A group from Heflin, deciding that self-help was the best help, went to get the records themselves. They were able to carry off about half of the county records. They found the other half were burned, either accidentally or in spite.

Edwardsville never recovered from the election loss. It still exists today but has only a few hundred residents. The courthouse building later was used as a school until 1961. It then was sold to the Town of Edwardsville and served as its city hall. In September 1964, the almost 90-year-old building was completely gutted by a fire. The town lost all of its records and office equipment.

Construction of a new courthouse at Heflin began in early 1907. The town held a great celebration July 4 of that year when the cornerstone was laid. It was reported that some 3,000 people attended the ceremony. This event marked the end of the courthouse battle in Cleburne County which one reporter called "one of the hardest fought political battles ever waged in any county in the state."

The Cleburne County Courthouse was planned in the Neoclassical style of architecture by Charles W. Carlton, who also designed the neighboring Clay County Courthouse. It was completed in 1907 by the F.B. Hull Construction Company. The brick structure is approximately 145 feet long. It has a triple arched entrance supporting Ionic columns. The building has a metallic domed bell tower with four clock faces.

In 1938, two two-story wings were added to the courthouse. Horace M. Weaver was the architect, and Ogletree Construction Company was the builder. On June 22, 1976, the Cleburne County Courthouse was named to the National Register of Historic Places. ■

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

Between March 1 and April 15, 1991, the following attorneys made pledges to the Alabama State Bar Building Fund. Their names will be included on a wall in the new portion of the building listing all contributions. Their pledges are acknowledged with grateful appreciation. (For a list of those making pledges as of February 28, 1991, please see the March edition of The Alabama Lawyer.)

William F. Addison
Daniel F. Aldridge
Howard C. Alexander
Richard Goodman Alexander
James Cathey Alison
Robert Harold Allen
Joseph Hodge Alves, III
Orrin K. Ames, III
Mary Riseling Amos
Frank B. Angarola
J. Knox Argo
Robert Emerson Armstrong, III
William Hugh Atkinson
Robert Lowell Austin
Robert T. R. Bailey
Mark Allan Baker
Richard A. Ball, Jr.
William C. Barclift, III
William Scears Barnes, Jr.
Dennis Michael Barrett
Joe Edward Basenberg
William Joseph Baxley
James Ralph Beaird
Walter McFarland Beale, Jr.
George M. Beason, Jr.
Benjamin F. Beckham, III
Travis Massey Bedsole
William Kermet Bell
Michael Joseph Bernauer
Edward Franklin Berry
Tom Bevill
David Humphrey Bibb
Anthony James Bishop
Dalton Owen Blake, Jr.
Jerrilynn Blankenship
George Anderson Blinn
Ralph Preston Bolt, Jr.
Charles Hikel Boohaker
John Garber Bookout
Alfred Quinton Booth
Joel Victor Bowman
John Sanderson Bowman
Brice Herald Brackin
Linda Lou Robertson Brackin
Marc E. Bradley
Jane Lecroy Brannan
Louis E. Braswell
Sarah Manning Brazzolotto
John McNeel Breckenridge
William H. Brittain, II
Glen Porter Brock, Jr.
Paul W. Brock
Richard E. Broughton
Earl Terry Brown
Ernest Hampton Brown
Gregory Delona Brown
Quentin Q. Brown, Jr.
Roger Alan Brown
Stephen E. Brown
Sarah Fain Browne
Raymond Charles Bryan
Frank Stephan Buck
John Perkins Buck
William Terry Bullard
Thomas E. Buntin, Jr.
Robert L. Burdine, Jr.
Robert Earle Burney, II
Linda Susan Burns
Bruce Allen Burttram
James Joseph Bushnell, Jr.
Richard F. Calhoun
Henry A. Callaway, III
Frank Mark Caprio
Thomas Neely Carruthers, Jr.
Richard C. Carter
John S. Casey
William Earle Cassady
Michael Leonard Chambers
William Garner Cheney, Jr.
Chris Steve Christ
Billy Lynn Church
John Wesley Clark
Jerry Mack Clayton
Clifford W. Cleveland
Patricia Wayne Cobb
Charles W. Cochran, III
Walter G. Cole, Jr.
William H. Cole
A. J. Coleman
Brittin T. Coleman
Irwin W. Coleman, Jr.
Ralph Earl Coleman, Sr.
Louis Carl Colley
John Sydney Cook, III
Ralph D. Cook
Reuben Wright Cook
Algernon Johnson Cooper, Jr.
Jack Corbitt
Steven Barry Corenblum
Nancy I. Cottle
Larry Eugene Craven
Stephen G. Crawford
Lisa C. Cross
Laura Lynn Crum
Blane Horton Crutchfield
Clarence Wayne Culver
William Mitchell Cunningham, Jr.
Sheryl Tatar Dacso
Mitchell Hobart Damsky
Willis Carey Darby, Jr.
Ronald Alan Davidson
Jack Glenn Davis
Lindsey Mussleman Davis
Patricia Ann Davis
Penelope Ann Davis
Terry Glenn Davis
Randy A. Dempsey
Mahala Ashley Dickerson
John Tilden Dillard
Timothy Lee Dillard
Frank McCoy Dominick
William Aubrey Dominick
Timothy Patrick Donahue
Richard H. Dorrough
Chriss Hershell Doss
Charles S. Doster
Edward Wesley Drinkard
Elbert Allen Drummond
James Joseph Duffy, Jr.
Patrick E. Dunagan
Thack Harris Dyson
Robert Sherard Edington
Bingham D. Edwards
William Jackson Edwards, III
Hoyt Massey Elliott, Jr.
Frank Corley Ellis, Jr.
Carl L. Evans
J. Robert Faulk
Joseph E. Faulk
Donald Earl Fazekas
Jerry L. Fielding
Arthur Freeman Fite, III
Charles William Fleming, Jr.
Walter S. Fletcher
George P. Ford
Clifford Foster, III
Thomas Leverne Foster
Ralph Abraham Franco
John R. Frawley, Jr.
Robert Bryant French, Jr.
Lawton Dale Fuller
Mark Everett Fuller
William Sidney Fuller

HONOR ROLL

ALABAMA STATE BAR BUILDING FUND

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Frank Coffey Galloway, III
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Leura Jane Garrett
Marshall Douglas Ghee
Robert Eugene Gibney
Walter Thompson Gilmer, Jr.
Samuel Perry Given
Michael Anthony Givens
William Bowman Givhan
James Wyman Gladden, Jr.
Cassandra G. Golden
John Thomas Golden
John S. Gonas, Jr.
Michael Davis Goodson
Stevan Kent Goozee
A. Pope Gordon
Brock Bingham Gordon
Fred King Granade
Patrick Howard Graves, Jr.
Fred D. Gray
Thomas Guy Greaves, Jr.
James Paul Green
Roy Mitchell Greene
Irvin Grodsky
Timothy M. Grogan
Susanna Revelle Gwyn
William B. Hairston, Jr.
Jack Jordan Hall
Robert Bruce Hall, Jr.
William Stephenson Halsey
Lewis S. Hamilton
Susan O. Hamilton
David E. Hampe, Jr.
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Ben Harte Harris, Jr.
John Wyly Harrison
John L. Hartman, III
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Howell Thomas Heflin
Clarence T. Hellums, Jr.
Frederick George Helmsing
Howard Ray Henderson
Wiley P. Henderson
Darron Code Hendley
James Austin Hendrix
William Banks Herndon, Jr.
William Kenneth Hewlett
George M. Higginbotham
John E. Higginbotham
Robert Bond Higgins
James Thomas Hines, Jr.

January: Pouring slab and forming columns for first to second floor.

Samuel Earle Hobbs
Jerome A. Hoffman
Lyman F. Holland, Jr.
James Allen Holliman
John Robert Holliman
Carey F. Hollingsworth, Jr.
Cindee Dale Holmes
Donald Eugene Holt
Charles Hooper
Gary D. Hooper
Christopher Manning Hopkins
William Lee Horn
George Pierce Howard
Ralph Wyatt Howell, Jr.
Gary Carlton Huckaby
Victor Talmage Hudson, II
Robert A. Huffaker
Katheree Hughes, Jr.
Phillip Francis Luke Hughes
Robert L. Humphries
Joseph Gullatte Hunter, III
Dow T. Huskey
David Truman Hyde, Jr.
Edward Anthony Hyndman, Jr.
Charles M. Ingrum
Vincent Paul Intoccia, III
Kenneth Stephen Jackson
John Litheu Jernigan, III
Norman Jetmundsen, Jr.
John Dixon Johns
Carlton Murray Johnson, Jr.
Hjalma Eugene Johnson
Roy Marvin Johnson, Jr.
William Earle Johnson, Jr.
George David Johnston
John Reese Johnston, Jr.
Neil C. Johnston
Percy W. Johnston, Jr.
Vivian Gaines Johnston, Jr.
William Hooper Johnston, Sr.
David Paul Jones
Kathy Dunston Jones
Keith Samuel Jones
Thomas Roy Jones, Jr.
Richard M. Jordan
Jasper Paul Juliano
Gordon Barry Kahn
Deborah Hope Kehoe
Joseph C. Kellett
Thomas Lauren Kelly
Robert Gordon Kendall
Paul Van Kilpatrick Jr.
Hardie Bradford Kimbrough
Lawrence H. Kloess, Jr.
Christopher Knight
Michael D. Knight
Gilbert B. Laden
Aubrey O. Lammons
Joe N. Lampley
Richard Donald Lane
Robert Pitt Lane
Alexander F. Lankford, III
Earle Forrest Lasseter
Donald Nickerson Lathem
Mitchell George Lattof, Sr.
Wesley M. Lavender
Charles M. Law
Richard Alfred Lawrence
Thomas Seay Lawson, Jr.
John N. Leach, Jr.
Gregory Luce Leatherbury, Jr.
Henry Fitzhugh Lee, III
Marcus W. Lee
Robert Edward Lee
Martin Howard Levin
Christine W. Lewis
Timothy Alan Lewis
William Robert Lewis
David Neal Lichtenstein
Dorothy Wells Littleton
Joe Hollis Little, Jr.
Terrell D. Little
Speer Jack Livingston
Eugenia L. Loggins
Robert E. Long, Jr.
William Breckenridge Long
Michael Stephen Lottman
Sharon Lovelace
Ralph Peyton Loveless
Peter Loftis Lowe, Jr.
Glenn Harris Lubel
Jonathan E. Lyerly
Champ Lyons, Jr.
Maurice Cecil Mackey
Richard S. Manley
Glenn F. Manning
M. Mallory Mantiply
Beth Marietta-Lyons
Henry William Marthaler, III
David L. Martin, III
Douglas Claude Martinson
Ludlow C. Martin
William Kelley Martin
Oscar D'Wayne May
William Randall May

ALABAMA STATE BAR BUILDING FUND HONOR ROLL

Fred Jester McCallum, Jr.
Brian Patrick McCarthy
Gaines C. McCorquodale
Douglas L. McCoy
Thomas Granville McCroskey
Jerry Arnold McDowell
Theron O. McDowell, Jr.
Edmund Cody McGarity, Jr.
Val Lloyd McGee
William Henry McGowen, Jr.
T. Bruce McGowin
Lester L. McIntyre
Marion Ashley McKathan
Robert H. McKenzie
Cephas Knox McLaney, III
Philip Ben McLauchlin, Jr.
David Bruce McLean
George D. H. McMillan, Jr.
Henry Ward McMillan, Jr.
Judith Louise McMillin
John Lee McPhearson
Sandra Kay Meadows
Augustine Meaher, III
David H. Meginniss
Von George Memory
Michael V. Mignano, Jr.
Lynn Christie Miller
William Hayes Mills
Anne W. Mitchell
Christopher Marlowe Mitchell
Tamara O. Mitchell
John Wesley Mobley
James D. Moffatt
Charles Robert Montgomery
Charles Richard Moore, Jr.
Wendell Richmond Morgan
Robert Timothy Morrison
Roger Stephen Morrow
William Alexander Moseley
Katherine Elise Moss
Clinton DeLaine Mountain
Robert Hiden Mudd, Jr.
Leslie Brueggemyer Murphy
William Thomas Musgrove, Jr.
Charlotte Blotner Mussafer
Phillip Russel Myles
Merton Roland Nachman, Jr.
Cecil Tommy Nail
Elizabeth Braden Nash
Hugh Anthony Nash
John Twohey Natter
Donald L. Newsom
Horace Earl Nix, Jr.
Joel M. Nomberg
Robert McKim Norris, Jr.
Thomas Berry Norton, Jr.
Tabor Robert Novak, Jr.
Robert W. O'Neill
Caine O'Rear, III
Mary Jane Oakley
Jerry Brantley Oglesby

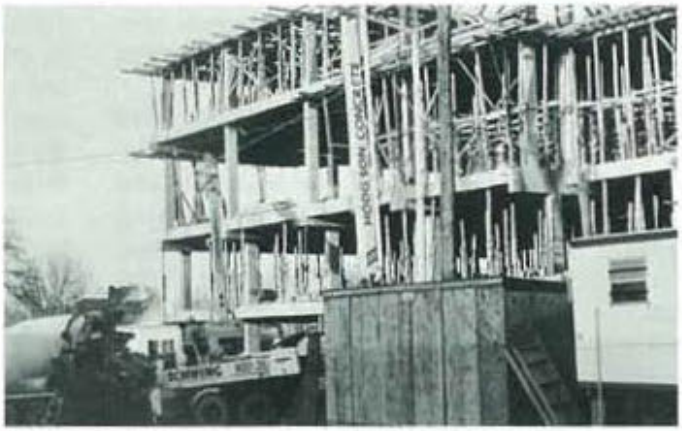
February: Forming columns for second to third floor.

Arthur Wooten Orr
Charles Wayne Owen
John Arthur Owens
William Donovan Owings
Robert Emmett Paden
Peter J. Palughi
Janice Humber Parker
Harold Dean Parkman
Charles C. Partin, III
Edward Milton Patterson
James William Patton, III
Gerald Raymond Paulk
Gary Coultas Pears
Charles Edward Pearson
Harold Gregory Pearson
Steven Campbell Pearson
William Beatty Pearson
Harold G. Peck
Clifton Benedict Perry
Herbert Warren Peterson
Walter Graves Pettey, III
Sam M. Phelps
Anthony J. Piazza
Rufus Dempsey Pitts
Harry Searing Pond, IV
Jerry Clarence Porch
John Finley Porter, III
E. Marona Posey
Deborah Guthrie Powell
Joseph Benjamin Powell
James R. Pratt, III
Arlie Dale Price
Joseph Victor Price, Jr.
Robert Franklin Prince
Lister H. Proctor
Richard Earle Proctor
Ira D. Pruitt, Jr.
Ernest Pugh
Teresa Tanner Pulliam
David Rankin Quittmeyer
Edward Lawrence Ramsey
Allen Clay Rankin, III
James Perry Rea
Eugene Warren Reese
Kelly Dana Reese
Archibald Thomas Reeves, IV
Charles Grady Reynolds, Jr.
Morgan Reynolds
Sibley Grady Reynolds
Schuyler Harris Richardson, III
Harry H. Riddick
Robert W. Rieder, Jr.
John Burruss Riis
Ray G. Riley, Jr.
Jerry Dean Roberson
Charles Edward Robinson
William C. Roedder, Jr.
Robert Merritt Rogers
John Wesley Romine, Jr.
Charles D. Rosser
Robert Hudson Rouse
Patricia Boyd Rumore
Samuel A. Rumore, Jr.
Robert Jackson Russell, Sr.
William John Russell, Jr.
Robert Austin Sapp
Warren Glea Sarrell, Jr.
Joseph M. Sarto
Joseph E. Sawyer, Jr.
Vernon Neil Schmitt
Deborah Glee Sciascia
Irene Feagin Scott
John B. Scott, Jr.
Euel Augustus Screws, Jr.
James Robert Seale
Robert M. Seale
Jon Rodney Sedlak
Gilbert Porterfield Self
John Wilford Self
Thomas Darrington Semple, Jr.
Jacquelyn Eudell Shaia
John Walter Sharbrough, III
Charles E. Sharp
James Gregory Shaw
Stephen W. Shaw
Charles Winston Sheehan, Jr.
Richard C. Shelby
Candice Joy Shockley
Jesse Woodrow Shotts
Richard C. Shuleva
Dana Jill Simpson
Fred Bryan Simpson
James Evans Simpson
Edward Simmons Sledge, III
Donna Wesson Smalley
Anita Tucker Smith
Kathy Dianne Smith
Robert Herschel Smith
Rufus Randolph Smith, Jr.
Thomas A. Smith, Jr.
William Gregory Smith
William Allen Smyly, Jr.
Leah Dawn Snell

HONOR ROLL

ALABAMA STATE BAR BUILDING FUND

John David Snodgrass
John Seymour Somerset
Paul L. Spain
Michael Edward Sparkman
Andra Donell Sparks
Thomas Winston Starlin
Joseph David Steadman
Henry B. Steagall, II
Roderic G. Steakley
Cyril Vaughn Stelzenmuller
William Guy Stevens
Carol Hardwick Stewart
James C. Stivender, Jr.
Samuel L. Stockman
William Roy Stokes
William R. Stokes, Jr.
Allen Richard Stoner
Edwin A. Strickland
Jacquelyn Lufkin Stuart
William Clinton Sullivan
William James Sullivan, Jr.
Roger C. Suttle
William Edward Swatek
Marda W. Sydnor
George Peach Taylor
Fred Walden Teague
Don Temple Terrell
David Lee Thomas
James Clarence Thomas
Steven Allen Thomas
Richard Allan Thompson
Jerry Laurance Thornton
William C. Tidwell, III
James Harvey Tipler
Cecil Morland Tipton, Jr.
Gary Allen Tomlin
Owen Stanley Trappe, Jr.
Karen Pailette Turner
John Malcolm Tyson, Jr.
Robert Perry Upchurch
Samuel E. Upchurch, Jr.
William L. Utsey
George Hamp Uzzelle, III
Donald Charles Vaillancourt
David J. Vann
Kenneth E. Vines
George H. Wakefield, Jr.
George Moore Walker
James Dee Walker
Joe Walker
William Cecil Walker
Howard P. Walthall
James Richard Walton
Junhong Wang
James J. Ward, Jr.
Lawton Taylor Ward, III
Walter Gregory Ward
Elias Calvin Watson, Jr.
S. A. Watson, Jr.
William Wadsworth Watts, III
James Houston Weaver, Jr.



March: Building forms for roof slab and third floor columns.

Macon Lenny Weaver
Donald B. Weir, Jr.
Ernest W. Weir
Charles Victor Welden, Jr.
Paul Charles Wesch
David Cleveland Wesley
John Francis Whitaker
John Mark White
Calvin M. Whitesell
James B. Whitfield, Jr.
James Bruce Wiley
Taylor D. Wilkins, Jr.
James Eugene Williams
Lee Bowling Williams
Richard Russell Williams
Forrest Crowell Wilson, III
Jack Wilson
Jim Lester Wilson
Robert Guest Wilson
Robert Earl Wilters
Randall Mark Woodrow
Charles L. Woods
Richard Pleasant Woods
Louis Charles Wright
James Frank Wyatt, Jr.
David Royce Wylie
Newman Manly Yeilding, Jr.
Brant Allen Young
Paul Arthur Young, Jr.
Thomas Jeffery Young
Thomas N. Younger
Alex William Zoghby
Guy Anthony Zoghby

Between March 1 and April 15, 1991, the following firms made pledges to the building fund. Their names will also be included on a wall in the new building listing all contributors. Their pledges are acknowledged with grateful appreciation. (For those contributing as of February 28, 1991, please see the March edition of the Lawyer.)

William J. Baxley
Baxter & Wilson
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Briskman & Binion
Buntin, Cobb & Shealy
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Conrad, Hammond & Barlar
Drake & Pierce
England & Bivens
Finkbohner, Lawler & Olen
Hamilton, Butler, Riddick, Tarlton & Sullivan
Hare & Hare
Hartley, Hickman & Russell
Holberg & Holberg
London, Yancey & Elliott
McElvy & Ford
McFadden, Lyon, Willoughby & Rouse
Miller, Hamilton, Snider & Odom
Parnell, Crum & Anderson
Patton, Latham, Legge & Cole
Paul & Smith
Poole & McFerrin
Powell & Baldwin
Ramsey, Baxley, McDougle & Collier
Ramsey & Sheldon
Sherling, Browning & York
Smith & NeSmith
Thomas, Means & Gillis
Turner, Onderdonk, Kimbrough & Howell
The Walter Foundation
Watson, Gammons & Fees
Woodham & Gunter

Between March 1 and April 15, 1991, the following special pledges or substantial contributions were received to dedicate rooms or areas in the state bar's new building. (For those contributing as of February 28, 1991, please see the March edition of the Lawyer.)

Alabama Power Company Foundation
Beasley, Wilson, Allen, Mendelsohn & Jemison
Johnson & Cory
Robison & Belser
South Central Bell

RECENT DECISIONS

By JOHN M. MILLING, JR., DAVID B. BYRNE, JR. and WILBUR G. SILBERMAN

UNITED STATES SUPREME COURT

Tax prosecution — the intent element

Cheek v. United States, No. 89-658 59 US LW 4049 (January 8, 1991). In *Cheek v. United States*, the Supreme Court ruled that even though an airline pilot filed no tax returns for four years, he committed no "willful" violation of the tax laws if he genuinely thought he was not liable for income tax on his pilot's salary. Justice White, writing for the Court, held that a good-faith misunderstanding of the law or a good-faith belief that one is not violating the law negates willfulness, whether the claimed belief or misunderstanding is objectively reasonable.

Statutory willfulness protects the average citizen from prosecution for innocent mistakes made due to the complexity of the tax laws. *United States v. Murdock*, 290 U.S. 389. The requisite intent required for conviction is the voluntary, intentional violation of a known legal duty.

Cheek could have broad, long-range implications. By stressing the prosecution's burden to prove that the defendant had the specific intent to violate the law, the Supreme Court reinforced the frequent claim by white collar defendants that they had no idea that their conduct violated any law. By a six-to-two margin, the Court agreed with *Cheek*, holding that the jury was instructed improperly that the defendant could negate willfulness only if his belief that he had no tax liability was objectively reasonable. Justice White's majority opinion noted that in most circumstances, ignorance of the law is no defense. However, he continued that in view of the complexity of the federal tax system, "Congress has . . . softened the impact of the common law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses."

Five-thousand-dollar justice

In re Vivian Berger, 494 U.S. ___ (1990). In ruling on a petition for fees by court-appointed counsel in *Saffle v. Parks*, the Supreme Court doubled to $5,000 the amount it pays for representation of indigents under the Criminal Justice Act of 1964, 18 U.S.C. §3006A(d)(2).

The petitioner, Berger, sought fees under the Capital Defendant's Fee Provision of the Anti-Drug Abuse Amendments Act of 1988, which allows compensation to counsel in an amount "reasonably necessary" to insure competent representation.

The Judicial Conference of the United States has recommended payment of between $75 and $125 per hour in federal habeas corpus proceedings involving capital defendants. The Court, however, concluded that a flat payment of $5,000 would insure competent representation of capital defendants before that Court.

Prisoner entitled to witness fees

Demarest v. Manspeaker, No. 89-5916, 59 U.S. LW 4047 (January 8, 1991). Demarest was an inmate in a state correctional facility at the time he testified as a witness in a federal criminal trial pursuant to a writ of habeas corpus *ad testificandum* issued by the district court. In accordance with 28 U.S.C. §1825(a), Demarest requested the clerk to certify that he was entitled to fees as a witness. His request was denied. The court of appeals affirmed, holding that while §1821's language was unqualified, other evidence revealed that Congress did not intend to permit prisoners to receive witness fees. The Supreme Court reversed the Tenth Circuit.

Chief Justice Rehnquist held §1821 requires payment of witness fees to a convicted state prisoner who testifies at a federal trial pursuant to a writ of habeas corpus *ad testificandum*. The statute's terms make virtually inescapable the conclusion that a "witness in attendance at any Court of the United States" under §1821(a)(1) includes prisoners unless they are otherwise excepted in the statute.

Federal grand jury subpoenas — a broader brush

United States v. R. Enterprises, Inc., et al, No. 89-1436, 59 U.S. LW 4077 (January 22, 1991). The Government can obtain enforcement of a grand jury subpoena *duces tecum* without having to establish, as it must do for trial subpoenas under *United States v. Nixon*, 418 U.S. 683 (1974), that the documents sought will be relevant to the criminal investigation and admissible at trial. In a unanimous opinion authored by Justice O'Connor, the Court said Federal Rule of Criminal Procedure 17(c), which allows a court to quash a subpoena if compliance would be "unreasonable or repressive", adequately restrains the grand jury's investigative authority.

A federal grand jury in the Eastern District of Virginia was investigating interstate transportation of "adult" materials. The grand jury subpoenaed three New York companies owned by one man for corporate records and other materials. The District Court refused to quash the subpoenas on relevance grounds, but the Fourth Circuit quashed the subpoenas for records of two of the companies. In so doing, it applied the *Nixon* standards and found no evidence that either of the companies had ever done business in eastern Virginia.

In laying the groundwork for the Court's opinion, Justice O'Connor observed:

> The Grand Jury occupies a unique role in our criminal justice system. It is an investigatory body charged with the responsibility of determining whether or not a crime has been committed. Unlike this Court, its jurisdiction is predicated on a specific case or controversy; the Grand Jury can investigate merely on suspicion that the law is being violated, even just because it wants assurance that it is not. *United States v. Morton*

Salt Co., 338 U.S. 632, 642-43 (1950). The function of the Grand Jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred. As a necessary consequence of its investigatory function, the Grand Jury paints with a broad brush. A Grand Jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed . . .

A Grand Jury subpoena is thus much different from a subpoena issued in the context of a prospective criminal trial, where a specific offense has been identified and a particular defendant charged.

In a portion of her opinion, joined by only a majority of the Justices, O'Connor declared that a grand jury subpoena is enforceable unless "no reasonable possibility" is found to exist that the materials requested would yield something relevant to the criminal investigation. She acknowledged the "difficult position" a grand jury subpoena recipient is in, but emphasized that such a subpoena is presumed to be reasonable. She concluded that the District Court properly ordered enforcement of the subpoenas in this case in the face of the recipient's "blanket denial" of any link to Virginia.

SUPREME COURT OF ALABAMA

Prior inconsistent statement rule changed

Hooper v. State, 25 ABR 711 (December 14, 1990). Hooper was initially convicted of two counts of second degree rape of his daughter. On appeal of those convictions, the court of criminal appeals reversed the convictions because the prosecutor had asked improper questions of character witnesses. The case was retried, and at the retrial, Hooper's daughter recanted her story. The State questioned the daughter about her previous testimony, and, thus, introduced into evidence all of her prior testimony concerning the alleged sexual abuse. The trial court, at the request of the State, specifically instructed the jury that it could consider that prior inconsistent testimony as *substantive evidence upon which it could base a conviction*. As a result, the jury found Hooper guilty on both counts.

The court of criminal appeals reluctantly reversed Hooper's convictions since they were constrained to follow the supreme court's earlier cases which held that prior inconsistent statements could never be used as substantive evidence. *Lester v. Jacobs*, 212 Ala. 614, 618, 103 So. 682, 686 (1925).

Justice Maddox, writing for the majority, changed the rule, observing that:

> It is clear to us that the modern trend is to allow a prior inconsistent statement to be used as substantive evidence, provided, of course, that the prior inconsistent statement was given under oath, was subject to the penalty of perjury, and was made at trial, hearing, or other proceeding, or in a deposition. This modern trend is in line with Federal Rule of Evidence 801 . . .

In accord with the modern trend, Justice Maddox held:

> We think that it is time that this Court changed our rule; therefore, after examining the record, considering the arguments of the parties, and reevaluating the rule against using prior inconsistent statements as substantive evidence, we hereby change that rule. We hold that a prior inconsistent statement of a witness who takes the stand and is available for cross-examination may be used as substantive evidence if the prior statement was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. All previous decisions of this Court to the contrary are hereby overruled.

Frye standard applied to admission of HGN results

Malone v. City of Silverhill, 25 ABR 331 (November 16, 1990). Malone was convicted of driving under the influence of alcohol. His conviction was affirmed by the court of criminal appeals. The supreme court issued the writ of certiorari to determine if the admission of evidence of Horizontal Gaze Nystagmus test results, without a proper predicate, was harmless error.

The court of criminal appeals held that the HGN test satisfied the standards for the admissibility of novel scientific evidence set out in *Frye v. United States*, 293 F. 1013 (C.A. D.C. 1923), but that the State's failure to lay a predicate showing that the test's reliability or the scientific principles upon which it is based rendered the admission of evidence regarding that test error. However, the intermediate appellate court held that the error did not require reversal of Malone's conviction because the other evidence supporting his conviction was "overwhelming."

Justice Almon, writing for the majority, reversed, specifically noting that:

> This Court has not been presented with sufficient evidence regarding the HGN test's reliability or its acceptance by the scientific community to determine if the court of criminal appeals correctly determined that the test meets the *Frye* standards. *See Sides v. State*, (Ms. 89-1349, Nov. 16, 1990) ____ So.2d ____ (Ala. 1990).

Justice Almon went on to note that the problem created by the improper admission of the HGN evidence is due to the scientific nature of the test and the disproportionate impact it might have had on the jury's decision-making process. In light of those considerations and

the possible adverse effect of the erroneous admission of the HGN test evidence could have had on Malone's right to a fair trial, the supreme court reversed the court of criminal appeals.

Evidence—"acts" may be privileged under §12-21-161

Larry Brice Richards, etc. v. Lennox Industries, Inc., 25 ABR 601 (December 7, 1990). Richards filed a products liability action against Lennox contending he was injured in an explosion caused by a defective valve assembly in a gas furnace. At trial, Lennox called Robertson, a former law clerk to Richards' attorney, to testify that he saw the valve being tested before it was removed from the furnace, that he removed the valve and that it was not broken, and that he returned the valve to Garmon's office. Garmon was Richards' attorney and Robertson was employed by Garmon at the time. Richards objected to the testimony, contending that §12-21-161, *Ala. Code* (1975) rendered him incompetent to testify because his knowledge was a "matter or thing, knowledge of which may have been acquired from the client" and was thereby protected under the attorney-client privilege. The trial court overruled the objection. Richards appealed, and the supreme court reversed.

The supreme court noted that the elements of the privilege are set in C. Gamble, *McElroy's Alabama Evidence* §388.01 (3 ed. 1977), as follows:

(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection may be waived.

The supreme court stated that Robertson's testimony regarding the "acts" he performed represented communication from the Richards (as his clients) to Robertson (as law clerk of Garmon) and that after careful analysis of DR 4-101, Rules of Disciplinary Enforcement (1974), and new Canon 4, Alabama Rules of Professional Conduct, the "acts" were privileged communications and protected by §12-21-161.

FELA—assumption of risk charge harmless error

Illinois Central Gulf Railroad Company v. Elliott, 25 ABR 797 (December 21, 1990). Elliott was injured when he slipped and fell in a storage area. He claimed that the railroad had negligently failed to provide him a safe place to work by allowing a foreign substance on the floor and by inadequately lighting the storage area. The railroad raised contributory negligence as a defense to diminish damages. Elliott requested a jury charge on assumption of risk, but the charge was refused. Nevertheless, the court instructed the jury on contributory negligence and charged the jury that assumption of the risk is not a defense in a FELA case. The railroad objected to the court's mentioning assumption of the risk because it did not raise the defense of assumption of risk. The jury rendered a verdict in Elliott's favor, and the railroad appealed because the court instructed the jury on assumption of risk. The supreme court affirmed.

The court noted that assumption of the risk is not a defense in a FELA case, and that the United States Supreme Court has stated that the phrase "assumption of risk" is a hazardous legal tool that is bound to create confusion and, therefore, should be discarded. The supreme court, however, noted that the

Family Law Section, Alabama State Bar
Divorce - On the Beach V

The Alabama Family Law Section Summer Seminar will be held Saturday, June 8, 1991 at Gulf State Park, Gulf Shores, Alabama. There will be an Early Bird Social Friday, June 7, 1991 at the Park from 6:30 p.m. to 7:30 p.m.

The meeting will begin on Saturday, June 8, 1991 at 8:30 a.m. and will conclude at 1:00 p.m.

Activities are planned for Saturday afternoon and evening for members and their families.

Thirty (30) rooms have been reserved for member reservations. Please make your reservations early. Look forward to seeing you there!

majority of the courts have held that an instruction that assumption of the risk is not a defense is harmless error when the court correctly instructs the jury on the effect of plaintiff's contributory negligence. In this case, the court correctly instructed the jury on contributory negligence, and the error was harmless error.

Insurance—no right of subrogation until insured is made whole

Powell, etc. v. Blue Cross-Blue Shield of Alabama, 25 ABR 945 (December 28, 1990). Powell was permanently injured in an automobile accident, and Blue Cross paid her medical expenses of approximately $27,000 under a group policy that covered her. Powell sued the driver of the other car and claimed $7 million as damages. Powell settled the claim for the $100,000 policy limits of the other driver's liability insurance policy. Blue Cross sought subrogation for the money it paid for medical expenses. The trial judge ruled that Blue Cross was entitled to recover the full amount under the terms of its policy even though the court acknowledged the $100,000 recovery "does not make the plaintiff whole". Powell appealed, and the supreme court reversed.

The supreme court noted that the law of subrogation, conventional or legal, is based upon equitable principles. Namely, (1) the insured should not recover twice for a single injury, and (2) the insurer should be reimbursed for payments it made that, in fairness, should be borne by the wrongdoer. Therefore, the insurer's obligation was to make the insured whole, but no more than whole. Although the Blue Cross contract entitled Blue Cross to subrogate and recover the money it paid, the supreme court declined to enforce the contract and held that Blue Cross had no right of subrogation unless and until the insured is made whole for her loss. Calculation of the loss requires the finder of fact to consider all elements of that loss, including, but not limited to, damages to property, medical expenses, pain and suffering, loss of wages, and disability. Punitive damages are not an element of compensation and may not be included in a calculation of the plaintiff's loss.

Torts—fraud, "justifiable reliance," replaces "reasonable reliance"

Harris, etc. v. M&S Toyota, Inc., 24 ABR 4654 (September 28, 1990). Harris purchased a used Toyota from Toyota City. The car had been in a wreck and the driver's door had been damaged, repaired and repainted. Harris testified that prior to his purchase of the car, a Toyota City salesperson orally told him that the car had never been in an accident. However, included in the provisions of the sales contract that Harris signed was a provision that the customer acknowledges that the seller has not represented that the car has not sustained damages prior to its purchase.

Approximately four months after the purchase, Harris was in an accident and a shop repairman discovered that the car had been damaged and repaired prior to Harris' purchase, despite what the salesperson told him. Harris filed suit for fraud, and the jury rendered a verdict in his favor. Toyota appealed and argued that Harris could not reasonably rely on the salesperson's statement in light of

the aforementioned sales contract provision. The supreme court disagreed.

The supreme court stated that "justifiable reliance" has been defined as follows:

> In light of modern society's recognition of a standard of business ethics that demands that factual statements be made carefully and honestly,
>
> "[r]eliance should be assessed by the following standard: A plaintiff, given the particular facts of his knowlege, understanding, and present ability to fully comprehend the nature of the subject transaction and its ramifications, has not justifiably relied on the defendant's representation if that representation is 'one so patently and obviously false that he must have closed his eyes to avoid the discovery of the truth.' "

The supreme court noted that the court has abandoned the requirement of "reasonable reliance", whereby a party making a false representation prevailed whenever the person defrauded did not investigate the statement in order to discover fraud. Under the "justifiable reliance" standard, the party receiving the representation is only required to be alert to patently false statements. This new standard places the burden on the party making the statement, the burden of knowing the truthfulness of the statement. A party should be able to rely on representations that are not obviously false. "Let the liar beware."

Venue — §6-3-7, *Ala. Code* (1975) determines venue of wrongful death actions

Ex parte W.S. Newell, Inc. (Re: Lewis, as administrator, etc. v. W.S. Newell, Inc.), 24 ABR 4903 (September 28, 1990). Mrs. Lewis was killed in an automobile accident in Tallapoosa County. Approximately one month after the accident, Mr. Lewis, administrator of Mrs. Lewis' estate, moved from Tallapoosa County to Macon County. Lewis then filed a wrongful death action against Newell in Macon County stating that Newell had negligently constructed the highway and caused the accident. Newell filed a motion for change of venue from Macon County to Tallapoosa County, arguing that in a wrongful death action, venue should be based on the county of the residence of the deceased at the time of death rather than the residence of the personal representative at the time suit is filed. The trial court denied Newell's motion, and Newell filed this petition for writ of mandamus. The writ was denied.

The supreme court reasoned that the rule suggested by Newell would not only create a conflict in Alabama venue law where none previously existed, but would produce the anomalous result denying the plaintiff's personal representative the right to sue in the county of his residence, a right clearly granted by the Alabama Constitution in all personal injury actions against corporations. Section 6-3-7, *Ala. Code* (1975), simply requires that a wrongful death action, brought by the personal representative, be brought in the county where the injury occurred or in the county where the personal representative resides, provided the corporation does business there.

ALABAMA COURT OF CRIMINAL APPEALS

Prosecutor's statement regarding his opinion of guilt leads to reversal

Quinlivan v. State, No. CR-89-728 (March 1, 1991). Quinlivan was convicted of manslaughter. During the prosecutor's rebuttal closing argument, the following occurred:

Mr. Davis: Anytime I get to the end of a trial—and let me take a moment to tell you that I'm very proud to be here this week. And I'm very proud to represent this case. *I'm not obliged to try any case that I don't want to try. I'm commanded by the law of Alabama as a District Attorney to prosecute the guilty and protect the innocent.*

Mr. Hess: Now, if the Court please, I object to that argument.

Mr. Copeland: That's highly improper . . .

Mr. Hess: Due to that deliberate misconduct, Judge, we move for a mistrial.

The Court: Motion denied.

On appeal, Quinlivan argued that the prosecutor's remarks were so prejudicial as to deprive him of a fair trial. The court of criminal appeals agreed.

In an excellent opinion, Judge Taylor surveyed the decisions of the United States Supreme Court and the federal appellate courts which place special restraints on a prosecutor during closing arguments because of his unique role in the criminal justice system.

The underlying reasons against allowing such argument by prosecutors were expressed by Chief Justice Burger in *United States v. Young*, 470 U.S. 1, 7, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). Chief Justice Burger, in *Young*, critically noted:

> The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and thus can jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgement rather than its own view of the evidence.

In this case, Judge Taylor held:

> We are of the opinion that the prosecutor's argument was nothing more than a blatant statement of his personal belief in the appellant's guilt. His comments expressly state that he tries only the cases that he wants to try and, consequently, chooses to prosecute only those defendants who are, as a matter of fact, guilty.

BANKRUPTCY

Exceptions to discharge-proof

Grogan v. Garner, ____ 111 Sup.Ct. 654 (January 15, 1991). The United States Supreme Court unanimously ruled upon the matter of proof necessary to except a debt from discharge under the exceptions listed in §523(a) of the Bankrupty Code. There had been differences in the various circuits as to whether the proof was "a preponderance of evidence" or "clear and convincing evidence". The 11th Circuit had adopted the latter.

In the *Grogan* case the creditor had recovered a fraud judgment in a Kansas state court. Kansas law required only "preponderance of evidence". In the Bankruptcy and district courts, the

debtor took the position that bankruptcy law required clear and convincing evidence of the fraud, but these courts held that the judgment was non-dischargeable, stating that the state court judgment, based upon "preponderance of evidence", operated as collateral estoppel on the issue. The Eighth Circuit reversed, stating that the creditor must show fraud by clear and convincing evidence.

On appeal, the Supreme Court held that the question of the validity of a claim is governed by state law but that the dischargeability standard is a matter of federal law. Judge Stevens, in writing the majority opinion, stated that the standard of proof for dischargeability exceptions in 11 U.S.C. §523(a) is the ordinary "preponderance of the evidence" standard. In reaching his conclusion, he said that a final consideration was that the preponderance standard will permit exception from discharge of all fraud claims which creditors had successfully reduced to judgment; that it would be inconsistent with Congressional intent to construe the exceptions to allow some debtors in some jurisdictions facing fraud judgments to have a judgment discharged, but while in other jurisdictions the fraud judgment could not be discharged.

John M. Milling, Jr.
John M. Milling, Jr. is a member of the firm of Hill, Hill, Carter, Franco, Cole & Black in Montgomery. He is a graduate of Spring Hill College and the University of Alabama School of Law. Milling covers the civil portion of the decisions.

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

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

Retention of collateral by Chapter 7 debtor

In re Robert Lesley Hunter, Jr., et al, 121 B.R. 609, Bankr. (N.D. Ala. 1991). The Court held that a Chapter 7 debtor, not in default with a secured loan at time of filing a petition, was entitled to retain collateral and continue making installment payments unless the creditor could show that it was thereby prejudiced. The debtor had purchased a mobile home prior to bankruptcy. In the bankruptcy petition, the mobile home was listed with a market value of $28,000. The secured lender filed proof of claim for approximately $69,000. The debtor did not reaffirm.

The lender filed a Motion for Relief from Stay on the ground that it was not adequately protected and that there was no equity in the property. The debtor subsequently obtained discharge of personal liability including the obligation to the secured lender on the mobile home.

On a motion by the lender to require the debtor to redeem or surrender, the Court stated that Bankruptcy Code §521(2)(A) allowed the debtor four options, namely (1) retain the collateral as long as it is not in default: (2) surrender; (3) redeem under §722; and (4) reaffirmation. The Court, admitting that there is a split in case law on the issue, held that the better view is that the debtor may retain the collateral as long as it continues payments; the high rate of depreciation in the particular type item is a risk assumed by creditors dealing in items of this type.

Business rentals as administrative expense

Lyon's Casuals Company, Inc., 20 B.C.D. 303 (S.D. Ala. 1991). In a Chapter 11 case, the landlord agreed with the debtor not to object to debtor's assumption of the lease if debtor would keep future rent current. The Court approved the lease assumption based upon the agreement. Later, the lessor moved for payment of pre-assumption rent as an administrative expense, to which the debtor objected, stating that the landlord had waived its right to the default being cured. The Bankruptcy judge ruled that §365 of the Bankruptcy Code allows a debtor-in-possession to assume a lease only if it cures the default or provides adequate assurance that it will do so; if there is to be a waiver of a right allowed by statute it must be unequivocal. The Court stated that the agreement contained no express waiver and, therefore, the landlord retained its administrative expense claim for the post-petition pre-assumption rent.

Dischargeability of military retirement benefits to ex-spouse

In re Charles Sommerville, 122 B.R. 446 (M.D. Ala. 1990). The husband and wife divorced in Texas in November 1989. The husband and present wife filed a Chapter 7 case in the Middle District of Alabama on April 1990. The Texas divorce decree provided that the husband would pay 40 percent of military retirement benefits to his ex-spouse. In the husband's Chapter 7, he contended that this obligation was dischargeable as not meeting requirements of Title 11, §523(a)(5), since it was not alimony or support but in the nature of a property settlement.

The Bankruptcy judge, in relying on Fifth and Eighth Circuit cases, held that the facts give rise to a trust relationship; the ex-husband receives the monthly pension checks as a constructive trusteee both as a pre- and postbankruptcy petition obligation to pay such benefits to the ex-wife. The Court held the trust obligations to be dischargeable under 11 U.S.C. §523(a)(4) and that the government should resume the payments to the ex-wife according to the divorce decree.

Right to trial by jury in bankruptcy

The United States Supreme Court in *Langenkamp v. C.A. Culp*, 23 C.B.C. 2d 973, 111 Sup.Ct. 330, (1990), laid to rest the question of whether a creditor who has filed a proof of claim is entitled to a jury trial should any subsequent action arise concerning said party. The Supreme Court held that once a proof of claim is filed, the creditor has subjected itself to the equitable power of the Bankruptcy Court and, therefore, if a trustee or debtor-in-possession later brings a voidable transfer action against such creditor, there is no entitlement to a jury trial ■

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THE NATIONAL JUDICIAL COLLEGE: *Report on Activities*

Of, by and for judges, The National Judicial College is a continuing judicial education institution located on the campus of the University of Nevada, Reno, where Alabama judges have completed more than 400 courses since the College was founded in 1963. During that 27 years, more than 27,000 certificates of completion have been issued, both on the main campus, and at special programs like the Alabama Sentencing Institute and the Faculty Skills Workshop, each presented in Tuscaloosa over the past two years. NJC also sponsors or cosponsors additional programs in other locations, including Boston, Orlando, San Diego, Williamsburg, and Washington, D.C. Chairperson of the NJC Board of Directors is former Alabama Circuit Judge John David Snodgrass of Huntsville. Circuit Judge Joseph A. Colquitt of Tuscaloosa was one of the first graduates of the College's Masters of Judicial Studies program and also serves on the faculty. In addition, District Court Judge Sue A. Bell is a current member of the faculty. In late August, Judge Michael W. McCormick, along with Alabama prison and mental health representatives facing heavy drug dependency caseloads, came to a special workshop on the Reno campus. "Diversion and Treatment of the Substance Abuser" was funded by the Department of Health and Human Services, Office of Treatment Improvement.

Governor Proclaims Law Day U.S.A. in Alabama

Governor Guy Hunt proclaimed May 1, 1991, as Law Day U.S.A. in Alabama. The proclamation drafting and signing was coordinated by members of the Alabama State Bar's Law Day Committee as a part of the committee's continuing activities to promote the public's appreciation of this day of national recognition.

STATE OF ALABAMA

PROCLAMATION

BY THE GOVERNOR

WHEREAS, May 1st is Law Day U.S.A. in the United States of America; and

WHEREAS, the United States has been the citadel of individual liberty and a beacon of hope and opportunity for more than 200 years to many millions who have sought our shores; and

WHEREAS, the foundation of individual freedom and liberty is the body of the law that governs us; and

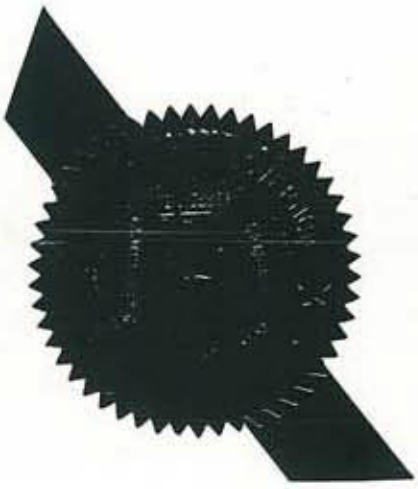
WHEREAS, the Constitution of the United States and the Bill of Rights are the heart of that body of law, which guarantees us many freedoms – including freedom of religious belief, freedom to have and hold property inviolate, freedom of assembly, freedom of speech, freedom of press, freedom of petition and due process of the law among others; and

WHEREAS, this year marks the 34th annual nationwide observance of Law Day, and the Congress of the United States and the President by official proclamation have set aside May 1 as a special day for recognition of the place of law in American life:

NOW, THEREFORE, I, Guy Hunt, Governor of the State of Alabama, do hereby proclaim May 1, 1991 as

LAW DAY U.S.A.

in Alabama and call upon all citizens, schools, businesses, clubs and the news media to commemorate the role of law in our lives.



GIVEN UNDER MY HAND, and the Great Seal of the Governor's Office at the State Capitol in the City of Montgomery on this the 28th day of March, 1991.

Guy Hunt

GUY HUNT

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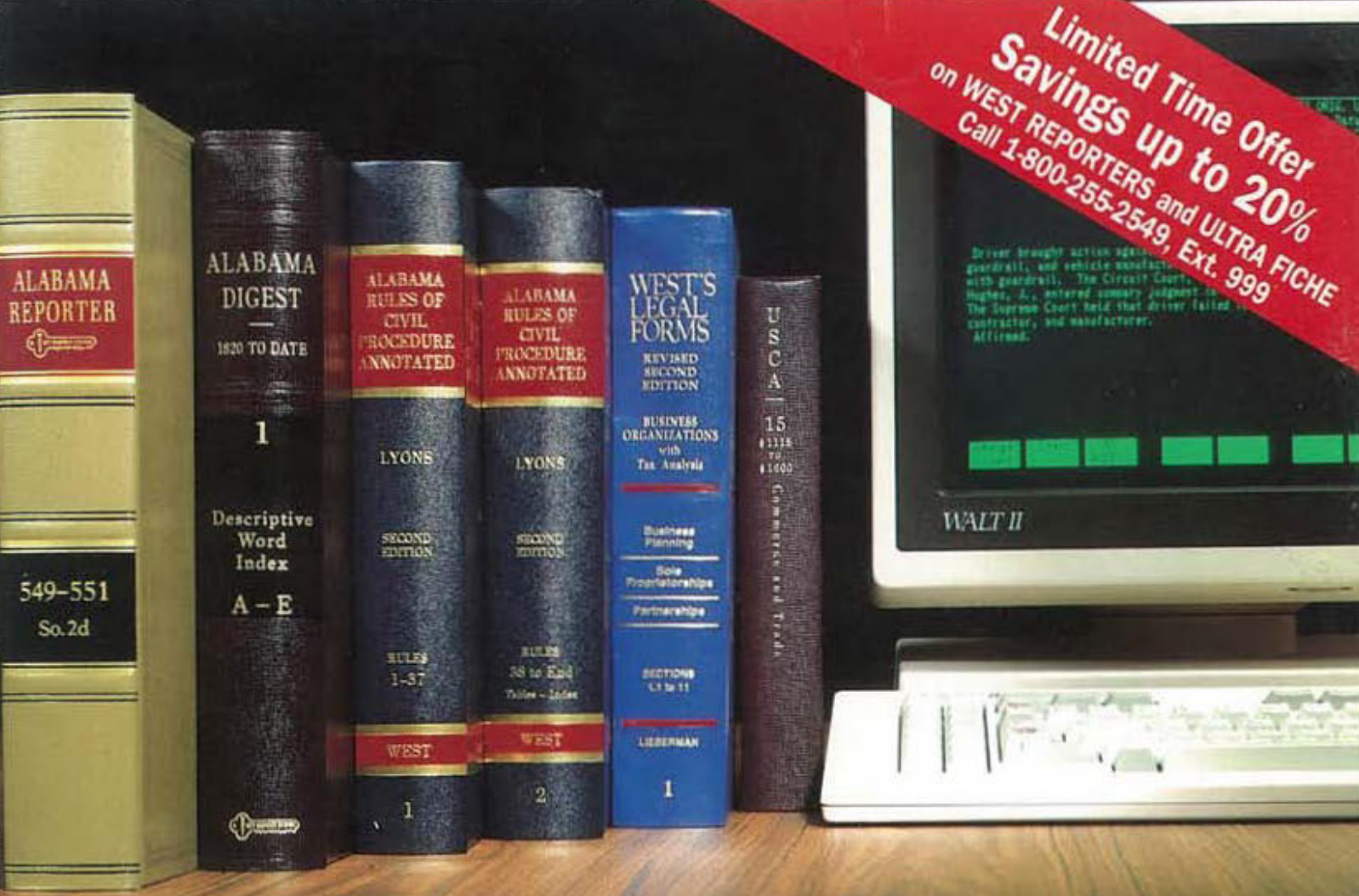

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