The Alabama Lawyer

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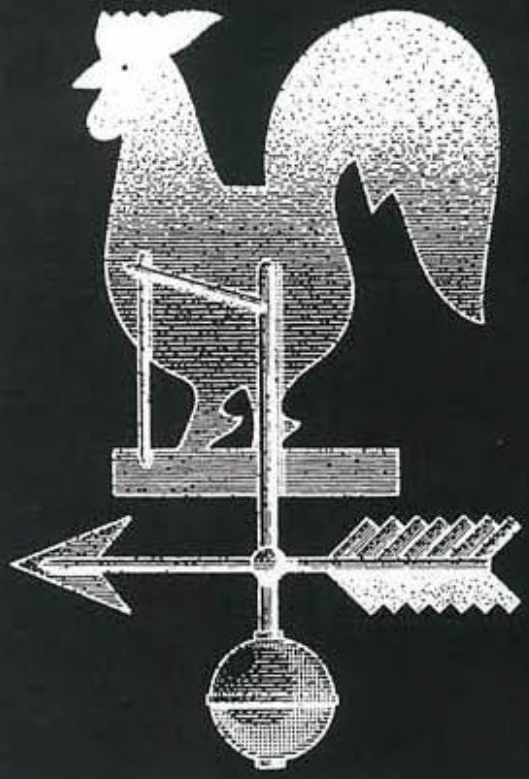

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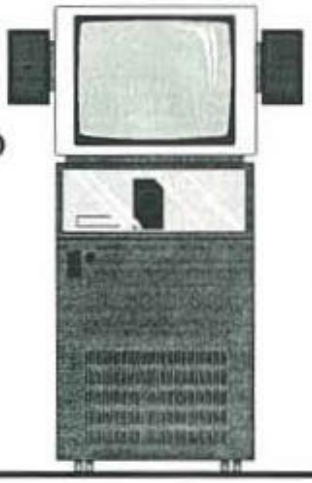

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IN BRIEF

May 1992 Volume 53, Number 3

ON THE COVER: Water flows sparkling blue through Saugahatchee Creek in Tallapoosa County.

Photo by Butch Guier, Montgomery

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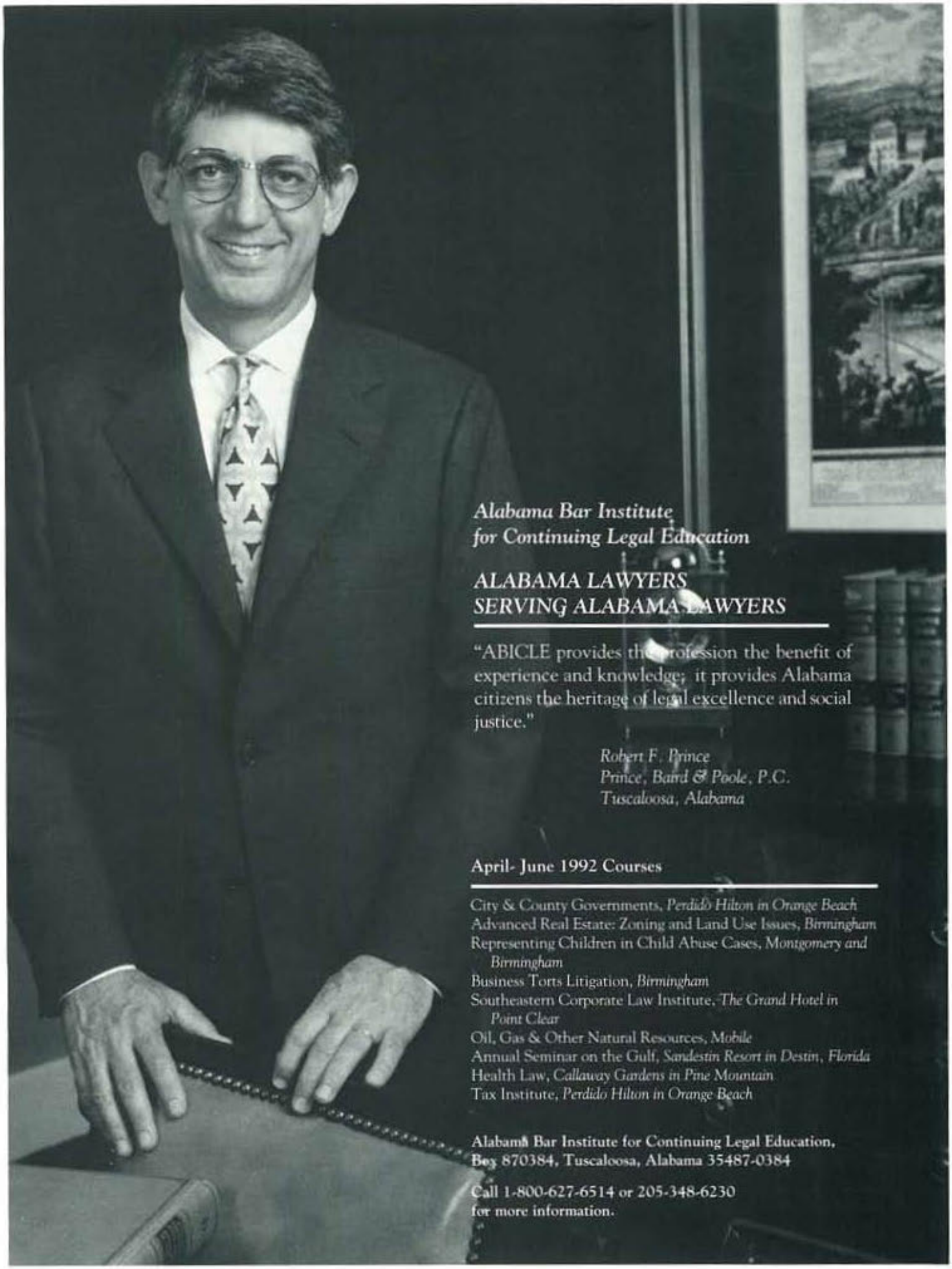

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PRESIDENT'S PAGE

Interview with Phil Adams, ASB President, 1991-92

(This interview was conducted in March of this year.)

Alabama Lawyer: *Phil, you're more than one-half way through your tenure as bar president. What are some of the important projects that you've been involved in during this time?*

Adams: I think the most important bar project this year has been the completion of the three and a half million dollar addition to our state bar building in Montgomery. We hope that we are going to occupy the new addition by late March. Hopefully, the entire project will be completed by mid-June or the first of July and we'll be through with our renovation. We're excited about that; we think our building will serve the needs of our members well into the next century. The hard thing has been to try to go out and impress upon the members of our bar the importance of their donating money to help us pay for this building.

Phillip E. Adams, Jr.

A.L.: *How has it been funded?*

Adams: We obtained a loan from the Alabama Retirement Systems to construct the addition and what they have committed to a permanent loan. Obviously, what we are trying to do is to raise enough money through donations and contributions from lawyers so that we don't have to finance a large portion of the cost.

A.L.: *What has been the response from the bar?*

Adams: The response from the small minority of the members of the bar has been very good. The response of the overwhelming majority of the lawyers has been very disappointing. We asked that every lawyer in the state contribute a total of $300 at $100 per year for three years. As of this moment, we have only received pledges and donations of about $1.2 million. If every lawyer in Alabama would pay $100 a year for the next three years, we could pay for this new building and not have any significant financial problems as far as the building is concerned.

A.L.: *Let's talk about disciplinary procedures. There's been a good bit of public comment and some public criticism about the bar's disciplinary procedures. The bar has been criticized for not making public disciplinary actions taken against lawyers. Have the disciplinary procedures changed any during your tenure and do you see a need for any changes?*

Adams: I'll answer the last question first. Yes, I do see a need for a change in some of the procedures. There is an awful lot of public criticism of the lawyer disciplinary process. This criticism comes even though the legal profession in my opinion does a better job of disciplining its members than any other profession. I don't think the medical profession or the accountants, engineers, architects, or any other profession does the job or has the commitment for disciplining its members as lawyers do. But that has not done away with the criticism. The criticism I have centers on two primary areas. One is that lawyer discipline is a secret. The public never knows what's happening in the disciplinary process until it's over and in some cases *never* knows what happens. Number two, the disciplinary process is self-regulated. Lawyers regulate lawyers and there should be lay members or non-lawyer involvement in the disciplinary process.

A.L.: *Do you think secrecy should be removed?*

Adams: I think that there is a time when secrecy should be removed and I believe that secrecy certainly ought to be removed at the end of the process. In other words, if there is a complaint filed against me and the process is completed and I am found not guilty, I don't see anything wrong with that fact being disclosed. I do not think it ought to be made public when a complaint is filed. At that point, there's too much risk of harming a lawyer personally and professionally. I am in favor of more openness in the lawyer disciplinary process.

A.L.: *What about the secrecy of the ultimate findings by the board, for example, we publish in* ***The Alabama Lawyer*** *private reprimands without identifying the name of the bar member that got reprimanded. Why shouldn't that name be disclosed when a bar member is reprimanded?*

Adams: Let me tell you what has happened in the states that have opened up the lawyer disciplinary process. I believe the reason the press and public criticize lawyer discipline is because they don't know what's going on behind that so-called "closed door." In the states where that door has been opened and where there are non-lawyer members involved in the disciplinary process, the public criticism and the criticism by the press has diminished considerably because people understand what happened, who's involved and the results. As a past chairman of the Disciplinary Board, I know the process in Alabama is a good one and there is no attempt to whitewash or to cover up. But the public really doesn't know that, and the reason they don't know is because it is a secret and there are no non-lawyers.

A.L.: *Do you think we need to have non-lawyer members on the disciplinary panels?*

Adams: I am in favor of non-lawyer involvement. This is being done in other states, and I am in favor of non-lawyer involvement in the disciplinary process, including non-lawyers as members of disciplinary boards and panels. These members should be selected through a process that insures objectivity.

A.L.: *How much of your statements represent official positions of the bar as opposed to what Phil Adams thinks?*

Adams: Everything I have said is my personal opinion. I have appointed a task force to study the disciplinary process in Alabama. The task force is chaired by former President Bill Scruggs and they are meeting right now. I decided to form this task force when I read an ABA report issued by the MacKay Commission. A member of the MacKay Commission is Justice Oscar Adams of our supreme court. The MacKay Commission's report was critical of the lawyer disciplinary process, and made about 20 proposals for changes. Rather than look at the MacKay Commission report from the standpoint of trying to adopt all of its recommendations, we looked at it as a tool to compare those recommendations to how we were doing it in Alabama.

A.L.: *Do you think the local grievance committee system that we have in place now has functioned well?*

Adams: I think that it has functioned well, however, I am personally in favor of the elimination of all but the larger committees and I say that as Phil Adams, an Alabama lawyer, rather than president of the state bar.

A.L.: *Why?*

Adams: We have grievance committees in Alabama in circuits with fewer than 100 lawyers. I believe those lawyers are doing a good job of investigating complaints filed against lawyers in those circuits, but that's not the point. The point is the public perception of what is being done in that situation. Does that look like a "good old boy" situation where I'm investigating you on Monday and you're investigating me on Tuesday and it's all a secret anyway so it really doesn't make any difference. I think the public perception is enough of a reason for us to take a real hard look at eliminating all but the largest of the local grievance committees. Quite frankly, if all of the local grievance committees in Alabama were eliminated today, the state bar doesn't have the staff or the money to take over that responsibility. The local grievance committees investigate and make a recommendation to the Disciplinary Commission. The Disciplinary Commission reviews those recommendations and makes the final decision as to what the recommended punishment, if any, will be. So the state bar is still making the final decision, but all the background work, all the investigative work to get the thing in form to be presented to the Commission, is being done by volunteer lawyers in Alabama.

A.L.: *As we are conducting this interview the state Legislature is meeting. The topic, of course, is tax reform and one of the items that has been considered in the tax reform package is a tax on services, including professional services. Has the bar taken a position, either in favor or against that piece of legislation?*

Adams: The bar officially has not taken a position in favor or opposed to that piece of legislation. However, I appeared before a joint committee of the House and Senate conducting hearings on the question of taxing services last fall. I advised the members of the committee that although the board of commissioners had not officially taken a position on the matter, I suspected the board would oppose a tax on professional services. The basis of this opposition, I suspect, is that it would simply be another tax on the consumer on our state. I mentioned that I did not think it would be appropriate to tax people seeking to obtain child support for their children or taxing someone who is seeking disability benefits or someone who has received a serious injury or the death of a loved one. Some members of the legislative committee apparently thought that this tax was a tax on lawyers rather than on the clients of lawyers. I am advised that the committee removed the idea of taxing legal services from the proposal so that question is not pending before the Legislature at this time. However, I don't believe the issue will go away. I know that it's being considered in other states and such a proposal actually passed the Legislature in Florida and was in existence for six months before it was repealed as being a bad idea.

A.L.: *Another legislative item is worker's compensation reform; has the bar taken a position on that?*

Adams: Last year, when the Industrial Relations Department proposed its worker's compensation bill, we took a position that opposed the legislation because it created an administrative law judge system and removed worker's compensation from the court system.

A.L.: *What's wrong with that?*

Adams: We believe that worker's compensation is a national problem. There are two states that have worker's compensation cases decided in the court system. The other 40 states have an administrative law judge system. So we don't think that taking the worker's compensation cases out of the court system and placing them in the administrative law judge system necessarily cures the problem. We especially don't understand the economics when you have a judicial system in proration to create another system to fund. We believe worker's compensation can be handled fairly, efficiently and consistently in the existing judicial system. One of the major criticisms heard about worker's comp is that there is not uniformity in deciding cases around the state, that you might have a case in south Alabama that was similar to a case in north Alabama on its facts but have greatly differing results. A system of appellate review could take those two cases and review the facts and, if appropriate, make the results similar. Frankly, we think that is a better system than the administrative law judge system. The state bar's only position has been to oppose the administrative law judge system and we have taken some criticism from the business community who I think perhaps were misinformed about our position.

A.L.: *What is the bar doing about the indigent defense crisis?*

Adams: This is a very serious problem. Our Indigent Defense Committee is working very hard in this area trying to arrive at a proposal that can help. I understand a lawsuit challenging defense counsel has recently been filed in Baldwin County. Other states have addressed this problem. I also understand that an Arkansas trial judge recently declared a similar statute in Arkansas to be unconstitutional and established a formula for compensation of lawyers for indigent defendants at an hourly rate. The methodology used by that judge was to take the salary of the district attorneys and the value of the office and staff of the district attorneys divided by 2,000 hours per year and determined that if the state were paying that amount for prosecutorial services then a similar amount should be adequate for defense counsel.

A.L.: *What has the bar done to try to serve the needs of the younger members?*

Adams: We have attempted to appoint young lawyers who want to serve on committees and task forces and to allow them to immediately get involved in bar activities. Another thing that we've attempted to do is develop a program where the state bar can help young lawyers. I appointed a task force to study the possibility of implementing a mentor program for young lawyers. The idea behind the program is to create a group or list of people, of older, more experienced lawyers who are willing to give their time and talents in teaching young lawyers the customs and courtesies and practice of law, how to practice law, how to set up their office, how to set up your bank account, what to do when you have a problem with a client or a complaint with a client, how to handle things in a procedural way as far as the client is concerned, and how to represent a client appropriately in court. Those things we believe can be done through a mentor program that would certainly benefit young lawyers. It could benefit older lawyers and the ultimate beneficiary in my opinion would be the public of Alabama if we could get that done. You know, too many people think differently than when you and I started to practice law. They believe that the proper way to be a lawyer is to be a young Rambo and to be the meanest man in town and to attack at every opportunity. Now you and I know that that is not the way in the long run to be a successful lawyer, but somebody has to deliver that message to the persons who are just beginning the practice of law or they are going to try to acquire what I consider to be a bad habit from looking at other folks.

A.L.: *Have you found this job to be time-consuming?*

Adams: The job requires much more time and attention than I anticipated. I became a member of the board of bar commissioners in 1983. I served as a member of the Disciplinary Board, I was chairman of the Disciplinary Board, I was chairman of the MCLE program, I was chairman of the Disciplinary Commission, I have served on the Executive Committee at least four times prior to becoming president, and I served two times prior to becoming president as vice-president. I served one year as president-elect. In spite of all this past service, I was absolutely flabbergasted at the amount of time the position requires. There is rarely a day that passes that I don't do something for the Alabama State Bar. I receive letters from disgruntled clients, I receive telephone calls from people wanting to tell me about a problem they have had with a lawyer or a gripe that they have with the legal system. I'm not complaining because I have immensely enjoyed serving as president. I am sure that the benefits from serving as state bar president far outweigh the sacrifice of time that I have made. I am very grateful for the opportunity to have served in this capacity.

A.L.: *You have to have understanding law partners, I'm sure?*

Adams: Everybody I know has been understanding, my law partners, my secretarial staff and my family. Without their support this job would not have been nearly as much fun as it has been. I deeply appreciate their help and support. ■

EXECUTIVE DIRECTOR'S REPORT

The Alabama State Bar and Workmen's Comp Reform

I received two letters recently concerning the state bar's role in the workmen's compensation reform effort. One lawyer described the bar's role as both "frustrating and disappointing" in opposing the governor's bill. The other lawyer was disappointed that the bar "had taken no leadership role" in this crucial, legal-political battle. One lawyer is defense-oriented while the other is plaintiff-oriented. I seem to recall an expression to the effect that, "We must be doing something right when both sides view our actions as having favored the one over the other."

Reginald T. Hamner

For the record, some facts should be noted for the bar's position or role in this matter to be accurately reported.

From day one — when John Allen, the director of the Industrial Relations Department, asked for the bar association's assistance in addressing a "crisis" in the workmen's compensation area — the bar responded. W. Harold Albritton, III, the state bar president at that time, appointed a special committee to work with a multi-disciplined task force to draft legislation in this area. This task force was never convened by Allen. In fact, I am convinced he never wanted it to meet. He already had "his bill" which was fraught with defects. It took a letter from the president to Governor Hunt before the bar could be heard. The original bill died in the 1991 Regular Session.

That bill would have done away with the current adjudication in the court system. This was the bar's singular objection. The board of bar commissioners wanted the integrity of the court system protected. This has been the bar's only position in this debate.

The Workers' Compensation Law Section of the state bar was formed in 1991. It has a legislative committee. The original task force, composed of Charles Carr, Steven Ford and Judge James O. Haley, recommended the task force be terminated at the July 1991 board meeting, with its function to be assumed by the Legislative Committee of the section in any future negotiations with respect to workmen's compensation reform. The board approved this action with the likely prospect that the workmen's compensation issue would reappear in 1992.

In January 1992, the governor's office called the bar to ask that it send certain representatives to meet with the governor to discuss this issue. I, accompanied by Keith Norman, Steven Ford (Worker's Compensation Law Section chair) and Robert W. Lee, Jr. (the section's Legislative Committee chair), met with the governor and his chief of staff, Dennis Nabors. At this meeting, in response to my direct questioning, the governor expressed no commitment to the administrative law judge system which had been proposed in the 1991 department bill. This was negotiable.

Subsequently, a schedule for meetings to draft a bill was determined, and our two representatives, Ford and Lee, began meeting with other interested entities, including the Medical Association of the State of Alabama, the Hospital Association, the Labor Council, the Trial Lawyers Association, and representatives of a non-profit group which had been formed for the express purpose of effecting some form of workmen's compensation reform. Under the leadership of Rob Hunter, the governor's special counsel, this group began meeting in hopes of having an agreed-upon piece of legislation ready for presentation to a special session of the Legislature that was called January 27 for the express purpose of dealing with the workmen's compensation reform.

At the first meeting, two representatives from either the business or insurance interests (they would not identify their principals) announced that the administrative law judge system in the proposed bill was a non-negotiable feature, and that any reform legislation must contain such a system. This was not what Governor Hunt had told me. I called Dennis Nabors who advised me that the governor had "apparently changed his mind" on this issue and was supporting the inclusion of the administrative law judge aspect in the bill.

The special session lasted from January 27 through February 3. Our two representatives spent hours in Montgomery at the Capitol helping draft legislation, as well as amendments during the legislative process to what was, in my opinion, a department bill even though it was represented that John Allen was not involved in this particular reform effort. Many participants in earlier "negotiations" found him unwilling to negotiate at all and adamant in his support of his "department bill" without amendment.

All parties to the negotiations preceding and during the legislative process were extremely complimentary of the contributions made by Ford and Lee. Their expertise in the technicali-

ties and their working understanding and appreciation of the workmen's compensation law system as it presently exists was evident. These two men, in spite of any personal views they may have had to the contrary, carried out the mandate of the board of bar commissioners as articulated originally in July 1991, namely, that the bar's interest was to insure the maintenance of a judicial system for adjudication of workmen's compensation claims. The bar's position was based upon the cost effectiveness of the current system and the obvious erosion of judicial independence under the proposed administrative law system as originally drafted and introduced in the Legislature.

A bill passed the Senate February 3. That bill did maintain the court system in the process. The bill contained a number of provisions which were controversial, but, nonetheless, were approved by the Senate and sent to the House. A conference committee was appointed but it was obvious that no consensus could be reached because of vast differences which many House members had with the Senate bill. The Senate adjourned *sine die* and the special session ended without any legislation changing the workmen's compensation law system in Alabama. Lawyers were blamed for this.

Workmen's compensation reform legislation is currently pending in the 1992 Regular Session. The measure which seems to have the best chance for favorable consideration retains the court system. It would appear the arguments against and opposition to an administrative law judge system may be having some influence at this late date in the newest effort to amend the current workmen's compensation system.

Ford and Lee reported to the board of bar commissioners at its meeting February 28. They outlined their activities which had been reported regularly to the Executive Committee of the board. At the conclusion of their presentation, they were thanked by the entire commission for their efforts. The board again reaffirmed its support for the position opposing any change in the current court system handling of workmen's compensation claims. The board opposes a mandated administrative determination of such claims.

What I have tried to convey in this column in very limited space is that the bar has not sought to be partisan in this matter. It has not opposed workmen's compensation reform. It has opposed, however, an attack upon the court system and the independence of the judiciary.

The press has been extremely critical of the role of lawyers in this process; however, I think the legislative debate, though at times tedious and highly partisan, has resulted in a greater awareness that the current system is not the "gold mine" it has been painted to be for lawyers who handle clients with workmen's compensation problems. It has been evident that medical costs, as well as some unique arrangements which affect the funding of various assigned insurance programs, play some role in the current crisis which has a bottom-line crisis of costs. These are escalating beyond the current system's capacity to deal with the overall costs. There is blame enough for all involved, but this is not a lawyer problem and the governor admitted this to me. His lawyer-bashing in the press does not represent his views expressed face to face with me. ■

BAR BRIEFS

Ross honored as one of Cumberland Alumni of the Year

Family Court Presiding Circuit Judge Sandra Ross was honored recently as one of the 1992 Distinguished Alumni by Cumberland School of Law, Samford University.

The honorees were recognized at Law Week banquet activities.

Ross was appointed family court district judge in 1980 and was elected circuit judge in 1988. She is a former Jefferson County deputy district attorney.

Dickson appointed to state personnel board

Joe Nathan Dickson, a Birmingham businessman and attorney was sworn in recently as a member of the state personnel board by Chief Justice Sonny Hornsby. Currently Dickson is president and chief executive officer of the Birmingham World Newspaper. A graduate of Howard University in Washington, D.C. and Miles College in Birmingham, Dickson formerly served as assistant to Governor Hunt for minority affairs.

Dickson is involved in numerous community service activities including membership in the Better Business Bureau, the National Newspapers Publishers Association, the Alabama Republican Council, and the Birmingham Chamber of Commerce. A well-known public speaker, he is a participant in the Alabama Republican Party's Speakers Bureau and the Robert A. Taft Institute at Auburn and the University of Alabama in Birmingham, and has frequently been a guest on "For The Record," a public service program on Alabama Public Television. He has served as manager of Vulcan Realty and Investment Corporation, a subsidiary of Booker T. Washington Insurance Company, manager of HUD, and an executive with C.D.W. Construction Company, Inc.

Cooper elected to American Law Institute Council

N. Lee Cooper of Birmingham, Alabama, the present chair of the American Bar Association's House of Delegates, has been elected to the Council of The American Law Institute for an interim term until the Institute's 1992 annual meeting. His name then will be submitted to the Institute's annual meeting in Washington, D.C. in May for election by the membership to a regular term. The Council is the governing body of the Institute.

A partner in the Birmingham firm of Maynard, Cooper, Frierson & Gale, P.C., Cooper received both his undergraduate and law degrees from the University of Alabama, where he was Articles and Case Notes Editor of the *Alabama Law Review*. Active in the American Bar Association, he was state delegate from 1980 until his election in 1990 to a two-year term as chair of the House of Delegates. A former chair of the ABA's Litigation Section, he chaired its Conference of Section Chairs from 1986 to 1988. Cooper, a Fellow of the American Bar Foundation, has also served as a director of both the American Bar Endowment and the American Judicature Society. He is an adviser to ALI's Restatement of the Law Governing Lawyers.

The American Law Institute was organized in 1923 "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work." The Institute drafts for consideration by its Council and its membership and then publishes various restatements of the law, model codes and other proposals for law reform.

Proposal for ABA Dispute Resolution Section

The American Bar Association's Standing Committee on Dispute Resolution Chair Robert D. Raven announced that the committee has unanimously voted to begin the process of becoming an ABA section. Section status will open up the ABA to the burgeoning number of attorneys and professionals who have become involved in this approach to the resolution of disputes and wish to actively participate with the Standing Committee.

Since 1976, the ABA has been a national leader in guiding the dispute resolution field, first as the Special Committee on Resolution of Minor Disputes and now as the Standing Committee on Dispute Resolution.

If interested on joining the ABA Dispute Resolution Section when created, or if you would like more information, write or call Larry Ray, (202) 331-2660, American Bar Association, Standing Committee on Dispute Resolution, 1800 M Street N.W., Suite 200, Washington, D.C. 20036.

Ford certified by NBTA

Robert H. Ford, of the Birmingham firm of Emond & Vines, was certified in March 1990 in civil trial law by the National Board of Trial Advocacy.

Requirements for certification include: documentation of at least 15 trials to verdict or judgment; 40 additional contested matters; 45 hours of continuing legal education in the three years preceding application for certification; submission of a legal brief for review; provision of six references (three lawyers and three judges); proof of good standing in the legal profession; and a day-long examination on trial techniques, evidence and ethics. ■

Notice of and Opportunity for Comment on Proposed Amendments to Addenda Five, Six, and Seven of the Rules of the U.S. Court of Appeals for the Eleventh Circuit and on Proposed Rules Governing Attorney Discipline in the U.S. Court of Appeals for the Eleventh Circuit

Pursuant to 28 U.S.C. §2071 (b), notice is hereby given of proposed amendments to Addenda Five, Six, and Seven of the Rules of the U.S. Court of Appeals for the Eleventh Circuit. Notice is also given of intent to adopt proposed Rules Governing Attorney Discipline in the U.S. Court of Appeals for the Eleventh Circuit. The proposed amendments to Addendum Seven and of the proposed Rules Governing Attorney Discipline may be obtained without charge from the Office of the Clerk, U.S. Court of Appeals for the Eleventh Circuit, 56 Forsyth St., N.W., Atlanta, Georgia 30303 [phone: (404) 331-6187]. Comments on the proposed amendments to Addenda Five, Six, and Seven and on the proposed Rules Governing Attorney Discipline may be submitted in writing to the Clerk at the above address prior to June 30, 1992.

Addendum Five, Section (b)(2), first sentence, is proposed to be amended as follows: "Any person seeking relief under 29 U.S.C. §621, 42 U.S.C. §1981, 42 U.S.C. §1982, 42 U.S.C. §1983, 42 U.S.C. §1985, 42 U.S.C. §1986, 42 U.S.C. § 2000a, 42 U.S.C. §2000d, and 42 U.S.C. §2000e or in such other cases as the court shall determine to be appropriate may be eligible for representation."

Addendum Six, Section 6.c., is proposed to be amended with regard to the extent and manner of circulation of certain background reports concerning bankruptcy judge nominees and would read as follows: "Information received from the FBI and IRS shall be reviewed by the chief judge of the circuit. If the chief judge of the circuit determines that information in the FBI and IRS reports warrants review, the chief judge shall send the reports to the screening committee or to the full Court. If the chief judge of the circuit determines that the FBI and IRS reports contain no negative information, the chief judge may issue an order of appointment on behalf of the Court. If the IRS report is not received in a timely manner, the chief judge may waive the report, provided that the chief judge is satisfied, and so reports to the other members of the Court, that tax returns have been filed by the selectee as required."

LEGISLATIVE WRAP-UP

By ROBERT L. McCURLEY, JR.

Probate procedure

The Probate Code was revised and became effective January 1, 1983. The probate committee then proceeded to draft the Uniform Guardianship and Protective Proceedings Act which was also passed by the Legislature and effective January 1, 1988.

For the last several years the probate committee has studied the procedural sections of the Uniform Probate Code which were drafted by the National Conference of Commissioners on Uniform laws. It was determined by lawyers and judges that the most critical areas needing revision were the personal representative duties and powers, bond and a determination of reasonable compensation.

The committee followed its policy that a personal representative should have certain proscribed powers while leaving to the probate court to approve additional authority. It further reduced the amount of bond required from double the value of the estate to equal the value of the estate. Both provisions were consistent with comparable provisions of the Guardianship and Protective Proceedings Act. The defining of reasonable compensation is not included in this bill.

Professor Tom Jones of the University of Alabama has served as reporter for this revision. The committee consisted of:

E.T. Brown, Jr.
Judge Mike Bolin
Professor Annette Dodd
Randy Fowler
Keith Foster
Norman W. Harris, Jr.
Lyman F. Holland, Jr.
Louis B. Lusk
Joe McEarchern
Judge Lionel Noonan
Joe L. Payne
Judge George Reynolds
Judge Frank Riddick
Kirby Sevier
Judy F. Todd
Leonard Wertheimer, III
Bob Woodrow, Jr.
John N. Wrinkle

The following is a section-by-section review of the bill which has been introduced in the House of Representatives by Representative Jim Campbell of Anniston and in the Senate by Senator Doug Ghee of Anniston:

§1. Devolution of Estate at Death: Resolutions

This section codifies the present law that upon the death of a person, the deceased person's real property passes to heirs, while personal property passes to the personal representative to be distributed to the heirs.

Both real and personal property are subject to homestead allowance, rights of creditors, etc.

§2. Time of Accrual of Duties and Powers

Although the duties and powers of a personal representative commence upon appointment, the powers relate back with regard to acts which are beneficial to the estate performed by the personal representative prior to the appointment. Even prior to the appointment, the personal representative may carry out the written instructions of the decedent relating to the decedent's body, funeral and burial arrangements.

§3. Priority Among Different Letters

This section establishes priority if more than one set of letters is issued.

§4. General Duties; Relation and Liability to Persons Interested in Estate; Standing to Sue

The personal representative is a fiduciary who must follow the prudent person standard and if named as the personal representative because of special skills, is under a duty to use those skills.

§5. Personal Representative to Proceed Without Court Order; Exception

A personal representative is to proceed expeditiously with the settlement and distribution of a decedent's estate without court order, but may invoke court jurisdiction when necessary.

§6. Duty of Personal Representative; Inventory and Appraisement

Unless the will provides otherwise, the personal representative will usually have to file an inventory within two months. The inventory shall be sent by the personal representative to any interested person who requests it.

§7. Duty of Personal Representative; Supplementary Inventory

The personal representative shall make a supplement to the initial inventory if additional property is located or to change erroneous market values or descriptions.

§8. Duty of Personal Representative; Possession of Estate

Except as provided by will, the personal representative shall take possession or control of the decedent's property, except that any real property or tangible

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.

personal property may be left with or surrendered to the person presumptively entitled to it until the personal representative needs it for purposes of administration. A personal representative's written request for delivery is conclusive evidence of its necessity for administration.

The personal representative may pay taxes and expenses necessary to manage, protect and preserve the property.

§9. Power to Avoid Transfers

The personal representative has the exclusive right to recover property that is necessary for the payment of decedent's unsecured debts whose transfer the law deems void or voidable as against creditors.

§10. Powers of Personal Representatives; In General

The personal representative has the same power over the title to property (subject to section 14 and 15), as owners would have, in trust for the benefit of the creditors and other interested parties. Such power can be executed without notice, hearing or court order.

§11. Improper Exercise of Power; Breach of Fiduciary Duty

The personal representative's liability for the improper exercise of power is the same as that of a trustee.

§12. Sale, Encumbrance, or Transaction Involving Conflict of Interest; Voidable; Exceptions

A sale or encumbrance involving a conflict of interest of the personal representative, the personal representative's spouse, agent, etc. is voidable unless the transaction is authorized by the will, approved by the court after notice to interested persons or otherwise authorized by law.

§13. Persons Dealing with Personal Representative; Protection

A person who deals with a personal representative in good faith for value is protected if the personal representative properly exercised the power. Except for limitation endorsed on the letters, no provision of the will or court order limiting the personal representative's powers is effective against any person who does not have actual knowledge.

§14. Transactions Authorized for Personal Representatives; Exceptions

This section parallels the conservatorship law in that it enumerates actions that the personal representative may take without prior court approval

unless the will or court specifically otherwise restricts the action.

§15. Transactions Authorized for Personal Representatives; Prior Court Approval

This section parallels the conservatorship laws in that it enumerates action that may only be taken with prior court approval unless the will expressly authorizes such action.

§16. Powers and Duties of Successor Personal Representative

A successor personal representative has the same power and duty as the original personal representative except as to any powers expressly made personal to the personal representative named in the will.

§17. Co-representatives; When Joint Action Required

Unless the will provides otherwise, the concurrence of all co-representatives is generally required an all acts. This restriction does not apply for receipt of property, in an emergency when concurrence cannot be reasonably obtained or when a co-representative has been delegated to act for others.

§18. Powers of Surviving Personal Representative

Unless otherwise provided for in the will, after the termination of a personal co-representative, the remaining co-representative may exercise every personal representative power.

§19. Expenses in Estate Litigation

The personal representative is entitled to receive necessary expenses and disbursements, including reasonable attorney's fees for defending or prosecuting an action.

§20. Proceedings for Review of Employment of Agents and Compensation of Personal Representatives and Employees of Estate

After notice to all interested parties, the court may review the reasonableness of the compensation paid out of the estate and order a refund for any excessive compensation.

§21 Bond

Unless waived in the will, the personal representative must execute a bond or give collateral generally equal to the amount under the personal representative's control less the value of property under section 15 that can only be sold or conveyed with court authority. Also, the court may waive the bond with the consent of all interested parties.

Even though the bond is waived in a will, it may nevertheless be required under limited circumstances, such as the likelihood of waste occurring otherwise.

§22. Terms and Requirements of Bonds

The section established the terms and requirements of the bond such as the joint and several liability of the personal representative and sureties.

§23. Prior Laws Repealed

This section enumerates those sections specifically repealed.

§24. Application to Existing Estates

Estates filed prior to the effective date of this act (January 1, 1993) continue under the old law unless they elect to come under the new law.

§25. Avoiding Conflict of Laws

Nothing in this act will abrogate any right conferred upon a personal representative or fiduciary under any other act.

§26. Severability

§27. Effective Date

January 1, 1993.

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

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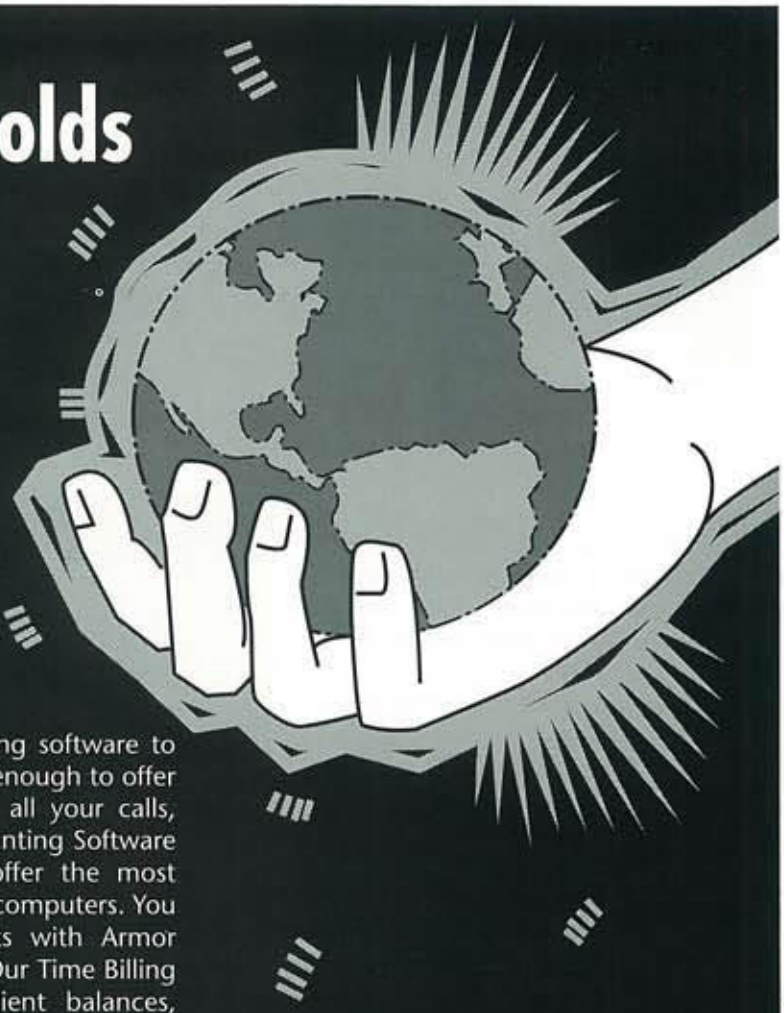

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BUILDING ALABAMA'S COURTHOUSES

PICKENS 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.*

Above: Pickens County Courthouse; Right: The mysterious window. (see arrow)

Pickens County

The Pickens County Courthouse is probably the best known courthouse in the state of Alabama. It is not famous for its architectural style, nor is it revered for a memorable historic event. Instead, it is renowned for a single pane of glass in an attic window. Many persons believe that that pane of glass contains the face of a ghost. An arrow on the courthouse wall points to the particular pane, and depending on where one stands below, a viewer can see something in or on that glass. It appears to be the visage of a man. Before telling the story, some background information on Pickens County is in order.

Pickens County was created by the Alabama Legislature on December 19, 1820. There is some confusion and controversy concerning the identity of the person for whom the county was named. Some sources claim that the name honors Israel Pickens, the second elected governor of Alabama who served from 1821 to 1825. However, it is not likely that the county would have been named for him since it was almost a full year after its creation that he won election as governor. Most historians insist that the county was named for General Andrew Pickens of South Carolina since a majority of the early settlers were from that state.

According to Willis Brewer in the book *Alabama: Her History, Resources, War Record, and Public Men,* Andrew Pickens was born in Dauphin County, Pennsylvania in 1739, but his parents settled in South Carolina during his childhood. He fought the Cherokees in 1761, and won much distinction as an Army officer. During the Revolutionary War, he rose to the rank of brigadier general. Later he served in Congress, and held other civic honors. He died in 1817. It was quite natural for the South Carolina settlers in Alabama to honor his name in their new state.

The first courts in Pickens County were held at the home of Jacob Dansby. The first judge was Solomon Marshall. Little is known of the first courthouse in Pickens County, although a reference was made in an early history of the county to a "little log courthouse." The county seat town was called Pickens Courthouse. Later the name was shortened to Pickens when the courthouse was removed. Finally, it became known as Pickensville in 1835. Pickensville, Alabama still exists today.

As Pickens County grew, its citizens demanded a more centralized county seat. On March 5, 1830 the federal government made a grant of 80 acres of land in what was the approximate geographic center of the county for the purpose of establishing a new county seat. Streets were surveyed, and in 1832 a courthouse and jail were built at the new town of Carrollton.

Carrollton was named for Charles Carroll of Carrollton in Maryland. Carroll, who died in 1832, was the last surviving signer of the Declaration of Independence. It is interesting that he always signed his name "Charles Carroll of Carrollton" so that the British would not confuse him with any other Charles Carroll. This brave and fiercely patriotic man served the cause for American independence in many ways. He was a member of the Maryland Senate, the Continental Congress, and later, the Senate of the United States. At the time of his death he was held in great esteem, and many places in this country were named in his honor.

Little is known concerning the construction of the first courthouse at Carrollton. Much is known of its destruction.

On April 4, 1865 Union troops under General John T. Croxton had entered the city of Tuscaloosa. Their mission was to destroy Confederate property. These troops burned the University of Alabama. The next day, a detachment under Captain William A. Sutherland left Tuscaloosa and entered Pickens County in search of information, and as a decoy for Croxton's true intentions, which were to destroy the railroad between Demopolis and Meridian.

Captain Sutherland wrote a report about his activities. He noted that his men charged gallantly into Carrollton and captured nine Confederate scouts. Before leaving the town on April 5, 1865 his men burned the commissary depot and the courthouse. This destruction took place in the last week of the war, and local residents contend to this day that the burning of the Pickens County Courthouse by the Union troops served no useful military purpose.

Pickens County suffered an economic decline in the post-Civil War period, but a new courthouse was built and the cost was between $18,000 and $20,000. The citizens were proud of their new courthouse. Yet, tragedy befell the building once more. On the night of November 16, 1876 the courthouse burned again. All of the probate books and most of the other records in the courthouse were lost. Arson was suspected, but no one knew the culprit.

Once again the citizens of Pickens County rebuilt their courthouse. The cornerstone was laid on July 4, 1877. According to county records, the cornerstone cost $17.50. W.P. Owens removed the brick of the old courthouse for the sum of $2 per thousand. The new building was completed, but the first court sessions were not held in the new courthouse until March 18, 1878. The total cost of this structure was $11,675. It is a two-story building, with an attic or garret. The architectural style of the courthouse is Italianate, and though quite small by modern standards, it serves the citizens of Pickens County to this day. The stage is now set for the story of the face in the window.

The cause of the second burning of the courthouse remained a mystery until January 16, 1878 when, almost by accident, certain facts were uncovered. It seemed that a black fugitive named Bill Burkhalter was apprehended and confessed to a number of crimes in Pickens County, including burglaries

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

and arsons. In his confession he stated that Henry Wells had burned the courthouse. Deputies were sent to arrest Wells who, it was reported, tried to escape but was shot twice. The wounded Wells was returned to Carrollton on January 29, 1878.

On January 30, 1878 Henry Wells supposedly signed a confession. It is presumed that he could not read or write since the confession was signed by a "mark." In the confession, he admitted his involvement in several burglaries. He also admitted breaking into the courthouse with Bill Burkhalter on the night the building was burned. They had tried to break open the probate office safe, but failed. He had left a candle near some papers. He then confessed to some other crimes but did not specifically state that he had torched the courthouse.

History is cloudy at this point. One version of the story is that a group of citizens, possibly a lynching mob, learned that Wells had been captured and was being held by the sheriff. The wounded Wells was kept in the attic of the newly completed courthouse for his own protection. He peered out the window in the attic at the crowd below. At that moment, the legend states that a lightning bolt from a thunder storm struck the courthouse, and like a photographic negative, the face of the fearful Wells was etched on the window pane.

No one knows the particulars of Henry Wells' death on February 3, 1878. It is not certain whether he died of his wounds or whether he died at the hands of the mob. What is certain is that the minutes of the county commission on February 11, 1878 reveal that a warrant was issued to Watts and Carson in the amount of $5 for making a coffin for Henry Wells. Another warrant in the amount of $2 was issued to Isaac Bostick for digging his grave. Henry Wells was gone, but his image on the window pane remained.

According to various accounts the image on the pane has been scrubbed with soap and rubbed with gasoline. It resembles an oil stain, but depending on the time of day one can see the outline of a man's face, with eyes staring in terror. The ghostly visage remains to this day, and curious visitors drive miles out of their way to Carrollton to catch a glimpse of the face. That pane of glass makes the Pickens County Courthouse Alabama's most famous.

There is one additional story concerning the Pickens County Courthouse. In 1979, Probate Judge Robert H. Kirksey applied a lesson from history and sought assistance for the construction of a new courthouse for his county. Kirksey discovered that Congress in 1884 deeded some 46,000 acres of land as compensation to the State of Alabama for the burning of the University of Alabama by Union Troops. He reasoned that since the Pickens County Courthouse was burned by the same Union troops, Pickens County should receive compensation of its own. Kirksey further argued that Pickens was an impoverished county and could not borrow the money to build a new courthouse estimated at five million dollars. He approached Congressman Tom Bevill with his proposal. However, to this date, no reparations have been paid to Pickens County, and the courthouse of 1878 appears virtually the same as it did when constructed. Perhaps a new effort should be made to compensate the county for this wrong from the past. ■

PROFILE

JAMES ROBERT SEALE

Pursuant to the Alabama State Bar's rules governing the election of the president-elect, the following biographical sketch is provided of James R. Seale. Seale is the sole qualifying candidate for the position of president-elect of the Alabama State Bar for the 1991-92 term.

BORN:

March 6, 1944,
Nashville, Tennessee

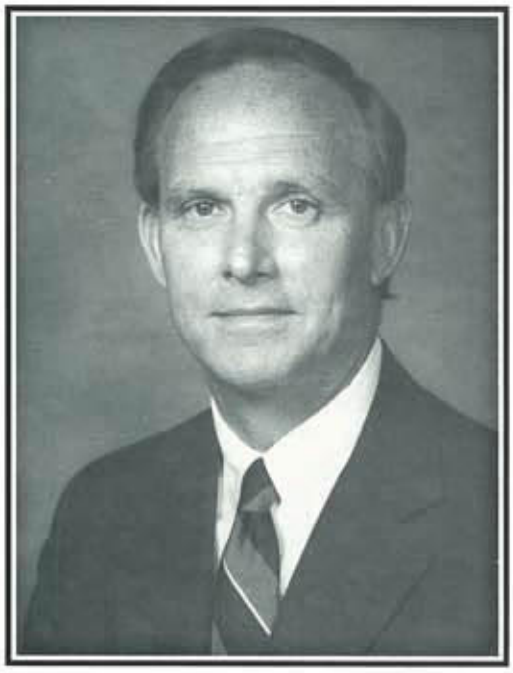
EDUCATION:

Emory University and the University of Alabama

Bachelor of Arts, 1967, University of Alabama
Juris Doctor, 1969, University of Alabama

MILITARY:

Captain, U.S. Air Force
Judge Advocate General Corp
1969-1972
Major, U.S. Air Force Reserve
1973-1983



TEACHING POSITIONS:

Business law instructor, University of Alabama School of Commerce and instructor, Jones Law School.

PROFESSIONAL ORGANIZATIONS:

Bench and Bar Legal Honor Society; The Florida Bar, 1973; Alabama State Bar, 1969; Director, Alabama Defense Lawyers Association.

CIVIC ORGANIZATIONS:

Served in leadership positions in various civic, athletic, educational, and charitable activities, including: United Way, Montgomery Museum of Fine Arts, Shakespeare Festival, S.T.E.P. Program, and YMCA.

LAW PRACTICE:

Began private practice of law in Montgomery, Alabama in March 1972 and has been involved in the private practice of law for 20 years. Partner in the Montgomery firm of Robison & Belser, P.A.

BAR ACTIVITIES:

Served as secretary of the Montgomery County Bar Association, 1982-1985; president, Montgomery County Bar Association, 1986; bar commissioner, 1987-present; member of Insurance Programs Committee (brought AIM program to state bar); chairman, Disciplinary Panel; chairman, MCLE Commission; Executive Committee, 1988-1990; Disciplinary Commission, 1990-92.

Various capacities with both county and state bars.

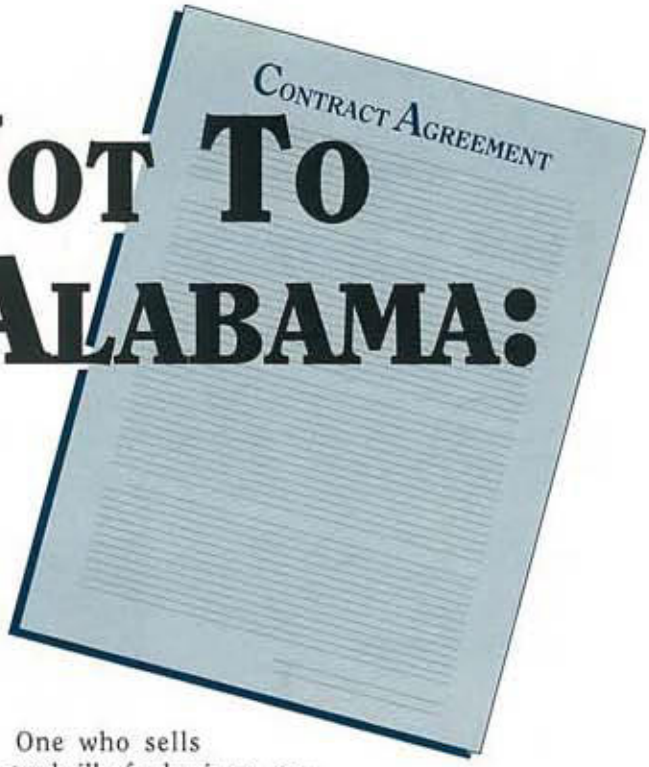
CHURCH:

Adult Sunday School teacher and deacon, Trinity Presbyterian Church.

FAMILY:

Married to former Nancy Lumpkin of Bessemer, Alabama. Three children: Shelby, age 22, a senior at Auburn University at Montgomery; Brooks, age 20, a sophomore at Southern Methodist University; and Margaret, a seventh-grader.

COVENANTS NOT TO COMPETE IN ALABAMA: REVISITED[1]



By MICHAEL L. EDWARDS AND MICHAEL D. FREEMAN

This article discusses situations in which one person covenants or contracts with another not to compete. The enforceability of such agreements is restricted by statute in Alabama and many other states.[2] Even when the covenant is of a type expressly allowed by the Alabama statute,[3] it still is subject to a judicially adopted test of reasonableness.

This article presents examples of different situations in which such agreements have been used and subsequently considered by the courts. However, the reader should remember that there is no paucity of authority in this area. In just the last ten years, the Alabama Supreme Court has decided over 35 of these cases. As one court noted regarding the law on this subject:

> This is not one of those questions on which the legal researcher cannot find enough to quench his thirst. To the contrary there is so much authority it drowns him. It is a sea — vast and vacillating, overlapping and bewildering. One can fish out of it any kind of strained support for anything, if he lives so long. This deep and unsettled sea pertaining to an employee's covenant not to compete with his employer after termination of employment is really Seven Seas . . ..[4]

At least one judge faced with the duty of deciding a case involving a covenant not to compete declined to embark upon this "Seven Seas" of authority:

> Because of a demanding caseload, family responsibilities and a desire to consider other matters in life, this court has been dissuaded from reading all of the available authorities.[5]

The Alabama statute applicable to covenants not to compete provides:

> (a) Every contract by which anyone is restrained from exercising a lawful profession, trade or business of any kind otherwise than is provided by this section is to that extent void.
>
> (b) One who sells the goodwill of a business may agree with the buyer and one who is employed as an agent, servant or employee may agree with his employer to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a specified county, city or part thereof so long as the buyer, or any person deriving title to the goodwill from him, or employer carries on a like business therein.
>
> (c) Upon or in anticipation of a dissolution of the partnership, partners may agree that none of them will carry on a similar business within the same county, city or town, or within a specified part thereof, where the partnership business has been transacted.[6]

The statute begins in subsection (a) by declaring void *all* contracts by which anyone is restrained from exercising a lawful profession, trade or business. In analyzing a situation involving a covenant not to compete governed by Alabama law, one generally should begin with the proposition that all such covenants are void, *except* as subsections (b) or (c) exempt the covenant from the blanket prohibition of subsection (a). One also should consider whether the covenant can be characterized as a lawful partial restraint or forfeiture provision not governed by the Alabama statute.

Of course, actions on contracts containing covenants not to compete, in addition to satisfying the Alabama statute, are subject to the same defenses as any other contract action. For example, a party seeking to enforce a contract containing a covenant not to compete must have been qualified to do business in Alabama at the time the covenant was executed.[7] Likewise, to be enforceable the covenant must be mutually binding and provide consideration to both parties. In *Hill v. Rice*,[8] the employee dance instructor agreed not to compete after termination of his employment, but the employer in the contract did not agree to provide the employee with any minimum hours or compensation. The Alabama Supreme Court held

that the contract lacked mutuality at its inception and remanded the case to the circuit court for a determination as to whether reasonable employment in fact had been provided to the employee before termination of the relationship.

However, merely because a covenant is made at some point after employment commences does not necessarily render it invalid for lack of consideration. In *Daughtry v. Capital Gas Co.*,[9] a gas company sued its former branch manager-routeman to enforce a covenant signed after employment had commenced. The employment continued for eight months after execution of the covenant, at which time the employee left voluntarily. The court held that the "continued employment" of the employee constituted sufficient consideration.[10]

While this article focuses primarily on the validity of covenants not to compete, practitioners should be aware that litigation in this area often includes other claims arising out of the employment relationship and its termination. For example, in *James S. Kemper & Co. Southeast, Inc. v. Cox & Associates, Inc.*,[11] the former employer sued its former employee and his new employer, asking for injunctive relief to enforce the covenant, damages against the former employee for breach of contract, and damages against the new employer for knowing and intentional interference with the covenant. The Supreme Court of Alabama ruled that (1) the covenant was enforceable by injunction, (2) the former employee was liable for damages for breach of contract, and (3) the new employer was liable for damages for intentional and knowing interference with the contractual relationship between the plaintiff former employer and its former employee.

For purposes of discussion, the covenants *not* disallowed by the Alabama statute may be divided into three categories: (1) employee-employer, (2) sale of the goodwill of a business or partnership dissolution, and (3) partial restraints and forfeiture provisions.

EMPLOYER-EMPLOYEE COVENANTS

Frequently, as a condition of employment or otherwise, employees will agree not to compete with their employers after termination of their employment. Alabama courts view such restraints with disfavor "because they tend not only to deprive the public of efficient service, but tend to impoverish the individual."[12] As the Alabama Supreme Court declared in *Calhoun v. Brendle, Inc.*,[13] "One does not have an unfettered right to be free of competition in this country, and contracts which seek to restrain one in the exercise of his right to practice a lawful trade or profession are disfavored."

Consistent with the court's general attitude toward post-employment restraints, the employment exception to the general prohibition of all contracts in restraint of trade is narrowly construed. For example, Alabama courts will not enforce a contract provision restricting the practice of a profession. This refusal to enforce such contracts is based on the court's interpretation of subsection (a) to the Alabama statute which provides:

> Every contract by which anyone is restrained from exercising a lawful profession . . . otherwise than is provided by this section is to that extent void.

Neither subsection (b) nor subsection (c) of the statute exempt contracts restricting the practice of a "profession." Applying this interpretation, the Alabama Supreme Court consistently has refused to enforce post-employment restrictions signed by professionals.

In defining what is a "profession" and who are "professionals," the Supreme Court of Alabama has referred to the late Dean Roscoe Pound's definition found in the *Lawyer from Antiquity to Modern Times:*

> The term refers to a group of men pursuing a learned art as a common calling in the spirit of a public service — no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art is the purpose. Gaining a livelihood is incidental, whereas, in a business or trade it is the entire purpose.[14]

The callings the court has defined as "professions" include physicians,[15] veterinarians,[16] and certified public accountants,[17] as well as public accountants.[18] However, in *Dobbins v. Getz Exterminators of Alabama, Inc.*, the court, noting that "there are multitudes of businesses but few professions," rejected the argument that pest control technicians were professionals by virtue of a statute referring to them as "persons engaged in professional services."

The court also has construed the wording of the Alabama statute, which allows restrictive covenants only as to "an agent, servant or employee," to preclude the enforceability of covenants entered into by independent contractors and sales agents.[20] In *Premier Industrial Corp. v. Marlow*,[21] the court refused to enforce covenants between a corporation and its "independent sales agents." In determining whether the independent sales agents were independent contractors (covenant not enforceable) as opposed to employees (covenant enforceable), the court applied the following test:

> For one to be an employee, the other party must retain the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or in other words, not only what shall be done, but how it shall be done.[22]

Michael L. Edwards

Michael L. Edwards is a partner with Balch & Bingham in Birmingham. He has served as a member of the Board of Bar Commissioners of the Alabama State Bar. He has served as chairman of the Business Torts and Antitrust Section of the Alabama State Bar. Edwards received a B.A. from the University of Alabama in 1964 and a law degree from the University's School of Law in 1966, where he was a member of the editorial board of the *Alabama Law Review*.

Michael D. Freeman

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Another way by which the court has narrowly construed the exceptions to the Alabama statute is to preclude enforcement of covenants by anyone other than the parties to them. For example, in *Wyatt Safety Supply Co. v. Industrial Safety Products, Inc.*,[23] the court, reversing a trial judge's decision granting injunctive relief, refused to permit a successor to the employer to enforce noncompetition agreements between the employees and the predecessor employer. In this case, the plaintiff, Industrial Safety Products, had obtained covenants from a number of its employees. Subsequent to obtaining these covenants, Industrial Safety Products engaged in a number of corporate reorganizations whereby it merged with another company and temporarily changed its name. It subsequently emerged from these reorganizations as Industrial Safety Products. Because the court considered the reorganized Industrial Safety Products a separate entity from the Industrial Safety Products that originally obtained the covenants, it refused to enforce the covenants.[24]

Despite the disfavor with which the court says it views post-employment agreements, covenants have been enforced in numerous cases. The Alabama Supreme Court and Court of Civil Appeals have enforced covenants not to compete made by top level banking executives,[25] insurance executives and agents,[26] television broadcasters,[27] radio announcers,[28] newspaper publishers,[29] advertising managers,[30] gas company[31] and dry cleaning routemen,[32] pest control managers and technicians,[33] travel agents,[34] and even coffee salesmen.[35]

In determining whether to enforce a contractual provision in restraint of employment, the Alabama Supreme Court asks whether:

1. the employer has a protectable interest;
2. the restriction is reasonably related to that interest;
3. the restriction is reasonable in time and place; and
4. the restriction imposes no undue hardship on the employee.[36]

If these questions can be answered in the affirmative, then the agreement typically will be enforced.

A. The employer must have protectable interest

The Alabama Supreme Court first held that an employer must have a "protectable interest" before its covenants will be enforced in the 1982 decision of *DeVoe v. Cheatham*.[37] In *DeVoe*, the employer hired an inexperienced employee and trained the employee to install vinyl tops on automobiles. The employee later was discharged and the employer sought to enforce a restrictive covenant prohibiting the employee from working for a competitor for five years within a 50-mile radius of Decatur. The court held that the restriction was not enforceable, because the employer had no protectable interest. The court went on to explain that in order for a protectable interest to exist, "the employer must possess 'a substantial right in its business sufficiently unique to warrant the type of protection contemplated by [a] noncompetition agreement."[38] The court stated:

> If an employee is in a position to gain confidential information, access to secret lists, or to develop a close relationship with clients, the employer may have a protectable interest in preventing that employee from competing. But in the present case, DeVoe learned no more than the normal skills of the vinyl top installation trade, and he did not engage in soliciting customers. There is no evidence that he either developed any special relationship with the customers or had access to any confidential information or trade secrets. A simple labor skill, without more, is simply not enough to give an employer a substantial protectable right unique in his business. To hold otherwise would place an undue burden on the ordinary laborer and prevent him or her from supporting his or her family.[39]

Soon after its decision in *DeVoe*, the court was called upon again to discuss its protectable interest requirement. In *James S. Kemper*,[40] a lumber industry casualty insurer sued its former salesman seeking to enjoin him from competing statewide for a two-year period. The evidence showed the employee had been trained and even carried at a loss for several years so that he could build up a client base, and had "full supervision" over his employer's business in Alabama from 1963 to 1981. Based on these facts, the Alabama Supreme Court enforced the covenant, stating that the employee "clearly had access to valuable trade information and customer relationships in the course of his employment," and that "such information and the clientele acquaintance involved clearly constitute[d] a protectable interest."[41]

Since *DeVoe* and *James S. Kemper*, the protectable interest requirement has been the focus of much litigation. In a variety of contexts, the court has refused to enforce post-employment covenants where the employment relationship was of short duration or where the court felt the employee was more akin to the simple laborer in *DeVoe*, than to the insurance salesman in *James S. Kemper*. For example, in its 1986 *Calhoun v. Brendle, Inc.* decision,[42] the court reversed a trial judge's order enjoining an employee whose job was to check and refill fire extinguishers. The employer argued it had a protectable interest in both its customer relationships and its customer list. Disagreeing with the employer, the court held that just because an employee may have talked with customers and customers knew his face did not support the trial court's finding of a "close relationship" between the employee and the employer's customers. As for the customer list, the court held that in order to be protectable a customer list "must be treated in a confidential manner by the employer."[43] Because the names of all the customers were kept on a magnetic board visible to all employees, the court ruled the customer list was not entitled to protection.[44]

The court also has found no protectable interest and refused to enforce a covenant signed by an insurance agent employed for only one year who denied taking customer information with him when he left,[45] copier technicians who the court said at best possessed simple labor skills,[46] and a television station advertising salesman employed for only two months.[47]

One should not interpret these decisions as an indication of the court's unwillingness to enforce covenants not to compete made by employees. Where a covenant is signed by an employee who had substantial customer contact during his employment, or had access to confidential information possessed by his employer, the covenant will be enforced. For example, in January of this year, in *Clark v. Liberty Nat'l Life Insurance*

Co.,[48] the Alabama Supreme Court affirmed a judgment declaring valid a noncompetition agreement signed by one of Liberty National's insurance agents and awarding damages against the employee for breach of the covenant. The employee had worked for Liberty National as an agent from 1981 until he resigned on March 4, 1988. Noting that the employee was Liberty National's "sole contact" with its policyholders, and recognizing that these relationships were a "valuable asset," the court held that Liberty National "clearly" had a protectable interest in these customer relationships.

A few months prior to its *Clark* decision, the court held that employers also have a protectable interest warranting enforcement of noncompetition provisions where they impart to their employees confidential information. In *Central Bancshares of the South, Inc. v. Puckett*,[49] the Alabama Supreme Court reversed a lower court's decision refusing to enforce statewide a covenant between Central Bank and two of its former top executives. The trial court had enjoined the employees only from soliciting Central Bank's existing customers and employees, but not from competing in the banking business. In reversing, the court stated:

> While we agree with the trial judge that Central Bank has a protectable interest in its customer relations and relations with its employees, we do not agree that that protectable interest is limited to its customers and employees. As the trial judge indicated, Central Bank has a prominent position in the banking industry in the state of Alabama. Moreover, Brannon and Puckett, as key employees of Central Bank, had peculiar access to all of the techniques and strategies of the bank responsible for that position. If an employee is in a position to gain confidential information, access to secret lists, or to develop a close relationship with clients, the employer may have a protectable interest.[50]

In addition to customer relationships and access to confidential information, a protectable interest also can arise from an employer's investment in its employees. In *Nationwide Mutual Insurance Co. v. Cornutt*,[51] the Eleventh Circuit Court of Appeals, reversing a summary judgment granted to an employee, conducted a thorough analysis of the Alabama decisions discussing the protectable interest requirement. After noting that a protectable interest may arise where the employee is in a position to gain confidential information, access to secret lists, or develop a close relationship with clients, the Court recognized that a protectable interest "can also arise from the employer's investment in its employee, in terms of time, resources and responsibility."[52] In reversing, the Eleventh Circuit stated that the trial court's ruling could well leave the employer's protectable "investment interest . . . unvindicated."[53]

B. Restriction must be reasonably related to employer's protectable interest

Even where an employer establishes the existence of a protectable interest, either in its customers or confidential information, the court will only prohibit competition that threatens that protectable interest. This point recently was illustrated in the *Central Bancshares* decision where the court stated:

> We find that the restriction regarding competition in the banking business is reasonably related to Central Bank's protectable interest, because the restriction is designed to protect Central Bank only in the area in which it has a legitimate interest: the banking industry. The agreement specifically prohibits Brannon and Puckett from competing in the banking business; it does not preclude Brannon and Puckett from pursuing work outside of banking.[54]

If Central Bank had attempted to prevent these employees from working in another line of business, the restriction would not have been enforceable, because it would not have been reasonably related to Central Bank's protectable interest.[55]

C. Restriction must be reasonable in time and place

The Alabama statute provides that an "employee may agree with his employer to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a specified county, city or part thereof so long as the . . . employer carries on a like business therein." The Alabama Supreme Court describes this statutory language as requiring that any restriction be "reasonable in time and place." While the singular word "county" is used in the statute, a restriction may cover a much wider area if reasonable.[56]

Where a restriction is overly broad or otherwise unreasonable, Alabama courts have the equitable power to strike any unreasonable portion and enforce the remainder.[57] In *Mason Corp. v. Kennedy*,[58] the Alabama Supreme Court conferred upon trial courts the power to rewrite or "blue pencil" contracts in this manner. The court stated:

> We hold that a court of equity has the power to enforce a contract against competition although the territory or period stipulated may be unreasonable, by granting an injunction restraining the [employee] from competing for a reasonable time and within a reasonable area.[59]

What constitutes a reasonable geographic area depends upon the proof of what protection the business needs. As the Eleventh Circuit recently advised in *Cornutt*,[60] "To secure enforcement of a non-compete clause within a particular territory, the employer must demonstrate that it continues to engage, in that locale, in the activity that it seeks to enjoin."[61] Applying this logic, the Alabama Supreme Court endorsed a trial judge's order limiting to one county the territorial restriction to be enforced by injunction where 90 percent of the employer's customers were located in that county.[62] In two other cases, the court held employers entitled to statewide injunctions where it was shown that the employers conducted statewide business and the employees had statewide responsibility.[63] As the court noted in applying a covenant to the geographic area covering the entire United States east of the Rocky Mountains, a covenant not to compete may properly include part of Alabama, all of Alabama, or "more territory than the state of Alabama," depending on the circumstances.[64]

While few Alabama cases expressly discuss what period of

time is reasonable for a valid employment restriction, it is clear that durations of two years and less will pass judicial scrutiny.[65] On more than one occasion the court has stated, "[T]here can be no doubt that a two-year period for the restriction is reasonable." One should be cautious, however, in attempting to enforce an employment covenant for a duration of longer than two years. In *Mason Corp. v. Kennedy*,[67] the court refused to enforce a five-year covenant against a former employee, where the employee already had refrained from competing for two years and four months immediately following his termination.

D. Restriction must not impose an undue hardship on employee

Typically, when the court refuses to enforce a covenant on the basis that the employer lacks a protectable interest, it also will find as additional support for its decision that the covenant would place an undue burden or hardship on the employee.[68] For example, in *Chavers v. Copy Products Co.*,[69] the court, after finding the employer lacked a protectable interest, added:

> [T]he restriction in question places an "undue hardship" on Chavers. Though he is a highly skilled working man, he is nevertheless still only a working man, and it is undisputed that the only trade he knows and by which he can support himself and his family is copier maintenance and repair.[70]

Similarly, in *Sheffield v. Stoudenmire*,[71] the court stated, "This restriction imposes an undue hardship on Stoudenmire, who is fifty years old, married, and possesses significant financial obligations."[72]

However, where the covenant does not appear to be the product of any unequal bargaining power or overreaching on the part of the employer, the court may use the fact that the employee received considerable consideration as additional support for its decision to enforce a covenant. For example, in *Central Bank of the South v. Beasley*,[73] the court recognized that consideration can be an important factor in the undue burden analysis. The court stated:

> Considering all the circumstances, we cannot hold that Beasley will suffer undue hardship if the covenant is enforced according to its terms. As a former director and officer of First National, he bargained for and received over a quarter of a million dollars for his stock. He is free to accept employment in a bank outside of Baldwin County, or he can accept a non-banking position within Baldwin County. On March 16, 1985, he will be totally free of the noncompetition covenant. We do not see how any lesser burden could be placed on Beasley without completely derogating both the covenant's purpose and its consideration.[74]

While the *Central Bank* case addressed a situation involving the sale of goodwill, not an agreement between an employee and employer, the court recently quoted the above passage as support for its decision to enforce covenants made by employees who received approximately $1.8 million and $800,000 for their agreements not to compete.[75]

SALE OF GOODWILL OF BUSINESS OR PARTNERSHIP DISSOLUTION

Subsection (b) of the Alabama statute permits the seller of the goodwill of a business to agree with the buyer to refrain from carrying on or engaging in a similar business. Subsection (c) of the Alabama statute provides that partners upon or in anticipation of a dissolution of a partnership may agree that none of them will carry on a similar business where the partnership business has been transacted. Alabama courts considering covenants not to compete executed in such situations have not been nearly so restrictive in construing the agreements as they have been in construing covenants executed by employees. Although never articulated by an Alabama court, this probably is due to the fact that covenants executed in connection with the sale of goodwill are negotiated between sophisticated individuals capable of arms-length bargaining who usually receive greater consideration for their covenants than do employees.

In order for a covenant not to compete to be valid when executed in connection with the sale of a business, it is not necessary that the contract of sale specifically state that the transaction includes the sale of goodwill. It is sufficient if the contract indicates that the buyer is taking over a going concern.[76] However, the contract of sale must contain a provision prohibiting competition, because a covenant not to compete never will be implied when a business is being sold.[77]

Just as contracts restricting the practice of a profession are void in the employment context, so too are such contracts when executed by a professional in connection with the sale of a business or the dissolution of a partnership. For example, in *Friddle v. Raymond*,[78] the Alabama Supreme Court affirmed a trial judge's refusal to enforce a covenant not to compete contained in an agreement memorializing the dissolution of a partnership between two veterinarians. The Court held, "Because veterinarians are professionals, they are not excluded from the general rule prohibiting covenants not to compete."[79]

Similarly, in *Thompson v. Wiik, Reimer & Sweet*,[80] an accountant sold her accounting business and agreed not to compete for a period of time, during which she was to receive a share of the profits from the purchaser. The contract specifically provided that the payments were not for goodwill. The purchasers failed to make the payments and the seller sought damages. The Court held void the covenant not to compete and the provision for payments for such covenant, citing its previous decisions holding contracts restricting the practice of a profession void. In subsequent decisions, the court has distinguished its decision in *Thompson* and required purchasers to continue to make payments to sellers even though the sellers' covenants not to compete were found void.[81] The court justified its ruling in these subsequent decisions on the basis that there was sufficient consideration, other than the covenant, provided by the seller to support the purchase price.[82]

In *First Alabama Bancshares, Inc. v. McGahey*[83] and *Central Bank of the South v. Beasley*,[84] the court made clear that the purchase of stock can equate to the sale of goodwill.[85] In both these decisions, the court considered transactions in which local banks were merged into larger bank holding com-

panies. In each case, the major stockholders of the local bank sold their stock to a larger bank holding company and in the process agreed not to compete with the holding company, but then violated their covenants. The Alabama Supreme Court rejected the stockholders' contention that the sale of their stock was not a transfer of goodwill, holding that stockholders of corporations are the equitable owners of the assets of the corporation and can themselves transfer these assets, including goodwill.

In two instances, the court refused to enjoin wives of sellers of businesses from competing with the businesses their husbands sold. In *Russell v. Mullis*,[86] an action was brought against a wife to enjoin her from operating a convenience store in competition with two convenience stores her husband previously sold to the plaintiff. Noting that the wife "was not a party to either contract," and the evidence showed that the convenience store was "owned and operated solely" by the wife, the court denied the plaintiff's request for injunctive relief against the wife. The court did recognize that had the facts shown that the husband assisted his wife in operating the store or the wife assisted the husband in violating the covenant, the wife properly could be enjoined.[87]

The outcome was the same in *Livingston v. Dobbs*,[88] where the court refused to enjoin a wife from competing with the purchaser of her husband's barbecue business, even though she had signed a noncompetition clause. The court reasoned that even though the wife had agreed not to compete, the agreement she signed was unenforceable because it did not meet one of the exceptions found in subsections (b) or (c) of the Alabama statute. The wife was not an employee of the purchaser nor did she own any of the business her husband sold.

The court made clear in *Files v. Schaible*[89] that it will not tolerate circumvention of valid covenants not to compete through the use of front people. Files sold to Schaible the Ellis Red Barn Restaurant in Demopolis, Alabama. In doing so, Files agreed not to compete for five years within five miles of the Ellis Red Barn Restaurant. Shortly after the sale, a restaurant called Ellis V began operating across the street from the Ellis Red Barn Restaurant. Schaible brought suit. While the evidence at trial showed that the lease purchase agreement for operation of the Ellis V was signed by a former Red Barn waitress and that others were involved in financing and running the operation, the court had no difficulty in affirming a jury verdict in the amount of $50,000 against Files where there was testimony that Files told a number of people that he had managed to find a way to get around the noncompetition agreement.[90]

Like post-employment restraints, the court will enjoin competition only for a reasonable time and within a reasonable geographic location. Simply because the restriction may be ambiguous, vague or overly broad does not render the entire covenant invalid. Rather, "[T]he court may strike the unreasonable restriction from the agreement or the court can enforce the contract within its reasonable limits."[91]

Agreements not to compete with sold businesses have been enforced in areas as expansive as the entire United States and Canada for a period of five years[92] to areas as small as Baldwin County for two years.[93] Again, like post-employment restraints, the guiding light has been what protection is necessary under the particular facts of the case. Put more simply, "Where did the sold business operate prior to the sale?"[94]

PARTIAL RESTRAINTS AND FORFEITURE PROVISIONS

In various contexts, the court has construed contractual provisions as only partial restraints on trade not governed by the Alabama statute. While many of these decisions seem to conflict with and even contradict other decisions of the court, they can be quite useful in enforcing an otherwise invalid restraint.

In three decisions, the Alabama Supreme Court has held that agreements by employees not to solicit customers are only partial restraints of trade not subject to the Alabama statute.[95] For example, in *Hoppe v. Preferred Risk Mut. Ins. Co.*, the court stated, "A prohibition against soliciting [customers] is the not the same as a prohibition against engaging in a lawful profession, trade or business."[96] The court reasoned that where an employee is not prohibited from ***competing***, but merely from soliciting customers, the agreement only partially restrains trade and is not even governed by the Alabama statute.[97]

In glaring contrast to these decisions, the Court held void and unenforceable in *Cherry, Bekaert & Holland v. Brown*[98] a provision requiring an accountant withdrawing from a partnership to pay a set fee to the partnership for any partnership clients he represented during the first three years after withdrawal. Even though the fee may have been so steep as to prevent the withdrawing partner from doing any work for the accounting firm's clients for the three year period, the provision still had only the effect of preventing solicitation with the partnership's clients. It was not a prohibition on engaging in a lawful profession. Under the rationale employed by the court in *Hoppe*, it would seem that the provision would have been viewed as a partial restraint not subject to the Alabama statute. Nonetheless, the court not only applied the Alabama statute to void the agreement, but charged the accounting firm with attempting to "subvert and circumvent the laws and policies of Alabama regarding covenants not to compete."[99]

There are many types of other provisions or agreements that the court has viewed and labeled partial restraints. For example, in *Tomlinson v. Humana, Inc.*,[100] the court endorsed the use of an exclusive service contract between a physician and a hospital. By the terms of the contract, the physician was required to supply all primary pathology services needed at three Humana hospitals. The agreement was challenged by

another pathologist. The Court, characterizing the agreement as "only a partial restraint," held the agreement enforceable, because it allowed the plaintiff pathologist to work at other hospitals and did not affect the public interest.

The Court reached the same conclusion in *Gafnea v. Pasquale Food Co.*,[101] where the restriction was located in a franchise agreement and prevented the franchisee only from operating another pizza parlor within five miles for a period of 18 months. If the court had not construed these provisions as partial restraints, they would have failed the Alabama statute, because they were not between employers and employees, nor did they involve the sale of a business or the dissolution of a partnership.

Perhaps the best statement of the law regarding partial restraints was set forth by the court in *Alabama-Tennessee Natural Gas Co. v. Huntsville*,[102] where the court upheld a contract giving the City of Huntsville the exclusive right to sell gas in Madison County. In enforcing the agreement as only a partial restraint of trade, the court stated:

> It is true that contracts in general restraint of trade violate the policy of the law and are therefore void, but as observed in *Terre Haute Brewing Co. v. McGeever*, "Every contract, however, which at all restrains or restricts trade, is not void; it must injuriously affect the public weal; that it may affect a few or several individuals engaged in a like business does not render it void. Every contract of purchase and sale to some extent injures other parties; that is, it necessarily prevents others from making the sale or sales consummated by such contract."
>
> Contracts in partial restraint of trade are always upheld, when properly restricted as to territory, time and persons, where they are supported by sufficient consideration.[103]

Applying this rationale in other cases, the court has approved of a landlord's agreement with a tenant not to lease space in a shopping center to any of the tenant's competitors,[104] and an agreement in which a retailer agreed to buy all the beer he needed from another party.[105]

Another form of restraint often employed by businesses to partially restrain or discourage competition is a forfeiture provision. The Alabama Supreme Court has recognized that provisions whereby an employee agrees to forfeit certain benefits can be valid and enforceable under Alabama law.[106] According to the court, these provisions do not implicate the Alabama statute.

In *Courington v. Birmingham Trust National Bank*,[107] an employee entered into an agreement with a bank that provided that the employee would forfeit all of the bank's contributions to his account in a profit sharing plan in the event he took employment with a competing bank. When the employee resigned and took employment with a competitor, the bank refused to pay him its contributions to his account. The employee sued to recover the bank's matching contribution. After reviewing decisions from throughout the United States, and noting that "forfeiture-by-competition clauses appear to be widely used in the business community" and "with few exceptions upheld," the court found the employee forfeited his benefits by taking employment with one of the bank's competitors.[108]

In *Southern Farm Bureau Life Ins. Co. v. Mitchell*,[109] the Alabama Court of Civil Appeals approved the use of a forfeiture provision similar to the one in *Courington*. In *Mitchell*, an insurance agent's employment contract provided that he would not be entitled to renewal commissions after termination of his employment if he began representing any other insurance company in the state of Alabama. After the agent was terminated, and began serving as an agent for other insurers, Southern Farm Bureau ceased sending him renewal commissions. The agent sued. The court held that the contract involved a valid forfeiture provision rather than an invalid damage clause and did not fall within the terms of the Alabama statute.

One type of partial restraint the Alabama Supreme Court will not enforce is the "no switch" agreement. A "no switch" agreement is an arrangement between competitors where each agrees not to hire the other's employees. In both *Defco, Inc. v. Decatur Cylinder, Inc.*,[110] and *Dyson Conveyor Maintenance, Inc. v. Young & Vann Supply Co.*,[111] the court refused to enforce these agreements. In both cases, the employers argued that the provisions were only partial restraints, because they did not foreclose the employees from gainful employment elsewhere. The Alabama Supreme Court disagreed, reasoning that in neither case had the employees themselves agreed with their employer not to be employed by the competitor. Because the agreements did not meet any of the exceptions found in the Alabama statute, they were struck down.

REMEDIES FOR VIOLATION

The normal remedy for one seeking to enforce a covenant not to compete is an injunction prohibiting the covenantor from violating the agreement.[112] In addition to obtaining an injunction prohibiting competition, a party may be entitled to damages for breach of the covenant.[113] Finally, a new employer may be enjoined from employing the party agreeing not to compete, or may be assessed damages for interfering with the covenant.[115]

LAW TO BE APPLIED

Quite often, contracts containing covenants not to compete, like other contracts, provide that the contract shall be governed by the law of another state. The court recently was confronted with such a situation in *Cherry, Bekaert & Holland v. Brown*,[116] where an accountant signed a partnership agreement providing that North Carolina law would govern. Under North Carolina law, the contract was enforceable; under Alabama law, it was not. The Alabama Supreme Court, declaring that the covenant at issue "clearly flies directly in the face of the public policy of Alabama," refused to enforce the contractual choice of law provision and applied Alabama law to void the agreement.[117]

CONCLUSION

As may be evident from this article, it is often difficult to predict where a trial or appellate court may draw the fine line between reasonable protection of an employer's or purchaser's business and an unreasonable restraint on trade. As the court cautioned in *Robinson v. Computer Servicenters, Inc.*,[118]

"[E]ach particular contract must be tested by determining on the facts *of the particular case* whether the restriction upon one party is greater than is reasonably necessary for the protection of the other party." While this article is in no way exhaustive, it is hoped that it provides some guidance in the drafting of restraints on competition and some assistance to counsel who may be drawn in after litigation commences. ■

Endnotes

1. The predecessor to this article appeared in the November 1983 edition of *The Alabama Lawyer*. While this article generally employs the same format as its predecessor, it emphasizes the cases decided and doctrines developed since 1983. However, unlike the previous article, this article does not address any antitrust implications on this subject matter.
2. *See generally* a. Valiulis, *Covenants Not To Compete: Forms, Tactics, and the Law* (1985 & Supp. 1992).
3. *Ala. Code* § 8-1-1 (1975).
4. *Hill v. Rice*, 259 Ala. 587, 591, 67 So. 2d 789, 793 (1953) (quoting *Arthur Murray Dance Studios of Cleveland v. Witter*, 105 N.E.2d 685, 687 (Ohio C.P. 1952)).
5. Unpublished memorandum opinion entered in *Consultants & Designers, Inc. v. Butler Service Group, Inc.*, No. CV 80-PT-0754-S (N.D. Ala. Nov. 3, 1981).
6. *Ala. Code* § 8-1-1 (1975).
7. *See Advance Indus. Sec., Inc. v. William J. Burns Int'l Detective Agency*, 377 F.2d 236 (5th Cir. 1967); *C & C Products, Inc. v. Premier Indus. Corp.*, 290 Ala. 179, 275 So. 2d 124 (1972).
8. 259 Ala. 587, 67 So. 2d 789 (1953).
9. 285 Ala. 89, 229 So. 2d 480 (1969).
10. 285 Ala. at 91, 229 So. 2d at 483; *see also Clark v. Liberty Nat'l Life Ins. Co.*, ___ So. 2d ___, 1992 WL 207 (Ala. Jan. 3, 1992) (holding that consideration for covenant signed on April 1, 1985 was employment until March 4, 1988); *but see Robinson v. Computer Servicenters, Inc.*, 346 So. 2d 940 (Ala. 1977) (enforcement of covenant denied where employer intended to terminate employee at the time covenant was signed); *Mason Corp. v. Kennedy*, 286 Ala. 639, 244 So. 2d 585 (1971) (refusing to enforce covenant for full five-year duration where it was "uncertain" what consideration was "moving to employee").
11. 434 So. 2d 1380 (Ala. 1983).
12. *Sheffield v. Stoudenmire*, 553 So. 2d 125, 126 (Ala. 1989) (quoting *Robinson*, 346 so. 2d at 943).
13. 502 So. 2d 689, 693 (Ala. 1986).
14. *Friddle v. Raymond*, 575 So. 2d 1038, 1040 (Ala. 1991) (quoting *Odess v. Taylor*, 282 Ala. 389, 396, 211 So. 2d 805, 812 (1980)).
15. *Salisbury v. Semple*, 565 So. 2d 234 (Ala. 1990); *Odess v. Taylor*, 282 Ala. 389, 211 So. 2d 805 (1968).
16. *Friddle*, 575 So. 2d at 1040.
17. *Cherry, Bekaert & Holland v. Brown*, 582 So. 2d 502 (Ala. 1991); *Mann v. Cherry, Bekaert & Holland*, 414 So. 2d 921 (Ala. 1982); *Thompson v. Wiik, Reimer & Sweet*, 391 So. 2d 1016 (Ala. 1980).
18. *Burkett v. Adams*, 361 So. 2d 1 (Ala. 1978).
19. 382 So. 2d 1135 (Ala. Civ. App., 1980)
20. *Premier Indus. Corp. v. Marlow*, 292 Ala. 407, 295 So. 2d 396, *cert. denied*, 419 U.S. 1033 (1974); *C& C Products, Inc. v. Fidelity & Deposit Co.*, 512 F.2d 1375 (5th Cir. 1975); *Blalock v. Perfect Subscription Co.*, 458 F. Supp. 123 (S.D. Ala. 1978), *aff'd*, 599 F.2d 743 (5th Cir. 1979).
21. *Premier Indus.*, 292 Ala. 407, 295 So. 2d 396.
22. *Premier Indus.*, 292 Ala. at 411-412, 295 So. 2d at 299 (quoting *Odess v. Taylor*, 282 Ala. 389, 396, 211 So. 2d 805, 811 (1968)).
23. 566 So. 2d 728 (Ala. 1990).
24. *See also Russell v. Birmingham Oxygen Serv., Inc.*, 408 So. 2d 90 (Ala. 1981) (holding wholly-owned subsidiary could not enforce covenants between its employees and its parent corporation); Unpublished memorandum opinion entered in *Metromedia, Inc. v. Jennings*, no. CV 83-H-5866-NE (M.D. Ala. 1984) (holding corporation which purchased all of the assets of another corporation could not enforce the covenants the purchased corporation had with its employees).
25. *Central Bancshares of the South, Inc. v. Puckett*, 584 So. 2d 829 (Ala. 1991).
26. *Clark v. Liberty Nat'l Life Ins. Co.*, ____So. 2d _____, 1992 WL 207 (Ala. Jan. 3, 1992); *James S. Kemper & Co. Southeast, Inc. v. Cox & Assocs., Inc.*, 434 So. 2d 1380 (Ala. 1983).
27. *Booth v. WPMI Television Co.*, 533 So. 2d 209 (Ala. 1988).
28. *Cullman Broadcasting Co. v. Bosley*, 373 So. 2d 830 (Ala. 1979().
29. *Tyler v. Eufaula Tribune Publishing Co.*, 500 So. 2d 1005 (Ala. 1986).
30. *Parker v. Ebsco Indus.*, 282 Ala. 98, 209 So. 2d 383 (1968).
31. *Daughtry v. Capital Gas Co.*, 285 Ala. 89, 229 So. 2d 480 (1969).
32. *Shelton v. Shelton*, 238 Ala. 489, 192 So. 55 (1939).
33. *Rush v. Newsom Exterminators*, 261 Ala. 610, 75 So. 2d. 112 (1954); *Slay v. Hess*, 252 Ala. 455, 41 So. 2d 582 (1949); *Dobbins v. Getz Exterminators of Alabama, Inc.*, 382 So. 2d 1135 (Ala. Civ. App. 1980).
34. *Daniel v. Trade Winds Travel, Inc.*, 532 So. 2d 653 (Ala. Civ. App. 1988).
35. *Dixon v. Royal Cup, Inc.*, 386 So. 2d 481 (Ala. Civ. App. 1980).
36. *Central Bancshares of South, Inc. v. Puckett*, 5834 So. 2d 829 (Ala. 1991) (quoting *James S. Kemper & Co. Southeast, Inc. v. Cox & Assocs., Inc.*, 434 So. 2d 1380, 1384 (Ala. 1983)).
37. 413 So. 2d 1141 (Ala. 1982).
38. *Id.* at 1142 (quoting *Cullman Broadcasting Co. v. Bosley*, 373 So. 2d 830, 836 (Ala. 1979)).
39. 413 So. 2d at 1143.
40. 434 So. 2d 1300 (Ala. 1983).
41. *Id.* at 1384.
42. 502 So. 2d 689 (Ala. 1986).
43. *Id.* at 692.
44. *Id.*; *see also Orkin Exterminating Co. v. Etheridge*, 582 So. 2d 1102, 1104 (Ala. 1991) (finding employer lacked protectable interest in customer list "available to anyone who walked into [employer's] office").
45. *Sheffield v. Stoudenmire*, 553 So. 2d 125 (Ala. 1989).
46. *Chavers v. Copy Products Co.*, 519 So. 2d 942 (Ala. 1988); *Greenlee v. Tuscaloosa Office Prods. & Supply Co., Inc.*, 474 So. 2d 669 (Ala. 1985).
47. *Birmingham Television Corp. v. DeRamus*, 502 So. 2d 761 (Ala. Civ. App. 1986).
48. ___ So. 2d ___, 1992 WL 207 (Ala. Jan. 3, 1992).
49. 584 So. 2d 829 (Ala. 1991).
50. *Id.* at 831 (quotation marks and citation omitted).
51. 907 F.2d 1085 (11th Cir. 1990).
52. *Id.* at 1087-1088.
53. *Id.* at 1088.
54. *Central Bancshares*, 584 So. 2d at 831.
55. *See also Cullman Broadcasting Co. v. Bosley*, 373 So. 2d 830, 835 (Ala. 1979).
56. *McNeel Marble Co. v. Robinette*, 259 Ala. 66, 69, 65 So. 2d 221, 223 (1953).
57. *Cullman Broadcasting*, 373 So. 2d at 835; *Mason Corp. v. Kennedy*, 286 Ala. 639, 645, 244 So. 2d 585, 590 (1971).
58. 286 Ala. 639, 244 So. 2d 585.
59. 286 Ala. at 645, 244 So. 2d at 590.
60. 907 F.2d 1085 (11th Cir. 1990)
61. *Id.* at 1088; *see also James S. Kemper & Co. Southeast Inc. v. Cox & Assocs. Inc.*, 434 So. 2d 1380, 1385 (Ala. 1983) (noting that "the area in which the [insurance] agent was active for the insurance company" is the appropriate territory to enjoin competition).
62. *Daughtry v. Capital Gas Co.*, 285 Ala. 89, 93, 229 So. 2d 480, 484 (1969).
63. *Central Bancshares*, 584 So. 2d at 832; *James S. Kemper*, 434 So. 2d at 1385.
64. *Parker v. Ebsco Indus.*, 282 Ala. 98, 104, 209 So. 2d 383, 386 (1968).
65. *Clark v. Liberty Nat'l Life Ins. Co.*, ___ So. 2d ____, 1992 WL 207 (Ala. Jan. 3, 1992); *Central Bancshares*, 584 So. 2d at 831; *James S. Kemper*, 434 So. 2d at 1384.
66. *Clark*, 1992 WL 207 (quoting *James S. Kemper*, 434 So. 2d at 1385).
67. 286 Ala. 639, 244 So. 2d 585 (1971).
68. *See Sheffield v. Stoudenmire*, 553 So. 2d 125, 126-27 (Ala. 1989); *Chavers v. Copy Products Co.*, 519 So. 2d 942, 945 (Ala. 1988); *Calhoun v. Brendle, Inc.*, 502 So. 2d 689, 694 (Ala. 1986).
69. 519 So. 2d 942 (Ala. 1988).
70. *Id.* at 945.
71. *Sheffield*, 553 So. 2d 125.
72. *Id.* at 126-127.
73. 439 So. 2d 70 (Ala. 1983).
74. *Id.* at 74.
75. *See Central Bancshares of the South, Inc. v. Puckett*, 584 So. 2d 829, 832 (Ala. 1991).
76. *Russell v. Mullis*, 479 So. 2d 727, 729 (Ala. 1985); *Files v. Schaible*, 445 So. 2d 257, 260 (Ala. 1984); *Maddox v. Fuller*, 233 Ala. 662, 173 So. 12 (1937).
77. *Joseph v. Hopkins*, 276 Ala. 18, 23-24, 158 So. 2d 660, 665 (1963) (citing *Collas v. Brown*, 211 Ala. 443, 100 So. 769 (1924)).
78. 575 So. 2d 1038 (Ala. 1991).
79. *Id.* at 1040.
80. 391 So. 2d 1016 (Ala. 1980).
81. *Salisbury v. Semple*, 565 So. 2d 234, 236 (Ala. 1990); *Mann v. Cherry, Bekaert & Holland*, 414 So. 2d 921, 924 (Ala. 1982).
82. *Salisbury*, 565 So. 2d at 236 (purchaser required to continue payments where 70 percent of the purchase price was allocated to the covenant not to compete and 30 percent for goodwill); *Mann*, 414 So. 2d at 924 (contract not void even though covenant unenforceable where purchaser also obtained client list and goodwill).
83. 355 So. 2d 681 (Ala. 1977).
84. 439 So. 2d 70 (Ala. 1983).
85. *See also Kershaw V. Knox Kershaw, Inc.*, 523 So. 2d 351, 357 (Ala. 1988) (holding that a stock swap between two brothers constituted a sale of goodwill).
86. 479 So. 2d 727 (Ala. 1985).
87. *Id.* at 729 (citing *Daughtry v. Capital Gas Co.*, 285 Ala. 89, 229 So. 2d 480 (1969)).
88. 559 So. 2d 569 (Ala. 1990).

89. 445 So. 2d 257 (Ala. 1984).
90. *Id.* at 261.
91. *Kershaw v. Knox Kershaw, Inc.*, 523 So. 2d 351, 359 (Ala. 1988).
92. *Id.* at 359.
93. *Central Bank of the South v. Beasley*, 439 So. 2d 70, 73 (Ala. 1983).
94. *See Kershaw*, 523 So. 2d at 359 (holding covenant enforceable only to extent that it prohibited where business was conducted prior to the sale); *Central Bank*, 439 So. 2d at 73.
95. *Corson v. Universal Door Systems, Inc.*, ___ So. 2d ___, 1991 WL 172434 (Aug. 9, 1991); *Hoppe v. Preferred Risk Mut. Ins. Co.*, 470 So. 2d 1161 (Ala. 1985); *FAMEX, Inc. v. Century Ins. Servs., Inc.*, 425 So. 2d 1053 (Ala. 1982); *see also Hughes Assocs., Inc. v. Printed Circuit Corp.*, 631 F. Supp. 851 (N.D. Ala. 1986)
96. 470 So. 2d at 1163.
97. *Id.* at 1164.
98. 582 So. 2d 502 (Ala. 1991).
99. *Id.* at 506.
100. 495 So. 2d 630 (Ala. 1986).
101. 454 So. 2d 1366 (Ala. 1984).
102. 275 Ala. 184, 153 So. 2d 619 (1963).
103. *Alabama-Tennessee Natural Gas Co.*, 275 Ala. at 193, 153 So. 2d at 627 (quotation marks and many citations omitted) (quoted in *Hibbett Sporting Goods, Inc. v. Biernbaum*, 391 So. 2d 1027 (Ala. 1980)).
104. *Hibbett Sporting Goods*, 391 So. 2d 1027.
105. *Terre Haute Brewing Co. v. McGeever*, 198 Ala. 474, 73 so. 889 (1916).
106. *Courington v. Birmingham Trust Nat'l Bank*, 347 So. 2d 377 (Ala. 1977); *Southern Farm Bureau Life Ins. Co. v. Mitchell*, 435 So. 2d 745 (Ala. Civ. App. 1983).
107. 347 So. 2d 377.
108. Before employing a forfeiture provision such as the one used by the bank in *Courington*, one should review the Employee Retirement Income Security Act of 1974 which preempts state law regarding covered employee benefit plans and prohibits forfeiture of employee benefits except as permitted under the Act.
109. 435 So. 2d 745.
110. ___ So. 2d ___, 1992 WL 208 (Ala. Jan. 3, 1992).
111. 529 So. 2d 212 (Ala. 1988).
112. *See, e.g., Booth v. WPMI Television Co.*, 533 So. 2d 209 (Ala. 1988) (enjoining television advertising salesmen from working for another television station within a 60 mile radius for one year).
113. *Clark*, 1992 WL 207 (employer awarded $14,819.61 for employee's violation of covenant); *Files v. Schaible*, 445 So. 2d 257 (Ala. 1984) (restaurant purchaser awarded $50,000 where seller breached covenant by opening competing by opening competing business across the street).
114. *Daughtry v. Capital Gas Co.*, 285 Ala. 89, 229 So. 2d 480 (1970).
115. *James S. Kemper & Co. Southeast, Inc. v. Cox & Associates, Inc.*, 434 So. 2d 1380 (Ala. 1983).
116. 582 So. 2d 502 (Ala. 1991).
117. *See also Blalock v. Perfect Subscription Co.*, 458 F. Supp. 123 (S.D. Ala. 1978), *aff'd*, 599 F. 2d 743 (5th Cir. 1979).
118. 346 So. 2d 940, 943 (Ala. 1977) (emphasis in original) (citing *Hill v. Rice*, 259 Ala. 587, 67 So. 2d 789 (1953)).

CORPORATE COUNSEL SECTION

To better serve the needs of corporate attorneys in Alabama, the Alabama State Bar formed the Corporate Counsel Section Task Force. The task force was chartered to determine if there is sufficient interest among members of the bar to support a Corporate Counsel Section. Several of Alabama's in-house corporate attorneys expressed a desire to see a section address the particular needs of corporate counsel.

The proposed section would serve members of the state bar who regularly provide legal services to corporate clients, either as in-house corporate attorneys or as attorneys in private practice who regularly advise corporate clients. The initial, informal investigation has uncovered a surprising number of attorneys in the state whose practice fits one of these two criteria.

The benefits of participation in the section would be numerous. First, by networking with similarly-situated attorneys, members could exchange information about library holdings, sample policies and practices, methods for managing in-house law offices, in-house training and development, and other topics. Second, the section would seek to provide continuing legal education programs which focus on the needs of in-house counsel in Alabama. Third, a quarterly newsletter could address current issues of interest to in-house counsel. Other publications might include various checklists submitted by members of the section, and an Alabama Corporate Counsel's Desk Reference. Among other possible section activities is a computer bulletin board accessible by any members of the section having the appropriate computer technology.

Members could contribute to the section's accomplishments by participating in committee addressing areas such as:
- in-house attorney monitoring and development programs;
- the development and maintenance of in-house legal libraries;
- in-house practice and technology;
- policies, practices and procedures;
- ethics;
- law department management;
- section publications; and
- section programs.

The task force is now trying to identify all members of the state bar who would be interested in the creation of such a section. If you are interested, please complete and return the attached response card. This does not commit you to become a member of the section (if formed), nor does it commit you to perform any work toward creating the section. Rather, it simply helps the task force determine the level of interest in forming such a section. In addition to this message in *The Alabama Lawyer*, a direct mail campaign is being conducted to attorneys who may not be directly involved in state bar activities, but who may want to participate in a corporate counsel program.

Jud Hennington, Task Force Chairperson

I would be interested in joining the proposed **Corporate Counsel Section** of the Alabama State Bar.

Name

Firm

Mailing address, City, State, ZIP)

Please return by June 1, 1992, to Keith B. Norman, Director of Programs, Alabama State Bar, P.O. Box 671, Montgomery, AL 36101.

About Members, Among Firms

ABOUT MEMBERS

Theodore L. Hall announces that he has moved his law office to 521 Two Office Park, Mobile 36609. Phone (205) 343-8363.

K. Stephen Jackson announces the relocation of his office to 2420 Arlington Avenue, Birmingham 35205. Phone (205) 933-2900.

Anthony R. Livingston announces the opening of his office at One Hall Street at Daleville Avenue, Daleville 36322. The mailing address is P.O. Box 445, Daleville 36322. Phone (205) 59-4539.

Robert E. Moorer announces the relocation of his office to 950 Financial Center, 505 Twentieth Street North, Birmingham 35203-2678. Phone (205) 328-9000.

Rodger K. Brannum, formerly of Price & Brannum, announces the relocation of his office to 166 South Main Street, Suite 203-B, Enterprise 36330. Phone (205) 393-1666.

Marona Posey announces her selection as the Chief Deputy Clerk for the United States Bankruptcy Court, Northern District of Alabama. Her mailing address is 1800 Fifth Avenue North, Room 108, Birmingham 35203. Phone (205) 731-3742.

Richard K. Keith announces the relocation of his office to 547 South Lawrence Street, Montgomery 36104. Phone (205) 264-6776.

Otto A. Thompson, Jr., formerly Counsel, U.S. Naval Supply Depot, Yokosuka, Japan, has been reassigned to the position of Counsel, U.S. Naval Regional Contracting Center, Singapore, and continues to act as the Pacific Area Counsel for the Naval Supply Systems Command. This position is a civilian position within the office of the General Counsel of the Navy. The mailing address is NRCC Singapore, FPO AP 96534-2100. Phone (65) 221-6266.

Linda Nobles announces a change of address to PSC 557, Box 1806, FPO AP 96379-1806, pursuant to relocation to Okinawa, Japan.

Marion F. Walker announces the opening of her firm at Suite 100, 2151 Highland Avenue Birmingham 35205. Phone (205) 930-6900.

Larry D. Smith announces that he recently became a founding shareholder in **Cabaniss, Burke & Wagner** with offices in Orlando and Tallahassee, Florida. **Michael J. Wiggins**, another member of the Alabama State Bar, is associated with the firm. The address of the Orlando office is Olympia Place, Suite 1800, 800 North Magnolia Avenue, P.O. Box 2513, Orlando, Florida 32802-2513. Phone (407) 246-1800.

AMONG FIRMS

Barker & Janecky announces the relocation of the firm's Birmingham office to Suite 3120, AmSouth-Harbert Plaza, 1901 Sixth Avenue North, Birmingham 35203, and that **Judson W. Wells** has become a member of the firm, and that **Thomas Coleman, Jr., Susan Lee Gunnels**, former staff attorney for senior Associate Justice Hugh A. Maddox, and **Daniel R. Klasing** have become associated with the firm.

Richard F. Pate & Associates announces that **Allen A. Ritchie** and **Susan S. Powers** have become associated with the firm.

Thomas E. Baddley, Jr. and **Wendy Brooks Crew** announce the merger of their practices and the formation of **Baddley & Crew, P.C.,** Suite 550, Park Place Tower, 2001 Park Place North, Birmingham 35203. Phone (205) 252-0919.

Lanier, Ford, Shaver & Payne announces that **Elizabeth Williams Abel** and **Y. Albert Moore, III** have become members of the firm and that **Jeffrey T. Kelly** has become associated with the firm.

Robbins, Owsley & Wilkins announces the firm's relocation to 726 Stone Avenue, Suite A, Talladega 35160. Phone (205) 362-1650.

Miller, Hamilton, Snider & Odom announces that **Carroll E. Blow, Jr., Matthew C. McDonald** and **Mark J. Tenhundfeld** have become members of the firm and **Joseph C. Gill, Jr.** has become *of counsel* to the firm and **James Rebarchak** has become associated with the firm.

Beasley, Wilson, Allen, Mendelsohn, Jemison & James announces that **David W. Vickers**, former assistant attorney general, State of Alabama, and **L. Landis Sexton**, former staff attorney to Alabama Supreme Court Justice H. Mark Kennedy have become associated with the firm.

Veigas & Cox announces that **J. Ray Warren**, chairperson, Alabama Ethics Commission and former claims superintendent, State Farm Mutual Automobile Insurance Company, has become associated with the firm.

Johnson & Cory announces that **David Madison Tidmore** has become an associate of the firm. The mailing address is 300 Twenty First Street North, Birmingham 35203. Phone (205) 328-1414.

Hand, Arendall, Bedsole, Greaves & Johnston announces that **Henry T. Morrissette, Allen S. Reeves** and **J. Stephen Harvey** have become associated with the firm.

Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves announces that **Stephen R. Copeland, William Austin Mulherin, III** and **Tara E. Thompson** have become associated with the firm. The mailing address is 1300 AmSouth Center, P.O. Box 290, Mobile 36601.

Rushton, Stakely, Johnston & Garrett announces that **Helen Crump Wells** has become a member of the firm. The mailing address is P.O. Box 270, Montgomery 36101-0270.

Barnett, Noble, Hanes & O'Neal announces that **Daniel Sparks** has become a member of the firm and that **Cecil G. Duffee, III** has become associated with the firm. The firm name has changed to **Barnett, Noble, Hanes & Sparks**. The address remains at 1600 City Federal Building, Birmingham 35203.

NOTICE

GRADUATE TAX PROGRAM TO BE CANCELLED

The University of Alabama announced recently that its Graduate Tax Program will not start another cycle this fall. The law school had conducted its Graduate Tax program since 1977, offering the LL.M. (taxation) degree. The program operates on a two-year cycle, meeting in the evenings and on weekends. The program has been offered in Birmingham, Mobile, Montgomery and Huntsville. Because of funding limitations at the University, the program will not start another two-year cycle in August 1992.

The decision does not indicate an end of the Graduate Tax Program. The law school hopes to resume offering the program in the near future.

Yearout, Myers & Traylor announces that **Bryan Scott Tyra** has become an associate of the firm. Offices are located at 2700 SouthTrust Tower, Birmingham 35203

Sarah F. Browne and Jo Alison Taylor have relocated their respective law offices to Suite 725, Brown Marx Tower, 2000 First Avenue North, Birmingham 35203.

McElvy & Ford announces that **Philip N. Lisenby** and **Mary S. Burns** have become associated with the firm. Offices are located at 621 Greensboro Avenue, Tuscaloosa 35401. Phone (205) 349-2000 and at 122 Court Square East, Centreville 35042. Phone (205) 926-9767.

Drinkard, Ulmer, Hicks & Leon announces that **Winn Faulk** has become associated with the firm. He also operates a branch office in Baldwin County, at P.O. Box 940, Spanish Fort 36527. Phone (205) 626-8051.

Hill, Hill, Carter, Franco, Cole & Black announces that **Robert C. Black, Jr.** and **William C. McGowin** have become associated with the firm. Offices are located at 73 Washington Avenue, P.O. Box 116, Montgomery 36101-0116. Phone (205) 834-7600.

Williams, Harmon & Hardegree announces that **T. Eric Ponder** has become associated with the firm. Offices are located at 1130 Quintard Tower, Suite 403, Anniston 36202.

Nolen & Nolen announces that **J. Merrell Nolen, Jr.** has become a member of the firm. Offices are located at 309 First Avenue, Northeast, Fayette 35555. Phone (205) 932-3281.

Bradley, Arant, Rose & White announces that **G. Edward Cassady, III, David G. Hymer, Michael D. McKibben** and **Michael R. Pennington**, all of the Birmingham office, and **Scott E. Ludwig** of the Huntsville office have become partners in the firm.

Trimmier, Atchison & Hayler announces that **Stephen P. Morton, Jr.** has become associated the firm.

Floyd, Keener, Cusimano & Roberts announces that **Gary J. Bone** and **Philip E. Miles** have become associated with the firm. Offices are located at 816 Chestnut Street, Gadsden 35901. Phone (205) 547-6328.

Walter, Henley, & Lawyer announces that **John Elgin McCulley** has become associated with the firm. The mailing address is 2101 Bridge Avenue, Northport 35401. Phone (205) 339-5151.

Altman, Kritzer & Levick announces that **Elizabeth Holland Hutchins** has become a partner in the firm, with offices located at 6400 Powers Ferry Road, Northwest, Powers Ferry Landing, Suite 224, Atlanta, Georgia 30339. Phone (404) 955-3555.

Wilkins, Bankester, Biles & Wynne announces that **Helen D. Walton** has joined the firm and will practice in the Fairhope office, 221 Fairhope Avenue, P.O. Box 1367, Fairhope 36533. Phone (205) 928-1915.

Sasser & Littleton announces that **Gregory D. Crosslin** has become a member of the firm, located in the Colonial Finance Center, One Commerce Street, Suite 201, Montgomery 36104. Phone (205) 843-7800.

Corley, Moncus & Ward announces that **Kathryn H. Sumrall** has become a partner of the firm, located at 2100 Southbridge Parkway, Suite 650, Birmingham 35209. Phone (205) 879-5959.

Emond & Vines announces that **Kirk Davenport** has joined the firm as an associate. The mailing address is 1900 Daniel Building, P.O. Box 10008, Birmingham 35202-0008. Phone (205) 324-4000.

Najjar Denaburg announces that **Leonard Wertheimer, III** has joined the firm as a member, and that **Richard W. Theibert** has joined the firm as an associate. The mailing address is 2125 Morris Avenue, Birmingham 35203. Phone (205) 250-8400.

O'Bannon & O'Bannon announces that **Christopher E. Connolly**, formerly associated with the firm, has become a member of the firm. Offices are located at 402 South Pine Street, Florence 35630, and the mailing address is P.O. Box 1428, Florence 35631. Phone (205) 767-6731.

Adams & Reese announces the opening of a new office in Washington, D.C., the fourth for the firm.

McRight, Jackson, Dorman, Myrick & Moore announces that **Patricia J. Ponder** and **David R. Peeler** have become partners in the firm. The office is located at 1100 First Alabama Bank Building, 106 St. Francis Street, Mobile 36602. Phone (205) 432-3444. ■

DISCIPLINARY REPORT

Disbarment

•Birmingham attorney **Barbara Fox Jones** has been disbarred from the practice of law pursuant to Rule (8)a, Rules of Disciplinary Procedure (Interim) effective February 11, 1992. [ASB No. 90-826]

Suspensions

•Tuscaloosa lawyer **Richard Owen Fant, Jr.** was suspended from the practice of law for 89 days by order of the Alabama Supreme Court, effective March 20, 1992. The Disciplinary Commission accepted Fant's conditional guilty plea in the following matters:

ASB 88-23 - Fant prepared and backdated a deed to remove 40 acres of land from a bankruptcy estate. Fant states that he had known the family for a number of years, knew they always intended to give this land to their children, and backdated the deed to help them.

ASB 89-806 - Fant contacted a juror after the jury was dismissed (hung jury) and asked her how she voted. When she told him how she voted, he became rude and profane.

ASB 89-119 - Fant was paid a fee of $1,500 by the elderly mother of a criminal defendant to petition for a rehearing or appeal to the Alabama Supreme Court. Fant did neither. [ASB Nos. 88-23, 89-806 and 89-116]

•Cullman lawyer **Eddie Lee Lewis** was suspended from the practice of law by order of the Supreme Court of Alabama, effective November 15, 1991, for a period of three years. Disciplinary charges pending against Lewis were deemed admitted by the Disciplinary Board of the Alabama State Bar by virtue of Lewis' failure to file an answer or other responsive pleadings. The charges involve the following:

ASB 90-32 - In August 1989, Lewis was retained to file a bankruptcy and was paid a fee of $600. On January 10, 1990, Lewis was informed by the client that he wanted Lewis to withdraw since he had not filed the bankruptcy. On January 17, 1990, Lewis, nevertheless, instituted a bankruptcy proceeding on behalf of his client but issued a worthless check to the Bankruptcy Court in payment of the filing fee.

ASB 90-279 - In December 1989, Lewis was retained to obtain an uncontested divorce and was paid a fee of $458. Although all necessary documents were signed, Lewis never filed the petition nor did he refund any portion of the fee.

ASB 90-390 - In February 1987, Lewis was retained to file a bankruptcy and was paid a fee of $510. Lewis never filed the petition nor did he refund any portion of the fee.

ASB 90-588 - In February 1990, Lewis was retained to obtain a divorce and paid a fee of $457. Lewis never filed the divorce petition nor did he refund any portion of the fee.

ASB 90-634 - Lewis entered into a barter arrangement with a client wherein Lewis was permitted to lease the client's house in exchange for legal services. Lewis failed to provide the agreed-to legal services. The client was forced to file an unlawful detainer action to recover possession of the premises.

ASB 90-719 - In October 1988, Lewis was appointed to represent a criminal defendant at trial and on appeal. The criminal defendant was sentenced to life without parole and, thereafter, tried on numerous occasions, unsuccessfully, to contact Lewis. Lewis willfully refused to correspond with his client, refused to provide him with the requested trial transcript or appellant brief, and did not inform his client that his conviction was affirmed.

ASB 90-990 - Lewis was retained to represent a client in two criminal matters and a divorce and was paid fees of $5,000 and $475, respectively. Lewis provided no legal services to his client nor did he refund any portion of the fee.

[ASB Nos. 90-32, 90-279, 90-390, 90-588, 90-634, 90-719, and 90-990]

• Wetumpka attorney **Blake Alan Green** has been temporarily suspended from the practice of law by the Disciplinary Commission of the Alabama State Bar, pursuant to Rule 20, Rules of Disciplinary Procedure (Interim), effective March 31, 1992.

(Rule 20(a) – Pet # 92-01)

Surrender of License

•Athens attorney **Thomas S. Woodruff, Jr.** has, in response to charges filed against him by the office of General Counsel of the Alabama State Bar, voluntarily surrendered his license to practice law in all courts of the State of Alabama, effective March 1, 1992.

Public Reprimands

•On February 28, 1992, Montgomery attorney **Richard C. Brooks** was publicly reprimanded by the Alabama State Bar. Brooks had represented a criminal defendant in the Montgomery County Circuit Court on several pending felony charges. Subsequent to the client's entering a plea of guilty, Brooks wrote to the client advising the client that the district attorney's office was going to make a recommendation that the client receive a maximum of 15 years, and further, that the trial court judge had agreed to be bound by this recommendation. However, at the sentencing hearing, Brooks made no motion on behalf of his client, and the judge, who obviously was not a party to any plea agreement, sentenced the client to 50 years.

Thereafter, the client filed a habeas corpus action. During those habeas corpus proceedings, it was disclosed that misrepresentations made by Brooks constituted ineffective assistance of counsel. The client was then resentenced by the trial court, upon recommendation of the attorney general's office, to a 15-year term. Brooks' ineffective assistance of counsel was found to have constituted a violation of DR 7-101(A)(1), [failing to seek the lawful objectives of a client], DR 1-102(A)(5), [engaging in conduct prejudicial to the administration of justice], and DR 1-102(A)(6), [engaging in conduct which adversely reflects on his fitness to practice law]. [ASB No. 90-309]

•In ASB Nos. 89-268 and 90-601(A), **Michael Lee Allsup** of Gadsden was publicly reprimanded for practicing law in a jurisdiction when to do so constituted a violation of the regulations of the profession in that jurisdiction, contrary to Disciplinary Rule 3-103(B). Allsup's license to practice law had been suspended September 15, 1987 for his failure to comply with the Alabama State Bar Rules of Mandatory Continuing Legal Education. While still under that suspension, Allsup negotiated employment as an

attorney with Leon Garmon, attorney-at-law, of Gadsden.

Thereafter, for a period of some ten weeks, Allsup engaged in the practice of law while in the employ of Garmon. Specifically, in 90-601(A), Allsup negotiated a guilty plea on behalf of a criminal defendant/client of Garmon's. Allsup appeared in the Etowah Circuit Court with and on behalf of the client when the client entered guilty pleas to pending criminal charges. Allsup also appeared with another of Garmon's clients at a preliminary hearing, and sat at counsel table with the client even though not accompanied by Garmon.

At the February 28, 1992 meeting of the board of commissioners of the Alabama State Bar, Allsup received a separate public reprimand in each of the above-referenced ASB matters. [ASB Nos. 89-268 & 90-601(A)]

•Birmingham lawyer **James B. Morton, II** was publicly reprimanded by the Alabama State Bar on February 28, 1992. Said reprimand was administered to Morton for his willfully neglecting a legal matter entrusted to him, a violation of Rule 1.3, Alabama Rules of Professional Conduct.

Morton was contacted by a client requesting that he pursue delinquent child support payments owed to the client by the client's former husband. Morton agreed to proceed on behalf of the client upon partial payment of his fee. However, even though Morton received said partial payment, he failed to proceed in a timely fashion on behalf of the client. The client, being unable to contact Morton and discuss the matter with him, filed a complaint against Morton with the bar. Morton failed to file any written response to the complaint even though requested to do so on at least three separate occasions by an investigator for the Birmingham Bar Association Grievance Committee. [ASB No. 91-467]

•**Robert M. Alton, III** of Montgomery was publicly reprimanded by the Alabama State Bar on February 28, 1992 for collecting from a client a clearly excessive fee, in violation of Rule 1.6, Alabama Rules of Professional Conduct.

Alton had entered into a written employment contract with the client whereby he was to receive an hourly rate of $150 per hour. Thereafter, the client insisted that the opposing party be responsible for Alton's fee. Alton then negotiated a $7,500 attorney's fee with the opposing party. However, this fee was contrary to the $150 per hour contractual agreement Alton had with the client, and constituted a unilateral modification of the employment agreement by Alton. The matter was subsequently settled for approximately $15,000, of which Alton received approximately $6,200. The end result was that the client received only approximately $3,000 of the $15,000 settlement proceeds due to Alton's attorney's fee and certain medical bills which had to be satisfied from the settlement proceeds. Upon investigation of the complaint filed by the client against Alton, Alton was unable to document any reasonable basis for his attorney's fee, which fee was found to be clearly excessive. [ASB No. 91-573]

• Huntsville attorney **Hilary Coleman Burton** was given a public reprimand on February 28, 1992 for willfully neglecting a legal matter entrusted to him. On September 7, 1990 Burton was hired to represent a client in a garnishment which had been filed by his ex-wife to recover child support arrearage. Burton took a $250 fee and told his client he would file documents within a week to have the garnishment terminated because the child in question had actually been residing with his client.

After the initial conference, Burton took absolutely no action on this matter. The client called him numerous times to inquire about the status, and each time was told that matters had been taken care of and that he would have a court date soon. In January 1991, the client went to the courthouse and learned that nothing had been done on his behalf. At that point, $2,283.96 had been garnished from his wages. [ASB No. 91-46]

• Birmingham attorney **William Ronald Waldrop** was publicly reprimanded February 28, 1992 for neglecting a legal matter and failing to communicate with his client.

On October 20, 1983 Waldrop was retained to handle a personal injury action. The client had fallen on the premises of a supermarket in Birmingham. Suit was filed by Waldrop on March 23, 1984. Trial was initially set for July 30, 1986, but continued until April 14, 1987 due to Waldrop's illness. The case was continued again until August 18, 1988. Finally, the case was dismissed for want of prosecution. Notice of that dismissal was sent to Waldrop on August 24, 1988. By then, the statute of limitations had run. During this entire period, the client made numerous calls to Waldrop to find out about the status of her case. Waldrop intentionally concealed the fact that the case had been dismissed by failing to communicate with her. She only learned of the dismissal after the filing of her grievance with the Birmingham Bar Association. [ASB No. 91-175(B)]

• Tuscaloosa lawyer **David A. Reid** was publicly reprimanded at the February 28 meeting of the board of bar commissioners. Reid was reprimanded for tendering a non-sufficient funds trust account check to the Sumter County Circuit Court in the amount of $531.01. These funds had previously been delivered to Reid by a client and deposited in his trust account. In addition to the check to the Sumter County Circuit Court, Reid issued an additional non-sufficient funds trust account check for the purchase of land for a client. Here, also, the money for the land purchase had been given to Reid and deposited in his trust account.

Additionally, Reid was requested to respond to the bar on three separate occasions and failed to do so. This necessitated the taking of Reid's deposition and subpoenaing his trust account records.

The Disciplinary Commission found that Reid failed to safeguard client funds in violation of Rule 1.5 of the Rules of Professional Conduct. The Commission also found that Reid's lack of cooperation with the investigation by the Office of General Counsel violated Rule 8.1(b) of the Rules of Professional Conduct. Finally, the Commission found that Reid's conduct involved dishonesty and misrepresentation, that it was prejudicial to the administration of justice and that it adversely reflected on his ability to practice law, in violation of Rules 8.4(c), (d) and (g). [ASB No. 91-71]

Transfer to Disability Inactive Status

•Birmingham lawyer **William Edward Ramsey** was transferred to disability inactive status pursuant to Rule 27, Rules of Disciplinary Procedure (Interim). The supreme court made this effective February 1, 1992. ■

ALABAMA STATE BAR BUILDING FUND HONOR ROLL

Between February 1 and April 8, 1992 the following attorneys made pledges to the Alabama State Bar Building Fund. Their names will be included on a wall in the portion of the building listing all contributors. Their pledges are acknowledged with grateful appreciation.
(For a list of those making pledges prior to February 1, please see previous issues of The Alabama Lawyer.)

Ralph Wyatt Adams

Barry R. Bennett

David R. Boyd

Michael Boyd Bryan

Billy C. Burney

William C. Carn, III

William John Causey, Jr.

James Edwin Cox

Michael Stephen Dampier

Nancy Jones Davis

Richard Edward Fikes

John Collier Gullahorn

Ronald T. Halfacre

Betsy Martin Harrison

Martha Durant Hennessy

Ralph N. Hobbs

David Lee Jones

Louis Buisch Lusk

Robert Hamilton Maxwell

James Ballard McNeill, Jr.

Aaron Scott Roebuck

Danny Lane Smith

Susan Salonimer Wagner

Joseph Daniell Whitehead

Martin Gordon Woosley

Between February 1 and April 8, 1992 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. (Please see previous issues of ***The Alabama Lawyer*** *for listings of those making contributions prior to February 1.)*

Alpha Sigma Chapter, Sigma Delta Kappa, Jones School of Law

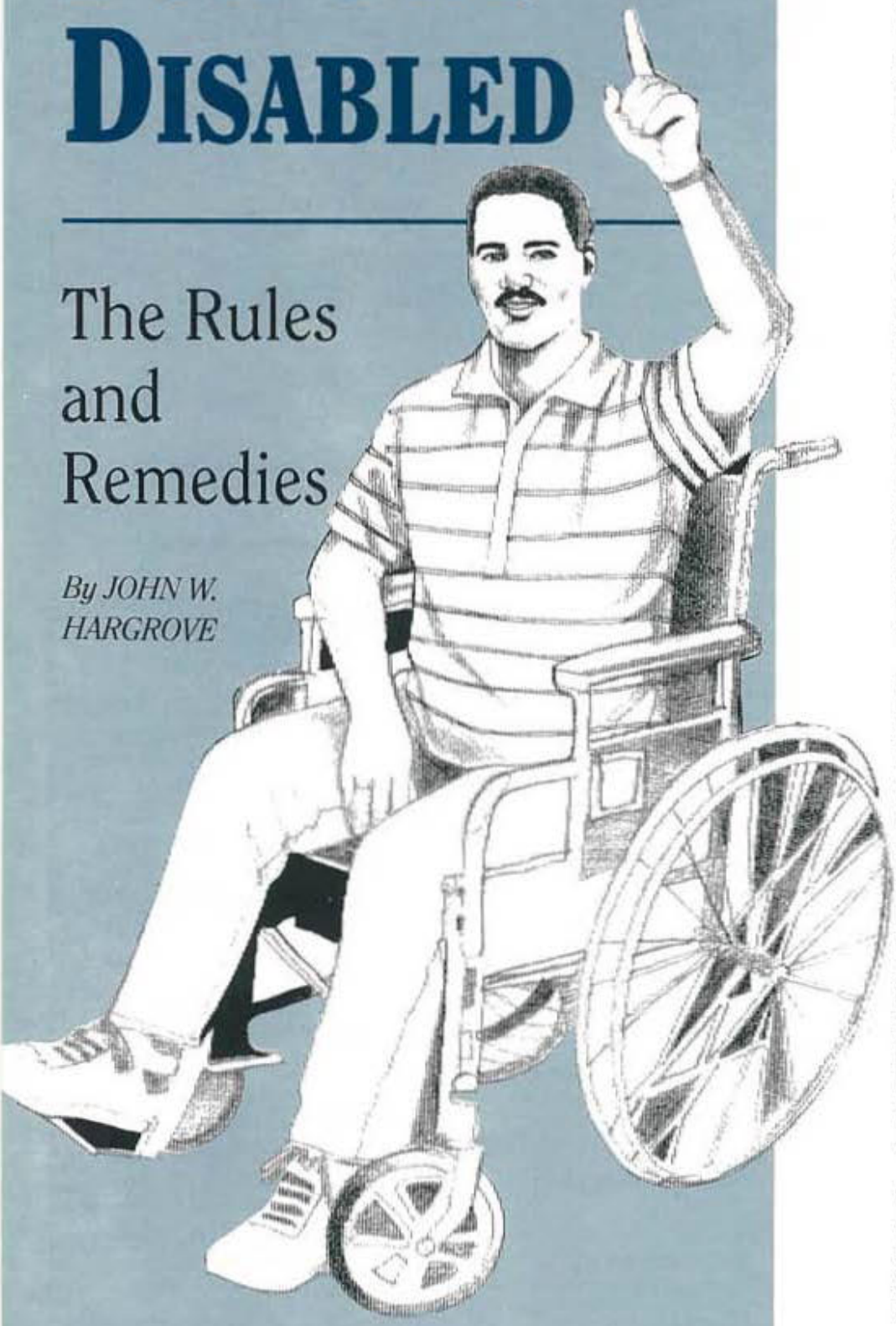
Birmingham Legal Secretaries Association

Cunningham, Bounds, Yance, Crowder & Brown

New Rights For The Disabled

The Rules and Remedies

By JOHN W. HARGROVE



What is the Americans with Disabilities Act?

President Bush signed The Americans with Disabilities Act (the "ADA" or the "Act") into law on July 26, 1990.[1] The ADA is an antidiscrimination law which protects individuals with disabilities from discrimination in employment, access to public buildings, transportation, and communications. This comprehensive new law is viewed by most as being the most significant civil rights legislation enacted by Congress in the last 25 years.

Although the movement toward comprehensive protections for individuals with disabilities began shortly after the return of American troops from the battlefields of World War II, protections for the disabled prior to the passage of the ADA were haphazard at best. The Rehabilitation Act of 1973 provided some protection for disabled individuals who sought employment with federal agencies, government contractors, and other recipients of federal funds.[2] Additionally, some local building codes included uniform standards for construction which required specific accommodations for certain disabled individuals such as those in wheelchairs.[3]

Today, however, there are some 43 million Americans — including 846,000 Alabamians — with physical and mental disabilities. These individuals now are protected by the ADA which eventually will apply to all private employers with 15 or more employees, irrespective of whether those employers receive federal funds. Many businesses simply are unprepared for the great impact the ADA will have on employment and accessibility, and Alabama lawyers no doubt will become entangled in complex new regulatory issues and, ultimately, litigation. This article is intended to address the principal compliance and enforcement issues which will arise under the ADA.

The ADA is divided into five titles. Title I prohibits discrimination in private employment, and for most employers, comes into effect on July 26, 1992. The second and fourth titles apply to public employers and telecom-

munications respectively, and the fifth title contains miscellaneous provisions applicable throughout the ADA. Title III of the ADA contains provisions regarding discrimination in public accommodations and became effective in part on January 26, 1992. Titles I and III, which apply to most private Alabama businesses (including law firms), are the subjects of this article. The rules and remedies under Title I will be discussed first below and then will be followed by a similar discussion of Title III.

Title I prohibits private employers from discriminating against qualified individual because of disability

RULES

1. Introduction

Title I of the ADA prohibits employers, employment agencies and labor unions from discriminating against a qualified individual because of a disability. The ADA proscribes such discrimination in all terms, conditions and privileges of employment. Specifically, Title I provides:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.[4]

John W. Hargrove

John W. Hargrove received his undergraduate degree from Auburn University and his law degree from Vanderbilt University where he was a Patrick Wilson Scholar. He is in his sixth year of practice with the Birmingham firm of Bradley, Arant, Rose & White, and is a member of the Board of Editors of *The Alabama Lawyer*.

The Act provides that the term "discriminate" includes segregating or classifying the disabled in a way that adversely affects their employment opportunities, participating in contractual or other arrangements that have the effect of subjecting a disabled individual to discrimination, utilizing standards that have the effect of discrimination, denying equal job benefits because of a disability, and failing to select and administer tests concerning employment in the most effective manner to ensure that the tests accurately reflect the skills or aptitude of the disabled individual rather than his or her disability.[5] Described in the next three subsections are the definitions of the key terms contained in Title I's discrimination prohibition. These are the definitions of "disability," "otherwise qualified," and "reasonable accommodation." The final subsection then describes some other miscellaneous specific provisions of Title I.

2. Who is a disabled individual?

An individual is an "individual with a disability" for the purposes of Title I's antidiscrimination provision if he or she meets one or more of the following criteria: (a) he or she has a physical or mental impairment that substantially limits one or more of the major life activities of the individual, (b) he or she has a record of such an impairment, or (c) he or she is regarded as having such an impairment.[6] Additionally, the ADA makes clear that a person who has a relationship or association with an individual who has a disability under this definition also is protected by the Act. Clearly then, those individuals who currently have a disability, used to have a disability, are regarded as having a disability, or associate with someone who has a disability all are protected by the ADA.

The legislative history of the Act indicates that a "major life activity" for the purposes of the statute means a function such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, or participating in community activities. Thus, the ADA's broad definition of an individual with a disability covers persons who traditionally have been considered as handicapped, such as those with ambulatory, visual or auditory disabilities. However, the definition also covers persons who are less obviously disabled. For example, those individuals who have a lower back injury, once had surgery for a lower back injury, are considered to have had a back injury, or are married to an individual who either has or once had a back injury all may be covered by the Act. In fact, such conditions as obesity or cosmetic disfigurement may be covered on the basis that these individuals will be "regarded as" having an impairment.

The Act does not include an exhaustive list of those disabilities which are covered by Title I, but employers should expect that the definition of disability will include such conditions as orthopaedic, visual, speech, hearing, muscular, mental, emotional, and learning disabilities. Such conditions as cancer, heart disease, lung disease, cerebral palsy, epilepsy, multiple sclerosis, diabetes, and AIDS clearly would be covered. Although individuals who currently are engaging in illegal use of drugs are not covered by the Act's definition, rehabilitated drug abusers and recovered alcoholics are covered.[7]

Certain "behavioral disorders" specifically are excluded from the definition of disability. Such conditions include homosexuality, transvestism, transsexualism, compulsive gambling, kleptomania, and pyromania.[8]

3. Who is otherwise qualified?

The term "otherwise qualified" as used in Title I's antidiscrimination provision is an extremely important concept under the ADA. The purpose of this concept is to prohibit discrimination against an individual with a disability who has the ability to complete the primary functions of a job, even though that individual might have difficulty or even might be completely unable to perform occasional tasks associated with the job. By way of example, an employer seeking to fill an inside clerical position cannot refuse to hire a person whose disability prevents that person from obtaining a driver's license if, only on an occasional basis, that clerical person normally drives from one company facility to another to perform a

job-related task. Of course, on the other hand, an over-the-road trucking company would not have to hire that same person for a driving position because driving would be the principal function of the employee hired.

The ADA refers to "essential functions" and "marginal functions" to clarify those job duties which will be sufficient to exclude an individual from consideration for a job and those which will not be sufficient.[9] Essential functions are those functions which are "intrinsic" to a position. Marginal functions are those which are only tangential to the job or are only occasionally associated with the job. Although an employer cannot determine unilaterally under the ADA what job functions are "essential," the ADA does provide that the employer's judgment should be given consideration in making this determination. Job descriptions are considered as evidence of essential functions of a job, especially when those job descriptions delineate essential and marginal functions.[10]

4. What is a reasonable accommodation?

The ADA requires employers to make reasonable accommodations to otherwise qualified disabled applicants or employees:

> [T]he term "discriminate" includes —
>
> not making reasonable accommodations to the known physical or mental limitation of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity ....[11]

Whether an accommodation is "reasonable" depends upon the concept of "undue hardship." This inquiry is purely cost-based, and the Act sets forth four factors to be evaluated: (a) the nature and cost of the accommodation needed, (b) the financial situation of the facility or facilities involved, (c) the overall financial situation of the employer, and (d) the nature of the employer's operations.[12] With regard to what types of accommodations may be reasonable, the ADA suggests job restructuring, modified work schedules, reassignment, acquisition or modification of equipment or devices, modification of tests or training materials, and the provision of qualified readers and interpreters.[13]

5. Other specific provisions

Title I of the ADA contains a number of specific prohibitions which are intended to protect further those individuals with disabilities. For example, the Act prohibits pre-employment medical inquiries, including those on employment applications, and also prohibits pre-employment medical examinations.[14] The only inquiries employers may make pre-employment are inquiries related to whether an applicant can perform the essential functions of the job applied for, with or without reasonable accommodation. Medical examinations may be given after a conditional offer of employment is made, but the results of such examinations must be used consistent with job-relatedness and business necessity and must not be used to violate the Act. All employees, not just those with perceived disabilities, must be subject to the exams, and results must be kept in special confidential medical files.

Title I contains specific provisions relating to drug programs. The Act provides that drug testing remains legal and that an individual testing positive for illegal drugs is not protected by the Act. Drug testing programs may not be used, however, as a vehicle to evade the purposes of the Act. For example, an employer may not test for prescription drugs, the detection of which would reveal a protected disability.[15]

One important specific provision is helpful to employers. The ADA allows employers to reject applicants if their disabilities "pose a direct threat to the health or safety of other individuals."[16] Once again, however, this standard is a difficult one to meet, and the risk must

be one which cannot be eliminated with reasonable accommodation.[1]

REMEDIES

Enforcement of the employment discrimination provisions of the ADA is vested with the Equal Employment Opportunity Commission ("EEOC"). Like aggrieved individuals under Title VII of the Civil Rights Act of 1964 (Title VII), a person who claims discrimination must file a charge with the EEOC within 180 days of the alleged discriminatory act.[18] Individuals then may file suit in federal court within 90 days of the conclusion of the EEOC's investigation if the EEOC does not resolve the issue. Prevailing plaintiffs will be entitled to injunctive relief such as reinstatement and backpay and will be able to recover attorneys' fees. Because of the ADA's incorporation of Title VII procedures, which now include provisions of the new Civil Rights Act of 1991, plaintiffs also will be entitled to compensatory and punitive damages and jury trials.[19]

Employers need to take immediate steps to protect themselves from future ADA discrimination charges. Employment forms should be inventoried and illegal inquiries deleted. Job descriptions should be developed to define essential and marginal job functions, and safety considerations for each job should be considered. Employers also should be advised to begin considering what types of accommodations can be made for the most common types of disabilities.

Title III prohibits public accommodations from discriminating against individual with disability

RULES

Introduction

Title III of the ADA prohibits discrimination in public accommodations. Title III's nondiscrimination prohibition requires both the provision of auxiliary aids and services and the removal of architectural and communication barriers. Auxiliary aids and services are not required if providing the aids and services fundamentally would alter the nature of the good or service being offered or would cause an "undue burden."[20] Likewise, removal of architectural and communication barriers in existing facilities must be accomplished only if to do so is "readily achievable."[21] Additionally, new construction and major renovations must be made readily accessible to and usable by disabled individuals.[22] Discussed next is Title III's coverage provisions. Specific regulations as they apply to aids and services and the removal of barriers then are discussed. Following that discussion is an overview of the new construction requirements.

Coverage

The regulations state that Title III's accessibility requirements for existing facilities, as opposed to the new construction requirements, apply to "public accommodations." The regulations further state that the requirements obligate a public accommodation only with respect to the operation of a "place of public accommodation" and not to all locations. A "place of public accommodation" is defined as a facility operated by a private entity whose operations affect commerce and which falls within the category of a sales, service or rental establishment, which includes all businesses open to the public.[23]

The new construction requirements of the ADA apply to a much broader spectrum of facilities than do the accessibility requirements for existing facilities. Specifically, the new construction requirements apply to "commercial facilities" which, generally speaking, are completed for initial occupancy after January 26, 1993. A "commercial facility" is defined simply as a facility which is intended for nonresidential use and whose operations will affect commerce. Thus, the "commercial facility" definition will include all of those manufacturing, distribution and office facilities which do not meet the "place of public accommodation" definition.[24]

Existing facilities — auxiliary aids and services

The regulations contain specific provisions related to auxiliary aids and services and the removal of barriers. With regard to auxiliary aids and services, the regulations state:

> A public accommodation shall take those steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, *i.e.*, significant difficulty or expense.[25]

The regulations specifically state that "[a] public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities." Examples of auxiliary aids and services include the following:

> Qualified interpreters, notetakers, and computer-aided transcription devices;
> Handset amplifiers and other assistive listening devices;
> Closed caption decoders;
> Telecommunication devices for deaf persons ("TDDs");
> Videotext displays;
> Qualified readers;
> Tape recordings;
> Brailled materials;
> Acquisition or modification of other equipment and devices; and
> Other similar services and actions.

The regulations specifically require a public accommodation to have a TDD available if clients are given the opportunity to make outgoing telephone calls on more than an incidental convenience basis.[26]

The failure to provide an auxiliary aid or service may be excused if (i) the aid or service would result in a fundamental alteration of the nature of the business services offered, or (ii) the aid or service would result in an undue

burden, defined as a "significant difficulty or expense." If these circumstances exist, the public accommodation must provide some "alternative" aid or service that would not alter the nature of the business services offered or would not result in an undue burden.[27]

The regulations further define the term undue burden. Factors to be considered include:

- The nature of the action needed;
- The cost of the action needed;
- The overall financial resources of the site involved;
- The number of persons employed at the site;
- The effect on expenses and resources;
- Legitimate safety requirements;
- The impact of the action on the operation of the site;
- The geographic separateness of the site to any parent company;
- The administrative or fiscal relationship of the site to a parent company; and
- The overall size, financial resources and operations of any parent company.

The Department of Justice has made clear that any companies basing a defense upon financial hardship must be prepared to disclose all of its financial records.[28]

Removal of barriers

The "removal of barriers" provisions of the regulations state:

> A public accommodation shall remove architectural barriers in existing facilities, including communication barriers that are structural in nature, where such removal is readily achievable, i.e., easily accomplishable and able to be carried out without much difficulty or expense.[29]

Examples given related to the removal of barriers include:

- Installing ramps;
- Rearranging furniture and shelving;
- Repositioning telephones;
- Adding raised markings on elevator control buttons;
- Widening doors and installing offset hardware;
- Rearranging toilet stalls;
- Installing toilet grab bars;
- Designating parking spaces;
- Removing high pile carpeting; and
- Installing vehicle hand controls.[30]

The regulations are clear that these examples are not exclusive. The regulations further define the term readily achievable. Factors to be considered are virtually identical to the factors listed above to be considered in evaluating "undue burden."[31]

New construction

The ADA requires that new construction relating to a "commercial facility" intended for first occupancy after January 26, 1993 must be "readily accessible to and usable by individuals with disabilities."[32] This requirement basically means that any such construction must meet the Americans with Disabilities Act Accessibility Guidelines (the "ADAAG"). The ADAAG are detailed architectural guidelines which have the force of regulations and which address a wide variety of construction details, such as walkways, hallways, doors, lobbies, and restrooms. Any alterations affecting access to an area of "primary function" of a facility also must meet the ADAAG. A "primary function" is a major activity for which the facility is intended, so the regulations include spaces such as offices and other work areas. The new construction provisions have a 20 percent "disproportionality"

provision, however, which provides that costs above 20 percent of the total cost of the construction which otherwise would be required to meet the ADAAG may be avoided.[34] The regulations provide that certain areas, mainly path of travel and restroom areas, should receive priority in determining which areas should meet the accessibility requirements.

REMEDIES

The responsibility for compliance with Title III, unlike Title I, rests with DOJ. Any disabled individual who believes that he or she has been subject to discrimination may request DOJ to institute an investigation of a business. Additionally, where the attorney general has reason to believe that there may be a violation of Title III, the attorney general may initiate a compliance review. Following such an investigation, or at any other time at the attorney general's discretion, DOJ may institute a civil action in federal district court if the attorney general has reason to believe that Title III has been violated. In such cases, DOJ may seek equitable relief, including an order requiring the provision of a specific auxiliary aid or service, may request monetary damages for the individuals aggrieved, and may assess civil penalties for up to $100,000. Punitive damages are not available.[35]

More significantly, any person who is being subjected to discrimination on the basis of a disability in violation of Title III may institute a civil action in federal district court and may seek temporary and permanent injunctive relief. The attorney general may intervene in any such suit if he or she determines that the case is of general public importance. Attorneys' fees, litigation expenses and costs are available to prevailing plaintiffs.[36]

Defending companies likely will face difficult cases brought pursuant to Title III. If a business has failed to provide auxiliary aids and services or has failed to remove path of travel barriers, and the only defense was that cost considerations prevented the action at issue, the business asserting the defense will have to be prepared to expose the financial condition of the company and any related companies. This will be an extremely undesirable alternative, especially for privately owned companies. Additionally, resolution of prospective cases no doubt will be result-oriented, and it will be very difficult for a company with significant assets and income to claim, for example, that purchasing a telecommunications device for the deaf costing only a few hundred dollars would have been an "undue burden."

Businesses must determine immediately which auxiliary aids and services will be easily obtainable and must inventory obvious architectural barriers. Businesses then should take reasonable steps toward accomplishing the required tasks in some fashion, even if the most desirable alternative is not possible. For example, if a company's main male and female restrooms cannot be made accessible, a unisex restroom at least should be made accessible as soon as possible. Primary attention should be focused upon path of travel areas. Finally, businesses will have to keep in mind the additional expenses associated with the ADAAG's impact on new construction when determining whether to make alterations or additions.

Key aspects of compliance and enforcement

Individuals with disabilities now will enjoy the protection of federal civil rights laws as others have for discrimination based upon race, sex, age, religion, and national origin. Alabama employers must realize that stereotypical opinions about the disabled absolutely must be disregarded in making future employment decisions. Employers must not only avoid adverse employment decisions based upon disabilities, but they also must be prepared to provide reasonable accommodations to disabled individuals who could not perform a job otherwise. Employers must take care to avoid inquiries, conscious or unconscious, into the disabilities of its applicants or employees. Alabama lawyers should be aware that individuals discriminated against have defined rights and may be able to obtain substantial damage awards. Title I discrimination charges must be filed with the EEOC within 180 days of the discriminatory act to preserve these rights.

Complaints about public accommodations already have been filed with DOJ, most notably against high profile facilities such as the Empire State Building in New York City. "Testers" no doubt will be active in Alabama as well. Businesses must take a common sense approach to Title III's accessibility requirements and begin making the basic, and especially visible, alterations required. Wheelchair ramps, motorized (or at least widened) doors, and telecommunications devices for the deaf are but a few examples. In cases in which individuals have been denied access to public sales, rental, or service establishments, Alabama lawyers must be aware that these potential clients have substantial rights as well. ■

Endnotes

1. Pub. L. No. 101-336, 104 Stat. 327 (1990), codified at 42 U.S.C. §§ 12101-12213 (1988).
2. 29 U.S.C. § 794.
3. *See, e.g.*, American National Standards Institute standard A117.1.
4. 42 U.S.C. § 12112(a).
5. *Id.*, § 12112(b).
6. *Id.*, § 12102(2).
7. *Id.*, § 12114(b).
8. *See* 29 C.F.R. § 1630.3(d), (e) (1991).
9. 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(n).
10. 42 U.S.C. § 12111(8).
11. *Id.*, § 12112 (b)(5)(A).
12. *Id.*, § 12111 (10)(B).
13. *Id.*, § 12111 (9)(B).
14. *Id.*, § 12112 (c).
15. *Id.*, § 12114 (d); *see id.*, § 12112 (c) (2).
16. *Id.*, § 12113 (b).
17. *See id.*, § 12111 (3).
18. *Id.*, § 12117 (a); *see id.*, § 2000e-5 (e).
19. *See* Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072 (1991), to be codified at 42 U.S.C. § 1981A.
20. *Id.*, § 12182 (b) (2) (A) (iii), (iv).
21. *Id.*
22. *Id.*, § 12183.
23. *Id.*, § 12181 (7).
24. *Id.*, § 12181 (2).
25. 29 C.F.R. § 36.303 (a).
26. *Id.*, § 36.303 (b), (d).
27. *Id.*, § 36.303 (f).
28. *Id.*, § 36.104.
29. *Id.*, § 36.304 (a).
30. *Id.*, § 36.104.
31. *Id.*, § 36.104.
32. *Id.*, § 36.401 (a).
33. *Id.*, § 36.406 (a).
34. *Id.*, § 36.403 (f).
35. *Id.*, §§ 36.502-504
36. *Id.*, § 36.501.

HIGHLIGHTS OF THE CIVIL RIGHTS ACT OF 1991

By R. TAYLOR ABBOT, JR.

On November 21, 1991 the United States Congress made the most sweeping changes in civil rights laws since 1964. On that day Congress passed the Civil Rights Act of 1991, thereby overturning or modifying no fewer than five Supreme Court decisions viewed by some as unacceptably restrictive of employees' civil rights. In so doing, Congress opened the floodgates to future litigation refining the concepts and defining the terms used in the 1991 Act. This article examines some of the highlights of the 1991 Act.

I. Section 1981 suits based on contract

Section 1981 grants to all persons "the same right . . . to make and enforce contracts . . . as is enjoyed by white persons." 42 U.S.C. § 1981. The Supreme Court had long ago held that private employment contracts were among the types of contract protected by Section 1981. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975) ("§ 1981 affords a federal remedy against discrimination in private employment on the basis of race"). The phrase "to make and enforce contracts" had been interpreted to include all aspects of the employment relationship from hiring to discharge and everything in between.

The Supreme Court changed that in 1989 with *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). The Court there construed the terms "make and enforce" literally to mean the formation of a contract, but not the termination of a contract. Section 1981 thus was deemed applicable to claims of race discrimination in hiring and promotion or transfer involving new terms and conditions of employment, but not to claims of discrimination in discharge, demotion, or other terms and conditions, since those processes did not involve contract formation.

Congress shored up the erosion of Section 1981 in the 1991 Civil Rights Act. The 1991 Act does away with *Patterson* by providing that Section 1981 applies to all aspects of the employment relationship, including discharge, as follows:

> For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

Sec. 101(b).

Lest there be any further tinkering by the Supreme Court, the 1991 Act also codifies the Supreme Court's long-standing construction that Section 1981 applies to private as well as public acts of racial discrimination. (Sec. 101(c)). *See Runyon v. McCrary*, 427 U.S. 160, 168 (1976).

II. Compensatory and punitive damages in Title VII cases

Traditionally, compensatory and punitive damages have not been available in actions brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. which prohibits discrimination in employment. *See Walker v. Ford Motor Co.*, 684 F.2d 1355 (11th Cir. 1982). It is not surprising that in times past plaintiffs would strain to add a Section 1981 claim of race discrimination to their Title VII race discrimination claim since compensatory and punitive damages are available under Section 1981. *See, e.g., Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975); *Claiborne v. Illinois Cent. R.R.*, 583 F.2d 143, 153 (5th Cir. 1978), *cert. denied*, 422 U.S. 934 (1979).

Ironically, while at the same time expanding the availability of Section 1981 as an avenue to remedy racial discrimination, Congress decreased the likelihood that plaintiffs will join Section 1981 claims to their Title VII lawsuits by permitting recovery for compensatory and punitive damages under Title VII in certain circumstances. Under the 1991 Act, available compen-

satory damages include "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses." (Sec. 102(b)(3)).

Part of the compromise associated with the 1991 Act was the placement of certain limitations on the right to recover compensatory and punitive damages in Title VII actions. First, compensatory and punitive damages are available only in cases of disparate treatment, as opposed to disparate impact. As is well known, a disparate treatment case is one involving intentional discrimination, usually with respect to one individual. The disparate impact theory, on the other hand, is that a facially neutral employment practice operates to affect a protected class disproportionally, regardless of intent.

Another limitation is the establishment of caps on the total amount of compensatory and punitive damages available, depending on the size of the employer. The sum of compensatory plus punitive damages is not to exceed $50,000 for employers with between 14 and 101 employees, $100,000 for employers with between 100 and 201 employees, $200,000 for employers with between 200 and 501 employees, and $300,000 for employers with more than 500 employees. (Section 102(b)(3)).

The final limitation on the recovery of compensatory and punitive damages is that punitive damages are recoverable only if the employer engaged in a discriminatory practice "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." (Sec. 102(b)(1)). It can be anticipated that plaintiffs will easily be able to reach the damages cap without the necessity of proving malice or reckless indifference.

The compensatory and punitive damages provisions of the 1991 Act will produce a massive amount of litigation over issues left unresolved by the Act. The constitutionality of the caps, for example, will have to be resolved. In addition, there is no indication in the Act or its legislative history whether the caps apply individually or collectively with respect to each plaintiff or defendant in a lawsuit. Neither the Act nor its legislative history indicate whether the caps apply to each alleged claim or violation individually or collectively. The meaning of the phrase "with malice or with reckless indifference" will also be the subject of debate since it is nowhere defined in the Act.

III. Jury trials in Title VII suits

Prior to the enactment of the 1991 Act, most courts held that jury trials were unavailable under Title VII. *See Walton V. Cowin Equipment Co.*, 930 F.2d 924 (11th Cir. 1991), *cert denied*, 112 S.Ct. 86 (1991). The 1991 Act permits jury trials under Title VII whenever a plaintiff seeks compensatory or punitive damages. (Section 102(c)). It can be expected that plaintiffs will routinely claim entitlement to compensatory and punitive damages. The 1991 Act forbids the court from informing the jury of the caps on damages.

IV. Burden of proof in disparate impact cases

The chief impetus for the 1991 Civil Rights Act was the 1989 Supreme Court case *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989). In that case, the Supreme Court radically altered in several ways the traditional disparate impact model first recognized by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). First, prior to *Wards Cove*, a plaintiff's obligation to prove discrimination under the disparate impact model extended to showing an underlying or bottom-line statistical disparity and the defendant was then obligated to prove that each of its employment practices was not responsible for the disparity. *Wards Cove* eliminated this process by holding that the employee is responsible for isolating and identifying at the outset the specific employment practice allegedly responsible for any observed statistical disparities.

Wards Cove also established the parties' respective burdens of proof in disparate impact cases. Once a plaintiff establishes a *prima facie* case by identifying a specific employment practice resulting in disparate impact, *Wards Cove* held, the burden shifts to the defendant to "produce" evidence of a business justification for the employment practice, with the burden of persuasion remaining with the plaintiff to show that the challenged practice is not justified by business necessity, or that alternative practices would reduce the impact. (490 U.S. at 656-60).

The Civil Rights of 1991 modifies or reverses these holdings. The plaintiff must still identify the specific employment practice allegedly resulting in disparate impact, subject to the exception that the various elements of the decision-making process may be analyzed as one whole employment practice if the plaintiff demonstrates to the court that the elements of the decision-making process are not capable of separation for analysis. (Section 105(a)). It can be expected that we will see much future litigation involving the issue of whether decision-making procedures are capable of separation for analysis for purposes of showing disparate impact. The only guidance provided by the 1991 Act is in the Interpretative Memorandum intended to be the exclusive legislative history with respect to the *Wards Cove* portions of the 1991 Act:

> When a decision-making process includes particular, functionally-integrated practices which are components of the same criterion, standard, method of administration, or test, such as the height and weight requirements designed to measure strength in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the particular, functionally-integrated practices may be analyzed as one employment practice.

(Interpretative Memorandum, 137 Cong. Rec. S. 15276).

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The 1991 Act also alters the burden of proof established in *Wards Cove* by providing that an unlawful employment practice is established if the plaintiff demonstrates that a particular practice results in a statistical disparity, *and* if the employer fails to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." (Sec. 105(a)). The term "demonstrate" is defined by the Act to mean "meets the burdens of production and persuasion." (Sec. 104).

The terms "business necessity" and "job related" are intended to reflect the definitions of those concepts as enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in other Supreme Court decisions prior to *Wards Cove*. *See* Interpretative Memorandum, 137 Cong. Rec. S. 15276.

V. Mixed motive cases

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) the Supreme Court held that in the situation of an event which is motivated by both lawful and discriminatory reasons, then the employee can prevail only if the employer fails to show that the same decision would have been made even in the absence of the discriminatory reason. The 1991 Act reverses this decision by providing that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." (Sec. 107(a)).

The 1991 Act provides some relief, however, to a defendant who can show that other, non-discriminatory reasons motivated the employment decision. If the employer would have taken the same action in the absence of the discriminatory factor, the court can grant declaratory relief, injunctive relief, and attorneys' fees attributable only to the pursuit of the claim with respect to the one discriminatory factor, but cannot order reinstatement, hiring, promotion or any other damages. (Sec. 107(b)).

Read in conjunction with the other provisions of the 1991 Act, this provision provides an avenue which could permit defendants to avoid claims of compensatory and punitive damages and, thereby, also avoid jury trials. If the employer can demonstrate that it would have taken the same action in the absence of the alleged discrimination, there may be a basis for striking the plaintiff's claims for compensatory and punitive damages and for jury trial.

VI. Challenges to consent judgments

The 1991 Act includes a provision specifically reversing the so-called "Birmingham Firefighters" case, *Martin v. Wilks*, 490 U.S. 755 (1989). That case involved a challenge by white firefighters in Birmingham to consent decrees entered in a lawsuit years ago which provided affirmative relief in hiring and promotions to black firefighters. White firefighters filed a separate lawsuit alleging that employment decisions made on the basis of the consent decrees were unlawful because they were based on race. The Supreme Court held that the white firefighters were entitled to challenge the consent decrees in the subsequent, separate lawsuit because they did not participate in the prior case which had produced the consent decrees and could not be deprived of legal rights in proceedings to which they were not parties.

Not satisfied with this result, Congress in the 1991 Act limited the circumstances under which persons can later challenge consent decrees or judgments entered in civil rights cases. Under the 1991 Act, a consent decree or judgment cannot be attacked by any person:

> (1) (a) Who had actual notice of the proposed judgment or order sufficient to apprise him that (i) the judgment might adversely affect his interests and that (ii) an opportunity was available to present objections to the order, and (b) who had a reasonable opportunity to present objections to the order; *or*
>
> (2) Whose interests were adequately represented by another person who had previously challenged the order or judgment on the same grounds and under similar factual circumstances, unless there have been intervening changes in law or fact. (Sec. 108).

These restrictions do not apply to parties to the original action or consent decree, including class members. Permitted challenges to consent decrees are to be brought before the judge who entered the consent decree in the first instance. (Sec. 108).

VII. Statute of limitations for challenging seniority systems

In Alabama, which has no state agency dealing with employment discrimination matters, complaints of discrimination must be filed with the Equal Employment Opportunity Commission (EEOC) within 180 days of the alleged unfair employment practice. 42 U.S.C. § 2000e-5(e). Confusion can arise over when an "alleged unfair employment practice" occurs, since a practice can be instituted but not felt by the affected employee for some time. Such practices might include, for example, changes in seniority systems: an employer can change the way seniority is accumulated, and the employee may not feel the effect of that change until it is time for her to retire, well after 180 days from the date of the change.

That was the situation in *Lorance v. AT&T Technologies*, 490 U.S. 900 (1989). There, the Supreme Court held that the time limit for filing Title VII claims began to run from the time of the adoption of a discriminatory seniority system, and not from the subsequent time that its effects were felt by employees. This holding caused some concern because it required the plaintiff to challenge a seniority system before he was ever affected by it.

The 1991 Act reverses this case. Under the 1991 Act, the time period for a challenge to a discriminatory seniority system begins to run from the time 1) when the seniority system is adopted, 2) when an individual becomes subject to the seniority system, or 3) when a person is injured by the application of the seniority system, whichever of the three is later. (Sec. 112).

These new accrual rules apply only to seniority systems that have "been adopted for an intentionally discriminatory purpose." So-called "bona fide" seniority systems which are not intentionally discriminatory are still subject to the *Lorance* holding.

VIII. Retroactive application

Of most immediate concern to employment law practitioners is the question of the retroactive application of the 1991 Act. The Act was signed into law on November 21, 1991, with the provision that, "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." (Section 402(a)). It would be a gross understatement to say that the issue of the retroactive application of the 1991 Act is debatable. Conflicting legislative history and case law regarding the standards for retroactive application permit both sides of this issue to advance colorable arguments for their respective positions, and the issue will ultimately have to be settled by the Eleventh Circuit and probably the Supreme Court.

In the meantime, practitioners are faced with an almost bewildering array of arguments and case law cutting both ways. In the legislative history category, there are statements by Senators Dole and Danforth, who were major sponsors of the compromise resulting in the 1991 Act, to the effect that the Act does not apply to cases arising before its effective date. (137 Cong. Rec. S. 15472-15478; 137 Cong. Rec. S. 15483). The sponsors of the compromise also placed in the Congressional Record a Sponsors Interpretative Memorandum stating that the Act shall not apply retroactively. (137 Cong. Rec. S. 15483-15485).

On the other side, we have Senator Kennedy stating that retroactivity "will be up to the courts to determine . . . (137 Cong. Rec. S. 15485). Representative Don Edwards of California also expressed his view on the record that it applies retroactively, even though he was not the author of the effective date provision of the Act. (137 Cong. Rec. H. 9530).

The case law is also confusing, with two lines of authority expressing different standards for determining retroactivity. On one hand there is *Bowen v. Georgetown University Hospital*, 488 U.S. 208 (1988), which favors prospective application and says that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."

On the other hand, we have *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 711 (1974), which held that courts are "to apply the law in effect at the time [of their] decision, unless doing so would result in manifest injustice or there is legislative history to the contrary." The Eleventh Circuit in *United States v. Peppertree Apartments*, 942 F.2d 1555, 1561 n. 3 (11th Cir. 1991) endorsed the *Bradley* approach over the *Bowen* approach.

The result has been a divergence of case law, with some cases holding that the 1991 Act is retroactive, and some holding that it is not retroactive. Ruling in favor of retroactivity are: *LaCour v. Harris County*, No. H-89-1532 (S.D. Tex. Dec. 6, 1991); *Mojica v. Gannett Co.*, No. 90-C-3827 (N.D. Ill. Nov. 27, 1991).

Ruling in favor of prospective application only are: *Van Meter v. Bayr*, No. 91-0027 (D.D.C. Dec. 18, 1991); *Hansel v. Public Service Co.*, No. 88-B-853 (D. Colo. Dec. 11, 1991); and *James v. American International Recovery, Inc.*, No. 1:89-CV-321 (N.D. Ga. Dec. 3, 1991). In addition, the EEOC issued a Policy Guidance on December 27, 1991 expressing the Commission's position that it will not apply the damages provisions of the 1991 Act retroactively to events occurring before November 21, 1991.

In the Northern District of Alabama Judge Hancock has ruled that the Act is not to be applied retroactively. *See, e.g., Carroll v. ABF Freight System, Inc.*, CV-91-H-2429-S (N.D. Ala. Feb. 5, 1992); *Maddox v. Norwood Clinic, Inc.*, CV-91-H-1452-S (N.D. Ala. Feb. 4, 1992).

IX. Conclusion

With the enactment of the Civil Rights Act of 1991, Congress left more issues unresolved than resolved. It will take years for the courts to sort through the various problems and questions which are certain to arise under the Act. Moreover, the EEOC will be hard-pressed to handle the demands of all the new claimants, along with complaints under the new American with Disabilities Act, in this era of tight federal budgets. ■

RECENT DECISIONS

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

SUPREME COURT OF THE UNITED STATES

Child abuse and Sixth Amendment Right of Confrontation

White v. Illinois 90-6113 (January 13, 1992). May juries in child abuse cases consider hearsay evidence, the out-of-court statements made by alleged victims, when those children are available to testify but excused from doing so? The Supreme Court unanimously answered yes.

The decision gives judges greater discretion to protect children from having to testify and further limits the Sixth Amendment confrontation rights of persons accused of child abuse. Writing for the Court, Chief Justice Rehnquist said spontaneous declarations and those made while receiving medical care are admissible as exceptions to the rule against hearsay because they are likely to be trustworthy. "Those same factors that contribute to the statements' reliability cannot be recaptured even by later in-court testimony."

Specifically, White argues that his confrontation rights under the Sixth Amendment were violated by the admission of a four-year-old girl's statements to family and medical attendants under the spontaneous declarations and medical examination exemptions to the hearsay rule, without a finding of unavailability.

The significance of this unanimous decision is not limited to child abuse cases. The decision holds that the right of an accused to confront accusers does not require that a prosecutor—before using hearsay testimony in court—produce the speaker or show that the speaker is unavailable.

It is this writer's opinion that the confrontation clause of the Sixth Amendment is being effectively written out of existence and has opened the door for "trial by experts."

Fifth Amendment's due process clause not violated by general verdict in multiple-object conspiracy charges where there is insufficient evidence as to one object

Griffin v. United States No. 90-6352 (December 3, 1991). Neither the Fifth Amendment's due process clause nor United States Supreme Court precedent requires that a general verdict of guilty on multiple-object conspiracy be set aside merely because there is insufficient evidence as to one of the objects.

Griffin and others were charged under 18 U.S.C. §371 (conspiracy) to defraud an agency of the federal government. The unlawful conspiracy was alleged to have had two objects: (1) impairing the efforts of the Internal Revenue Service (IRS) to ascertain income tax; and (2) impairing the efforts of the Drug Enforcement Administration to ascertain forfeitable assets.

The evidence introduced at trial implicated Griffin's co-defendants in both conspiracy objects, but implicated Griffin only in the IRS object. On that basis, Griffin moved for a severance which was denied. At the close of the trial, she proposed instructions to the effect that she could be convicted only if the jury found that she was aware of the IRS object of the conspiracy and further proposed special interrogatories asking the jury to identify the object or objects of the conspiracy of which she had knowledge. The trial court denied both requests. The jury returned a general verdict of guilty.

Justice Scalia delivered the opinion of the Court and held that neither the due process clause of the Fifth Amendment nor Supreme Court precedent requires, in a federal prosecution, that a general guilty verdict on a multiple-object conspiracy be set aside if the evidence is inadequate to support conviction as to one of the objects.

The Court reasoned that a jury is well-equipped to determine whether a particular theory is supported by the facts. The Court observed that "it would generally be preferable to give an instruction removing from the jury's consideration an alternative basis of reliability that does not have adequate evidentiary support, the refusal to do so does not provide an independent basis for reversing an otherwise valid conviction."

SUPREME COURT OF THE ALABAMA

Race-neutral strikes mandated during jury selection—or else

Byrd v. State of Alabama, Warner v. State of Alabama 26 ABR 747 (December 6, 1991). The Supreme Court of Alabama granted certiorari to consider whether the defendants were denied their rights to a fair and impartial trial by the prosecution's use of peremptory

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strikes to eliminate black venire persons from the jury, and whether Byrd, a white defendant, had standing to challenge the prosecution's use of peremptory strikes. The Supreme Court of Alabama answered both questions in the affirmative and reversed.

In the trial of these consolidated cases, the Chief Deputy District Attorney for Montgomery County and another assistant used 17 of their 20 peremptory strikes to eliminate 17 of the 19 black venire members. The defendants struck one black, thus leaving only one black venire member to serve on the jury. Prior to the jury's being sworn, both defendants moved to quash the panel on the grounds that the State's use of its peremptory strikes violated the teaching of *Batson*.

In reaching its decision, the supreme court found a historical "pattern in the use of peremptory strikes by the Montgomery County District Attorney's Office." Justice Adams critically noted that the historic pattern "in conjunction in this case clearly supports the defendants' contention and raises an inference of discriminatory intent."

Likewise, Justice Adams noted that "the bare allegations that a venire member lives in a 'high crime' area is also constitutionally deficient ... Not only do such allegations fail to demonstrate any relevance to the particular case *sub judice* but, were they given credence, they could serve as 'convenient talisman[s] transforming *Batson's* protection against racial discrimination in jury selection into an illusion and the *Batson* hearing into an empty ceremony." 26 ABR at 759.

In this case, Justice Adams sets forth a "bright-line" test as follows: "Therefore, a defendant has standing to request a *Batson* hearing whenever (1) the State has exercised peremptory challenges to exclude members of a distinct racial group; and (2) the defendant requests such a hearing regardless of whether he is a member of that distinct group." Once this threshold requirement has been met, the defendant must then prove a prima facie case within the general framework of *Batson*.

Byrd and Warner stopped short of requiring that the racial composition of the trial jury actually correspond to that of the population from which it was drawn. The diversity of our society renders such an endeavor logistically prohibitive. In other words, "Defendants are not entitled to a jury of any particular composition."

Finally, Justice Adams noted, "... This opinion should be taken only as requiring that a white defendant be allowed standing to challenge, as racially discriminatory, the exclusion of black jurors through the use of peremptory strike."

Voluntariness of confession — primer on overreaching

Matthews v. State 26 ABR 1770 (February 7, 1992). Matthews pleaded guilty to robbery, burglary and theft. Prior to the entry of his plea, Matthews moved to suppress certain incriminating statements made to police officers and the investigator for the district attorney's office. At the suppression hearing, the record shows that the following statements were made to Matthews before he made his incriminating statements:

(1) "There's a possibility that being an accomplice and not actually doing the deed, you might get boot camp."

(2) "Let me explain something to you, I'm not the investigator for this department, I'm the investigator for the district attorney. I can go back and tell the district attorney Matthews cooperated with me or I can go back and tell the district attorney that Matthews did not cooperate with me. That's right, I have that option."

(3) "We might cut you a deal."

(4) "You've got an opportunity right here ... to tell us what you know. It could make a lot of difference for you."

(5) "You know there's two ways to go about things, either you go about it and you don't cooperate and the judge knows that you didn't and the district attorney knows you didn't, or you turn around and you did cooperate, you know."

The trial court denied Matthews' motion to suppress. The court of criminal appeals confirmed.

On certiorari, Matthews argued that his confession was involuntary because he had given the statements under the impression that the State would go easy on him if he confessed or hard on him if he did not.

In an excellent opinion, Justice Maddox gives the criminal practitioner a primer on voluntariness of confessions.

It is well settled that "extrajudicial confessions are prima facie involuntary and inadmissible, and that the burden is on the State to prove that the confession was made voluntarily."

The reasoning behind the exclusion of confessions obtained by the promise of a reward or by a threat was stated in *Luttrell v. State*, 551 So.2d 1126, 1128 (Ala.Crim.App. 1989), as follows:

> The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from actual criminals themselves.

In the opinion, Justice Maddox expressly adopts the three *Luttrell* factors which are to be considered in determining whether the State has sustained its burden of proving that a defendant's "consent" was voluntary. In order to meet that burden under *Luttrell*:

First, there must be clear and positive testimony that the consent was unequivocal and specific. Second, the government must establish that the consent was given without duress or coercion. Finally, we evaluate those first two standards with the traditional indulgence of the courts against a presumption of waiver of constitutional rights. 26 ABR at 1774.

Justice Maddox, in dealing with the conflicting statements of Matthews and the officers as to what was said, relied upon the supreme court's decision in *Ex Parte Johnson*, 522 So2d 234, 237 (Ala. 1988) as follows:

" . . . in order to be admissible a confession must be free and voluntary and cannot be the result of any direct or implied promises, however slight."

Based upon the *Luttrell* standards,

the supreme court concluded that the statements "engineered and encouraged" Matthews to think that he would be more favorably dealt with if he [would] confess. In reversing the conviction, Justice Maddox critically noted:

The statements made to Matthews in this case are prime examples of statements that entice a suspect into making a confession. Matthew's incriminating statements were not trustworthy, because the statements to him strongly suggested that it would be difficult for him if he did not come forward with information but would be easier for him if he did. 26 ABR at 1776.

BANKRUPTCY

Contest of dischargeability in converted Chapter 11 cases

Bank of Louisiana v. Pavlovich, 5th Circuit Court of Appeals, January 30, 1992, 22 B.C.D. 889; _____ F.2d _____. In the original Chapter 11 case, the plan of reorganization was confirmed, but two years after confirmation the debtor stopped making payments and the case converted to a Chapter 7 liquidation. The Bank of Louisiana then contested the dischargeability of its debt. The Fifth Circuit held that a pre-petition creditor was bound by the confirmation order in the Chapter 11, which prevented it from objecting to discharge on grounds which occurred prior to confirmation, for the reason that this would be *res judicata*. However, if the debt arose after confirmation, and there were post-confirmation acts which would meet the Bankruptcy Code's requirements for non-dischargeability, then a creditor could attempt to avail itself of the remedies provided by the Bankruptcy Code under §§523 and 727. Such a creditor must have extended new value after confirmation to the debtor and in such a situation, would be entitled to contest post-confirmation actions.

Obligation of Chapter 11 liquidating trustee to file income tax returns and pay taxes

Holywell Corp. v. Smith, _____ SupCt. _____, 60 LW 4159 (February 25, 1992). Justice Thomas spoke for the U.S. Supreme Court which unanimously reversed the Eleventh Circuit's ruling that a liquidating trustee under a confirmed plan of reorganization was not responsible for filing income tax returns for affiliated corporations and the individual debtor, or for the payment of taxes due from sale of properties. In reversing the Eleventh Circuit, the Court states that IRC §6012(b)(3) requires the trustee to make the return, due to the fact that as such trustee qualifies as an assignee of the property, there is an obligation to pay taxes due on the individual debtor's assets by reason of IRC §6012(b)(4) requiring a fiduciary of a trust to do so. This case is important in another respect in that it was held that although the government did not object to the Chapter 11 plan, this was no excuse for the trustees not to fulfill the duties as mentioned above, this so, even though §1141 of the Bankruptcy Code states that creditors and the debtor are bound by the provision of a confirmed plan. However, it is important to note that the ruling applied to post-confirmation taxes. The opinion in the concluding paragraph contained the following:

Even if §1141(a) binds creditors of the corporate and individual debtors with respect to claims that arose before confirmation, we do not see how it can bind the United States or any other creditor with respect to post-confirmation claims.

Comment: Thus, although the inference is that pre-petition taxes not mentioned in the plan might be barred, this question is still left open.

Post-petition transfer of funds to pay pre-petition taxes

U.S. v. Nordic Village, Inc., _____ SupCt. _____ (1992); 60 LW 4163. The Sixth Circuit had held that where a debtor had post-petition transferred funds to the IRS in payment of his own individual tax liability, the trustee was entitled to a refund of this by reason of it's being a post-petition transaction covered by §549 of the Bankruptcy Code. Justice Scalia, author of the majority opinion, stated that there was no clear statute placing the monetary liability upon the United States, that §106 which concerns sovereign immunity does not cover the factual situation, and, therefore, the IRS was not ordered to disgorge the funds. He said that a waiver of sovereign immunity must be considered strictly, not liberally, and be unequivocally expressed. **Comment:** This is another indication of the U.S. Supreme Court protecting the government on tax matters. Apparently, in the often-used words, it will take an act of Congress to change this attitude.

Pre-petition IRS levy on receivables, held vulnerable

United States of America v. Challenge Air International, Inc., 22 B.C.D. 892 - F2d. - (11 Cir. January 30, 1992). The Eleventh Circuit, relying on the *United States v. Whiting Pools*, 103 S.Ct. 2309 (1983) held that the pre-petition levy on obligations owed by American Express to the debtor did not prevent the debtor from receiving a refund. The IRS theorized that it had constructive possession of the fund after the levy and before the Chapter 11 filing. The Eleventh Circuit stated that the bankrupt estate includes property seized by a secured creditor before the filing of the petition, and that §542(a) mandates the turnover to the trustees of property of the estate. The United States tried to show that this case was different from *Whiting Pools* as *Whiting Pools* was based upon a levy on tangible property, while this was on cash equivalent property. The government also cited other cases which the Eleventh Circuit held were not applicable, were distinguishable, or had been overruled by the *Whiting* case.

Comment: It remains to be seen

whether the IRS is going to take this case up also in the belief that it has a more friendly Supreme Court.

SouthTrust Mobile Services, Inc. v. Scottie D. Engelbert and Sandra D. Engelbert, 1992 WL 18326, USDC Northern District of Alabama, Western Division (January 21, 1992). In an opinion of over 34 pages, Judge Acker reversed the Bankruptcy Court in a case involving a mobile home in which Appellant SouthTrust had a security interest. The Bankruptcy Court had allowed the debtor time to cure a post-petition default. Judge Acker ruled that by reasons of the facts, the mobile home qualified as a residence. Other conclusions of law as determined by Judge Acker were: (1) the filing of notice of appeal divests the Bankruptcy Court of jurisdiction, thus preventing the amending of any portion of the Bankruptcy Court's proceeding; (2) the automatic stay of §362 applies to collection of post-confirmation payments on any debt whether or not mentioned in the plan (3) 11 U.S.C. §1329(a) expressly allows the Trustee as well as a debtor to request a modification of a Chapter 13 claim; and (4) on the dispositive question in this case, the Court ruled in a confirmed Chapter 13 case, the debtor cannot include in an amended plan, payments for a post-petition arrearage on the debtor's principal residence, and that when such is attempted, it is an abuse of discretion to deny the secured lender its request for relief from the stay.

Failure of administrative claimant to name trustee as party rendered default judgement unenforceable

Bellini Imports v. Mason and Dixon Lines, 944 F.2d 199 (4th Cir. 1991). Mason and Dixon filed a Chapter 11 petition on March 29, 1984. Thereafter, Bellini engaged the debtor to transport freight which was delayed in transit. A trustee was appointed in December 1984. In June 1985, Bellini sued the debtor without naming the trustee. Bellini secured a default judgement, and although was aware of the bankruptcy, did not file a proof of claim. In March 1986, a plan of reorganization was confirmed. When Bellini attempted to enforce the judgement through state court process, the Bankruptcy Court enjoined Bellini and further disallowed the claim which Bellini then attempted to file. The District Court reversed the Bankruptcy Court, stating that the trustee was not a necessary party. The Fourth Circuit, on appeal, held that the automatic stay did not apply to Bellini's suing on a post-petition breach of contract, but that Bellini had to obtain relief from stay to enforce collection in any action to proceed against the assets of the estate. Thus, the Bankruptcy Court was held to have been correct in not allowing a claim based solely on a judgement unenforceable against the estate.

Statute allows trustee two years to pursue pre-petition claims not applicable to claims arising between Chapter 11 filings and conversion to Chapter 7

Independent First Assurance Co., Pender, Trustee, 948 F.2d 985 (5th Cir. 1991). More than a year after the Chapter 11 was filed, the debtor's house was destroyed by fire. The insurance policy contained a one-year limitation period for taking legal action. The case was converted approximately three weeks after the fire, and a trustee was appointed first as interim and later as case trustee. The trustee filed suit almost two years from appointment. The District Court granted summary judgement against the trustee on the ground that the case was barred. The Fifth Circuit affirmed, stating that §108(a) lengthens the time of bringing suit only if the period had not expired pre-petition. It held that it made no difference here that the individual debtor was "in possession" a portion of the one-year policy limitation. The trustee further argued that §108(a) when viewed in the context of §348 as a whole, applies only to claims against the estate and to those in behalf of the estate. However, the Court stated that Bankruptcy Code §348(a), which is the section on conversion, reveals that (a), (b) and (c) do not distinguish between claims against or on behalf of the estate, but that §348(d) expressly provides for special treatment of only those claims arising against the estate before conversion to Chapter 7. Thus, the conversion did not change the date from that of the original occurrence, and, therefore, the action was not filed in time. ■

Consultant's Corner

The following is a review of and commentary on an office automation issue that has current importance to the legal community, prepared by the office automation consultant to the state bar, Paul Bornstein, who views are not necessarily those of the state bar.

This is the 25th article in our "Consultant's Corner" series. We would like to hear from you, both in critique of the article written and for suggestions of topics for future articles.

Sole practitioner check-up

Sole practice is the only segment of the private sector that is growing, albeit slowly. The reasons are varied, from the desire to be your own boss, to the reality that no one else wants you due to the current economic outlook. Regardless of the reason, sole practitioners have special problems, in particular, profitability technology and business development. These needs have to be dealt with and the sole practitioner check-up may be of help.

Profitability

Whenever lawyers return from gatherings of their peers, be they CLE seminars, bar conventions or law school reunions, they often fall into a "blue funk," convinced they are the least productive of their colleagues. The reality is that lawyers often engage in creative hyperbole regarding their earnings and prospects. In a word, they lie!

The first step in assessing sole practice profitability is to know what is reasonably achievable, consistent with a decent lifestyle. I recommend two statistics that are fair predictors of financial success in sole practice: utilization and realization. Utilization is the ratio of hours billed to hours worked. For sole practitioners, it should be at least 75 percent. Realization is the ratio of effective billing rate to budgeted (or stated) billing rate, effective billing rate itself a ratio of fee income divided by hours billed. It should be very near 90 percent.

In start-up situations, I advise sole practitioners to use a pro forma budget of 55 percent expenses, 5 percent reserve and 40 percent distributable income, provided you gross about $100,000. This is the key. (By the way, grossing $100,000 requires you to bill the equivalent of 1,200 hours at an effective rate of $80.) If there is a secret to success in sole practice, it is thorough, scrupulous, brutally honest timekeeping, and that means all your time, both billable and nonbillable.

Technology

Many sole practitioners are mislead by colleagues (or salespeople) into thinking that technology, in itself, is vital to success. It is an ingredient, but by no means the essence of successful practice. (Reread the last sentence of the previous section.) True, word processing is a necessary (and by now routine) component of a solo office; so are a working phone and a copy machine. Beyond that, however, it gets optional. For example, automated billing is no panacea, particularly if your manual billing system is a mess. A fax machine is a necessity for some, a convenience for some and a status symbol for others. Dictation equipment of some sort is required.

The point of this is not to denigrate technology as such, far from it, but to put it into perspective. The importance of technology in sole practices is often overrated. True, it is important, but generally not that important.

Business development

If technology is overrated in importance for sole practitioners, then business development is badly underrated. It is critical to a viable sole practice, as it is to any other practice, but perhaps more so. Notice the operative word "viable." True, there are solo practices with no awareness of the need for business development, but I have never encountered a viable one without an acute awareness of the issue.

Business development is not synonymous with television advertising and splashy yellow page ads. It is concerned with making sure that your clients know all the services you are competent to perform. Many lay people perceive lawyers as they do doctors, specialists in one practice area or another. This may well be true from some solos. Urban solos generally ought to specialize in a single area. Rural solos, on the other hand, need to generalize their practices, as their rural medical counterparts do.

What are the implications? For both rural and urban solos it is vital that potential clients in your service area know what it is you do. This can be listings in the general or practice-specific section of the local yellow pages, letters to other lawyers inviting reciprocal referrals, or a brochure or pamphlet of some sort. Finally, remember to thank those who refer clients to you.

In summary, sole practitioners have special problems and special opportunities. A sole practice check-up may help you to identify both. ■

Request for Consulting Services

Office Automation Consulting Program

SCHEDULE OF FEES, TERMS AND CONDITIONS

Firm Size*	Duration**	Fee	Avg. Cost/lawyer
1	1 day	$ 500.00	$500.00
2-3	2 days	$1,000.00	$400.00
4-5	3 days	$1,500.00	$333.00
6-7	4 days	$2,000.00	$307.00
8-10	5 days	$2,500.00	$277.00
Over 10			$250.00

*Number of lawyers only (excluding *of counsel*)

**Duration refers to the planned on-premise time and does not include time spent by the consultant in his own office while preparing documentation and recommendations.

REQUEST FOR CONSULTING SERVICES

OFFICE AUTOMATION CONSULTING PROGRAM

Sponsored by Alabama State Bar

THE FIRM

Firm name _____

Address _____

City _____ ZIP _____ Telephone # _____

Contact person _____ Title _____

Number of lawyers _____ paralegals _____ secretaries _____ others _____

Offices in other cities? _____

ITS PRACTICE

Practice Areas (%)

Litigation _____ Maritime _____ Corporate _____

Real Estate _____ Collections _____ Estate Planning _____

Labor _____ Tax _____ Banking _____

Number of clients handled annually _____ Number of matters presently open _____

Number of matters handled annually _____ How often do you bill? _____

EQUIPMENT

Word processing equipment (if any) _____

Data processing equipment (if any) _____

Dictation equipment (if any) _____

Copy equipment (if any) _____

Telephone equipment _____

PROGRAM

% of emphasis desired Admin. Audit _____ WP Needs Analysis _____ DP Needs Analysis _____

Preferred time (1) W/E _____ (2) W/E _____

Mail this request for service to the Alabama State Bar for scheduling.
Send to the attention of Margaret Boone, executive assistant, Alabama State Bar, P.O. Box 671, Montgomery, Alabama 36101.

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 Friday
ALABAMA SALES AND USE TAX
Montgomery
National Business Institute, Inc.
Credits: 6.0 Cost: $108
(715) 835-8525

16-17
MUNICIPAL COURTS CLERKS AND MAGISTRATES CONFERENCE
Gulf Shores
University of Alabama
Credits: 3.4 Cost: $90
(205) 348-9066

19 Tuesday
ALABAMA SALES AND USE TAX
Birmingham
National Business Institute, Inc.
Credits: 6.0 Cost: $108
(715) 835-8525

28 Thursday
ENVIRONMENTALLY DISTRESSED PROPERTIES IN ALABAMA
Birmingham, Parliament House
National Business Institute, Inc.
Credits: 6.0 Cost: $108
(715) 835-8525

29 Friday
ENVIRONMENTALLY DISTRESSED PROPERTIES IN ALABAMA
Huntsville, University Inn
National Business Institute, Inc.
Credits: 6.0 Cost: $108
(715) 835-8525

JUNE

2 Tuesday
WORKERS COMPENSATION IN ALABAMA
Birmingham
National Business Institute, Inc.
Credits: 6.0 Cost $108
(715) 835-8525

3 Wednesday
WORKERS COMPENSATION IN ALABAMA
Huntsville
National Business Institute, Inc.
Credits: 6.0 Cost $108
(715) 835-8525

4-6
TAX INSTITUTE
Orange Beach
Perdido Hilton
Alabama Bar Institute for CLE
Credits: 9.0
(800) 627-6514

5-7
DIVORCE ON THE BEACH VI
Gulf Shores, Gulf State Park
Alabama State Bar Family Law Section
(205) 930-9000

18 Thursday
COLLECTING JUDGMENTS IN ALABAMA
Birmingham
National Business Institute, Inc.
Credits: 6.0 Cost $108
(715) 835-8525

19 Friday
COLLECTING JUDGMENTS IN ALABAMA
Huntsville
National Business Institute, Inc.
Credits: 6.0 Cost $108
(715) 835-8525

JULY

1 Wednesday
LOAN COLLECTION LITIGATION IN ALABAMA
Mobile
National Business Institute, Inc.
Credits: 6.0 Cost $108
(715) 835-8525

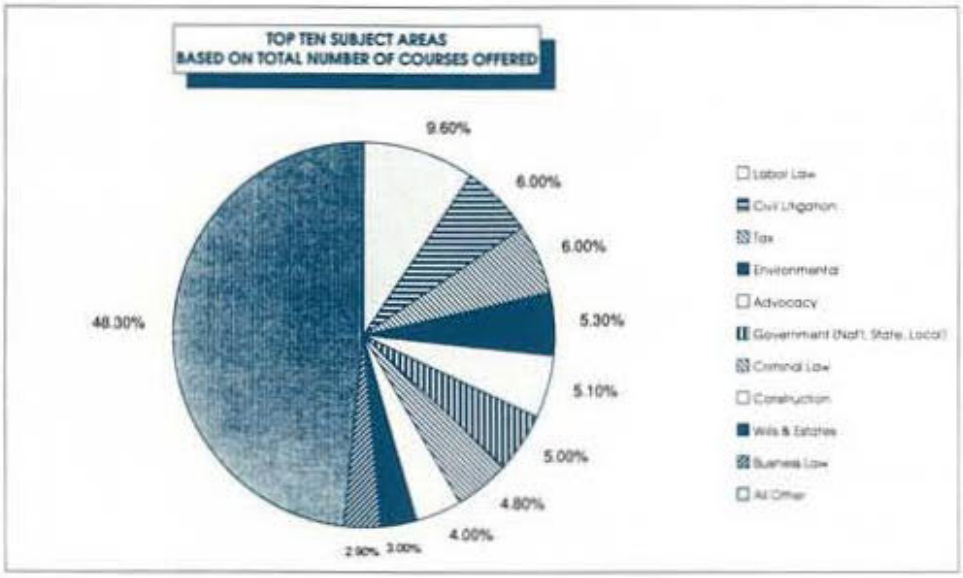
2 Thursday
LOAN COLLECTION LITIGATION IN ALABAMA
Montgomery
National Business Institute, Inc.
Credits: 6.0 Cost $108
(715) 835-8525

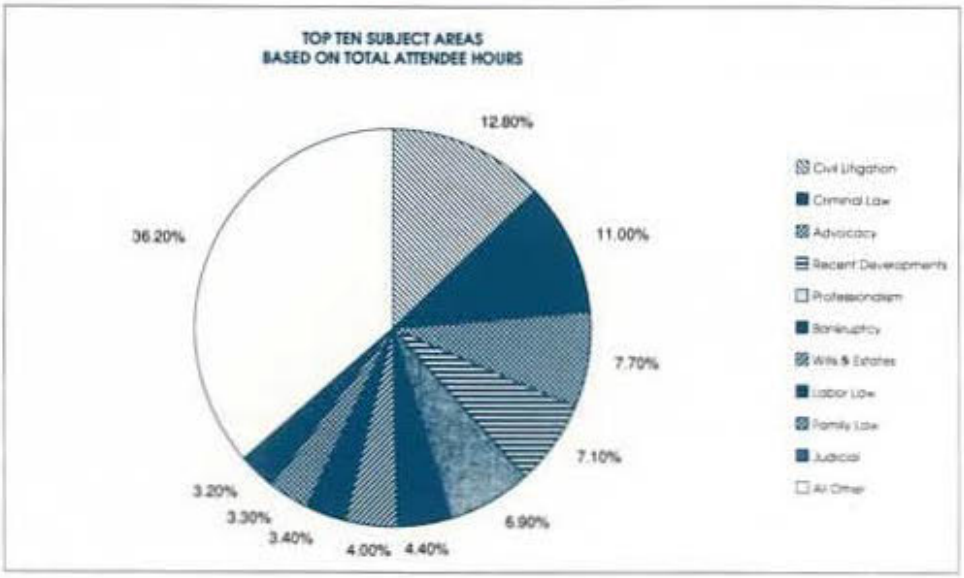
16-18
ANNUAL MEETING
Birmingham, Wynfrey Hotel
Alabama State Bar
(205) 269-1515

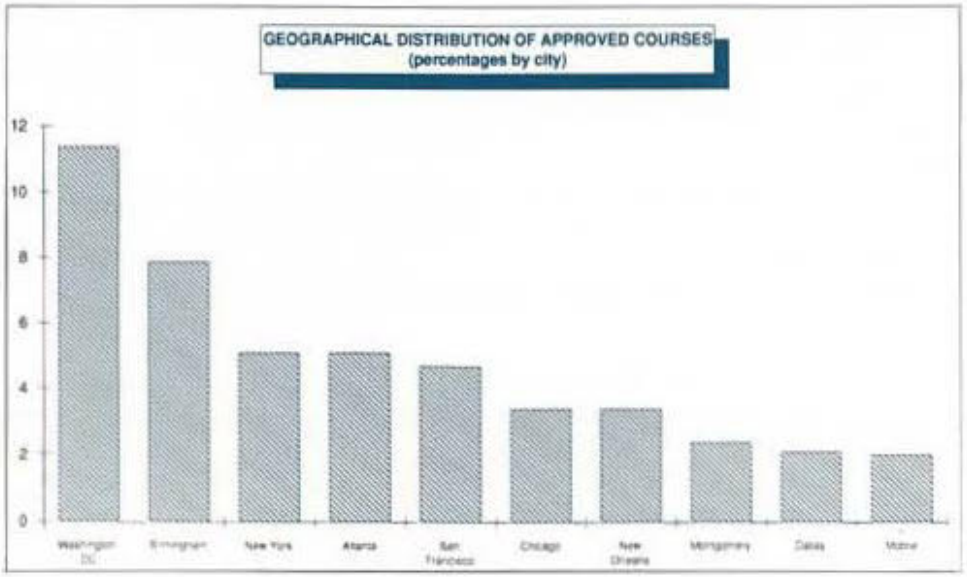
21 Tuesday
CONSTRUCTION LAW IN ALABAMA
Birmingham
National Business Institute, Inc.
Credits: 6.0 Cost $108
(715) 835-8525

22 Wednesday
CONSTRUCTION LAW IN ALABAMA
Huntsville
National Business Institute, Inc.
Credits: 6.0 Cost $108
(715)835-8525

CONTINUING LEGAL EDUCATION FACTS – 1991







In 1991, the Mandatory Continuing Legal Education Commission reviewed a total of 2,949 programs seeking CLE accreditation. Of this number, 2,866 were accredited. Of the 2,949 programs offered, 420 were offered by in-state sponsors and 2,529 out-of-state sponsors, 14 percent and 86 percent, respectively. Yet, six in-state sponsors accounted for 49.4 percent of the total CLE hours attended by state bar members in 1991.

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 47 percent of all CLE programs accredited in 1991 were held in the ten cities in Figure 3.

Finally, 6,558 or 99 percent of the lawyers subject to the CLE rules and regulations complied with them in a timely fashion or filed a deficiency plan as permitted under Rule 6 of the rules and regulations. Only 59 lawyers' names were certified to the Disciplinary Commission for noncompliance.

NOTICE

The following is a memorandum from Leslie G. Johnson, administrative director of courts, regarding recent changes to Rules 4 and 7, Alabama Rules of Criminal Procedure. Also included are copies of the Alabama Supreme Court's orders amending these rules.

TO: Presiding Circuit Judges
Circuit Clerks
Municipal Judges
Municipal Clerks

FROM: Leslie G. Johnson
Administrative Director of Courts

RE: Changes to Rules 4 and 7, Alabama Rules of Criminal Procedure

Enclosed are copies of two orders, dated March 3, 1992, and effective the same day, whereby the Supreme Court of Alabama amended Rules 4 and 7, Alabama Rules of Criminal Procedure. Particularly with regard to Rule 7, there were extensive changes, including those summarized below; **however, you should carefully review the amended rules in their entirety.**

Rule 4

By memorandum, dated May 15, 1991, we advised you of the decision of the U.S. Supreme Court, in *Riverside v. McLaughlin*, 111 S.Ct. 1661 (May 13, 1991). The holding in the *Riverside* case requires that *probable cause* hearings, in connection with *warrantless* arrests, be held within 48 hours. Accordingly, Rule 4.3 (Procedure Upon Arrest) has been amended to require that probable cause hearings (in warrantless arrest cases where a defendant is in jail) be held within 48 hours. The 72-hour time limit for *initial appearance* hearing remains unchanged. Finally, Rule 4.3 (a) (1) (iii) was amended to no longer require the defendant to be brought before the magistrate for the probable cause hearing because there was no constitutional or statutory requirement to do so.

Rule 7

As noted above, there were extensive changes to this rule, including:

- adding definitions for "Professional Surety Company" and "Professional Bail Company" (see p. 3, Rule 7.1 (f) & (g)).
- requiring a Professional Surety Company to deposit, among other requirements, a "Certificate of Authority" or "Certificate of Compliance" from the Department of Insurance (see p. 3, subparagraph (1)).
- requiring a Professional Bail Company to deposit, among other requirements, a corporate surety bond or escrow agreement in the amount of $25,000 (see p. 5, subparagraph (1)).
- the guarantee of payment, whether by a Professional Surety Company or by a Professional Bail Company, is *per county* and a company is liable for the full amount of any bond(s) signed, regardless of other requirements which must be met pursuant to Rule 7, e.g., deposit of $25,000 corporate surety bond.
- annual authorization of presiding circuit judge and approval of the corporate surety bonds or escrow agreements by the presiding circuit judge are required.
- applies to municipal courts.
- there is a 60-day "phase-in" period for Professional Bail Companies whose corporate surety bonds and escrow agreements were previously approved by the presiding circuit judge which are not in compliance with Rule 7, as amended. On page 7, subparagraph (m), lines 8 and 9, the date "December 1, 1992" appears to be a typographical error and apparently should be "December 1, 1991," as it is on line 18; and there is a 60-day "phase-in" period for Professional Surety Companies who have been issued an "order of authorization" which is not in compliance with the rule, as amended.
- The forfeiture procedure in Rule 7.6(d) has been changed. Now, there is no time limit within which a "show cause" hearing must be held. A written response to a show cause notice is required within 28 days of service of the notice (p. 14).
- the Appendix contains a sample "Corporate Surety Bond" and "Escrow Agreement" (pp. 16 and 18, respectively).

THE STATE OF ALABAMA JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA

March 3, 1992

ORDER

IT IS ORDERED that Rule 4.3(a)(1), Alabama Rules of Criminal Procedure, be, and it hereby is, amended to read as follows:

"RULE 4.3 PROCEDURE UPON ARREST

"(a) On Arrest Without a Warrant

"(1) A person arrested without a warrant:

"(i) May be cited by a law enforcement officer to appear either at a specified time and place or at such time and place as he or she shall be subsequently notified of and may be released; or

"(ii) May be released by a law enforcement officer upon execution of a secured appearance bond in an amount set according to the schedule contained in Rule 2, A.R.J.A., and directed to appear either at a specified time and place or at such time and place as he or she shall be subsequently notified of; or

"(iii) Shall be afforded an opportunity to make bail in accordance with Rule 4.3(b)(3) and 4.4. A judge or magistrate in the county of arrest shall determine whether probable cause exists to believe that the defendant committed the charged offense, by examining any necessary witnesses in accordance with the procedures for making a probable cause determination provided in Rule 2.4. If the judge or magistrate finds that there is probable cause for the arrest of the person, a complaint shall promptly be prepared, filed, and served on the defendant, and the judge or magistrate shall proceed as provided in Rule 4.4 for initial appearance. If a probable cause determination is not made by a judge or magistrate without undue delay, and in no event later than forty-eight (48) hours after arrest, then, unless the offense for which the person was arrested is not a bailable offense, the person shall be released upon execution of an appearance bond in the amount of the minimum bond set in Rule 2, A.R.J.A., and shall be directed to appear either at a specified time and place or at such time and place as he or she shall be subsequently notified of.

"(Amended effective March 3, 1992.)"

IT IS FURTHER ORDERED that this amendment shall be effective immediately.
Hornsby, C.J., and Almon, Shores, Houston, Steagall, Kennedy, and Ingram, JJ., concur.
Maddox, J., concurs specially.

MADDOX, J., CONCURRING SPECIALLY.

I concur with the amendment to Rule 4.3(1) to change the 72-hour provision to 48 hours, but I would also change the 72-hour provision in Rule 4.3(b).

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 3rd day of March 1992.

Clerk, Supreme Court of Alabama

THE STATE OF ALABAMA JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA

March 3, 1992

ORDER

IT IS ORDERED that Rule 7, Alabama Rules of Criminal procedure, be, and it hereby is, amended to read in accordance with the appendix attached hereto.

IT IS FURTHER ORDERED that this amendment shall be effective immediately.

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

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 3rd day of March 1992.

Clerk, Supreme Court of Alabama

APPENDIX

RULE 7. RELEASE.

Rule 7.1 Definitions and Requirements

(a) **Personal Recognizance** A release on defendant's "personal recognizance" means release without any condition of an undertaking relating to, or a deposit of, security.

(b) **Appearance Bond** An "appearance bond" is an undertaking to pay to the clerk of the circuit, district, or municipal court, for the use of the State of Alabama or the municipality, a specified sum of money upon the failure of a person released to comply with its conditions.

(c) **Secured Appearance Bond** A "secured appearance bond" is an appearance bond secured by deposit with the clerk of security equal to the full amount thereof.

(d) **Security** "Security" is cash, certified funds, or a surety's undertaking, deposited with the clerk to secure an appearance bond.

(e) **Surety** A "surety" is someone (other than the person released) who executes an appearance bond and binds himself to pay its amount, if the person released fails to comply with the conditions. A surety, except one qualified as a professional bondsman, professional surety company, or professional bail company, shall file with an appearance bond an affidavit or certification, under penalties of perjury,

(1) Stating that the surety is not an attorney, judicial official, or person authorized to take bail (or if the surety is an attorney, judicial official, or person authorized to take bail, then the affidavit or certification shall state the surety's relationship to the person released). An attorney, judicial official, or person authorized to accept an appearance bond shall not be precluded from being a surety for a member of his or her immediate family. For purposes of this rule, the term "immediate family" shall be limited to include only a spouse; a sibling; a spouse's sibling; a lineal ancestor or descendant; a lineal ancestor or descendant of a spouse, a sibling, or a spouse's sibling; or a minor or incompetent person dependent upon the surety for more than one-half (1/2) of his or her support;

(2) Stating that the surety owns property in this state, which property, when aggregated with that of other sureties, is worth the amount of the appearance bond (provided, that the property must be exclu-

sive of property exempt from execution and its value equaling the amount of the appearance bond must be above and over all liabilities, including the amount of all other outstanding appearance bonds entered into by the surety) and specifying that property and the exemptions and liabilities thereon; and

(3) Specifying the number and amount of other outstanding appearance bonds entered into by the surety.

No surety may execute an appearance bond or become surety for more than four (4) persons in any twelve- (12-) month period (other than immediate family members) unless such surety qualifies and meets the requirements of a professional surety company or professional bail company.

(f) **Professional Surety Company** A "professional surety company" is an insurance company, a domestic or foreign corporation, or an association engaged in the business of insurance, or a surety, to which or to whom has been issued a "Certificate of Authority" or "Certificate of Compliance" by the Alabama Department of Insurance to execute appearance bonds or to transact a surety business in the State of Alabama.

(g) **Professional Bail Company** A "professional surety company" is an insurance company, a domestic or foreign corporation, or an association engaged in the business of insurance, or a surety, to which or to whom has been issued a "Certificate of Authority" or "Certificate of Compliance" by the Alabama Department of Insurance to execute appearance bonds or to transact a surety business in the State of Alabama.

(h) **Professional Bondsman** A "professional bondsman" is any individual person or agent who is employed by a professional surety company or professional bail company to solicit and execute appearance bonds or actively seek bail bond business for or in behalf of a professional surety company or a professional bail company.

(i) No professional surety company or professional bail company shall execute or become surety on any appearance bond in this State, unless it has an order granting authorization to become professional surety on any such bail issued annually by the presiding circuit judge of the county in which such company desires to execute such bail or appearance bonds. Prior to the judge's issuance of such an order, professional surety companies and bail companies must submit annually to the presiding circuit judge the following:

If a professional surety company,

(1) An original or certified copy of a "Certificate of Authority" or "Certificate of Compliance" from the Department of Insurance of the State of Alabama reflecting that the company is qualified to write either a surety or a bail line of insurance and that the company is in good standing;

(2) An original "Qualifying Power of Attorney" issued by the professional surety company, specifying any applicable limitations and the agents that are authorized to execute and bind the company to a bail undertaking. The Qualifying Power of Attorney cannot name any company, corporation, or other entity as an agent except a person as defined in paragraph (h), and that person must be a licensed agent of the company with the Department of Insurance of the State of Alabama;

(3) A copy or copies of the license issued by the Department of Insurance of the State of Alabama of each agent who is named in or appointed by the Qualifying Power of Attorney in (2) above or a letter or other documentation from the Department of Insurance indicating that such appointed agents are temporarily licensed as agents of the professional surety company for those lines of insurance; and

(4) An affidavit or certification in writing, under oath, executed by a licensed agent of the professional surety company or a licensed agent of the professional surety company who is the manager, owner or president of a corporation, company, partnership, or other entity that represents the professional surety company, filed with the clerk of the circuit court of each county in which the professional surety company shall execute or become surety on appearance bonds, stating the following:

(a) That all appearance bonds shall be executed in the name of the professional surety company as surety by the agents listed or appointed in the Qualifying Power of Attorney presented to the court or any other Qualifying Powers of Attorney filed with the circuit clerk of the county.

(b) That all agents listed or appointed in the Qualifying Powers of Attorney will be licensed by the Department of Insurance, prior to such appointments.

(c) That any agency, company, corporation, or other entity that represents the professional surety company in the county, has no owners or other persons having a direct or indirect financial interest in such agency,

(Continued)

company, corporation, or other entity, that have been convicted of a felony or a crime involving moral turpitude. If any persons, having a direct or indirect financial interest in such agency, company, corporation, or other entity, have been convicted of a felony or a crime involving moral turpitude, then the affidavit or certification shall certify that there has been such a conviction, providing the name of the person convicted, and shall certify that the person convicted has been pardoned or has had a restoration of civil rights;

(d) That the professional surety company has no knowledge of forfeitures that have been final for more than thirty (30) days that have not been paid arising out of surety undertakings, and as to which the professional surety company has no petitions, motions, or other litigation matters pending;

(e) That no agents of the professional surety company who have the authority to execute appearance bonds in its behalf or any person having a financial interest, direct or indirect, in the ownership or management of any agency, company, corporation, or other entity that represents the professional surety company in the execution of appearance bonds, is an attorney, a judicial official, a person authorized to accept an appearance bond, or an agent of an attorney, judicial official, or person authorized to accept an appearance bond;

(f) The names and addresses of all persons, officers, employees, and agents of the agency, company, corporation, or other entity that represents the professional surety company becoming surety on appearance bonds who have a direct or indirect financial interest in the agency, company, corporation, or other entity representing the professional surety company and the nature and extent of each interest; and

(g) That those persons stated in (f) have not, within a period of two (2) years, violated any provisions of these rules or any court order pertaining to these rules.

If a professional bail company,

(1) An original corporate surety bond or escrow agreement, filed and approved by the presiding circuit judge of the county in which the professional bail company shall execute or become surety on appearance bonds, in the amount of $25,000, guaranteeing the payment of all sums of money that may become due by virtue of any judgment absolute that may be rendered against said professional bail company on a forfeiture entered by any court in the county. Corporate surety bonds shall be executed only by a surety company authorized to do business in the State of Alabama and qualified to write such bonds by the Insurance Department of the State of Alabama. Such corporate surety bonds shall provide that it may be canceled as to any future liability by the corporate surety company's or the professional bail company's giving thirty- (30-) days prior written notice of such cancellation to the clerk of circuit court in which the bond or instrument was filed. A bank in the State of Alabama must be a party to all escrow agreements, and those agreements shall provide that the agreement may be canceled as to any future liability only by the professional bail company's and bank's giving thirty- (30) days prior written notice of such cancellation to the clerk of circuit court in which the escrow agreement or instrument is filed;

(2) An original "Qualifying Power of Attorney," letter, or other document issued by the professional bail company specifying any applicable limitations and specifying the agents who are authorized to execute and bind the professional bail company to a bail undertaking or to appearance bonds. The Qualifying Power of Attorney, letter, or other document may name persons as agents, only; and

(3) An original affidavit or certificate in writing, under oath, executed by an owner or officer of a professional bail company, to the clerk of the circuit court of the county in which the professional bail company shall execute or become surety on appearance bonds, which contains the following:

(a) That all appearance bonds shall be executed in the name of the professional bail company as surety by the agents listed or appointed in the Qualifying Power of Attorney, letter, or other document presented to the court of any other so named in any future Qualifying Powers of Attorney, letters, or documents filed with the circuit clerk of said county.

(b) That the professional bail company is qualified to do business in this state and its resident address;

(c) That the professional bail company has sufficient financial net worth to satisfy its obligations as a surety;

(d) That no person having a direct or indirect financial interest in the professional bail company has been convicted of a felony or a crime involving moral turpitude, then the person making the certification shall certify that there has been such a conviction, providing the name of the person convicted, and shall certify that the person convicted has been pardoned or has had a restoration of civil rights;

(e) That the professional bail company has no knowledge of any forfeiture that has been made final for more than thirty (30) days that has not been paid arising out of surety undertakings and as to which the professional bail company has no petitions, motions, or other litigation matters pending;

(f) That there are no persons, including employees, agents, or persons with a financial interest in the professional bail company, who, within a period of two (2) years, violated any provisions of these rules or any court order pertaining to these rules;

(g) That no employee, agent, or any other person having a direct or indirect financial interest in the professional bail company is an attorney, a judicial official, a person authorized to accept an appearance bond, or an agent of an attorney, judicial official, or person authorized to accept an appearance bond; and

(h) The names and addresses of all officers, employees, and agents of the professional bail company who have a direct or indirect financial interest in the professional bail company and the nature and extent of each interest.

(j) All professional surety companies and all professional bail companies shall file all original documents required to be filed pursuant to Rule 7.1 with the clerk of the circuit court of the county where such companies desire and intend to become surety on appearance bonds. Such documents are public records.

(k) All corporate surety bonds and escrow agreements as set out in Rule 7.1 shall be filed with the circuit clerk of the county where the professional bail company desires and intends to become surety on appearance bonds, and such bonds and escrow agreements must be approved by the presiding circuit judge as being sufficient. Any surety bonds, escrow agreements, and other documents pertaining or attached thereto shall be originals only. After the documents are approved, the circuit clerk shall take custody of the originals and file them for safekeeping.

(l) All corporate surety bonds and escrow agreements shall contain essentially the language set out in the forms provided in the appendix to this rule. Corporate surety bonds presented shall have an original Qualifying Power of Attorney from the company attached thereto and a Certificate of Authority or Certificate of Compliance from the Department of Insurance of the State of Alabama reflecting that the corporate surety company is qualified to execute surety bonds in Alabama.

(m) All corporate surety bonds and all escrow agreements that have been filed and approved by the probate judge of any county of the State of Alabama, for the purpose of qualifying bail companies, prior to the adoption of Rule 7, as amended, shall be forwarded to the circuit clerk of the same county in which such bond or escrow agreement was filed. The circuit clerk shall file and maintain them for safekeeping. Any such corporate surety bonds or escrow agreements not in conformity with these rules but that have been approved by the presiding circuit judge of such county prior to December 1, 1992, shall not affect the professional bail company's right to execute appearance bonds, but those professional bail companies shall be notified by the circuit clerk by certified mail, return receipt requested, that the documents are not in conformity and shall have sixty (60) days from the date of receiving notice to comply. If the professional bail companies have not complied within the sixty (60) days provided, the clerk shall notify the presiding judge of the noncompliance and the presiding circuit judge shall issue a order of revocation of its order of authorization. All professional surety companies that are not in compliance with these rules but that have been issued an order of authorization prior to December 1, 1991, shall likewise be notified by the circuit clerk and shall be allowed sixty (60) days to conform and comply, failing which their authority shall be revoked.

(n) The presiding judge of the circuit court at any time may, and on verified

(Continued)

motion of the prosecutor shall, subpoena the representatives of the professional surety company or professional bail company or other persons for examination under oath concerning matters relating to any affidavit or certificate filed, outstanding forfeitures, and all relevant books, tax returns, and financial data. Authority to act as a professional surety company or a professional bail company may be revoked or withheld by the court for violation of any provision of this rule, for failure to submit subpoenaed documents, for failure to answer truthfully all relevant questions asked by the court, or in the event the professional surety company or professional bail company has outstanding and unpaid final forfeiture(s). As used herein, outstanding unpaid final forfeitures shall be those in which a final order or forfeiture has been entered by the court and thirty (30) days have elapsed since the date of the judgment; provided, however, that those companies have no petitions, appeals, or other matters of litigation pending of which the court has knowledge.

(Amended effective March 3, 1992.)

COMMITTEE COMMENTS AS AMENDED TO CONFORM TO RULE AS AMENDED EFFECTIVE MARCH 3, 1992

Rule 7.1 provides definitions for use within these rules and explicitly defines "professional bondsman" and imposes restrictions and requirements on the business of making bonds for others for a fee. It is specifically provided that any surety shall be liable for the full amount of any bond signed, regardless of other requirements that must be met pursuant to this rule, e.g., deposit of $25,000 corporate surety bond. Attorneys, as officers of the court, judicial officials, and officers authorized to accept appearance bonds, should not be making bonds.

See Ala. Code 1975, § 15-13-22, for general qualifications of bondsmen and Ala. Code 1975, § 15-13-24, for restrictions against judicial and ministerial officers of the state becoming sureties or signing bonds.

Section (h) defines "professional bondsman" as one who is employed by a professional surety company or professional bail company to solicit or execute appearance bonds or to actively seek bail bonding business. The court supervises professional bondsmen by requiring annual certification under oath of qualifying information, including that no person have a financial interest in the business has been disqualified for any reason from being in the bonding business.

Rule 7.1(i) requires certification that the bondsman is not acting for an attorney or other disqualified person. The rule would not necessarily preclude the spouse or a close relative of an attorney from acting as a bondsman, but it would cast a strong burden of showing that there was no financial benefit, direct or indirect, accruing to the attorney. The implication would be otherwise, and the better practice would be to avoid the appearance of impropriety. On one hand, the rule keeps the attorney from being in a potential conflict of interest with his own client (as, for example, not arguing forcefully for release on recognizance in hopes of making a bond fee). On the other hand, it removes the attorney from the position of feeling obliged to make bond for a client who has paid the attorney a good fee for representation. The language giving the court power to inquire into the bonding business is within the inherent power of the court anyway, but the rule makes it explicit. The district attorney is given power to initiate an inquiry, which he or she could do anyway through a grand jury investigation, of suspected perjury in the certificate. Failure to furnish records or to respond truthfully is sufficient grounds for the court to withdraw or to withhold authority to make bonds.

Rule 7.2 Right to Release on One's Own Recognizance or on Bond

(a) **Before Conviction** Any defendant charged with an offense bailable as a matter of rights may be released pending or during trial on his or her personal recognizance, unless the court or magistrate determines that such a release will not reasonably assure the defendant's appearance as required, or that the defendant's being at large will pose a real and present danger to others or to the public at large. If such a determination is made, the court may impose the least onerous condition or conditions contained in Rule 7.3(b) that will reasonably assure the defendant's appearance or that will eliminate or minimize the risk of harm to others or to the public at large. In making such a determination, the court may take into account the following:

(1) The defendant's length of residence in his or her place of domicile;

(2) The defendant's employment status and history and financial condition;

(3) The defendant's family ties and relationships;

(4) The defendant's reputation, character, and health;

(5) The defendant's prior criminal record, including prior releases on recognizance or on secured appearance bonds, and other pending cases;

(6) The identity of responsible members of the community who will vouch for the defendant's reliability;

(7) The nature of the offense charged, the apparent probability of conviction, and the

likely sentence, insofar as these factors are relevant to the risk of nonappearance; and

(8) Any other factors indicating the defendant's ties to the community or bearing on the risk of willful failure to appear.

(b) **After Conviction and Sentencing**

(1) After a defendant has been convicted of an offense for which the defendant has been sentenced to punishment by death or by life imprisonment or by imprisonment for a term in excess of twenty (20) years, the defendant shall not be released.

(2) Any defendant who has been convicted of an offense for which the defendant has been sentenced to a term of imprisonment of twenty (20) years or less may be released on appearance bond or on the defendant's personal recognizance,

(i) Upon application for release made concurrently with the filing of a notice of appeal, or
(ii) If an application for probation is made, upon application for release made at any time before probation has been granted or denied.

(c) **Denial of Release** Release shall be denied after conviction and sentencing if the trial court has reason to believe that the appearance bond or conditions of release will not reasonably assure that the defendant will not flee, or that the defendant's being at large poses a real and present danger of harm to any other person or to the public at large, or if at the time sentence was rendered, the defendant filed a notice of appeal and elected to waive release and to begin serving sentence.

COMMITTEE COMMENTS

The Eighth Amendment to the United States Constitution provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Art. 1, § 16, Alabama Constitution of 1901, provides:

> "That all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great; and that excessive bail shall not in any case be required."

See also Ala. Code 1975, § 15-13-2, and -3, for right to bail as a matter of right.

Assuming that the offense is bailable, Rule 7.2 is based on the presumption of innocence of the accused and the policy that a defendant should be released pending trial whenever possible. The defendant is eligible for a recognizance release unless the judge determines that the defendant's presence would not thereby be reasonably assured or that the defendant poses a real and present danger of harm to others. The list of factors to be considered is taken from the ABA, Standards for Criminal Justice, Pretrial Release 10-5.1 (2d ed. 1986).

Section (b) recognizes that after conviction the defendant is no longer presumed innocent and is not entitled admission to bail as a matter of right. If the defendant's sentence is for twenty (20) years or less, he can be admitted to bail, in the judge's discretion, unless the judge has reason to believe that bail will not reasonably assure that the defendant will not flee, or that there is a real and present danger to others posed by the defendant's being at large, thereby modifying Ala. Code 1975, §12-22-170, which unconditionally allows bail if the sentence does not exceed twenty (20) years.

Under Rule 7.2(b)(2)(i), a convicted defendant may apply for release on an appearance bond or on his personal recognizance at the time of filing a notice of appeal. This changes former practice whereby application for release had to be made with the filing of notice of appeal at the time sentence was rendered (i.e., at the time sentence was pronounced), an unduly restrictive, unfair, and technical trap for the unwary practitioner. See *Ex parte Downer*, 44 Ala. App. 77, 203 So.2d (1967); *Ex parte Rogers*, 53 Ala. App. 245, 298 So.2d 665 (1974); *Ex parte Pennington*, 57 Ala. App. 128, 326 So.2d 656 (1976). For "Appeal as of Right – When Taken," see A.R.App.P., Rule 4(b). *CF.* Fed.R.Crim.P., Rule 46(c).

Rule 7.2(b)(2) allows some discretion to the trial judge in releasing the defendant on bail or on the defendant's personal recognizance. If the defendant has initially filed a notice of appeal at the time sentence was pronounced but elected to waive release and to begin serving the sentence and thereafter requests that the sentence be suspended, whether to grant bail is left to the discretion of the trial court. There are no cases on this point, and there has been some question whether the trial court retains jurisdiction over the defendant, because the defendant will have already begun serving sentence. However, it is preferable that the trial court make the release decision, because that court is more familiar with the case, because the record is usually still with the trial court, and because any witnesses would be more readily available to that court.

Rule 7.2(b)(2) conforms with the Alabama Rules of Appellate Procedure. Rule 9(b) of the appellate rules provides: "Release after judgment of conviction shall be governed by Title 15, §§ 368 and 372 [Ala. Code 1975, § 12-22-170]."

Rule 7.3 Conditions of Release

(a) **Mandatory Conditions** Every order of release under this rule shall contain the conditions that the defendant:

(1) Appear to answer and to submit to

(Continued)

the orders and process of the court having jurisdiction of the case;

(2) Refrain from committing any criminal offense;

(3) Not depart from the state without leave of court; and

(4) Promptly notify the court of any change of address.

(b) **Additional Conditions** An order of release may include any one or more of the following conditions reasonably necessary to secure a defendant's appearance:

(1) Execution of an appearance bond in an amount specified by the court, either with or without requiring that the defendant deposit with the clerk security in an amount as required by the court;

(2) Execution of a secured appearance bond;

(3) Placing the defendant in the custody of a designated person or organization agreeing to supervise the defendant;

(4) Restrictions on the defendant's travel, associations, or place of abode during the period of release;

(5) Return to custody after specified hours; or

(6) Any other conditions which the court deems reasonably necessary.

COMMITTEE COMMENTS

Rules 7.3(a) provides mandatory conditions of release, which apply in every release order. Rule 7.3(b) allows the court the flexibility to fashion other conditions of release.

Rule 7.4 Procedure for Determination of Release Conditions

(a) **Initial Decision** If a defendant has not been released from custody and is brought before a court for initial appearance, a determination of the conditions of release shall be made. The judge or magistrate shall issue an order containing the conditions of release and shall inform the defendant of the conditions, the possible consequences of their violation, and that a warrant for arrest of the defendant will be issued immediately upon report of a violation.

(b) **Amendment of Conditions** If the defendant is in custody, the judge or magistrate may, for good cause shown, either on its own initiative or on application of either party, modify the conditions of release, after first giving the parties an adequate opportunity to respond to the proposed modifications.

(c) **Review by Circuit Court** By the second day of each month, the officials having custody of defendants who are being held in jail pending trial or on extraordinary writs shall provide the presiding judge, the district attorney, and the clerk of the circuit court for the county in which such defendant is being held, the names of all defendants in their custody, the charge or charges upon which they are being held, and the date they were most recently taken into custody. The circuit court shall review the conditions of release for every defendant who has been in jail for more than ninety (90) days.

(d) **Review by Municipal Court** By the second day of each month, the officials having custody of defendants being held in a municipal jail pending trial or on extraordinary writs shall provide the presiding municipal judge, the city attorney, and the municipal court clerk, with the names of all defendants in their custody, the charge or charges upon which they are being held, and the date they were most recently taken into custody. The municipal court shall review the conditions of release for every defendant who has been in the municipal jail for more than ninety (90) days.

COMMITTEE COMMENTS

Rule 7.4 provides the mechanism for setting and periodically reviewing release conditions. The conditions of release will usually be set on the arrest warrant at the time of its issuance. If not, or if the defendant cannot meet the conditions, the defendant gets a release hearing at initial appearance within seventy-two (72) hours of arrest. Thereafter, the conditions can be modified if need be, to be made either more or less stringent, depending on the circumstances.

Sections (c) and (d) provide a means by which the responsible officials will be apprised of the status of long-term holdovers.

Rule 7.5 Review of Conditions; Revocation of Release

(a) **Issuance of Warranty** Upon motion of the prosecutor stating with particularity the facts or circumstances constituting a material breach of the conditions of release or stating with particularity that material misrepresentations of omissions

of fact were made in securing the defendant's release, the court having jurisdiction over the defendant released shall issue an arrest warrant under Rule 3.1 to secure the defendant's presence in court. A copy of the motion shall be served with the warrant, and a hearing shall be held on the motion without undue delay, except in no event later than seventy-two (72) hours after the arrest of the defendant released, as provided in Rule 4.3(a).

(b) **Hearing; Review of Conditions; Revocation of Release** If, after a hearing on the matters set forth in the motion the court finds that the defendant released has not complied with or has violated the conditions of release, or that material misrepresentations or omissions of fact were made in securing the defendant's release, the court may modify the conditions or revoke the release. If a ground alleged for revocation of the release is that the defendant released has violated the condition under Rule 7.3(a)(2) by committing a criminal offense, or that there was a misrepresentation or omission concerning other charges pending against the defendant released, the court may modify the condition of release or revoke the release, if the court finds that there is probable cause (or if there has already been a finding of probable cause) to believe that the defendant released committed the other offense or offenses charged.

COMMITTEE COMMENTS

The 72-hour provision for hearing on a motion to revoke release is in harmony with the policy behind Rule 4.3(a)(1)(iii) that there must be some type of hearing within seventy-two (72) hours of arrest in order to hold someone.

The rule is not intended to operate as an absolute denial of release where there is probable cause to believe the defendant committed an offense while on release. However, since it is an automatic, mandatory condition of release that the defendant not commit an offense, then the same problems of finding probable cause and what to do about it still exist.

Rule 7.6 Transfer and Disposition of Bond

(a) **Transfer upon Supervening Indictment** An appearance bond or release order issued to assure the defendant's presence for proceedings following the filing of a complaint shall automatically be transferred to the same charge prosecuted by indictment, even though the complaint is superseded by return of the indictment, unless, upon issuance of the arrest warrant following indictment, the judge presiding, for good cause, shall order revocation or modification of the conditions of release, as provided in Rule 7.5(a) and (b).

(b) **Filing and Custody of Appearance Bonds and Security** Appearance bonds and security shall be filed with the clerk of the court in which the case is pending. Whenever the case is transferred to another court, any appearance bond and security shall be transferred also.

(c) **Surrender of Defendant by Surety** At any time, a surety may surrender to the sheriff a defendant released, and the sheriff shall certify such surrender to the court. The defendant may then obtain other sureties under the same conditions of release. In municipal ordinance cases, surrender may be to the chief of police of the municipality, who shall certify to the court the defendant's surrender.

(d) **Forfeiture** If at any time it appears to the court that a defendant fails to appear, the court shall so notify the principal and any surety and shall require the principal and any surety to show cause by filing a written response with the clerk of the court within twenty-eight (28) days of the date of service of the notice why the bond should not be forfeited. The notice required by this subsection may be served in the same manner as provided in Rule 3.4 for the service of a summons and must be returned by the person serving it, with his proper return endorsed thereon, within twenty-eight (28) days of the date of issurance or within five (5) days of service, whichever period of time is shorter. If the notice is not served on any of the parties to the undertaking, such other notices as are necessary may from time to time be issued, but two returns of "not found" by the proper officer are equivalent to personal service. If a written response is filed within the time allowed, the court shall set a hearing to determine whether the bond should be forfeited. If at the hearing the violation is not excused for good cause, or if, after twenty-eight (28) days from the date of service of the notice, no written response has been filed, the court may enter an appropriate order or final judgment forfeiting all or part of the amount of the bond or cash deposit, which shall be enforceable as any civil judgment.

(e) **Exoneration** At any time that the court finds there is no further need for an appearance bond, the court shall exonerate the appearance bond and order the return of any security deposited.

(Amended effective March 3, 1992.)

COMMITTEE COMMENTS

Under prior practice, bonds did not necessarily carry over from one court to another. Under Rule 7.6(a), the same bond would carry over from the initial appearance through indictment and trial, unless the presiding judge for good cause orders revocation of the release upon issuance of the indictment. The good cause may be information not available to the district attorney earlier, or which he did not want to reveal until after an indictment was returned. The process of revocation is the same as in any other situation. In any event, revoking release at this stage should not be done capriciously, because in most instances no good reason exists to rearrest the defendant and have him execute a new recognizance bond or make a new secured bond. This would, of course, apply as well to substitute indictments.

See Ala. Code 1975, §§ 15-13-80, -81 , and -82, which relate to forfeitures.

SAMPLE

CORPORATE SURETY BOND

STATE OF ALABAMA
_____ Judicial Circuit
_____ County

KNOW ALL MEN BY THESE PRESENTS, that we, _____ (bail company) , as the principal and the _____ (surety company), a Corporation, as Surety, duly authorized and existing under and by virtue of the laws of the State of Alabama and authorized to become sole surety on bonds in the State of Alabama, are held and firmly bound unto the courts of _____ County in the State of Alabama and unto the State of Alabama or any political subdivision thereof, in the full and just sum of Twenty-five Thousand and No/100 ($25,000) Dollars, lawful money of the United States for payment of which will and truly be made, we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents. The right of exemption under the Constitution and laws of Alabama is hereby waived.

WHEREAS, the principal desires to engage in the business of making bonds and charging therefor, and whereas, the principal is required to furnish bond with corporate surety authorized to act as Surety on bonds in this State for the amount of Twenty-Five Thousand and No/100 ($25,000) Dollars in accordance with Rule 7.1, Alabama Rules of Criminal Procedure,

NOW, THEREFORE, the consideration of the foregoing obligation is such that may be due to the State of Alabama or any political subdivision thereof by virtue of any judgment absolute being rendered against said principal, as Surety on said bond or bonds, this obligation to be null and void, otherwise to remain in full force and effect. This is a continuous bond and shall remain in effect unless cancelled as provided herein.

It is expressly understood and agreed that regardless of the number of premiums that shall be payable or paid, the liability of the Surety shall not be cumulative and shall in no event exceed in the aggregate the sum of Twenty-Five Thousand Dollars.

This bond may be cancelled, as to future liability, by the principal's or surety's giving no less than thirty (30) days' notice, in writing, to the clerk of the Circuit Court of _____ County, Alabama.

IN WITNESS WHEREOF, the said principal has hereunto set its hand and seal and the said _____ (bail company) has caused these presents to be signed by its proper officer for the purpose noted above on this _____ day of _____ , 199__ .

Professional Bail Company

_____ By: _____
WITNESS

ITS _____
Corporate Surety Company

BY: _____

ATTORNEY-IN-FACT, _____

STATE OF ALABAMA
_____ Judicial Circuit
_____ County

Before me this ___ day of _____ , 199__ , personally appeared _____ , who are known to me and known to me to be the individuals described in, and who executed the foregoing bond, and they acknowledged to me that they executed the same.

_____
NOTARY PUBLIC

SAMPLE

ESCROW AGREEMENT

STATE OF ALABAMA
_____ Judicial Circuit
_____ County

It being the desire of _____ (bail company) to purchase certificate(s) of deposit in the total amount of Twenty-Five Thousand Dollars ($25,000) which shall be in the name of _____ bank of _____ Alabama, as Escrow Agent for (bail company) ; document and its terms are submitted for approval and acceptance by the Presiding Judge of the Circuit Court of the _____ Judicial Circuit, _____ County, Alabama, and when said approval and acceptance is given by the said Presiding Circuit Judge, then this document and its terms shall constitute the surety bond or escrow agreement in accordance with and as required by Rule 7.1 of the Alabama Rules of Criminal Procedures. Said approval and acceptance shall be evidenced by the signature of the Presiding Judge of the Circuit Court of _____ County, Alabama, being executed hereto.

The provisions and terms of this escrow agreement shall be as follows:

Upon receipt of Twenty-Five Thousand Dollars ($25,000) from _____ (bail company) of _____ , Alabama shall issue certificate(s) of deposit in the name of _____ bank of _____ , Alabama, as escrow agent for _____ (bail company) . Said certificate(s) of deposit may be reissued from maturity date to maturity date so long as the principal sum(s) shall not be less than a total sum of Twenty-Five Thousand Dollars ($25,000) and said reissuance shall conform to the requirements and terms of this agreement. _____ bank shall send to the said circuit clerk copies of the original certificate(s) of deposit as heretofore mentioned and copies of the original certificate(s) of deposit as heretofore mentioned and copies of any and all reissued certificate(s) of deposit issued hereunder. Said certificate(s) of deposit remain in escrow and they may not be withdrawn or converted without prior consent of the Presiding Circuit Judge of _____ County, Alabama, and such consent shall be in writing.

All interest earned from said certificate(s) of deposit shall be paid to _____ (bail company) as agreed to between _____ (bail company) and_____ bank of _____ .

The said _____ bank, is hereby authorized to pay from said certificate(s) on receipt from an order of the Presiding Circuit Judge of _____ County, Alabama, to the State of Alabama or its political subdivisions, and said payment is hereby guaranteed to the full amount of said deposit for Twenty-Five Thousand Dollars ($25,000), all sums of monies that may become due to the State of Alabama or any of its political subdivisions by virtue of a judgment absolute being rendered against the said _____ bail company on a forfeiture of bail. The aggregate liability of said bank shall not exceed the said Twenty-Five Thousand Dollars ($25,000) so deposited and the said bank of _____ , bail company, or both, may cancel this agreement as to any future liability by giving thirty (30) days' written notice of cancellation to the circuit clerk of _____ County.

Upon the approval and acceptance by the Presiding Circuit Judge of _____ County, this document shall become effective.

ACCEPTED AND EXECUTED THIS _____ DAY OF _____, 199__ .

[Bail bond company's name]

BY: _____
Its _____
Bank _____
BY: _____
Its _____

STATE OF ALABAMA
_____ COUNTY

I, _____ a notary public in and for said State and County, do hereby certify that _____ , whose name as _____ of _____ bail bond company, is signed to the foregoing instrument, and who is known to me, acknowledged before me on this day, that being informed of the contents of said instrument, he/she as such officer and with full authority, executed the same voluntarily for and as the act of said bail company, on the day the same bears date.

GIVEN UNDER MY HAND AND SEAL THIS _____ DAY OF _____ , 199__ .

_____
NOTARY PUBLIC

MEMORANDUM

TO: Presiding Circuit Judge
Circuit Clerk
Municipal Judges

FROM: Leslie G. Johnson
Administrative Director of Courts

RE: Calculation of Time for Post-Trial Motions
under Rule 24.4, ARCrP

Recently, several questions have arisen regarding the time calculation one should use in determining when post-trial motions are denied by operation of law pursuant to Rule 24.4, ARCrP [formerly Temporary Rule 13(d)].

Rule 24.4, ARCrP, is explicit in its language stating, "No motion for new trial or motion in arrest of judgment shall remain pending in the trial court for more than sixty (60) days after the **pronouncement of sentence**, except as provided in this section." Thus, if a trial court failed to rule on a post-trial motion within 60 days after the sentencing date, the motion is deemed denied on the sixtieth day.

> Example: Judge enters sentence for defendant on **March 2, 1992.** If the defendant wants to file a post-trial motion, he or she must file the motion within 30 days after the sentence is pronounced [see Rule 24.1(b), ARCrP]. Thus, defendant has until **April 1, 1992** [see Rule 1.3(a), ARCrP, for calculations of days] to file his post-trial motion. According to Rule 24.4, the judge must rule on this motion within 60 days after *pronouncement of sentence*, which would place the deadline at **May 1, 1992**, the sixtieth day. Even if the defendant files on the 30th day, April 1st, the judge only has until May 1st to rule on the post-trial motion, of the motion is deemed denied.

Of course, Rule 24.4 also provides that, if both parties consent, the 60-day time period may be extended; however, both parties' consent must be shown affirmatively on the record.

Rule 24 applies to district and municipal court proceedings; however, in district and municipal courts, the defendant has **14 days after pronouncement of sentence** to file a post-trial motion, and the court has to rule on this motion within 14 days of sentencing. Thus, if a post-trial motion is field in district of municipal court on the 14th day, the court must rule on it that day or the motion is deemed denied.

An important exception to Rule 24, applicable in cases where a defendant has different trial and appellate counsel and wants to raise an ineffective assistance of counsel claim in the trial court by motion for a new trial, was recognized in *Ex parte Carlos Dewayne Jackson*, [Ms. 1901438, February 28, 1991], __So.2d __ (Ala. 1992). In this case, defendant was appointed one lawyer for the trial proceedings and sentencing, but another attorney was appointed to represent defendant on appeal. The 30-day period allowed for filing a motion for new trial expired with neither the trial nor appellate counsel handling it. The court of Criminal Appeals affirmed the conviction, holding that defendant's claim of ineffective assistance of counsel was procedurally barred because defendant failed to raise the issue in the trial court by a motion for new trial. On appeal to the Supreme Court, defendant, argued that, when appointed trial and appellate counsel differ, and appellate counsel must present an ineffective assistance of counsel claim via a motion for a new trial, defendant's procedural due process rights are denied if an appellate court treats the claim as procedurally barred on appeal, since the appellate counsel may not have a reporter's transcript until after the 30-days for a motion for new trial has run.

The Supreme Court created an exception to this rule, holding, ". . . if the trial court appoints new counsel to represent the defendant on appeal, the trial court shall note that fact on the case action summary sheet, and shall also note the time within which to file a motion for anew trial is extended in such case, . . ." **Thus, if newly appointed counsel files a motion within 14 days after his appointment requesting the tolling of the time within which to file a motion for new trial, then "the 30-day period within which to file a motion for a new trial shall be computed from the date the reporter's transcript is filed . . . rather than the date of the pronouncement of sentence, . . ."**

If you have any questions, please call staff attorney Bob Maddox at 1-800-392-8077 or -8078.

• M.E.M.O.R.I.A.L.S •

MORRIS CLINTON MCGEE

Morris Clinton McGee passed away January 18, 1992 at the age of 76.

He did not like his first name, and to tweak him, occasionally I would address him as "Morris." During the 15 years I served on the University of Alabama's law faculty with him, he was referred to by most of us as "McGee." His charming wife of 46 years, Paddy, who devoted herself completely to him during his steadily debilitating illness, preferred "Clinton." By whatever name, he was a great character, and one who invariably stood out in any group, not because he was a showoff, but simply because of his natural magnetism.

McGee's most notable characteristic, and certainly the more obvious, was his superior intellect. His collegiate career itself bears witness to this. Following his enrollment in the School of Commerce at the University of Alabama, he earned every scholastic and service honor of any note existing at the time—Dean's List, Beta Gamma Sigma, Druids, Quadrangle, Rho Alpha Tau, and Pershing Rifles.

After being graduated with a B.S. degree in 1938, McGee entered the law school where he was an academic leader among those elected to the Farrah Order of Jurisprudence. I will never forget the story he told me about a practice court trial he lost while a law student. His appeal to the faculty appellate tribunal was also lost. Convinced, however, that both decisions were unjust, he did the unheard-of-thing by appealing to the entire faculty, who, after argument, reversed and rendered the case. This audacity was the measure of the man.

McGee carried that trait into law practice with the Birmingham firm of Leader, Hill & Tenebaum after graduation from law school in 1940. World War II interrupted that career. For four years, beginning in 1943, McGee served in the Army Air Forces as an assistant staff judge advocate, engaging in an extensive trial practice throughout Britain and western Europe. It was during the latter stage of this period that he prosecuted the "Model Case" of the European Theatre which later was presented to the Senate Advisory Committee on Military Justice in 1947.

The labor of McGee's life, however, began in 1947 when he returned to the University's Commerce School as a member of the business law faculty. In 1950, he moved to the law school faculty. That was my first year as a student in the law school, and my second class on each Monday, Wednesday and Friday was in Mr. McGee's "Criminal Law Class." Having piloted many hair-raising and frightening combat missions during World War II, I believed I could neither be awed nor frightened. That was before McGee.

McGee demanded, and usually received, full preparation, articulate recitation and complete attention. Woe to the student, for example, who had not used the dictionary on each unfamiliar word, or who depended upon "coolies" for his briefs of cases. Many a sharp pencil have I caught on the fly, and aimed at me, while he gesticulated through an explanation. He could, and often did, strike terror in us and, because of our ineptitude, sometimes lost his temper. But, as I had more courses under McGee, I realized that it was his own deep and sincere commitment to our education in this most demanding profession and his desire that we should learn the discipline necessary to be good lawyers that prompted his classroom management. Sure, he could be short and impatient, critical and contemptuous, but he was also patient, funny and helpful. In the complexity of his nature, he was always an educator—fully informed on his subjects and well-prepared to guide his students through them.

It was during my 15 years as a member of the law school faculty, however, that I came to admire McGee even beyond the respect I held for him as a teacher. He was a high-standards man, both for faculty and for students. It was not his way to use the classroom as a platform for the redress of social or political ills, to relate internal faculty squabbles, or to bash courts or judges. Of course, he had his likes and dislikes, professional and otherwise, but his views on such subjects were kept out of the classroom. He did not practice ingratiation or obsequiousness toward his superiors, he devoted his time out of class to the publication of law books, to the work of the new Criminal Code, of which he was chief reporter, to the Alabama Defender Program, and to his continuing role as advisor to many commissions on law reform.

McGee's interests were catholic. For one thing, he was a great storyteller, and he loved jokes, especially practical jokes. (I have been the butt of some of them.) He was an avid collector of rare coins, stamps, old maps and documents, and unstamped letter covers. He admired antiques of all kinds. Moreover, he had an expansive collection of Glenn Miller arrangements. He often described himself as a "pack rat."

He traveled through life on his own talent, and his inherent curiosity, quiet enthusiasm and firm convictions made him truly a "man for all seasons." These qualities and others caused those of us whom he taught, and with whom he worked, to respect and admire him, and to consider him a friend. As the old song goes:

"The old friends are always the best, you see,
Good pals you find everyday;
But they can't fill the place or ever be,
Like the old friends of yesterday."

Goodbye, McGee, you made our law degrees, and our lives, worthwhile.

—Sam A. Beatty
Associate Justice (retired)
Alabama Supreme Court

. M.E.M.O.R.I.A.L.S .

Charles Samuel Price

Whereas, the Mobile Bar Association notes with regret the death in Mobile on February 9, 1992 of member Charles Samuel Price.

Now, therefore, be it resolved that Charlie, as affectionately known, was born in Evansville, Illinois, the son of William DeHart and Parthenia Rose Price. He obtained his law degree from the University of Alabama School of Law in 1933, the same year he began his practice in Mobile with Curtis Moody, and his membership of 59 years in the Mobile Bar Association and Alabama State Bar. His marriage to his devoted wife, Alma Dunn, as well as his legal career, were interrupted by World War II and his service as a naval officer. He retired with the rank of Lt. Commander.

On his return to Mobile and private practice, he distinguished himself by serving his profession and his community in many admirable ways. For several years he chaired the Mobile Bar Association's Law Day ceremonies, for which he received a commendation in 1984 from the American Bar Association. His community services included the presidencies of the Civic Round Table, the Catholic Maritime Board and the Civitan Club. Among his many additional honors, we note his commendation in 1956 by the federal government for his services in helping to eliminate the problem of stowaways in the Port of Mobile, and his appointment in 1958 by President Dwight D. Eisenhower to temporary federal service in Vienna, Austria for assistance to Hungarian refugees seeking political asylum in this country.

Although a member of Trinity Episcopal Church, he also gave of himself as a former member of the board of stewards of Dauphin Way United Methodist Church.

Following World War II, he returned to Mobile and briefly opened his law office as a sole practitioner, leaving that pursuit to begin a new career which lasted for 36 years as a member of the Federal Department of Justice, Immigration Service Division.

Charlie's skill and expertise in the field of immigration was recognized throughout the area, not only for its soundness and reliability, but also for the cordial and generous sharing of his knowledge and skills with his colleagues. In the passing of Charles Samuel Price, this association sadly acknowledges the loss of a respected brother lawyer and cordial friend. He was a devoted husband and father. His many contributions to his profession, country and community qualify him as most deserving of our grateful recollections.

– Jerry A. McDowell
President
Mobile Bar Association

Ralph Kennamer

Whereas, Ralph Kennamer, a respected and distinguished member of the Mobile Bar Association, died February 17, 1992, and

Whereas, this association desires to record this memorial of our colleague and to publicly recognize some of the achievements on his professional career,

Now, therefore, be it resolved that Ralph Kennamer, born in 1910, did his undergraduate work at David Lipscomb College in Nashville, Tennessee and graduated from the University of Alabama School of Law in 1935. For many years he worked in various capacities in the federal judicial system in the Middle District of Alabama, with and under the direction of his father, the late U.S. District Judge Charles Kennamer. Ralph also practiced law in Montgomery for several years before being appointed U.S. Attorney for the Southern District of Alabama in Mobile by President Eisenhower in 1956, serving in that office until 1961. Thereafter, and until 1991, Ralph practiced law in Mobile, during which time he served for several years as city attorney for the City of Mobile and later as city attorney for the City of Prichard.

Ralph Kennamer was a quiet person, possessed of a keen wit and sense of humor. He was also a student of politics and extremely well-versed in history. He enjoyed speaking informally to groups on subjects upon which he was particularly well-informed. He remains acclaimed around the federal courthouse in Mobile for his extraordinarily effective closing arguments to juries in criminal cases.

In 1960, while U.S. Attorney, when physically threatened by an armed mental patient at the federal courthouse, he had the presence of mind and the fortitude to wrestle the man to the floor and take his weapon away, thus preventing likely physical harm to himself and possibly others.

Our colleague is survived by his wife, Linda Tew Kennamer, three daughters and two sons, five grandchildren, and his brother, Dr. Rex Kennamer of Beverly Hills, California.

Wherefore, be it resolved by the Mobile Bar Association in regular meeting assembled on February 21, 1992, that we mourn the death of our distinguished colleague, Ralph Kennamer, while we note with pride his service to the public and to our profession and his achievements and accomplishments spanning a legal career of 57 years.

– Jerry A. McDowell
President
Mobile Bar Association

. M.E.M.O.R.I.A.L.S .

LEWIS VERNON CHESSER
Andalusia
Admitted: 1930
Died: November 18, 1991

ROBERT TIMOTHY COX
Anniston
Admitted: 1980
Died: October 7, 1991

WILLIAM QUINTON KENDALL
Selma
Admitted: 1966
Died: January 24, 1992

RALPH KENNAMER
Mobile
Admitted: 1935
Died: February 17, 1992

WILLIAM EARL MCGRIFF, II
Anniston
Admitted: 1972
Died: December 31, 1991

CHARLES SAMUEL PRICE
Mobile
Admitted: 1933
Died: February 9, 1992

JOHN ANDREW REYNOLDS, JR.
Huntsville
Admitted: 1948
Died: March 8, 1992

JOE STARNES, JR.
Guntersville
Admitted: 1947
Died: March 3, 1992

LEVIE BURDESHAW STEPHENS
Montgomery
Admitted: 1950
Died: April 6, 1992

ROBERT BERNARD WILKINS
Mobile
Admitted: 1948
Died: February 20, 1992

NOTICE

The members of the Alabama State Bar are cordially invited to the dedication of the Frank M. Johnson, Jr. Federal Courthouse in Montgomery, Alabama, May 22, 1992 at 2 p.m. Special guests will include United States Supreme Court Associate Justice Anthony Kennedy and members of the United States Court of Appeals for the Eleventh Judicial Circuit.

THE STATE OF ALABAMA JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA
March 27, 1992

ORDER

WHEREAS, the Board of Commissioners of the Alabama State Bar has recommended to this Court that Rule VII, Rules Governing Admission to the Alabama State Bar, be amended; and

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

IT IS, THEREFORE, ORDERED that rule VII, Rules Governing Admission to the Alabama State Bar, be amended to read as follows, and that the form appended to this order be adopted for use with this rule.

"ADMISSION OF NONRESIDENT ATTORNEYS PRO HAC VICE

"A. **Appearance of Counsel Pro Hac Vice Permitted** An attorney or counselor-at-law who is not licensed in good standing to practice law in Alabama, but who is currently a member in good standing of the bar of another state, the District of Columbia, or other United States jurisdiction (hereinafter called a foreign attorney) and who is of good moral character and who is familiar with the ethics, principles, practices, customs, and usages of the legal profession in the State of Alabama, may appear as counsel pro hac vice in a particular case before any court or administrative agency in the State of Alabama upon compliance with this rule. For purposes of this rule, an administrative agency is any board, bureau, commission, department, hearing officer, or other administrative office or unit of the state.

"B. **Foreign Attorney Appearing Pro Hac Vice Subject to Local Jurisdiction** A foreign attorney appearing as counsel pro hac vice before any court or administrative agency of the State of Alabama shall be subject to the jurisdiction of the courts of this state in any matter arising out of the attorney's conduct in such proceedings. The attorney shall be familiar with and comply with the standards of professional conduct required of members of the Alabama State Bar and shall be subject to the disciplinary jurisdiction of the courts of this state, of the disciplinary tribunals of the Alabama State Bar, and of the Board of Commissioners of the Alabama State Bar with respect to any acts occurring during the course of the attorney's appearance. The judge, hearing officer, or agency may examine the foreign attorney to satisfy the court, officer, or agency that the foreign attorney is aware of and will observe the ethical standards required of attorneys in this state. If the judge, hearing officer, or agency is not satisfied that the foreign attorney is a reputable attorney and will observe the ethical standards required of attorneys in this state, the court, hearing officer, or agency may in its discretion revoke the authority of the attorney to appear. Except as provided in Section I below, no foreign attorney is eligible to appear as counsel pursuant to this rule if that attorney (a) is a resident of the State of Alabama, or (b) is regularly employed in the State of Alabama, or (c) is regularly engaged in substantial business, professional, or other activities in the State of Alabama.

"C. **Association of Local Counsel** No foreign attorney may appear pro hac vice before any court or administrative agency of this state unless the attorney has associated in that cause an attorney who is a member in good standing of the Alabama State Bar and who maintains his or her principal law office in this state (hereinafter called local counsel). The name of local counsel shall appear on all notices, orders, pleadings, and other documents filed in the cause. Local counsel shall personally appear and participate in all pretrial conferences, hearings, trials, and other proceedings conducted in open court, unless specifically excused from such appearance by the court or administrative agency. Local counsel associating with a foreign attorney in a particular case shall thereby accept joint and several responsibility with the foreign attorney to the client, to opposing parties and counsel, and to the court or administrative agency in all matters arising from that particular cause.

"D. **Verified Application** In order to appear as counsel before a court or administrative agency in this state, an applicant shall file with the court or agency where the cause is pending a verified application for admission to practice (a form for such an application follows this rule) together with proof of service by mail, in accordance

with the Alabama Rules of Civil Procedure, of a copy of the application and of the notice of hearing upon the Alabama State Bar at its Montgomery, Alabama, office. In the event application is made before any defendant in an action has appeared, a copy of the application and notice must also be served upon such defendant. The copy of the application and the notice of hearing served upon the Alabama State Bar shall be accompanied by a nonrefundable $100 filing fee. The notice of hearing shall be given at least 21 days before the time designated for the hearing, unless the court or agency has prescribed a shorter period. In criminal cases involving indigent defendants, the court or agency may waive the filing fee and notice requirements for good cause shown.

"Upon receipt of any application for admission, the Alabama State Bar shall file with the court or agency and serve upon all counsel of record, or upon any parties not represented by counsel, and upon the applicant, before the scheduled hearing date, a statement indicating whether the applicant or other attorney members of the firm with which he or she is associated have previously made any application for admission, the date of such application, and whether it was granted. No application shall be granted before this statement of the Alabama State Bar has been filed with the court or agency. Once this statement is received, the court or administrative agency shall issue an order granting or denying the application. A copy of each order granting or denying an application shall be mailed by the local counsel to the Alabama State Bar at its Montgomery, Alabama, office.

"E. **Form of Application** The application required by this Rule shall be on a form approved by the Alabama State Bar (a form for such application follows this rule) and shall state: (1) the applicant's residence; (2) the court or courts to which the applicant has been admitted to practice and the date of admission; (3) that the applicant is a member in good standing of such court or courts; (4) that the applicant is not currently suspended or disbarred from practice in any court; (5) the title of the court and cause in which the applicant or any member of the firm of attorneys with which the applicant is associated has filed an application for admission as counsel under this rule in this state in the preceding three years, the date of each application, and whether it was granted; (6) the name, address, and telephone number of local counsel, who is attorney of record; and (7) the name of each party and the name and address of counsel of record who appeared for that party.

"Before any application is granted, local counsel must appear as attorney of record in the particular cause or consent in writing to the association.

"The granting or denial of an application for admission as counsel pursuant to this rule is discretionary with the court or administrative agency before which the application is made. Absent special circumstances, repeated appearances by any person or firm of attorneys pursuant to this rule shall be cause for denial of an application. In any case where the foreign attorney has entered an appearance pro hac vice in 5 cases within the preceding 365 days, the court or administrative agency shall examine the foreign attorney to establish good cause for according such privilege, including facts or circumstances affecting the personal or financial welfare of the client and not the attorney. Such facts may include, but are not limited to, the following: (1) a showing that the cause involves a complex field of law in which the foreign attorney is a specialist, (2) a long-standing attorney-client relationship, 3) lack of local counsel with expertise in the field involved, (4) the existence of legal questions involving the law of the foreign attorney's home jurisdiction, or (5) the need for extensive discovery proceedings in the foreign jurisdiction.

"In the event venue is transferred to another court or agency of this state or in the event the action is appealed, a foreign attorney authorized to appear in a cause pending before the court or administrative agency where venue was originally set shall be deemed admitted to the court or agency to which the cause has been transferred or appealed; provided, however, that the court or agency having jurisdiction over the transferred or appealed cause may, for good cause, revoke the authority of the foreign attorney to appear.

"F. **Initial Appearance Before Appellate Court** If the appearance by the foreign attorney in the first instance shall be on application before an appellate court of this state, the application for admission shall be in the form heretofore provided for other courts. If the application is opposed, the appellate court shall conduct a hearing; otherwise, the matter may be considered and ruled upon the appellate court without a hearing.

"G. **Quarterly Report** The Executive Director of the Alabama State Bar shall prepare a quarterly report listing all applications filed during that quarter and during the preceding 12 months and listing the names of the applicants and whether the application was granted or denied. The report shall be transmitted to the clerk of each court, each circuit and district judge, the clerk of the Supreme Court of this State, and to such other persons as the Board of Commissioners directs.

"H. **Suspension or Disbarment Terminates Permission To Appear Pro Hac Vice**

"(1) Permission for a foreign attorney to appear pro hac vice under the provisions of this rule shall terminate upon that attorney's suspension or disbarment in any jurisdiction in which the foreign attorney has been admitted. The foreign attorney shall have the duty to promptly report to the court or administrative agency of this state before which the attorney is appearing any disciplinary action that has been taken against the attorney in any other jurisdiction.

"(2) In the event local counsel in a particular case is suspended or disbarred from the practice of law in the State of Alabama, the foreign attorney shall, before proceeding further in the pending cause, associate new local counsel who is in good standing to practice law in the State of Alabama and file a verified notice thereof with the court or administrative agency of this state before whom the foreign attorney is appearing.

"I. **Exceptions**

"(1) Nothing is this rule shall be construed to prohibit any attorney from appearing before any court or administrative agency of this state on his or her individual behalf in any civil or criminal matter.

"(2) Attorneys representing the United States Government in matters before the courts or administrative agencies of this state shall be permitted to appear on behalf of the United States Government and to represent its interest in any matter in which the United States Government is interested without the association of local counsel.

"J. **Enforcement**

"(1) No court clerk or filing officer of any administrative agency of this state shall accept for filing any pleadings or other documents from a foreign attorney who has not complied with the requirements of this rule. Any pleadings or other documents filed in violation hereof shall be stricken from the record upon the motion of any party or by the court or administrative agency sua sponte.

"(2) The courts and administrative agencies of this state shall have the duty and authority to enforce the provisions of this rule by denying violators the right to appear. If a foreign attorney engages in professional misconduct during the course of an appearance, the judge or the hearing officer of the administrative agency before which the foreign attorney is appearing may revoke permission to appear pro hac vice and may cite the attorney for contempt. In addition, the judge or hearing officer shall refer the matter to the Disciplinary Commission of the Alabama State Bar for appropriate action.

"(3) Violation of this rule is deemed to be the unlawful practice of law. The Alabama State Bar or its designated commissioners shall have the right to take appropriate action to enforce these rules under the provisions of *Code of Alabama* 1975, § 34-3-43.

"(4) The provisions of this rule shall be cumulative to all other statutes and rules providing remedies against the unauthorized practice of law within the State of Alabama.

"K. **Effective Date** This rule shall become effective on October 1, 1992. Foreign attorneys now appearing pro hac vice in causes before the courts or administrative agencies of this state shall conform to these rules in pending proceedings not later than 30 days following the effective date of this rule.

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

APPENDIX

_____ _____

Plaintiff

vs.

_____ _____

Defendant Court or Administrative Agency]

VERIFIED APPLICATION FOR ADMISSION TO PRACTICE UNDER RULE VII OF THE RULES GOVERNING ADMISSION TO THE ALABAMA STATE BAR

Comes now _____, petitioner herein, and respectfully represents the following:

1. Petitioner resides at _____,
Street Address

_____, _____, _____, _____,
City County State Zip Code

_____.
Telephone

2. Petitioner is an attorney and a member of the law firm of _____, with offices at _____,
Street Address

_____, _____, _____, _____,
City County State Zip Code

_____.
Telephone

3. Petitioner has been retained personally or as a member of the above-named law firm by _____ to provide legal representation in connection with the above-entitled matter now pending before the above-referenced court or administrative agency of the State of Alabama.

4. Since _____ of 19 __, petitioner has been, and presently is, a member of good standing of the Bar of the highest court of the State of _____, where petitioner regularly practices law.

5. Petitioner has been admitted to practice before the following courts: [List all of the following courts the petitioner has been admitted to practice before: United States District Courts; United States Circuit Courts of Appeals; the Supreme Court of the United States; and courts of other states.]

Court: Date Admitted:

_____

_____

_____

Petitioner is presently a member in good standing of the Bars of those courts listed above, except as may be listed below: [Here list any court named in No. 5 that the petitioner is no longer admitted to practice before.]

_____

_____

6. Petitioner presently is not subject to any disbarment proceedings, except as provided below (give particulars, e.g., jurisdiction, court, date):

_____

_____

_____

7. Petitioner presently is not subject to any suspension proceedings, except as provided below (give particulars, e.g., jurisdiction, court, date):

_____

_____

8. Petitioner never has been subject to any disbarment proceedings, except as provided below (give particulars, e.g., jurisdiction, date of proceedings, court, date of reinstatement):

_____

_____

9. Petitioner never has been subject to any suspension proceedings, except as provided below (give particulars, e.g., jurisdiction, date of proceedings, court, date of reinstatement):

_____

_____

10. Petitioner never has had any certificate or privilege to appear and practice before any regulatory administrative body suspended or revoked, except as provided below (give particulars, e.g., date, administrative body, date of suspension and reinstatement):

_____

_____

11. Petitioner, either by resignation, withdrawal, or otherwise, never has terminated or attempted to terminate petitioner's office as an attorney in order to avoid administrative disciplinary, disbarment, or suspension proceedings.

12. Petitioner or a member of petitioner's firm has filed application(s) to appear as a counsel under Rule VII during the past three (3) years in the following matters:

Date of Application	Cause	Court or Administrative Body	Was Application Granted or Denied?

(If necessary, please attach statement of additional applications.)

13. Local Counsel of record for petitioner in this matter is _____, who has offices at

_____,
Street Address

_____, _____, _____, _____,
City County State Zip Code

_____.
Telephone

14. The following accurately represents the names and addresses of each party in this matter, WHETHER OR NOT REPRESENTED BY COUNSEL, and the names and addresses of each counsel of record who appeared for said parties:

Name of Party	**Mailing Address**

Name of Counsel	**Party Represented**	**Mailing Address**

15. Petitioner agrees to comply with the provisions of the Alabama Rules of Professional Conduct of the Alabama State Bar, and petitioner consents to the jurisdiction of the courts and the disciplinary boards of the State of Alabama.

16. Petitioner respectfully requests to be admitted to practice in the above-entitled court or administrative agency for this cause only.

DATED this _____ day of _____ , 19 __ .

_____

PETITIONER

I hereby consent, as Local Counsel of record, to the association of petitioner in this cause pursuant to Rule VII of the Rules Governing Admission to the Alabama State Bar.

DATED this _____ day of _____ , 19 __ .

_____

COUNSEL OF RECORD

STATE OF _____)
COUNTY OF _____)
I, _____ do hereby swear or affirm under penalty of perjury that the assertions of this application are true:

That I am the petitioner in the above-entitled matter; that I have read the foregoing and know the contents thereof; that the same is true of my own knowledge except as to those matters herein stated on information and belief, and as to those matters I believe them to be true.

_____

PETITIONER/AFFIANT

Subscribed and sworn to
before me this _____ day
of _____ , 19__ .

_____

NOTARY PUBLIC

NOTICE OF HEARING

The above and foregoing application is set for hearing before the court or administrative agency appearing in the style hereof on the _____ day of _____ , 19__ .

_____

PETITIONER/AFFIANT

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing upon the Alabama State Bar by mailing a copy to the same at the following address: Alabama State Bar, Attn: PHV Admission, P.O. Box 671, Montgomery, Alabama 36101, accompanied by my check in the amount of $100 payable to the same on this the _____ day of _____ , 19 __ .

_____

PETITIONER/AFFIANT

(Form approved by Alabama State Bar, 1992.)

PROFILE

NINA MIGLIONICO

BY SAMUEL A. RUMORE, JR.

Nina Miglionico is my law partner. Those of us who have law partners know that this is a special relationship. It includes being a colleague, confidante and friend. Because of the difference in our ages and experiences, she has also been my mentor in the law. We have practiced law together now for almost 18 years, but that does not even cover one-third of her more than 55 years as a practicing attorney.

The Alabama Lawyer asked me to profile Miss Nina. I was told that she is probably the longest practicing woman attorney in the history of the State of Alabama. I would say that this gives her "living legend" status. So what does one say about a "living legend"? I know many things about her from personal experience, but her involvement with the law precedes my own by almost four decades. Some research was necessary.

Nina Miglionico was born in Birmingham to Italian immigrant parents. Her father ran a delicatessen, and from her earliest days Nina worked in the family store. Nina was always a good student, and twice was double-promoted.

Since the family lived in Avondale, she attended Woodlawn High School. There was never a doubt that she would enter college. In fact, her father told her that she could do anything she wanted to with her life, provided she finished college first. She enrolled at Howard College, forerunner to Samford University, then located at East Lake. Her home was on the streetcar line to the college.

James Sulzby, in his definitive history of Samford University, noted that in 1932 Nina Miglionico participated in a Girls' Glee Club concert where she played a piano solo. Music and the piano have always been important to Miss Nina. Her father was a violinist before he married, an uncle was a university music professor, and other relatives played in orchestras. Her most cherished pasttime, besides reading, is listening to opera. (I will tell you more about her love of music.) At any rate, her years at Howard College were productive. Sulzby recounted that she held the highest scholastic average in her class.

It was at this point in her life when Nina made a decision. She was bright and she wanted to do something with her life. She wanted to become a lawyer. Despite the fact that she only a 19-year-old girl, only 59 inches tall, and with a difficult-to-pronounce last name (Mill-yon-i-co; the "g" is silent), she enrolled with Dean Farrah at the University of Alabama School of Law. She was the youngest member of her class.

Many apocryphal stories exist concerning the venerable Dean Farrah, but Miss Nina has told one story that I found to be quite amusing. One day Dean Farrah saw the diminutive teenager and said something to the effect of, "I understand that you play in the University Orchestra." "Yes, sir," she said. "Well, Miss Miglionico, perhaps we are not keeping you busy enough here at the University. Law school is a place to work, not play." In any event, she kept alive her love for music as well as for law. She even found time to earn money teaching piano.

There were five women law students in the Alabama Class of 1936. It should be remembered that at this time many law schools did not even accept women students. And during the Depression, opportunities were not so promising for any law school graduates, be they male or female. Three of the women students accepted positions with the federal government. One of these rose to the position of senior judge on the United States Tax Court. The other woman graduate practiced law with her husband, also a classmate, for a number of years and then went into banking. Only Nina began a law practice and stayed with it over the years.

The early days in her practice were certainly a struggle. Law firms were not hiring women. The only offer for the young, short, female, Italian, Catholic attorney with a difficult-to-pronounce last name was that of a secretary at $15 per week, if she could type and learn shorthand.

In that first year Nina joined with Robert Gordon, a founder of today's Gordon, Silberman firm, in a space-sharing arrangement. They decided that as lawyers they could either "starve" separately or together. They chose the latter.

They shared a desk in a private office with a reception area. Whenever she had a client, he would leave the room, and vice versa. Later, they hired a secretary. One week he paid the salary. The next week, she paid the salary. Many nights Bob ate dinner with Nina and her parents.

With determination Nina worked hard and her practice began to grow. Then World War II intervened. When the "draft" was initiated in 1940, she took over the practice of a young lawyer who was inducted into the armed forces. Later, when another young lawyer went off to war, she took over his

cases to safeguard his practice. During this time the word "vacation" was not in her vocabulary.

Nina gained a fine reputation and was a hard worker. She had a general practice that emphasized tax matters, real estate and probate law. She acquired a loyal clientele. She was particularly interested in women's issues: salaries based on qualifications, not gender; uniform divorce law; married women's property rights; jury service for women; and equal political rights with men. She made speeches in all of Alabama's 67 counties and in many states.

Nina became involved in a number of organizations. These included the Alabama Federation of Business and Professional Women's Clubs (BPW), the Alabama Women Lawyers Association, the Zonta Club, and the American Association of University Women. Through her activities, speeches and writings, a number of Alabama laws were changed, including allowing women to serve on juries in Alabama.

In 1958 she was honored by her peers when she was elected president of the National Association of Women Lawyers. This was a tremendous achievement as she became known beyond Birmingham and Alabama. In the *Women Lawyers Journal* she was glowingly described as follows: "Nina Miglionico, the new president of the National Association of Women Lawyers, is a human dynamo. Only 5 feet tall, she alone has the secret for perpetual motion, but whatever she does, she does so very well. She has all the qualifications of leadership, is a fine organizer, presides with grace and dignity and is blessed with good health and a fine sense of humor.

"With all of her talents and honors, Nina is gracious and unassuming, soft-spoken and dignified. She thinks straight, works hard, plays fair and interprets life in truth, beauty, reality, freedom, and efficiency.

"The members of the National Association of Women Lawyers can look forward to a successful and harmonious year . . . ."

The only offer for the young, short, female, Italian, Catholic attorney ... was that of a secretary at $15 per week, if she could type and learn shorthand.

Her year as president was a good one, but it was only a beginning. She was elected in 1959 to serve a two-year term in the House of Delegates of the American Bar Association, and continued her work for the legal profession. She was appointed to the Citizen's Advisory Committee to the Commissioner of Internal Revenue, and President Kennedy appointed her to the Presidential Commission on the Status of Women. But, she was also "bit" at this time by the "political bug," and her greatest public contributions were yet to come.

In 1963, Birmingham was in the midst of great changes. These changes were social and political. A new form of government opened the opportunity for Nina to practice what she had been preaching for so many years. She had told women over the years to get involved in politics, and many of her friends now recruited her to run for the new Birmingham City Council. In the primary election she finished third out of 75 candidates. She took her seat on the original council, and won re-election in 1965, 1969, 1973, 1977, and 1981, serving her city for over 22 years.

It was difficult and a challenge to practice law full time and serve as a city official part time. The demands of Birmingham in those early days of the council were great, but as *Birmingham Post-Herald* reporter Ted Bryant said in an article at the time of her retirement from the council, she helped to change Birmingham.

In 1963, Birmingham was known for police dogs, fire hoses and racial demonstrations. Miss Nina provided leadership that helped citizens of Birmingham work together in solving their problems with maturity, vision and good judgment. She reached out to all segments of the community, and she was not afraid to speak out in black churches as well as at meetings with whites.

Her outspokenness was not without some risk. Crosses were burned in her yard. There were phone threats. A bomb was placed on her front porch, but her father discovered the bomb and moved it. The fire marshal said that her father "could have been turned into a pat of butter." However, she continued her service to her city in the same fearless way. Again, as Ted Bryant stated in his article, the original council "accomplished their goal, often through personal sacrifice as opposed to personal gain."

Miss Nina served as chair of the Birmingham Park and Recreation Board, and from 1979 to 1981 she served as the first woman president of the Birmingham City Council. She was also the first woman president of the Alabama League of Municipalities. She retired from the Birmingham City Council in 1985.

At the time of this retirement she wrote to the citizens of Birmingham, "I hope it can be said that I have served the people of this community with integrity, independence, and good humor." An editorial in response to her letter stated that "perhaps more than any public official of her era in this area, Nina Miglionico has been a voice of reason and selflessness."

A few years ago Miss Nina wrote me a note that I have saved. It says a lot about her feelings and her philosophy. I share an excerpt with you now:

"I hope you have found our working relationship during the past years as pleasant, enriching, and satisfying as I have. You also know that I want you to continue to be a great lawyer, personally enriched by your work, and contributing to the life of your community. All of this is the basis for individual growth and development, and a good, productive, and happy life."

Certainly she has lived this philosophy to the fullest.

I have not recounted many of the wonderful stories that could be told concerning her private law practice over the last half century. Her career has been the equivalent of a family doctor, as she now represents the grandchildren of her early clients who have stayed with her over the years. She has been a wise, faithful and compassionate counselor to literally thousands of persons. Today Miss Nina is still seeing clients on a daily basis. Her health is good, and she loves to travel, particularly overseas. And, she enjoys reading, listening to music, politics, and yes, practicing law. ■

CLASSIFIED NOTICES

RATES: Members: 2 free listings per bar member per calendar year EXCEPT for "position wanted" or "position offered" listings — $35 per insertion of 50 words or less, $.50 per additional word; **Nonmembers:** $35 per insertion of 50 words or less, $.50 per additional word. Classified copy and payment must be received according to the following publishing schedule: **May '92 issue**—deadline March 31, 1992; **July '92 Issue**—deadline May 29, 1992. No deadline extensions will be made.

Send classified copy and payment, payable to *The Alabama Lawyer*, to: *Alabama Lawyer* Classifieds, c/o Margaret Murphy, P.O. Box 4156, Montgomery, Alabama 36101.

FOR SALE

For Sale: The Lawbook Exchange, Ltd. buys and sells all major lawbooks, state and federal, nationwide. **For all your lawbook needs, phone 1-800-422-6686.** MasterCard, VISA and American Express accepted.

For Sale: Save 50 percent on your lawbooks. Call National Law Resource, America's largest lawbook dealer. Huge inventories. Low prices. Excellent quality. Your satisfaction absolutely guaranteed. Also, call America's largest lawbook dealer when you want to sell your unneeded books. **Call for your free, no-obligation quotes, 1-800-886-1800. National Law Resource, Inc.**

For Sale: *Model Rules of Professional Conduct;* personal copies available for $5 (includes postage). **Mail check to P.O. Box 671, Montgomery, Alabama 36101. Pre-payment required.**

For Sale: Antique Alabama maps. 1820s-1860s. Great as office decoration or gift. Guaranteed authentic. Write, call, or FAX for list and photos. **Sol Miller, P.O. Box 1207, Huntsville, Alabama 35807. Phone (205) 536-1521, FAX (205) 534-0533.**

For Sale: *Code of Alabama*, including updates through third quarter of 1991. **Contact S. Perry Given, Jr., Harbert Corporation, P.O. Box 1297, Birmingham, Alabama 35201. Phone (205) 987-5677.**

For Sale: *Code of Alabama* with all current supplements. **Phone (205) 381-4953.**

MISCELLANEOUS

Needed: Office-sharing attorney with some bankruptcy, business, probate or trial practice. We have need for one lawyer with some clients. We can provide some clientele and business. We are totally set up with all amenities and staff. **Send resume to Attorney, P.O. Box 530343, Birmingham, Alabama 35253.**

SERVICES

Service: Securities expert witness. Will review facts to determine suitability, churning, excessive charges, etc. Expert witness experience in both plaintiff and defendant oriented cases. Registered investment advisor and member of the Alabama State Bar. Resume available upon request. **Write to M.L. Bronner, P.O. Box 1310, Montgomery, Alabama 36102-1310.**

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

Service: Legal research help. Experienced attorney, member of Alabama State Bar since 1977. Access to state law library. WESTLAW available. Prompt deadline searches. **Sarah Kathryn Farnell, 112 Moore Building, Montgomery, Alabama 36104. Phone (205) 277-7937.** *No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers.*

Service: Certified Forensic Document Examiner. Chief document examiner, Alabama Department of Forensic Sciences, retired. B.S., M.S. Graduate, university-based resident school in document examination. Published nationally and internationally. Eighteen years' trial experience state/federal courts of Alabama. Forgery, alterations and document authenticity examinations. Criminal and non-criminal matters. American Academy of Forensic Sciences, American Board of Forensic Document Examiners, American Society of Questioned Document Examiners. **Lamar Miller, 3325 Lorna Road, #2-316, P.O. Box 360999, Birmingham, Alabama 35236-0999. Phone (205) 988-4158.**

Service: Examination of questioned documents. Handwriting, typewriting and related examinations. Internationally court-qualified expert witness. Diplomate, American Board of Forensic Document Examiners. Member: American Society of Questioned Document Examiners, the International Association for Identification, the British Forensic Science Society and the National Association of Criminal Defense Lawyers. Retired Chief Document Examiner, USA CI Laboratories. **Hans Mayer Gidion, 218 Merrymont Drive, Augusta, Georgia 30907. Phone (706) 860-4267.**

Service: Securities expert witness. Will testify to suitability and churning. Fifteen years' experience in securities business. Arbitrator for National Association of Security Dealers, American Arbitration Association, American Stock Exchange. Can assist in court or arbitration hearing. Member National Forensic Center. **Chuck Schildhauer, P.O. Box 3033, Gulf Shores, Alabama 36542. Phone (205) 968-8191.**

Service: HCAI will evaluate your cases gratis for merit and causation. Clinical reps will come to your office gratis. If your case has no merit or if causation is poor, we will also provide a free written report. State affidavits superrushed. Please see display ad on page 174. **Health Care Auditors, Inc.,**

P.O. Box 22007, St. Petersburg, Florida. Phone (813) 579-8054. FAX 573-1333.

Service: Insurance, expert witness. Siver Insurance Consultants (since 1970)—available to consult and/or furnish expert testimony in areas of property/casualty insurance, employee benefits and business life insurance. Twenty-person staff includes JDs with insurance industry experience. Due to firm's core-consulting practice with corporate and government clients, we are particularly qualified for matters involving coverage interpretation, insurance industry customs and practices, professional liability, bad faith, rates and premiums, controverted property claims, claims-made issues, and insurer insolvency. Initial discussion and impressions offered without charge. **Call Edward W. Siver, CPCU, CLU or Jim Marshall, JD, CPCU, ARM at (813) 577-2780.**

Service: Research/brief writing/assistance in all aspects of case preparation by experienced Alabama attorney. Member of state bar since 1987. WESTLAW, including Shepard's. Prompt response on research requests. **Contact Anna Lee Giattina, 2112 11th Avenue, South, Suite 218, Birmingham, Alabama 35205. Phone (205) 328-9111.** *No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers.*

Service: Automotive expert. Thirty years' experience, including manufacturer's service policies and procedures, warranty claims, collision repair, salvage appraisal, service equipment, aftermarket equipment and accessories, tire repair, tire disposal. **Rick Shea, Route 2, Box 5, Gadsden, Alabama 35903.**

Service: Law library upkeep service on contractual basis. Negotiation with publishers for reduced upkeep costs. Consulting on all information resources, including CD-ROM for PCs. Professional experienced law librarian with M.L.S. Member American Association of Law Librarians. Initial evaluation, including travel, gratis. **Janet Smalley, 1714 15th Avenue, South, Birmingham, Alabama 35205. Phone (205) 933-7581.**

POSITIONS OFFERED

Position Offered: Attorneys wanted, experienced in insurance or subrogation for new business referrals. **Write Insurance Services Group, 413 East Broad Street, Columbus, Ohio 43215. Phone 1-800-274-1537.**

Position Offered: Attorney jobs. National and Federal Legal Employment Report. Highly regarded monthly detailed listing of attorney and law-related jobs with the U.S. Government, other public/private employers in Washington, D.C., throughout the U.S. and abroad. 500-600 new jobs each issue. $34 for 3 months; $58 for 6 months. **Federal Reports, 1010 Vermont Avenue, NW, #408-AB, Washington, D.C. 20005. Phone (202) 393-3311. VISA and MasterCard.**

Position Offered: Corporate attorney. Company based in Birmingham is seeking attorney with experience in real estate and commercial transactions; some knowledge of general corporate, securities and antitrust laws also helpful. Candidates should have outstanding academic credentials (e.g., top 20 percent of class or law review). Two to five years of experience preferred. **Please submit resumes in confidence to Attorney Search, P.O. Box 59172, Birmingham, Alabama 35259.**

Position Offered: Mobile shipbuilding and repair company seeks lawyer to fill new position of in-house counsel. Qualified candidates must have three to five years' experience with strong background in contracts; experience in maritime law also preferred. Salary commensurate with experience. **Send resumes to "In-house Counsel", P.O. Box 262, Mobile, Alabama 36652.**

Position Offered: Attorney position available. Personal injury, worker's compensation, bankruptcy and Social Security. Experience preferred. Inquiries confidential. **Send resumes to Rhonda Thomas, Davis & Goldberg, 1910 3rd Avenue, North, Suite 500, Birmingham, Alabama 35203.** ■

Local Bar Focus

The Tuscaloosa County Bar Association has been involved in a number of activities this year, including hosting various CLE programs and sponsoring the Explorer Post. Post members, ages 14 to 21, heard speakers involved in various areas of practice, visited the University of Alabama School of Law and will participate in a mock trial program this year.

In the United States District Court for the Northern District of Alabama

NOTICE

The local rules of this court require attorneys to be readmitted to the bar of this court and pay a prescribed fee every five years. If you were admitted prior to January 1, 1987 and have not filed application to continue as a member in good standing in the northern district of Alabama, contact the clerk's office of this court at (205) 731-1701 as soon as possible. Our records indicate approximately 1,600 attorneys have not applied for readmission and/or paid the fee and are, therefore, no longer active members of this bar. In order to avoid possible delays occurring in filing new cases or in the progress of pending cases, please check your records and if you have not been readmitted, contact the clerk's office at the above number. An application form will be mailed to you.

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