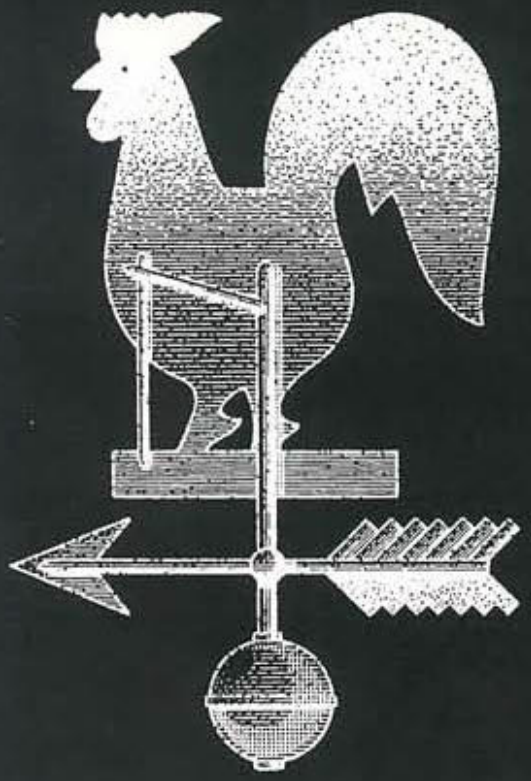
# The Alabama Lawyer

Vol. 54, No. 3 MAY 1993



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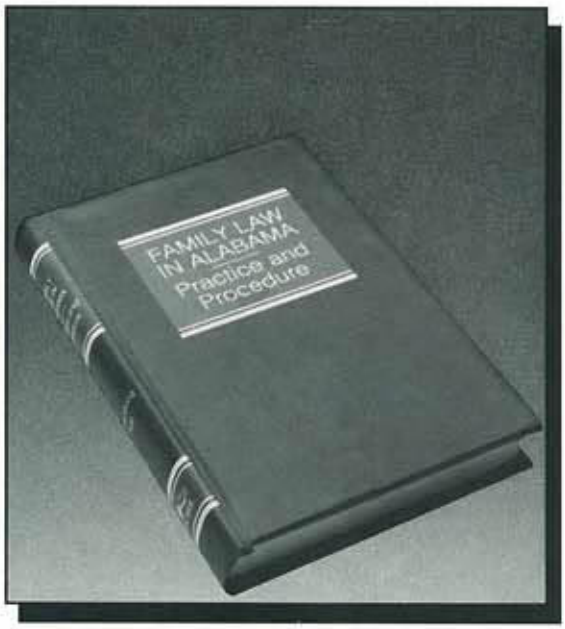


This one-volume source offers family law practitioners all the tools for guiding clients through the gauntlet of family disputes: statutes, case law, forms, and practical advice on every aspect of handling the case. Written by two of Alabama's top family law experts, Rick Fernambucq and Judge Gary Pate, it provides quick access to state and federal laws affecting the case; practical recommendations for dealing with traumatized clients; and proven forms, pleadings, and motions used throughout the Alabama domestic courts, such as:

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# IN BRIEF

May 1993 Volume 54, Number 3

## ON THE COVER:

The Birmingham Civil Rights Institute houses exhibits depicting historical events from post-World War I racial separation to present-day racial progress.

*Photo courtesy of the Birmingham Civil Rights Institute, Odessa Woolfolk, president*

## INSIDE THIS ISSUE:



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



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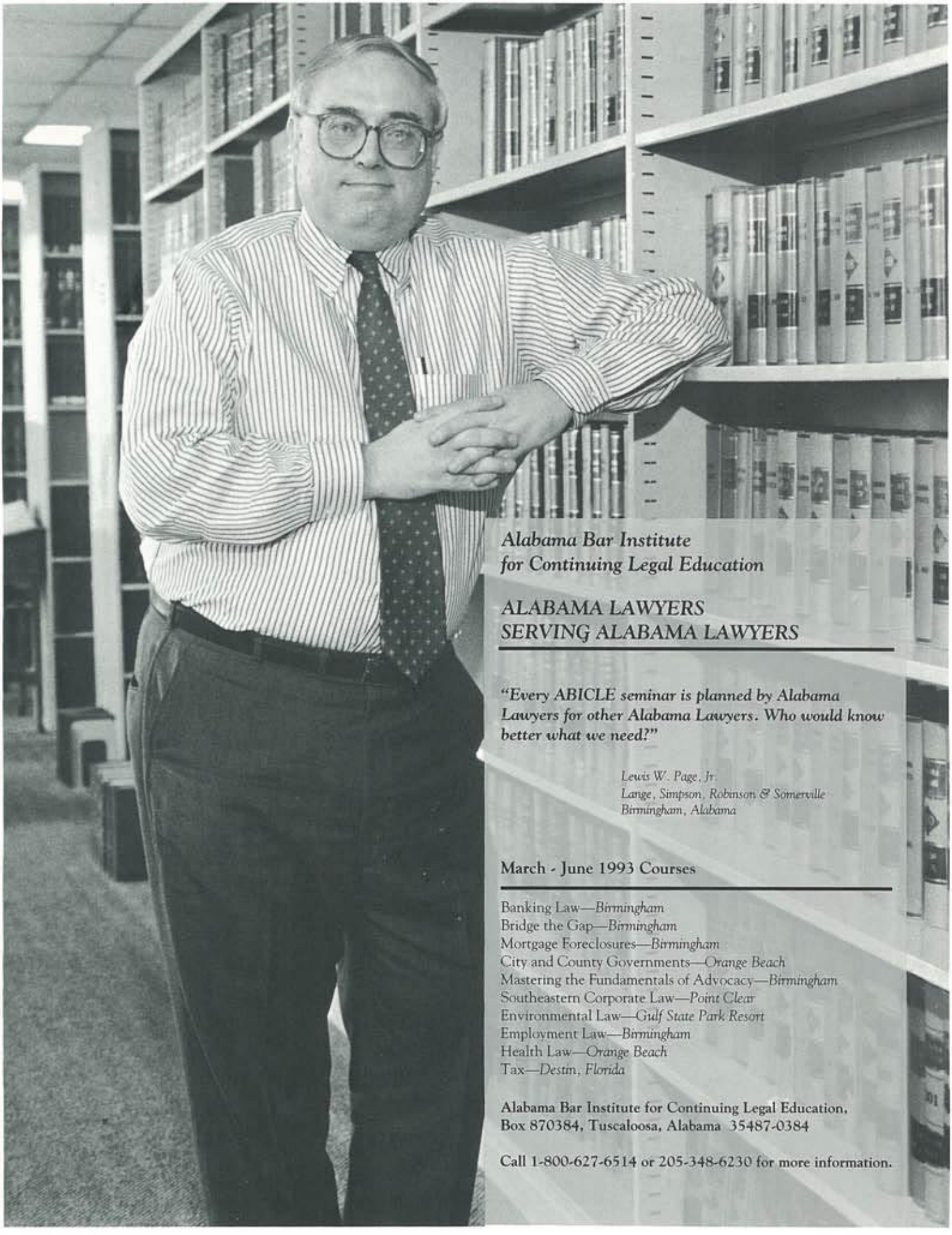

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# ALABAMA FIRST

Clarence M. Small, Jr.

Forty members of the **Alabama First Task Force** met at the state bar headquarters March 25, 1993 to develop a plan of action to improve the state's bleak economic future. The task force members were welcomed and given an overview by state bar President Clarence M. Small, Jr. and task force Chair Walter R. Byars of Montgomery. Speakers for the program

*Members, Alabama First Task Force, at planning session*

**A+** As a part of the Alabama First effort and to keep you informed, listed below are the community meeting dates for A+, the statewide education reform organization. All interested citizens are invited to attend these meetings. If you need more information about the A+ meeting locations and times for your community, please contact the A+ office in Montgomery at 1-800-253-8865 or 1 (205) 834-4884.

MISSION

- To seek input and develop broad-based ownership for the reform blueprint throughout Alabama;
- To encourage grassroots support for education reform;
- To demonstrate that education reform must occur in a systematic, not piecemeal, fashion; and
- To show that a quality education system is a necessity for a quality life for each citizen in Alabama.

TOWN MEETINGS SCHEDULED TO DATE

| Town meeting | Date | Contact person | Phone number |
|---|---|---|---|
| Decatur | May 18, 1993 | Cindy Paler | (205) 355-1116 |
| Anniston | May 20, 1993 | Maudine Holloway | (205) 267-6144 |
| Monroeville | June 8, 1993 | Steve Stewart | (205) 575-3232 |
| Auburn/Opelika | June 10, 1993 | not available | |

OTHER LOCATIONS FOR TOWN MEETINGS (to be scheduled)

| | | | |
|---|---|---|---|
| Alexander City | Cullman | Huntsville | Talladega/Sylacauga |
| Andalusia | Demopolis | Mobile | Troy |
| Baldwin County | Dothan | Montgomery | |
| Birmingham | Gadsden | Scottsboro | |

*Will Hill Tankersley*

*Frank B. McRight*

included Will Hill Tankersley, immediate past chair of the Montgomery Area Chamber of Commerce, Mobile lawyer Frank B. McRight, chair of Leadership Alabama, and Retirement Systems CEO David Bronner.

Task force members learned from these knowledgeable speakers the need for leadership and dramatic action to keep Alabama from falling farther and farther behind educationally and economically. After hearing the sobering reports of these speakers, task force members divided into "idea groups" to focus on specific problems and ways lawyers can help resolve them. Following these sessions, the task force members reassembled and made reports on their findings and recommendations. From this exchange, a plan of action was developed to guide Alabama lawyers in helping remedy the state's problems. During the next several months, the task force will be calling upon and energizing lawyers across the state to helpimplement the Alabama First plan of action. ■

*Task force chair Walter Byars*

*Dr. David Bronner*

# Letter to the Editor

All of us in the legal profession get exasperated at one time or another from the onslaught of criticism about lawyers and the cynical comments about our negative contribution to society. We know that these comments are for the most part stereotyped and often totally untrue, and certainly distort the extraordinary contribution that lawyers have made, historically and today, to society.

After the blizzard of '93, I heard about the quite heroic efforts of one of our colleagues to help a family in distress. There are probably hundreds of other examples where lawyers pitched in but I thought the effort made by Alva Caine, past president of the Alabama State Bar, was truly inspiring.

Alva Caine lives in a heavily forested neighborhood. As a result, the heavy snows and winds blew down thousands of trees, made the roads totally impassable, and knocked out electricity.

Just before the storm hit, a neighbor in the general vicinity of Alva Caine's residence, but some miles away, had had major surgery and was suffering from life-endangering post-operative medical problems.

Alva Caine did not know the gentleman in distress. He learned of this man's plight from a third party. Nevertheless, Alva got in his four-wheel drive vehicle, and, equipped with a chainsaw, determined to rescue the man from his plight and make hospital and medical attention available to him.

Alva's extraordinary effort entailed cutting and removing numerous trees, many of which were so large they had to be cut in multiple places in order to be pushed, shoved and carried, piece by piece, off of the road. It entailed cutting branches, moving wires, and proceeding literally a couple of feet at a time — all in sub-freezing weather.

After Alva finally arrived at the people's house, he then had to repeat the process, moving more trees and branches that had fallen, proceeding over frozen roads, digging out his car several times after it had gotten stuck, and delivering the man in need to the hospital for medical attention.

We heard of Alva's heroic effort from the wife of the man who was rescued. Her praise of Alva's bravery, reassurance to her husband that he would get to the hospital in time for proper medical attention, and general support were matters related with heartfelt conviction and tears of appreciation in her eyes.

I know it is trite to say that we have a wonderful profession, but this is true because of people in our profession like Alva Caine — people who constantly sacrifice their self-interest for others.

***Donald B. Sweeney, Jr.***
***Rives & Peterson***
***Birmingham, Alabama***

**April 8, 1993**

# WE'LL MISS YOU NORMA JEAN!

On May 1, Norma Jean Robbins, the admissions secretary of the Alabama State Bar since 1979, retired. Norma completed 30 years of service to the State of Alabama. Fortunately, she chose to spend her "last tour of duty" with us. She will be sorely missed.

Norma brought to this position a warm and concerned personality, extraordinary administrative skills, and a work ethic which was based upon absolute integrity and fairness — both essential for her sensitive position.

*Norma Jean Robbins*

We have experienced our greatest increase in both lawyer admissions and law student registrations during her tenure. She has processed over 1,500 applications and registrations each year, and, excluding the pending February results, has overseen the admission of 5,613 lawyers — well over half of our total membership. Until late 1992, when she advised me of her desire to retire, she directed our admissions area, by herself, with only seasonal part-time assistants during peak periods.

Norma has handled the many pressures and endless deadlines with calm resolve. Above everything else, she did it with an absolute, firm evenhandedness (to the consternation of a few folks).

Over the years, I have received my share of calls from persons who "couldn't believe" they were not an "exception" to our rules and regulations, and, early on, when they would begin discussing Miss Robbins' faults, I knew they were way off base.

Norma is a "soft touch" and has gone the extra mile to assist any applicant in every way possible when special needs or accomodations were permissible under our rules. She simply did not play favorites. No parent, spouse or applicant could hurt more than she when bar results were adverse. She was often the first person a disappointed applicant turned to — she could quickly dispel the feeling that the "end of the world" was at hand.

Our bar examiners and members of the Character and Fitness Committee have praised her efficiency and helpfulness. She simply has made all of our responsibilities easier to meet with her cheerful and positive attitude.

These persons honored Norma with a retirement luncheon April 30 in Montgomery and presented her with a remembrance of their appreciation. Norma leaves many friends in the Alabama State Bar family as she enters this new phase in her life. She will reside in Montgomery where she will pursue her considerable talents as an artist. She maintains interests in the theatre and gardening.

*State bar staff members at the 1980 convention in Mobile: (l-r) Margaret Boone, Norma Robbins and Diane Weldon*

The letters of appreciation and floral tributes received after she administered a bar examination were constant reminders of the respect our applicants had for her. She set the standard which we must seek to maintain.

Norma will be succeeded by Dorothy Johnson who has been working with her since last June. Elizabeth Shwarts will be Mrs. Johnson's assistant.

Norma has indicated an interest in assisting as a bar examination monitor for future exams each February and July. This is an offer we cannot refuse. We will miss Norma as a daily ray of sunshine, but we will not forget her influence on a generation of lawyers. She is very special. ■

# • ALABAMA STATE BAR •

# At a Glance

## Keep In Touch!

- Need an updated CLE Calendar? Need to know if a seminar has been approved for CLE credit? Want a CLE seminar at an exotic spot or on a particular subject matter? Call Diane at 1-800-354-6154 for a calendar and information.
- If you attended or will be attending a CLE seminar that has not been approved for CLE credit, call Diane at 1-800-354-6154 for application information.
- To reserve a meeting room for a deposition, call Kim at 1-800-354-6154.
- Questions regarding the purchase of your occupation license or payment of dues? Call Alice Jo at 1-800-354-6154 or (205) 269-1515.
- Want to join the Lawyer Referral Service? Call Katherine at 1-800-392-5660.
- The state bar's fax number, main office, is (205) 261-6310.
- To fax something to the Center for Professional Responsibility, the number is (205) 261-6311.
- The telephone number to reach either office is (205) 269-1515, Monday through Friday, 8 a.m. to 5 p.m.

## Member Services

- Bar directories for 1992-93 now cost $25 for ASB members and $40 for non-members. Send check or money order to Alabama Bar Directory, P.O. Box 4156, Montgomery, Alabama 36101.
- To change your name, address or telephone number, send it IN WRITING, to Alice Jo Hendrix, Membership Services, P.O. Box 671, Montgomery, Alabama 36101.
- To get a classified notice, an announcement in "About Members, Among Firms", or a letter to the editor in the May 1993 issue of *The Alabama Lawyer*, the deadline was Wednesday, March 31, 1993 for the information to be RECEIVED at the state bar. To get something in the July 1993 issue, it has to be RECEIVED at the state bar by Monday, May 31, 1993.

## Exam Deadlines!

- All bar exam applicants shall have their completed applications filed no later than November 1 preceding the February examination, and no later than March 1 preceding the July examination for which they wish to sit. (Rule II, C, Rules Governing Admission to the Alabama State Bar) Attorneys submitting affidavits for prospective applicants should be mindful of these deadlines.

## Let's Get Together!

- ✔ Young Lawyers' Section Annual Meeting at the Gulf, May 14-15, 1993. For room reservations, contact Sandestin directly at 1-800-277-0800. For registration information, call Barry Ragsdale at (205) 879-3737.
- ✔ The next meeting of the Alabama State Bar Board of Commissioners is May 21, 1993.
- ✔ Mark your calendar—Alabama State Bar Annual Meeting—July 15-17, 1993, Riverview Plaza, Mobile.

# FACTS/FAX POLL

## FACTS/FAX POLL RESULTS: Critique of *The Alabama Lawyer*

In the January and March issues of *The Alabama Lawyer*, we asked for your opinion of the *Lawyer*, and what additions, deletions and changes you would like to see in the magazine. Seventy-four attorneys responded to this poll, either by faxing or mailing in their responses. Here are the results:

**Of the members who responded:**

1. 86% read selected portions of the magazine; 11% read it in its entirety; 3% skim it; and no one admitted to never reading it.
2. Regarding the different sections of the magazine:

PRESIDENT'S PAGE
55% sometimes read it;
27% always read it;
18% never read it.

EXECUTIVE DIRECTOR'S REPORT
48% sometimes read it;
28% never read it;
24% always read it.

LEGISLATIVE WRAP-UP
61% sometimes read it;
34% always read it;
5% never read it.

BAR BRIEFS/ABOUT MEMBERS, AMONG FIRMS
61% always read them;
2% read them sometimes;
7% never read them.

BUILDING ALABAMA'S COURTHOUSES
53% sometimes read it;
38% never read it;
9% always read it.

SUBSTANTIVE LEGAL ARTICLES
65% sometimes read them;
35% always read them;
none admitted to never reading the articles.

CLE OPPORTUNITIES CALENDAR
53% sometimes read it;
28% always read it;
19% never read it.

DISCIPLINARY REPORT
74% always read it;
20% read it sometimes;
6% never read it.

YOUNG LAWYERS' SECTION
54% sometimes read it;
35% never read it;
11% always read it.

RECENT DECISIONS
72% always read them;
27% sometimes read them ;
1% never read them.

MEMORIALS
53% sometimes read them;
40% always read them;
7% never read them.

It appears from this very unscientific, extremely informal poll that of those responding, the most popular sections in the magazine are "Bar Briefs/About Members, Among Firms", "Disciplinary Report" and "Recent Decisions" – in other words, who has received an honor or been promoted or moved, who has been disciplined, and what the courts decided on a certain issue.

Suggestions for future issues included having articles on: the use of in-house counsel; attorneys combining the practice of law with other professions or businesses; time and effort donated to different communities by attorneys; ethics opinions on a regular basis; a quarterly focus on county bars, with an emphasis on demographics and lawyers' typical practices, clients and income; advantages of local grievance committees as opposed to centralized committees; criminal law; appellate and trial court judges, and Alabama's federal courthouses; solo practitioners, and small firm practice, problems and solutions; a $1 court cost fee, per case, to fund a retirement plan for attorneys; actual cases tried in Alabama with jury decisions; more substantive legal articles; Alabama property law; and articles from state law professors.

## FACTS/FAX POLL RESULTS: Punitive Damages

The Facts/Fax Poll which has appeared in recent issues of *The Alabama Lawyer* was designed to generate reader interest and to provoke comment on issues of interest to members of the bar. By that measure, the fax poll has been a resounding success.

However, as specifically noted in the announcement for the first fax poll, the survey was never intended to be a scientific sampling. Unfortunately, recent fax polls on issues concerning the election/selection of judges and punitive damages have generated what appears to be organized efforts to skew the results. Similarly, other media and interest groups have sought to portray the poll results as being an authoritative measure of the position of bar members on these issues. Because of concerns about the validity of the polling results and the potential for misuse of the polling data, no tabulation has been made of the fax poll on punitive damages.

# THE ALABAMA STATE BAR ANNOUNCES A

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# BAR BRIEFS

Birmingham attorneys **F.A. Flowers, III** and **David G. Condon** recently co-authored a book for the National Association of Manufacturers, entitled *Products Liability Law, Loss Control and Insurance*. Flowers is a partner with the firm of Burr & Forman, and Condon is executive vice-president and general counsel for SMIS, Incorporated, an insurance brokerage house specializing in products liability/completed operations insurance, loss control and claims management for equipment manufacturers and dealers.

The book is designed for industrial, agricultural and construction equipment manufacturers and dealers as a tool to help them manage legal exposure to products liability claims and suits. The book offers two solutions, loss control through loss avoidance and loss reduction measures, and insurance.

Editorial assistance in developing the book was provided by **Tom Cottingham**, who is also a partner with Burr & Forman.

**John M. Johnson**, a partner in the Birmingham firm of Lightfoot, Franklin, White & Lucas, contributed to a book that has just been named the best law book of 1992.

After a nationwide competition, the Association of American Publishers gave the award to the six-volume *Environmental Law Practice Guide*.

Johnson wrote the chapter on pesticides. He is also the author of *Pesticide Litigation Manual*.

*The Environmental Law Practice Guide* includes text, case and statutory citations, forms, bibliographies, indexes, and practice pointers designed to help lawyers, government officials, consultants, and regulated businesses.

According to a recent study by the American Bar Association, 67.6 percent of attorneys in midsize firms (20-100 attorneys) use a computer. In a similar study of smaller law firms, 55.6 percent surveyed use a computer.

The overwhelming function performed with the computers is word processing, but things are rapidly changing. The **ABA's Technology Clearinghouse** offers a free service for members, answering their automation questions over the telephone. The Clearinghouse is a one-stop source for automation information on software, hardware, services and publications.

For information about the Clearinghouse and packets containing product descriptions, vendor contacts, informational articles and reading lists, call (312) 988-5465.

Friedman

**Linda Friedman**, a partner with the Birmingham firm of Bradley, Arant, Rose & White, has been elected a member of the American Law Institute. She is the first female practicing attorney ever elected to the ALI from Alabama. The ALI currently has 2,500 elected members.

Friedman is a member of the American Bar Association, the Alabama State Bar (chairperson of the Business Torts & Antitrust Section), the Birmingham Bar Association and the U.S. Trademark Association. She also served for a number of years on the Board of Bar Examiners of the state bar. She contributed to *State Trademark and Unfair Competition in Alabama* and *Protecting Intellectual Property and Alabama Law*, which are comprehensive manuals for lawyers, as well as business managers.

She graduated *summa cum laude* from Kenyon College and received her law degree from Vanderbilt Law School, where she was associate editor of the *Vanderbilt Law Review*. She clerked with the Honorable Sam C. Pointer, Jr., chief judge of the U.S. District Court for the Northern District of Alabama.

**Milton C. Davis** of Tuskegee recently was elected the 29th General President of Alpha Phi Alpha Fraternity, Inc. during its National Convention in Anaheim, California. Davis is the first Alabama resident to be elected to head the nation's oldest African-American fraternity. His term began in January.

Davis received his undergraduate degree from Tuskegee University and law degree from the University of Iowa. He is an American Political Science Foundation Fellow, a Ford Foundation Graduate Fellow, a Herman Lehman Foundation Scholar, and a Henry Luce Foundation International Scholars Finalist. A former assistant attorney general of Alabama, Davis practices in his hometown of Tuskegee.

He has served as a member of the Alabama State Bar Board of Bar Examiners, a member of the U.S. 11th Circuit Court of Appeals Advisory Committee, and as former president of the Macon County Bar Association.

*Nina Miglionico, a partner in the Birmingham firm of Miglionico & Rumore, received the Outstanding Alumnus award from the University of Alabama School of Law during Law Week in March. The award was presented by the Bench & Bar Society and is named for Dean Daniel Meador.*

**U.S. Circuit Judge Joel F. Dubina**, a 1973 graduate of Cumberland School of Law, Samford University, was honored recently as Alumni of the Year for the law school. Judge Dubina, along with retired Mississippi State Supreme Court Chief Justice Roy Noble Lee, was recog-

nized during Law Week activities in March.

Dubina, of Montgomery, was appointed to the Eleventh U.S. Judicial Circuit Court in 1990. He is a former U.S. District Judge, U.S. Magistrate and practicing attorney.

Cumberland's Law Week activities included appearances by the Alabama Court of Civil Appeals, attorneys F. Lee Bailey and Bobby Lee Cook, and the Rev. Jerry Falwell.

The **Mobile Bar Association's** executive committee has publicly objected to a television commercial run in the Mobile area which the association's President, **Thomas E. Bryant**, says maligns the whole legal profession.

The ad uses actors to depict an unsavory looking character identified as an attorney with his desk set up on a dangerous crack in a sidewalk, attempting to solicit clients from among people who fall on the sidewalk. Trick photography is used to distort the face of the actor who plays the attorney, adding to the "scurrilous attack", Bryant said.

"This commercial does not address any issue in any factual or responsible manner but attempts to arouse strong attitudes of contempt by the public toward an entire profession," Bryant said.

The ad, part of a statewide political campaign to pass new legislation regulating attorney's fees and to remove certain legal responsibilities of insurance companies for some actions of their agents, has run on television stations around the state.

"We have no objection to factual, honest discussions of issues, including those that are the subject of pending legislation. But we do object to cleverly produced commercials that hold an entire profession up to ridicule and contempt," Bryant said.

He pointed out to the local television stations and to the public that the commercial depicts an attorney behaving in a manner which is clear violation of Alabama law and of American, Alabama and local bar association codes of ethics. He requested Mobile television stations refuse advertising that maligns a profession as outside the bounds of what "are or should be acceptable values and tastes of the Mobile community." ■

# NOTICE

# TREAT AWARD FOR EXCELLENCE

Each year at its annual meeting in November, the National College of Probate Judges honors the recipient of its prestigious Treat Award for Excellence. The award was created and named in honor of Judge William W. Treat, founder and president emeritus of NCPJ.

The College annually selects an individual who has made a significant contribution to the improvement of the law or judicial administration in probate or related fields. The purpose of the award is "to recognize and encourage achievements in the field of probate law and related fields consistent with the goals of the National College of Probate Judges." Previous recipients have been members of the judiciary, attorneys and law school deans or professors.

**Submit nominations of qualified individuals to:**

Treat Award for Excellence Committee
National College of Probate Judges
300 Newport Avenue
Williamsburg, Virginia 23187-8798

This committee includes three NCPJ officers, the president of the American College of Trust and Estate Counsel, and the chair of the American Bar Association's Section on Real Property, Probate and Trust Law.

Nominations should include a resume of activities, letters of recommendation, awards received, achievements in probate and related fields of law, and any other relevant material.

Nominations received by June 15, 1993 will be considered for selection of the recipient to be introduced at the annual meeting November 19, 1993 in Charleston, South Carolina.

# ABOUT MEMBERS, AMONG FIRMS

## ABOUT MEMBERS

**Terry G. Davis** announces the new location of his office at 4183 Carmichael Road, Suite B, Montgomery, Alabama 36117. The mailing address is P.O. Box 230907, Montgomery, Alabama 36123-0907. Phone (205) 270-0592.

**James W. May** announces the relocation of his office to 416 East Laurel Avenue, Foley, Alabama 36536. The mailing address is P.O. Box 549, Foley, Alabama 36536. Phone (205) 943-2881.

**C. MacLeod Fuller** announces the relocation of his office to One North Royal Street, Mobile, Alabama 36602. Phone (205) 432-2211.

**Julia Christie Glover** announces the new location of her office in the Van Antwerp Building, 103 Dauphin Street, Suite 201, Mobile, Alabama 36602. Phone (205) 432-3800.

**Danny Farnell**, formerly with Jeff Foshee & Associates, announces the opening of his office at 314 Bell Building, 207 Montgomery Street, Montgomery, Alabama 36104. Phone (205) 262-7500.

**Kendall W. Maddox** announces the opening of his office, located at 250 Farley Building, 1929 3rd Avenue, North, Birmingham, Alabama 35203. Phone (205) 251-7717.

**Ann Curtright Bridgeman** announces the relocation of her office to the Clemmons-Edington House, 551 Church Street, Mobile, Alabama 36602. Phone (205) 433-4468.

**J. Massey Relfe, Jr.** announces the new location of his office at 2102-D Cahaba Road, Birmingham, Alabama 35223. Phone (205) 870-1138.

**Clarence L. McDorman, Jr.** announces the relocation of his office to Suite 310, 200 Office Park Drive, Birmingham, Alabama 35223. Phone (205) 871-3800.

**John W. Carroll**, formerly of Birmingham, has retired after 36 years with Lawyers Cooperative Publishing. He worked for 17 years as a sales representative in Alabama and Georgia, and for 19 years as regional manager of southern states. He now resides in Gulf Shores.

## AMONG FIRMS

**Lyons, Pipes & Cook** announces **William E. Shreve, Jr.** and **R. Mark Kirkpatrick** have become members of the firm. Offices are located 2 North Royal Street, Mobile, Alabama 36602. Phone (205) 432-4481.

**James W. Webb, Michael M. Eley, Kendrick E. Webb, Craig S. Dillard, Daryl L. Masters, E. Wray Smith, Bart Harmon, Mary E. Pilcher, Lyn Head Durham** and **Kristi Allen Dowdy** announce the formation of **Webb & Eley.** Offices are located at 2000 Interstate Park, Suite 102, P.O. Box 238, Montgomery, Alabama 36101-0238. Phone (205) 271-1820.

**Leo & Associates** announces the association of **Morris J. Brooks, Jr.**, formerly Madison County District Attorney, **M. Bruce Pitts** and **Brent E. Hieronymi.** The address is 200 Randolph Avenue, Huntsville, Alabama 35801. Phone (205) 539-6000.

**Cabaniss, Johnston, Gardner, Dumas & O'Neal** announces **R. Taylor Abbot, Jr.** has become a member and **John M. Graham** and **Samuel D. Payne** have become associates. Offices are located in Birmingham and Mobile, Alabama.

**Schmitt & Harper** announces that **John G. Smith** has become an associate of the firm. Offices are located at 213 Barnett Boulevard, Tallassee, Alabama 36078. Phone (205) 283-6855.

**Dick & Wisner** announces that **Susan Conlon Ruester** has become an associate with the firm. Offices are located at 100 Washington Street, Suite 200, Huntsville, Alabama 35801. Phone (205) 533-1445.

**Wilmer & Shepard** announces that **Frederick L. Fohrell,** former chief assistant district attorney for Madison County and former counsel to the Governor, has joined the firm. The mailing address is P.O. Box 2168, Huntsville, Alabama 35804. Phone (205) 533-0202.

**Kizer, Bennitt & Gonzalez** announces their new member, **Marco A. Gonzalez.** Offices are located at 2101 City Federal Building, 2026 2nd Avenue, North, Birmingham, Alabama 35203. Phone (205) 324-1582.

**Boyd & Fernambucq** announces the formation of **Boyd, Fernambucq & Nichols,** and that **Randall W. Nichols** has become a partner. The mailing address is Suite 302, 2801 University Boulevard, Birmingham, Alabama 35233. Phone (205) 930-9000.

**Douglas I. Friedman** announces the formation of **Friedman & Pennington** and that **John M. Pennington** has become a partner. Offices are located at 2000-A Southbridge Parkway, Suite 535, Birmingham, Alabama 35209. Phone (205) 879-3033.

The **City of Dothan** announces the appointment of **F. Lenton White** as city attorney. Offices are located at 126 North St. Andrews Street, Dothan, Alabama 36302. Phone (205) 793-0117.

**S. Kent Stewart, Ricky T. Davis** and **Scott J. Humphrey** announce the formation of **Stewart, Davis & Humphrey.** Offices are located at 3800 Colonnade Parkway, Suite 650, Birmingham, Alabama 35243. Phone (205) 969-3737.

**Taylor & Roberson** announces that **Christian E. Roberson** has become an associate of the firm. Offices are located in Prattville and Birmingham, Alabama. Phone (205) 365-2221 and (205) 323-3300.

**Vincent, Hasty & Arnold** announces that **David Madison Tidmore** has become counsel to the firm. Offices are located at 2090 Columbiana Road, Suite 4400, Birmingham, Alabama 35216. Phone (205) 979-4490.

**Jennings, Carter, Thompson & Veal** announces that **Thomas A. Jennings** has become associated with the firm and the name has been changed to **Veal & Associates.**

**Balch & Bingham** announces that **W. Joseph McCorkle, Jr.** and **Karl R. Moor** have become members of the firm. **Joseph McCorkle** practices in the Montgomery office. Phone (205) 834-6500. **Karl R. Moor** practices in the Washington, D.C. office. Phone (202) 269-0387.

**Helmsing, Lyons, Sims & Leach** announces that **Charles H. Dodson, Jr.,** former circuit judge of the Thirteenth Judicial Circuit, has become a member of the firm. The mailing address is P.O. Box 2767, Mobile, Alabama 36652. Phone (205) 432-5521.

**Maynard, Cooper, Frierson & Gale** announces the retirement of **Meade Frierson, III** and the firm's new name is **Maynard, Cooper & Gale.** The firm also announces that **Luther M. Dorr, Jr.** and **Alfred F. Smith, Jr.** have become members, and **Dana L. Thrasher** and **Lucinda P. Cole** have become associates of the firm.

**Capouano, Wampold, Prestwood & Sansone** announces that **Linda G. Smith,** former law clerk to Hon. Joel F. Dubina and Hon. Kenneth F. Ingram, has become associated with the firm. Her mailing address is P.O. Box 1910, Montgomery, Alabama 36102. Phone (205) 264-6401.

**Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves** announces that **William Steele Holman, II** has become a member and **James F. Watkins** and **Rodney R. Cate** have become associated with the firm. The mailing address is 1300 AmSouth Center, P.O. Box 290, Mobile, Alabama 36601.

**Simmons, Brunson & McCain** announces that **Rebecca Ann Walker** has joined the firm as an associate. Offices are located at 1411 Rainbow Drive, Gadsden, Alabama. Phone (205) 546-9205.

**J. Robert Faulk, David A. McDowell** and **T.O. McDowell, Jr.** announce the formation of **McDowell, Faulk & McDowell,** with **T.O. McDowell** becoming *of counsel* and **Cynthia A. Talley,** formerly associated with the firm of George P. Walthall, Jr., becoming a partner. Offices are located at 145 W. Main Street, Prattville, Alabama 36067. Phone (205) 365-5924.

**Marshall H. Sims** announces that **Leslie S. Ennis** has joined the firm as an associate. Offices are located at 111 North Chalkville Road, Trussville, Alabama 35173. Phone (205) 655-3289.

**Harris, Evans, Berg, Morris & Rogers** announces that **Jeffrey K. Hollis,** former law clerk to Chief Justice E. C. Hornsby, Jr. of the Alabama Supreme Court, and **Stephen J. Bumgarner** have become associated with the firm. Offices are located at Historic 2007 Building, 2007 Third Avenue North, Birmingham, Alabama 35203. Phone (205) 328-2366.

**Parker, Brantley & Wilkerson** announces that **David A. Thomas** has joined the firm as an associate. Offices are located at 207 Montgomery Street, Suite 1200, Bell Building, Montgomery, Alabama 36104. The mailing address is

# Alabama Law Foundation Awards $1,000,000 in Grants

*by Tracy A. Daniel, executive director*

*John Scott, trustee of the Alabama Law Foundation, presents a grant check to Melinda Waters, director of the Alabama State Bar Volunteer Lawyers Program.*

The Alabama Law Foundation awarded $1,000,000 in grants of IOLTA funds for its 1993 grant cycle, bringing the total awarded since 1989 to $4,130,498. This is 20 percent less than the $1,250,000 awarded last year, but was necessitated because lower interest rates have brought about a 19 percent decrease in revenue over last year. Our IOLTA program is actually faring better than others around the nation. Some programs have seen revenue drop as much as 40 percent.

Even though income is down, the foundation was still able to award more than four times as much as it awarded in 1989. The foundation received 59 requests, totaling $2,000,000, and funded 33. All grant requests were deserving, but there simply was not enough money to fund them all.

The foundation again provided funding for the Alabama State Bar Volunteer Lawyers Program, the Mobile Bar Association Pro Bono Program and the Montgomery County Bar Association Pro Bono Program, helping to support the volunteer efforts of attorneys throughout Alabama. The state program, administered by Melinda Waters, has begun referring cases in several counties and is currently recruiting lawyers to participate in the Birmingham Bar Association Volunteer Lawyers Program. Mobile's program closed 1,008 cases last year. The costs of administering the program were just over $57,000. This works out to a cost of $57.15 per case closed, which is below the national average of $161 per case closed for pro bono programs.

The Alabama Capital Representation Resource Center received funding to help continue its operation. Thanks to the Center's work, no attorney appointed to handle a death penalty case has to go without support in his or her efforts. Legal Services received funding to continue its projects through which the foundation provides funds for attorneys to handle domestic cases, primarily those involving abuse. The foundation also continued its support of county law libraries.

The Alabama Law Foundation is grateful for the support it receives from attorneys participating in IOLTA. Without that support, most of the projects funded by IOLTA would not otherwise have existed. ■

P.O. Box 4992, Montgomery, Alabama 36103-4992. Phone (205) 265-1500.

**Hand, Arendall, Bedsole, Greaves & Johnston** announces that **Forrest C. Wilson, III, Judith L. McMillin, William B. Givhan, P. Russel Myles, Brian P. McCarthy,** and **Walter T. Gilmer, Jr.** have become members of the firm. Offices are located at 3000 First National Bank Building, Mobile, Alabama. The mailing address is P.O. Box 123, Mobile, Alabama 36601. Phone (205) 432-5511.

**William J. Freeman** and **James L. Hoover** announce the opening of their firm, **Freeman & Hoover,** at Suite 1623, 2121 Eighth Avenue, North, Birmingham, Alabama 35203. Phone (205) 323-3030.

**Lewis, Brackin & Flowers** announces that **Harry P. Hall, II** has joined the firm as an associate. The firm has relocated to 209 West Main Street, Dothan, Alabama 36301 and the mailing address is P.O. Box 1165, Dothan, Alabama 36302. Phone (205) 792-5157.

**Yearout, Myers & Traylor** announces that **Michael W. Carroll** and **Howard Yielding Downey** have become associated with the firm, with offices at 2700 SouthTrust Tower, Birmingham, Alabama 35203. Phone (205) 326-6111.

**Blankenship, Robinson & Rhodes** announces a division of their firm and the formation of **Blankenship & Rhodes,** phone (205) 517-1550, and **Charles G. Robinson**, phone (205)517-1500, with both offices located at 229 East Square, Huntsville, Alabama 35801.

**Joel S. Rogers, III** and **Dale Rouse Waid** announce the formation of a partnership. Offices are located at 407 Lay Dam Road, P.O. Box 1580, Clanton, Alabama 35045. Phone (205) 755-7880.

**Gaines, Gaines & Gaines** announces that **Mark A. Rasco** has become a member of the firm and the firm's new name will be **Gaines, Gaines, Gaines & Rasco.** Offices are located at 127 North Street, Talladega, Alabama 35160. Phone (205) 362-2386.

**Seir, Johnston & Trippe** announces a change in the firm's name. It will now be known as **Johnston, Trippe & Brown**. Partners of the firm are **A. Eric Johnston, Allan M. Trippe** and **Hayes D. Brown.** The address and phone number remain the same.

**John M. Green,** formerly with Helmsing, Lyons, Sims & Leach in Mobile, Alabama, has relocated. He is now with **Blackard, Pitts & Murphy,** P.O. Box 1027, Brentwood, Tennessee 37027. Phone (615) 370-8900.

**Armstrong, Vaughn & Stein** announces that **James M. Scroggins** has become a member, and the firm name will be **Armstrong, Vaughn, Stein & Scroggins.** Offices are located at The Summit, 29000 U.S. Highway 98, Suite 305, Daphne, Alabama 36526. The mailing address is P.O. Box 2370, Daphne, Alabama 36526. Phone (205) 626-2688.

**David S. Luker,** formerly of Luker, Brewer, Shores, Umstead & Erskine, announces the formation of **David S. Luker & Associates.** Joining the firm as associates are **G. Gregory White, J. William Cole,** and **Cynthia Forman Wilkinson.** Offices will be located at 2205 Morris Avenue, Birmingham, Alabama 35203. Phone (205) 251-6666.

**Sirote & Permutt** announces that **W. McCollum Halcomb, Bradley J. Sklar, Thomas G. Tutten, Jr., Anthony C. Willoughby** and **Peter L. Lowe, Jr.** have become members of the firm. Associates are **William Todd Carlisle, Brent L. Crumpton, Wanda S. McNeil** and **Melissa C. Wimberley.**

**A.J. Coleman** and **Jon R. Sedlak** announce the formation of **Coleman & Sedlak.** Offices are located at 115 Johnston Street, S.E., Suite 203, P.O. Box 1685, Decatur, Alabama 35602. Phone (205) 353-6824.

**Richard C. Duell, III** and **Paul J. Spina, III** announce the formation of **Duell & Spina. Edith J. Schauble** has become an associate of the firm. Offices are located at One Independence Plaza, Suite 600, Birmingham, Alabama 35209. Phone (205) 870-7900.

**Holcomb, Dunbar, Connell, Chaffin & Willard** announces that **Stephan Land McDavid** has become an associate with the firm. The firm has five locations in Mississippi. Phone (601) 234-8775.

**Schoel, Ogle, Benton & Centeno** announces that **Melinda Murphy Dionne** has become a member of the firm. The mailing address is 600 Financial Center, 505 North 20th Street, Birmingham, Alabama 35203. Phone (205) 521-7000.

**J. Floyd Minor** announces that **John L. Olszewski,** former law clerk to Judges Lynn Bright, Sally Greenhaw and Craig Miller, is now an associate with the firm. The mailing address is 458 South Lawrence Street, Montgomery, Alabama 36104. Phone (205) 265-6200.

**Robinson-Adams Insurance** announces that **William S. Dodson, Jr.,** fomerly with Maynard, Cooper, & Gale, has become associated with the firm. The mailing address is 2200 Woodcrest Place, P.O. Box 530510, Birmingham, Alabama 35253. Phone (205) 877-4500. ■

# Daniel appointed to National Conference Board of Trustees

*Daniel*

Tracy A. Daniel, director of the Alabama Law Foundation, Inc., was recently appointed to the National Conference of Bar Foundations Board of Trustees. The appointment came at the mid-year meeting of the American Bar Association.

The NCBF was established in 1977. It is an independent, voluntary organization serving both Canadian law foundations and bar foundations in the United States. The NCBF assists its members by providing a medium for the exchange of ideas and information related to foundation management, raising and allocating funds, developing public service programs, and accomplishing law-related service objectives.

Daniel received her undergraduate degree from Huntingdon College in Montgomery, Alabama and her MBA from Auburn University. She has been director of the Foundation since 1987. ■

**THE LEGAL SERVICES PROGRAMS OF ALABAMA** gratefully acknowledge the many lawyers, firms and individuals who contributed to the first Fund for Equal Justice campaign. Your support has encouraged us and will help us in our goal of making access to justice a reality for Alabama's poor.

J. Greg Allen
J. Knox Argo
C.P. Armbrecht, II
Gigi Armbrecht
Beverly Baker
Belinda Barnett
Sloan Bashinsky
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Jere Locke Beasley
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# BUILDING ALABAMA'S COURTHOUSES

## CHAMBERS 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.*

*Chambers County Courthouse, following restoration*

### Chambers County Courthouse

Chambers County is another Alabama county created from the Creek Indian lands ceded to the state by the Treaty of Cusseta. In fact, the village of Cusseta is physically located within the boundaries of Chambers County. The county was established December 18, 1832. It was named for Dr. Henry Chambers of Madison County.

Chambers was a native Virginian who came to Alabama at the age of 22 in 1812 after studying at the College of William and Mary and the University of Pennsylvania Medical Department. He served as a surgeon on Andrew Jackson's staff during the Creek Indian War. Later, Chambers grew wealthy from his medical practice and attained great respect in his community due to his civic endeavors. Politics soon became his passion. He was a member of the 1819 Constitutional Convention and served in the 1820 Legislature. In 1821 and 1823 he ran for Governor, losing each election narrowly to the winner, Israel Pickens. In 1824, he served as a Presidential elector for Andrew Jackson. In 1825, the Alabama Legislature elected him United States Senator.

En route to Washington to assume his office, he stopped by his boyhood home in Virginia. While there, he was struck by an illness and died suddenly on January 24, 1826 at the age of 35 without ever serving a day in the U.S. Senate. He was buried in the old family cemetery.

It is ironic that Chambers was succeeded as Senator by his old political nemesis, Israel Pickens, who likewise took ill on his way to Washington. Pickens never fully recovered and resigned within the year.

In all of his Alabama political activities, Chambers was considered a leader of the powerful "Georgia Faction," having followed in the professional and political footsteps of William Wyatt Bibb, the first governor of Alabama who had migrated from Georgia. It was, thus, appropriate that a new county formed on the Georgia border should be named for the prominent physician and early political leader, Henry Chambers.

An organizational election took place in Chambers County on March 4, 1833. At this election Dr. Thomas C. Russell and the brothers Baxter and James Taylor were selected as courthouse commissioners. Their task was to select a place for the permanent county seat near the geographical center of the county and to construct a courthouse for the newly formed county. The commission took its job seriously and selected a site in the wilderness on a ridge between the Tallapoosa and Chattahoochee rivers.

Meanwhile, the first circuit court was

held April 20, 1833 at the home of Captain Baxter Taylor, one of the courthouse commissioners. There were no cases to try, but a grand jury was sworn in and retired to the shade of a big oak tree. They returned a few true bills and then adjourned.

The commissioners ordered a survey of the county seat location and set a public sale of lots for October 22 and 23, 1833. The lots sold for good prices, and the commission realized $15,703 for the sale of the 92 town lots.

The county seat town was originally called Chambersville and then Chambers Court House. In 1835, the name was changed to LaFayette in honor of the French general and American Revolutionary War hero who visited Alabama and had died the year before.

A temporary courthouse was built of split pine logs on the site that the county surveyor had selected for the yet-to-be built county jail. This log structure was 20 feet square and, when not used for public business, served as a meeting place for local denominations until they could build their churches. This temporary building was used until the courthouse was completed, and then it was sold for $15 and removed.

The county commissioners made a contract with Joshua S. Mitchell and Benjamin H. Cameron on May 24, 1834 for the construction of a courthouse and jail. The contract was quite specific, stating that the courthouse was to have the quality and appearance of the Troup County Courthouse at nearby LaGrange, Georgia. This building had been the recent work of Cameron.

The courthouse in Chambers County was 60 feet long by 40 feet wide. It was a two-story brick structure constructed in the Greek Revival style. Mitchell and Cameron were paid $9,500 for building the courthouse and $4,500 for building the jail. Because more than enough construction money had been raised due to the sale of town lots, Chambers County was, perhaps, the only county to have its courthouse and jail completely paid for without the necessity of assessing any taxes.

This Chambers County Courthouse also has a few interesting distinctions. First, the builders knew they had a good design and this courthouse was duplicated in three other counties of Alabama. The courthouses at Tallapoosa, Macon and Randolph counties followed the identical plan of the Chambers County Courthouse.


*Historic marker details the beginnings of the Chambers County Courthouse.*

Next, the courthouse contract called for its completion within 25 months or by June 1836. This deadline was not met and the contract was not completed until July 1837. The builders were not penalized, however, because they had a legitimate excuse. Work was stopped due to the Indian uprisings in 1836. The Indians had lost their treaty-awarded lands for ridiculously low prices due to the unscrupulous action of certain white men. An insurrection resulted, ending with the removal of the Indians west of the Mississippi in the fall of 1836.

Finally, the Chambers County Courthouse was located in a unique position. The county seat site rests on a ridge between the Tallapoosa and Chattahoochee rivers. Rain falling on the western side of the courthouse runs off into the Tallapoosa River. Rain falling on the eastern side finds its way into the Chattahoochee.

Various improvements of the courthouse grounds were made over the years. On September 25, 1848, the county contracted with James E. Bland for a fence to surround the court square. The enclosure could be entered only at steps over the fence located in front of the four outside doors of the lower story of the courthouse. The cost of this contract was $250. This awkward arrangement was removed in November 1887 when the steps were replaced by gates and a wrought iron fence. The fence was purchased from the Valley Forge and Foundry of Knoxville, Tennessee for $475 and it replaced the prior wooden railing. This fence was later moved to the LaFayette Cemetary when the next courthouse was built.

The 1837 courthouse was of solid construction and served the county well for 62 years. Except for routine painting and maintenance, no major repairs were ever undertaken on the building. Still, in 1899, a decision was made to replace the courthouse. The principal reason was the need for vaults to adequately protect the county records.

The Chambers County Commission sought the services of J.W. Golucke of the architectural firm of Golucke and Stewart in Atlanta for the design of a new courthouse. Golucke also designed the Calhoun County Courthouse at about this same time. Phil Yeager and Company, Builders, completed the construction. The first session of the circuit court took place in this building on January 16, 1900.

This newest Chambers County Courthouse is a two-story red brick structure with limestone trim. It has four matching facades and four identical cupolas at each corner of the roof. In the center of the roof is an elaborate dome which contains the old clock removed from the previous courthouse. On top of the dome is a statue of Justice, standing today without her scales and without a sword, but with a weathervane attached to her back.

This third courthouse building cost $30,000. Its style is generally termed "Late Eclectic". Different windows exhibit differing architectural influences, ranging from Greek Revival to Victorian, and other styles can be seen in various architectural elements throughout the structure.

**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.

Following World War I, an oak tree was planted on the courthouse lawn. This oak came from the Argonne area of France where many Americans fought and died. It was dedicated to the memory of the men from Chambers County who gave their lives in France. The tree died of disease in 1972, but the next year local veterans planted a young tree which was a descendant of the original. The living memorial continues.

Beginning in 1959, under the leadership of probate judge O.D. Alsobrook, the county began a long-term restoration and maintenance program for the courthouse. First, the roof was repaired. Then the wiring system was replaced. The building was sandblasted and a coat of silicone was applied for waterproofing. Interior renovation proceeded over the next ten years, which included stripping walls and woodwork, repainting and then replacing old floors. This work proceeded slowly room by room.


*Like many areas in Alabama, Chambers County was originally the site of an Indian civilization.*

The result today is that the Chambers County Courthouse and its surrounding historic square is one of the most intact and well-preserved of any in the state. The majority of the buildings on the square were constructed between 1880 and 1920, and a large number of them retain their original look. The Chambers County Courthouse Square Historic District was entered in the National Register of Historic Places on March 27, 1980.

As a final footnote, Hollywood came to LaFayette in 1988 because of the well-preserved rustic courthouse square. The city was chosen as a major location for filming the movie "Mississippi Burning". Thus, the citizens of Chambers County realized a tangible and economic benefit from the preservation of their rich heritage. ■

# NOTICE TO MEDIATORS

With the advent of the new Alabama Civil Court Mediation Rules, effective August 1, 1992, mediation has been officially approved for use by our state circuit courts as an ADR approach to settlement in the litigation process. As a result, mediators will be needed to assist the courts in this new procedure.

The Alabama State Bar **Task Force on Alternative Dispute Resolution** is working on the structured implementation of mediation. We are developing recommendations for adoption of (1) a Mediation Model with instructions, forms, etc., (2) standards for state court mediators, (3) mediator training programs, and (4) a system of central coordination, management and control of the mediation effort, which includes maintaining a statewide listing of mediators.

The task force is in need of an "inventory" of our state bar licensed attorneys who are either trained mediators, through instruction and/or experience, or prospects for future mediator status. While state court mediator status will not be restricted solely to licensed attorneys, we are focusing initially only on this group. Other trained professionals, such as family counselors, will be considered at a later date.

If you are a present or prospective mediator, please send a letter with your name, address, telephone number and fax number, with a brief summary of your mediator status (e.g., 15 years' experience in domestic relations, American Arbitration Association certification, or prospect for training) to:

**Center for Dispute Resolution**
**Alabama State Bar**
**P.O. Box 671**
**Montgomery, Alabama 36101**

Upon receipt of your letter, you will be mailed an application form for mediator status.

*Marshall Timberlake, chairperson*
*Task Force on Alternative Dispute Resolution*

# AFRICAN-AMERICAN LAWYERS IN ALABAMA

African-American lawyers represent a growing percentage of the Alabama bar. Three hundred thirty-six black lawyers (3.3 percent of the bar) now practice law in this state, up from 250 (2.8 percent) in 1988. This issue of *The Alabama Lawyer* examines the experience and contributions of African-American lawyers in Alabama from several perspectives.

Our first article profiles what author Raymond L. Johnson, Jr., a lawyer in the Birmingham United States Attorney's office, calls black pioneer lawyers — those living individuals who first broke the Alabama bar's color barrier and won major reforms for clients challenging segregation in this state.

A second article by Montgomery lawyers Cynthia Clinton and Anita Kelly focuses on another segment of the bar with growing influence: African-American women who are attorneys and judges in Alabama.

Finally, Judge Ken Simon, a black circuit judge in Birmingham, has authored an article describing an overview of jury trials.

AFRICAN-AMERICAN LAWYERS IN ALABAMA

# BLACK PIONEER LAWYERS IN ALABAMA - LIVING LEGENDS

*By RAYMOND L. JOHNSON, JR.*

*The history of living black legal pioneers in Alabama is also the history of the civil rights movement in Alabama and America. The strategies employed by these attorneys were the main force in shaping what Dr. Martin Luther King, Jr. later termed, "The Dream." This article explores some of the experiences and accomplishments of black pioneer lawyers in this state.*

**Justice Oscar Adams, Jr.**

Justice Oscar Adams, Jr. was inspired to be a lawyer by his father, a noted publisher and owner of the *Birmingham Reporter*, Grand Chancellor of the Knights of Pythias, and Executive Secretary of the A.M.E. Zion Church. As a boy, Justice Adams was frequently challenged by his father to discuss, at the family dinner table, in a lawyer-like fashion, important civil rights issues. At the early age of 12, Justice Adams decided to go to law school and become a lawyer, although he never considered becoming a judge. After completing grade school in Alabama and his undergraduate studies at Talladega College in Talladega, Alabama, he went on to obtain his law degree from Howard University School of Law.

During his matriculation at Howard, Justice Adams was influenced by great legal minds and architects of constitutional and civil rights law such as Charles Hamilton Houston, Dean William Hastie, and Judge Spottswood W. Robinson. As a law student, he would frequently take a bus to the United States Supreme Court to watch oral arguments in cases before the Court. One argument that he vividly recalls was *Morgan v. Virginia*[1] in which the Court upheld the power of Congress, pursuant to the Commerce Clause, to prohibit racial discrimination in the use of interstate commerce. The day before oral argument to the Supreme Court, the plaintiffs' attorneys argued the case before the senior law school class at Howard. Selected senior class students acted as Supreme Court Justices and asked the attorneys difficult questions that they anticipated the Court might ask the next day. This exchange with Howard law students and faculty was a common practice for civil rights lawyers who had cases before the Supreme Court. Often Justice Adams would also visit Justice Hugo Black, since Justice Adams' father was a good friend of Justice Black's.

Justice Adams' father encouraged his son to return to Alabama to help resolve the problems blacks faced at home. Justice Adams applied to take the Alabama bar exam, but he was not assigned an examination number or given permission to sit for the exam. A week before the bar exam, in desperation, Justice Adams called Douglas Arant, a white Birmingham attorney and acquaintance, who was on the Character and Fitness

Committee of the bar. Justice Adams inquired about the delay and expressed his concern about rumors that the bar might not want another black lawyer, since Arthur Shores was already a black practicing attorney. According to Justice Adams, Arant personally called the secretary of the bar and demanded that Justice Adams immediately be given his exam number. The next day, Justice Adams got his exam number, sat for and passed the Alabama bar.

At that time, the only other black lawyer actively practicing law in Alabama was Arthur Shores. Justice Adams frequently called upon Mr. Shores for legal advice. He also recalls that he had very good relations with white members of the Alabama bar. His practice focused on collections, real estate, tort and probate cases.

It was not until the middle 1950s that Justice Adams began handling civil rights cases. Justice Adams painfully remembers having to try his cases before all-white juries, because only a token number of blacks were on the jury venire and most white prosecutors and civil attorneys commonly struck blacks from the petit jury, which lessened Justice Adams' chances to win jury trials. Consequently, he would only try those cases that he was sure he would win. Today, the issue of striking blacks off of juries has not completely abated, but with the recent *Batson* ruling,[2] attorneys can "ring a bell" and the problem can be remedied. Justice Adams maintains that now, as a justice on the Alabama Supreme Court, he is sensitive to *Batson* type complaints.

Justice Adams humorously recalls an incident that occurred in the mid-1950s before Judge Oliver Hall, a white judge presiding over the old Birmingham police court. The courtroom seating was segregated, with blacks required to sit on one side of the courtroom and whites seated on the opposite side. However, it was the practice of black lawyers to sit behind the rail on any side they wanted. While Judge Hall was trying a case that preceded Justice Adams' case, Justice Adams sat on the "white side" of the courtroom. Judge Hall's bailiff approached Justice Adams and asked him to sit on the "colored side." Justice Adams asked, "For what reason?" The bailiff responded by telling Justice Adams about the segregation law. Justice Adams told the bailiff that he did not know anything about the law, and it did not apply to him anyway since he was an attorney.

The bailiff approached the bench and whispered to Judge Hall. Later, when Justice Adams, acting as a special prosecutor, got up to handle his case, Judge Hall said, only partly in earnest, "I understand you wouldn't obey the bailiff when he asked you to sit on the colored side." Justice Adams responded that he did not know the segregation law applied to lawyers. Judge Hall replied, "So you *did* disobey the bailiff. You go to jail." Justice Adams was arrested and taken to jail. Later, he was brought back into the courtroom and Judge Hall asked him if he wanted to purge himself of contempt for disobeying the bailiff. Justice Adams asked, "Are you going to try me for contempt?" Judge Hall said yes. Justice Adams asked Judge Hall for a lawyer, and a battery of lawyers who were nearby stood up to represent him. The trial for contempt commenced and Justice Adams found himself challenging the Birmingham segregation law. Justice Adams says that he was prepared to appeal the case, if he were convicted, to the United States Supreme Court. However, during the trial, Judge Hall apparently paused and reflected on the enormity of the issue. He told Justice Adams that since he was there for a legitimate court case, as a special prosecutor and not to create a test case, he would dismiss the charges against Justice Adams.

Several years later, after passage of the 1964 Civil Rights Act, Justice Adams recalls having trouble getting admitted to the Birmingham Bar Association because it refused to accept black lawyers. Again, Justice Adams called upon his ally, Douglas Arant, who intervened and got Justice Adams admitted as the first black lawyer in the Birmingham bar.

While in private practice, Justice Adams, along with other Alabama lawyers, represented Dr. Martin Luther King, Jr. in Dr. King's civil disobedience cases. Justice Adams also handled a number of civil rights school desegregation cases, including *Armstrong v. Board of Education of the City of Birmingham, Stout v. Jefferson County Board of Education*, and other such cases in Etowah County, Bessemer, Lawrence County and several other cities. His law firm, Adams, Baker & Clemon, as local counsel for the NAACP Legal Defense Fund, took on major employment discrimination cases against United States Steel, American Cast Iron Pipe Company, and Pullman Standard Manufacturing Company (recently settled with a substantial attorney fee award). His firm was also involed in Title II public accommodation, voting rights, and housing discrimination cases. Today, U.W. Clemon, one of Adams' former partners, is a United States District Court Judge for the Northern District of Alabama. James Baker, the firm's third partner, recently retired as city attorney for the City of Birmingham.

Justice Adams says that, in his view, the number of black lawyers today reflects the significant progress of blacks in the legal field: when he started his practice, there were only two black attorneys (Oscar Adams and Arthur Shores) practicing law in Alabama; today, there are several hundred. But, he is quick to add, the percentage of black lawyers (approximately 4 percent) in the bar is still very low compared to the total number of lawyers in the state. Other signs of progress, Justice Adams comments, are more black judges and prosecutors. He further indicates that black attorneys are better off today than they used to be, but far from where they ought to be.

**Orzell Billingsley**

In March 1953, a young white Selma woman telephoned the police and told them that she had been raped by a black man during the night. She said she only saw his eyes, because he was wearing a mask. In April 1953, the daughter of Selma's mayor said a black man assaulted her while she was asleep. The mayor's daughter reported that she could not see the attacker's face because he had a towel wrapped around his head. She said

that she fought him off and he ran. Whites in Selma were in an uproar. Black males in Selma were arrested and questioned at random. A couple of months after this incident, a black man named William Fikes was arrested, and after intensive interrogation, the police claimed they had a confession. During the trial of the rape of the first white woman, Mr. Fikes was represented by a white attorney before an all-white jury. Mr. Fikes was identified by the victim based on his eyes, his voice and his confession, and he was sentenced to prison for 99 years. For the second trial, involving the mayor's daughter, the NAACP sent Birmingham attorneys Orzell Billingsley[3] and Peter Hall to represent Mr. Fikes. Mr. Billingsley was another fiery activist and a Howard University Law graduate. He and Mr. Hall were the first black attorneys to try a case in Dallas County. Mr. Billingsley and Mr. Hall challenged Fike's indictment because blacks were excluded from serving on the grand jury. They also challenged the petit jury, since no blacks had ever served on a trial jury in Dallas County. The motions were denied and Mr. Fikes was convicted and sentenced to death. However, because of the arguments made by Mr. Billingsley and Mr. Hall, the U.S. Supreme Court overturned the second conviction because the confession was not voluntary. Mr. Billingsley and Mr. Hall had made new law relating to confessions.

Mr. Billingsley became a leading legal advocate for blacks in Alabama. He helped incorporate many small, predominately black towns in Alabama—such as Forkland, Roosevelt City, Bogue Chitta, Whitehall, and Memphis—which resulted, Mr. Chestnut said, in these towns getting running water and some power. "Some of the first black elected officials in Alabama were mayors of the all-black towns Orzell incorporated," Mr. Chestnut said.

When Dr. King was arrested in Birmingham and placed in jail, Bull Connor at first personally prevented black attorneys from seeing Dr. King; however, Mr. Billingsley was later one of the attorneys who was allowed to see Dr. King. While Dr. King was in jail, several white religious leaders spoke out critically against Dr. King. Dr. King spent his time in jail drafting a handwritten response to the white religious leaders, which he gave to Mr. Billingsley on his visits. Mr. Billingsley then had the handwritten sheets typed. The result of this effort was the famous letter from a Birmingham jail by Dr. King.

Mr. Billingsley proudly recalls being the founder and president of the Alabama Democratic Conference (ADC). Today, this is the largest and oldest black democratic organization in the state.

Mr. Billingsley, along with Mr. Chestnut, led the fight to get blacks in the jury system in Dallas County and other Black Belt counties. He worked hard for voter registration and voting rights for blacks in Alabama.

One of Mr. Billingsley's biggest weapons, according to those who knew him, was that "no white person could intimidate him, and he could intimidate the hell out of a 'redneck'." One prominent black Alabama attorney said, "Blacks in Alabama owe Mr. Billingsley a debt of gratitude because of his tenacious and forceful representation of blacks and the poor."

**Bruce Boynton**

As Bruce Boynton, a black Howard University law student, boarded the Trailways bus in Washington, D.C., headed for Montgomery, Alabama, he had no idea that his trip would set in motion a legal conflict that would have to be resolved by the United States Supreme Court, and start a nightmarish struggle with the Alabama State Bar that would hold up his bar admission for six years.

Mr. Boynton was headed home to spend time with his family on a Christmas break from law school. The year was 1958. At approximately 10:40 p.m., the bus driver announced that there would be a 40-minute stopover in the Richmond Trailways Bus Terminal. Mr. Boynton, tired and hungry, got off the bus, went into the terminal, entered the restaurant, sat at the counter and ordered a hamburger and tea. The waitress said she would serve him but he would have to move to the "colored section." When Mr. Boynton refused, he was arrested, tried, convicted and fined by the Police Justice's Court of Richmond on a charge of unlawful trespass. After Mr. Boynton lost several appeals in the Virginia court system, the United States Supreme court granted certiorari on the question of whether his conviction violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Before the Supreme Court, Mr. Boynton was represented by the director of the NAACP Legal Defense Fund, the late Thurgood Marshall, later to be Justice of the United States Supreme Court. The Supreme Court decided not to address the Due Process and Equal Protection Clause issues; instead, it decided the case on a more narrow issue which it raised, *sua sponte*: whether Mr. Boynton's conviction violated the Interstate Commerce Act. The Supreme Court decided that segregated restaurant seating arrangements by interstate carriers, bus or rail, did violate the Interstate Commerce Act.[4] This decision was later used by James Farmer, National Director of CORE, to start a new initiative, a "Freedom Ride," to challenge segregated restaurants in bus stations in the South.

Mr. Boynton's troubles did not end, however, when the Supreme Court decided the Virginia case in his favor. After his graduation from Howard, he returned to Alabama, and took and passed the bar exam. However, as Mr. Boynton now tells it, for six years thereafter the state bar investigated the circumstances surrounding his arrest in Virginia and refused to admit him, pending the conclusion of the investigation. In 1964, the United States Congress passed and President Lyndon B. Johnson signed the Public Accommodations Act,[5] which effectively ended discrimination in all public places, including bus and train terminals. Shortly thereafter, Mr. Boynton contacted Judge John B. Scott, then secretary of the Alabama State Bar, and asked him if he would help him obtain his Alabama license, since the Public Accommodations Act was law. Judge Scott agreed, got the necessary Alabama Supreme Court signatures on

the license, and finally swore Mr. Boynton into the bar in his own office.

Later in his legal career, Mr. Boynton represented Stokley Carmichael, who was in Alabama for a voter registration drive. While in Alabama, Carmichael was involved in a violent confrontation with police in Prattville, Alabama. Mr. Boynton got the charges against Carmichael dismissed in exchange for an agreement that Carmichael would never return to Prattville. Mr. Boynton also represented SNCC Chairman H. Rap Brown on criminal charges in Alabama.

Later in his career, Mr. Boynton was beaten by a deputy sheriff in Wilcox County. As a result, Mr. Boynton always carries a Smith & Wesson .38 for protection. At times, he has had to practice law with bodyguards.

Mr. Boynton remembers that he received outward opposition from many members of the white bar in Selma, where he practiced. However, he does recall that some attorneys like Harry Gamble and Harry Gamble, Jr. did, on occasion, extend a hand of assistance.

Mr. Boynton proudly recalls desegregating the Monroe County courtroom's segregated seating arrangement in 1966. At that time, black spectators could only sit in the balcony. Mr. Boynton's objections to this practice by Judge Robert E. Lee Key resulted in Judge Key's rendering a decision permitting blacks to sit on the main floor of the courtroom along with whites.

Today, Mr. Boynton is the attorney for Dallas County.

**J.L. Chestnut, Jr.**

J.L. Chestnut, Jr., or "Chess", as he is affectionately called by friends, was born in Selma, Alabama in 1930. He grew up in Selma at a time when *Plessey v. Ferguson*[6] was the law of the land. While at Dillard University in New Orleans, Louisiana, he was persuaded by Benjamin Quarles, a noted historian, and Daniel Thompson, an eminent sociologist, to attend Howard University Law School. "They suggested that I put the saxophone down, come out of the French Quarter [in New Orleans] and make something of myself." At the time, Mr. Chestnut considered himself a very good saxophone player, yet he took their advice and attended Howard University Law School.

Mr. Chestnut's classmates at Howard included Vernon Jordan and Douglas Wilder, now Governor of the State of Virginia. Mr. Chestnut was immensely impressed with what he saw while a student at Howard. For example, one day he sat in a large law school classroom and watched noted black lawyers, such as Wiley Branton, Herbert Reid, Sr., James Naibreth and Robert Carter, attorney for the NAACP Legal Defense Fund, drill Thurgood Marshall, then director of the NAACP Legal Defense Fund, on questions that Mr. Marshall could expect to be asked during oral argument by the U.S. Supreme Court in the second case of *Brown v. Board of Education of Topeka*[7], a case challenging segregation in the public schools.

While at Howard, Mr. Chestnut and several students sued the University over landlord-tenant disputes. Howard owned many apartments near campus and through real estate agents was evicting people and putting them out in the snow. Howard, in effect, "was a silent slum lord." Mr. Chestnut said: "We got Howard to change its policy. And that [experience], more than any course I took in law school, demonstrated the power of the law in effecting desirable social change."

In 1958, Mr. Chestnut graduated from Howard. After graduation, he talked with Dr. Martin Luther King, Jr. who convinced Mr. Chestnut that "the real action was going to be in the South, and not in New York or Chicago." Mr. Chestnut changed his plan to go to New York and, instead, returned home, later saying, "I was correct in that decision because the South turned out to be the battleground."

Mr. Chestnut first ran up against hometown opposition with the Dallas County Bar Association, which did not have any black members. "They passed a resolution and carried it to the local banks asking the banks not to lend me any money to set up an office to practice [law in Selma]." Mr. Chestnut maintains that it was a difficult time for blacks in Selma. There were no black law enforcement officers or political office holders. "The only blacks with jobs downtown were barbers, janitors and messengers." He says that he was never formally admitted to the Dallas County Bar, although several years after he began his practice, he received a letter inviting him to a bar meeting, and he did attend.

He had to learn how to practice law by trial and error since there was no one else to "teach him the ropes." Occasionally, he would seek legal advice from attorneys Peter Hall[8] and Orzell Billingsley in Birmingham. Mr. Chestnut remembers the environment in the courtroom as being "extremely hostile." The judges referred to the white attorneys by use of a title, like "Mr." or "Attorney", but they referred to him as "J.L.". "For a long time, I could not sit in front of the rail, I had to sit in the audience," Mr. Chestnut recalls. He said, "Judges took every opportunity they could to cut [me] down and embarrass [me]." In 1959, he recalls raising an objection at trial to the admission into evidence of a deed that had not been signed or authenticated. The opposing counsel and the judge, Judge Blanton of the County Court of Common Pleas, were both white. Judge Blanton chastised Mr. Chestnut for making the evidentiary objection and referred to him "in so many words, as a glorified notary public and not very bright at that," — and then looked over to the white section of the courtroom "as if to receive an applause."

Mr. Chestnut recalls that, during a trial in 1961, the sheriff of Wilcox County angrily called him a liar. Mr. Chestnut, in response, called him a "double liar." The sheriff picked up an ax handle that was lying on the exhibit table and "threatened to take my head off." Mr. Chestnut recounts that the judge just sat on the bench, smiling. Through it all, Mr. Chestnut does remember that Harry Gamble, Sr., a white Selma attorney, did offer to help him at times, and once gave him an outdated set of the Alabama Code.

Mr. Chestnut handled many important civil rights cases in Alabama. He tried the first case that put blacks in the jury

box. Mr. Chestnut, along with Orzell Billingsley of Birmingham, also tried the case that gave black doctors hospital privileges in Mobile, Alabama. Black doctors formerly had to turn over their patients to white doctors once their patients were hospitalized, since the black doctors did not have hospital privileges. Mr. Chestnut and Mr. Billingsley changed that policy. Mr. Chestnut also tried major voting rights, employment discrimination, and housing discrimination cases. In Selma during the turbulent 1960s, he represented Dr. King, Rev. Ralph Abernathy, Dick Gregory, noted author James Baldwin, and hundreds of others on civil disobedience charges.

Mr. Chestnut says that black lawyers have made significant progress. "They are making money now and are recognized as skilled attorneys." Also, the rules have changed to include discovery. As Mr. Chestnut says, "You know as much about his [your opponent's] case as he knows. When I started out, we threw a brick and ducked."

**J. Mason Davis**

Without debate, J. Mason Davis is affectionately regarded as the historian of black progress and development in Alabama. Mr. Davis has an uncanny ability to recall dates, names and events.

Mr. Davis was influenced to take up law by Walter Harris, Mr. Davis' uncle, who, in 1912, helped found Protective Industrial Insurance Company, one of his family businesses. Mr. Davis graduated from State University of New York School of Law in 1959. Mr. Davis returned to Alabama because he wanted to help the family run its insurance and funeral home businesses. Davenport and Harris Funeral Home, the other family business, was established in 1899. Mr. Davis' practice has always been focused on commercial law. His clients have included Protective Industrial Insurance Co., Atlanta Life Insurance Co., North Carolina Mutual Insurance Co., Pilgrim Health and Life, and Davenport and Harris Funeral Home.

He recalls that the Alabama State Bar has always been an integrated bar, meaning that every lawyer, black or white, who was licensed to practice was a member of the bar. However, the state bar has not always had a good passing record for blacks who were required to sit for the bar examination. Mr. Davis notes that one white bar commissioner implied in a letter years ago that there was a deliberate intent to prevent blacks from passing the bar.

Mr. Davis recounts that the Birmingham Bar Association was not originally integrated. He said that it did not open its doors to blacks until 1971, when General E. M. Friend, a Jewish attorney, became president of the Birmingham Bar. In 1974, Mr. Davis was elected to the Executive Committee of the Birmingham Bar, and in December 1983, he was elected president of the bar and served as its first and only black president. Under Mr. Davis' term as president, the association moved its headquarters from the Jefferson County Courthouse to its present location in the Neighbors, Morrow Building.

Mr. Davis also handled his share of criminal cases, including sharing with Orzell Billingsley, Fred Gray and J.L. Chestnut in the defense of the well-known Rev. Lewis Lloyd Anderson who was convicted of manslaughter. This conviction was later overturned by the U.S. Supreme Court. Also, Mr. Davis and Mr. Billingsley represented Mr. Caliph Washington of Bessemer and the students in the Huntsville public accommodation sit-in cases. Mr. Davis says it was very scary practicing during those days, because law enforcement was trying to protect a "way of life."

Because of motel segregation laws, when he travelled far out of Birmingham to try cases, Mr. Davis would drive back home at night and get up early the next morning to drive back to court. He said that he never knew if he would have a confrontation with the police. Once, in 1961, Mr. Davis and Peter Hall went to Anniston City Court to defend two blacks charged with shooting two white men in a Texas style shoot-out. Several whites who were family members and friends of the alleged victims were in the audience, and they told Mr. Davis they had their shotguns hidden in their overalls. When Mr. Davis and Mr. Hall were travelling on a highway back to Birmingham, those men followed them in their cars and tried to sandwich Mr. Davis' car between their two cars. Mr. Davis, not known for any high speed driving skills, luckily managed to out-maneuver the lead car and speed away. In 1963, Mr. Davis and two bail bondsmen were arrested in Birmingham and sent to jail for representing the original Freedom Riders who came to Birmingham on a Trailways Bus. At the time of the arrest, Mr. Davis was sitting in his car on the corner of 4th Avenue, North and 19th Street, at the Trailways Bus Terminal (the site is now a parking lot), waiting for the arrival of the next bus load of Freedom Riders.

In the Birmingham city courts, Mr. Davis remembers judges, such as a Judge Brown, who did not want black lawyers to sit within the railing. Judge Brown required black lawyers to sit on the row where the defendants sat. Mr. Davis also recalls having to go outside the courtrooms to get water, and seeing signs over the water fountains marked "Colored." Mr. Davis said he always drank out of the "White" water fountain, and no one ever told him not to. He also recalls that some of his white colleagues would drink out of the "Colored" fountain because they wanted to know how the "Colored" water tasted. Happily, Mr. Davis can state that he "tried cases all over the state and generally was treated with a great deal of deference and respect by the clerks of the court in the small counties." He says that this was done because "they wanted you to take back to Birmingham the story that in the rural areas, a black lawyer is accorded with some dignity."

The major problem that Mr. Davis said he had was with the jury system. Again, blacks were not on the petit or grand jury until the late 1960s. The jury rolls in those days were filled with people "who had a Mountain Brook address and a Treemont telephone exchange." Therefore, it was difficult to win a jury trial. "It was common practice that if we had a good case, and had to try it before a jury, we would associate a white lawyer. And we had to split the attorney fees with the

white lawyer," Mr. Davis says. He further said, "We had to associate a white lawyer, otherwise, your client probably would sue you for malpractice."

Mr. Davis does recall white attorneys who helped him in his practice, including Chester W. Austin, Colonel Crampton Harris, Abe Berkowitz, A. Leo Oberdorther, and several Jewish lawyers.

Today, Mr. Davis said the atmosphere in the courts is totally different because it is not as racially charged as it was during the 1960s and early 1970s. He said that Birmingham has made tremendous progress since those early days. "I go to Michigan, New York, and other states, and the progress that has been made in this state far exceeds the progress that has been made in the large Northern states where you have large populations of blacks," he said. Today, Mr. Davis is a senior partner in the law firm of Sirote, Pemutt.

**Fred D. Gray**

The list of black legal pioneers in Alabama is not complete without Fred D. Gray. Mr. Gray, born in Montgomery, Alabama, graduated from Case Western Reserve University Law School in 1954 and returned to Montgomery to begin private practice. Mr. Gray was not allowed to attend law school in Alabama, because of his race. As was the case with other black students seeking law degrees, the State of Alabama paid a portion of Mr. Gray's law school expenses on the condition that he attend a law school outside of Alabama. Mr. Gray's contact with noted law professors at Case Western Reserve helped to shape his rich legal education. Another formative experience for Mr. Gray occurred when, as a student, he was arrested in Birmingham for using a white-only restroom in the train station. Mr. Gray returned to the South to help fight discrimination and segregation. One of Mr. Gray's first clients was Mrs. Rosa Parks, a long-time friend. A tired and drained Mrs. Parks was arrested December 1, 1955 when she refused to surrender her bus seat to a white male. Mr. Gray's representation of Ms. Parks propelled him into the leadership ranks of the Montgomery bus boycott, in which more than 60,000 blacks refused to ride Montgomery buses. Although Ms. Parks was found guilty, and her state court appeal was lost on local technical grounds, the bus issue was resolved in another forum. Because Mr. Gray and other black attorneys felt that the Alabama state court system did not provide equal protection of the laws to blacks, they developed a strategy of removing as many of their civil rights cases as possible to the federal courts. Such was the case in *Browder v. Gayle*,[9] when Mr. Gray represented Mrs. W. A. Gayle. In *Browder*, the United States Supreme Court affirmed a lower court ruling that declared the state's segregation statute unconstitutional. As a result of that decision, there was no longer a legal justification for a segregated seating policy on Montgomery buses and the bus boycott ended. Mr. Gray remembers that when his role in the bus boycott gave him greater visibility, his draft status changed from a 4-D (a clergyman's exemption he was entitled to since he was an assistant minister) to 1-A (ready for active duty).

Mr. Gray's civil rights activism landed him in another Supreme Court issue, this time the landmark libel case of *New York Times v. Sullivan*.[10] Mr. Gray represented a group of ministers, including Dr. King, who signed a letter advertisement in the New York Times which solicited funds for the civil rights movement. The ad mentioned the Montgomery bus boycott and the brutality that the demonstrators faced at the hands of city officials. L.B. Sullivan, Montgomery's Police Commissioner, sued, claiming defamation. The Montgomery Circuit Court awarded Sullivan damages; however, the Supreme Court reversed and held, in part, that where an elected public official sues a "citizen critic" of government for defamation, the

First Amendment applies and "guarantee[s] the right of the 'citizen critic' to criticize his government."[11]

Mr. Gray also handled voting rights cases. In 1960, in association with Arthur Shores, Mr. Gray argued in the case of *Gomillion v. Lightfoot*[12] before the supreme court. The Alabama Legislature had passed an act gerrymandering all but four or five of the blacks out of the City of Tuskegee, while not removing a single white voter or resident. Mr. Gray represented the black residents. The supreme court held the statute was unconstitutional and enjoined its enforcement.

Mr. Gray also represented the Freedom Riders in the state of Alabama. As a result of Mr. Gray's successful legal feats, Dr. King retained Mr. Gray as one of his principal attorneys.

Mr. Gray is also noted for representing Charlie Pollard. Over 40 years ago, the U.S. Government induced rural black males to become involved in the Tuskegee Syphilis Study. They were neither informed nor treated for syphilis by the Government. The suit resulted in a final settlement award in excess of $9.5 million.

Between 1970-74, Mr. Gray served in the Alabama House of Representatives. Mr. Gray continues to handle civil rights cases. Recently, he represented Alabama State University in a federal case seeking to eliminate all remaining vestiges of segregation and discrimination in state institutions of higher education in the state of Alabama.

**Charles D. Langford**

Inspired by his mother, Lucy B. Langford, Charles D. Langford left Montgomery to attend Catholic University Law School in Washington, D.C. In the 1950s, white students who attended the University of Alabama did not have to take the bar exam but were admitted to the bar, upon motion to the Alabama Supreme Court. Black students, of course, were not admitted to the University of Alabama Law School. Thus, Mr. Langford had to take the Alabama bar. He recalls that in 1953, there was no bar review course in Alabama to help preparation for the exam. Despite this adversity, he prepared for and passed the bar exam.

Mr. Langford set up his practice in Montgomery. There were only a few black attorneys in the entire state, so when he would walk into court "everyone would look very surprised to see me," he said. Mr. Langford states that he did get his share of bitter and angry looks, and he always felt cognizant that he was a black man practicing law in an all-white profession. When he did appear in court in surrounding counties, many times the court would ask him to show his bar card. He recalls that he once sat and watched Peter Hall, a black Birmingham attorney, try a jury trial in circuit court. During closing argument to an all-white jury, the judge instructed Mr. Hall not to look at the jury but to address him. Mr. Langford said that the incident was humiliating to both Mr. Hall and Mr. Langford.

Mr. Langford remembers assisting in the representation of individuals who were arrested during the Montgomery bus boycott, including Dr. King and Ms. Rosa Parks. Mr. Langford also fought in

court for the desegregation of the Montgomery public schools. Mr. Langford says that he is happy for the changes that have occurred for black attorneys, and is particularly pleased to see more black law firms and black lawyers getting a variety of different cases that they did not get when he started practicing law—for example, representing cities, counties and the State. Mr. Langford says, however, that black lawyers still do not get their fair share of government bond counsel work and other government cases. Mr. Langford is trying to make changes in this area, since he currently serves as a state Senator.

**Judge J. Richmond Pearson**

Judge J. Richmond Pearson wanted to be a lawyer all of his life. He was reared in Birmingham, and he said that he never thought of any other profession. He said that he is still surprised that he is a circuit court judge, because he never thought of being on the bench. After graduating from Morehouse College in Atlanta, Georgia, he attended Howard University Law School. At Howard, he participated in many of the preparatory mock U.S. Supreme Court hearings for those attorneys who had cases scheduled for oral argument on the Supreme Court docket. He was greatly influenced by legal thinkers such as Dean James Nabrit, Jr. and Professor Herbert O. Reid, Sr.

After graduating in 1958, Judge Pearson returned to Birmingham, passed the bar exam, and started practicing law. Judge Pearson remembers that he could not participate in the activities of the state bar or the Birmingham Bar because he never received any notices of events, committee meetings or activities. He does recall receiving an application from the Birmingham Chamber of Commerce. He filled out the application and sent it in with the requested membership fee. However, he recalls, several days later, two white men walked into his downtown office, handed him his application and fee and told him they could not accept it, since blacks could not join.

At the commencement of his practice, Judge Pearson handled tort and civil rights cases. Whenever he had a good tort case that was going to be tried before a jury, he would associate a white lawyer. Judge Pearson said that he managed to find white lawyers who would split the fee recovered, fifty-fifty. The normal practice, according to Judge Pearson, was for black lawyers who associated white lawyers to give their white counterparts two-thirds of the total fees earned or awarded. Judge Pearson felt that a fifty-fifty split was fairer because blacks had to associate with a white attorney merely because of the black attorney's race.

Judge Pearson recalls the humiliation and hostility that black attorneys, victims, defendants and witnesses had to go through in court. Blacks were referred to by their first name or without their appropriate surname or title, while whites were referred to by their last names coupled with Mr., Mrs., Attorney or the appropriate title. Even today, many black attorneys and judges are sensitive to such informal references unless the reference is made in an appropriate environment and by a genuine friend.

Judge Pearson remembers the snubs that many black attorneys received in the county library. He said, "When blacks went to the law library on top of the courthouse, we had to sit down, write on a piece of paper the books we wanted, and, when the librarian had time, he would go get the books for us — we could not circulate like the white attorneys." He further said, "The librarian said he was doing us a favor. I guess he thought we didn't have enough sense to know how to use the library, even though we finished law school."

Once, Judge Pearson and Justice Oscar Adams, then practicing attorneys, went to Selma to look at some court records that were in the basement of the courthouse. They were accompanied in the basement by a white court clerk or secretary. "Oscar responded to her questions by saying 'yes' or 'no'. And she told Oscar that blacks couldn't address her by stating 'yes' or 'no', that they had to address her as 'yes, Ma'am'. She stood there and insisted that he refer to her as "yes, Ma'am." Judge Pearson said that, without much choice, Justice Adams responded as she requested. "You couldn't blame him for saying it, because if he did not say it, there is no way of knowing what she would have said we did to her down in the basement. So he said it, we got out of there and got out of town."

Judge Pearson recalls representing Rev. Fred L. Shuttlesworth and Dr. King when they were arrested for sit-ins and other civil disobedience charges. Judge

Pearson believes that blacks have made tremendous progress since those days, noting that blacks are now on the bench and serving as federal, state and county prosecutors.

**Rose Marie Sanders**

With few professional employment options available for a young black woman in the South, Rose Marie Sanders decided that she would take the unconventional route and become a lawyer instead of a teacher. In 1966, she enrolled at Harvard University Law School. At Harvard, she met Henry ("Hank") Sanders, now her husband and law partner.

Her parents lived on 9th Court, West, Birmingham, (aka, "Dynamite Hill"), and during the tumultuous period when homes were bombed, she decided she wanted to see other places besides Birmingham. However, Mr. Sanders was devoted to fighting for civil rights in Alabama, and in 1970, he persuaded Ms. Sanders to return. Several years later, Mr. Sanders opened up his practice in Selma and persuaded Mr. Chestnut to join him. As a result, in 1972, the now well-known firm of Chestnut, Sanders & Sanders was started. For the last 20 years, Ms. Sanders' practice has been in the area of general law, emphasizing in employment law, welfare rights and consumer law.

She recalls that her experiences with sitting judges were the most difficult. Once, in a custody hearing, a Clarke County Circuit Court judge had her arrested and held in contempt. Prior to the custody hearing, the judge had said that he would continue her client's case. She reminded the court that under Alabama law the hearing had to be held that day. The judge then threatened to keep her in court until midnight. Ms. Sanders responded, "So be it." She was then arrested and held because of her comment and her refusal to apologize.

A court experience Ms. Sanders vividly recalls occurred in the 1970s in Marengo County. During a trial, Ms. Sanders questioned the absence of blacks on the jury. The prosecutor, in response, called an employee from the sheriff's department who testified that blacks confess to crimes more often than whites which he said was an indication that blacks were intellectually inferior to whites. Thus, he reasoned, blacks were less qualified than whites to serve on a jury.

Ms. Sanders says that she still notices a marked improvement in the attitude of white judges when she represents white clients as opposed to black clients.

Ms. Sanders is very proud of her employment discrimination cases which include suits against Ziegler Company, Bush Hall and Russell Corporation. Ms. Sanders also successfully assisted in representing Albert Turner and Spiver Gordon on federal voting fraud charges stemming from elections in the Black Belt counties.

Ms. Sanders extensively involves herself in community work, including starting a pre-school, organizing cultural enrichment programs and, along with her husband, founding the Alabama Lawyers Association [see related article].

Ms. Sanders says that she is still fighting the Alabama State Bar to eliminate the rule which limits the number of times, i.e. five attempts, a bar examinee can take the exam. Ms. Sanders argues that since the bar examination is designed to test only minimum standards, then it should not matter how many times an examinee sits for the exam if he or she eventually meets the minimum standards.

**Solomon S. Seay, Jr.**

Solomon S. Seay, Jr.[13] was a true pioneer in Alabama school desegregation cases. Mr. Seay graduated from Howard University Law School and decided to return to Alabama after his graduation. In 1957 Seay passed the Alabama bar and set up his law practice with Fred Gray and Charles Langford.

In 1958, 16-year-old Mark Gilmore of Montgomery took a short cut on his way to work across Oak Park, a segregated park in Montgomery. Mr. Gilmore was arrested, beaten, tried and convicted of a violation of a local "Jim Crow" law, and sentenced to jail for one year. Mr. Seay, in behalf of Gilmore's relatives and others, sued the City. Federal Judge Frank M. Johnson, Jr. ruled the city ordinance was unconstitutional. To avoid supporting an integrated park, the City closed the park.

During Mr. Seay's 20-year-tenure at the firm of Gray, Seay & Langford, Mr. Seay was responsible for most of the public school desegregation litigation throughout the state.

**Arthur D. Shores**

The title of "Dean of Black Attorneys in the State of Alabama" belongs to only one man—Arthur D. Shores. Mr. Shores received his education at Talladega College and the University of Kansas. He has practiced law in Alabama since 1937. For more than a decade, he was the only black attorney practicing in Alabama. Julius L. Chambers, former director/counsel of the NAACP Legal Defense Fund, recently said of Mr. Shores, "In the course of more than five decades, Mr. Shores played a central role in abolishing state-sanctioned apartheid in Alabama, in working for equal rights for all Alabamians, and in bringing Birmingham to what it is today: a community that promises to ensure equal opportunities for all of its citizens, a model for the rest of the nation."

All was not easy for this soft spoken gentleman. Before the public accommodation laws struck down segregation in hotels and restaurants, blacks could not stay in hotels or motels. Mr. Shores traveled from one end of the state to the other to represent poor and needy clients. Even if his case were in a city 300 miles away and lasted several days, each evening after court Mr. Shores would drive back to Birmingham and stay at home. The next morning, he would awake early and drive back to court. This continued day after court day until the trial ended.

Mr. Shores says that he was generally treated very well by all with whom he came in contact. However, there were a few incidents where he did narrowly escape serious injury. In July 1940, he defended Will Hall, a black union leader who charged George Williams, a white Ensley police officer, with excessive force. The all-white civil service board returned a finding in favor of Mr. Shores' client. As Mr. Shores left the courtroom and attempted to get into the elevator, he was attacked from behind. Mr. Shores was arrested for "disorderly conduct." Later, the attacker admitted he had been paid by police informants. Mr. Shores now says, "It wasn't easy to practice then. I had to carry a .41 Colt pistol in my brief case. Not too many people messed with me after that, because they knew I had a permit to carry it."

As the lead local counsel for the NAACP, Mr. Shores sought to dismantle state and local "Jim Crow" laws. Mr. Shores' federal court battle with Birmingham's segregated zoning ordinances caused Federal District Court Judge Clarence Mullens to give Mr. Shores one of his first victories. With the sweet taste of victory still fresh, he challenged the segregated educational system that denied black children equal educational opportunities. His most famous battle in this area challenged the University of Alabama and its denial to Autherine Lucy, a black student, to attend classes. This 1956 federal case brought Mr. Shores national attention. Mr. Shores won the case and Federal Judge Hobart Grooms ruled that the University must re-admit Ms. Lucy and allow her to return to class. But vicious white mobs rioted, and the University defied the court order and refused to allow her to continue her classes. Mr. Shores recalls that the mob was so unruly that, one evening while retreating from the campus, he and Ms. Lucy were attacked while in his car, and he thought they would be killed. Thereafter, Governor George Wallace tried to block the school house door. As a result of Mr. Shores' fight for Ms. Lucy, Ms. Vivian Malone and Mr. James Hood obtained admission to attend the university. Years later, Mr. Shores received an Honorary Doctor of Humanities Degree from the University of Alabama.

In 1947 Mr. Shores represented black teachers in federal court to secure equal pay for them when they were just as qualified as their white counterparts. Federal District Court Judge T.A. Murphree decided the case in favor of the black teachers.

Mr. Shores said that he sometimes associated Crampton Harris, a white attorney, to help him on some of his cases. In those days, black attorneys had to associate with white attorneys if they

wanted to win their jury trials, because the juries were all white, according to Mr. Shores.

In the mid-1960s, when Mr. Shores fought for and obtained an injunction to enforce the *Brown v. Board of Education* decision in Birmingham, his home was twice bombed within a matter of weeks. The bombing of Mr. Shores' home touched off rioting in Birmingham. Mr. Shores says today that during all of this he was not afraid for his safety. "I just did what I knew was right." He does recall that about a dozen blacks sat outside of his home, day and night, to protect his home and family from further bombings. During this time, Mr. Shores was influenced by and valued his relationship with Thurgood Marshall, then director of the NAACP Legal Defense Fund. Mr. Marshall stayed at Mr. Shores' house and at the house of Dr. and Mrs. A.G. Gaston and worked out of Mr. Shores' law office. Together, they shared ideas and developed case strategies. Mr. Shores always shared his knowledge with other young attorneys who worked with him, including Fred Gray, Orzell Billingsley, J.L. Chestnut, Jr. and Peter Hall.

Mr. Shores, like Justice Adams and several others, represented Dr. King when he was arrested in Birmingham. Mr. Shores also represented thousands who stood up to Bull Conner's firehoses and attack dogs. He successfully argued before the supreme court to overturn the convictions of demonstrators who were convicted of violating Birmingham's city parade permit. Mr. Shores was not in the limelight, but he was always vigilant in negotiating with the white city officials to end segregation in Birmingham. Mr. Shores also handled many voting rights cases to ensure that blacks had equal access to the political process and could elect representatives of their choice. In 1947, he filed the first suit in Birmingham to enforce the right of blacks to vote.

Later, in 1968, he was appointed by an all-white city council to fill a vacancy on the Birmingham City Council. The following year, he was elected to the same position and became the city's first black elected official. He was victorious because he won wide support from both white and black voters. Soon thereafter, the council elected him president pro tem. Whenever the mayor was out of town, Mr. Shores acted as Birmingham's mayor.

One of Mr. Shores' crowning achievements was when he worked with Dr. A.G. Gaston to found Citizens Federal Savings Bank. To this day, Mr. Shores is an active member of the Board of Directors of Citizens Federal, which is rated as one of the safest savings and loan institutions in the State. The late David Hood, also a pioneer black lawyer, served on Citizen's Board with Mr. Shores.

**Frankie Fields Smith**

Frankie Fields Smith has been affectionately referred to as the "Jewel of Mobile." When she was admitted to the Alabama bar in 1967 she became one of the first black female attorneys in Alabama. In 1975, she became the first black female Municipal Court Judge in Mobile County. That year, she was appointed to the Municipal Court of Prichard, Alabama, where she remained on the bench until 1985.

Frankie, as she is called by her friends, was encouraged to attend Howard University Law School by Professor Randolph T. Blockwell, a professor at Alabama A & M and a Howard Law Alumnus. After her acceptance to Howard, she did not show up for classes for financial reasons. Soon thereafter, she received a call from Dean Spottswood W. Robinson, III. Dean Robinson, later chief judge of the U.S. Court of Appeals for the D.C. Circuit, had a national reputation for litigating civil rights cases. "I was really

impressed by him when he personally called and asked me why I did not show up for classes. When I told him about my problem, Howard gave me a full scholarship."

A native Alabamian, reared in Sunflower, Alabama, Frankie always dreamed of returning to Alabama and using her skills to make life better for blacks who continued to suffer from discrimination and poverty. "I never knew how bad it was until I left and saw [the progress and success of blacks in other parts of the country]." At an NAACP Legal Defense Fund Conference, she met Vernon Z. Crawford, who, at that time, was the only black attorney in Mobile. Crawford's firm handled civil rights cases. Crawford was impressed by Frankie and asked her to join his firm. Frankie agreed and she began to handle civil rights cases. In 1967, Frankie, in a class action federal employment discrimination lawsuit, represented black truck drivers who were denied by their employers the opportunity to have interstate routes. The white drivers would bring the goods to Mobile and turn the trucks over to black drivers who would make the actual deliveries. Black drivers could not drive trucks outside of Mobile. The case reached the circuit court, and the trucking companies were forced to eliminate their discriminatory policy. Frankie also won back pay for the black truck drivers, since they had been denied the higher salaries that went to interstate drivers.

Frankie never formally joined the Mobile Bar Association because she was told it was segregated. However, she was invited to attend their social functions and she paid her way to attend. Once she got in the door, she states she was treated well by all with whom she came in contact. She says that she has not formally applied to the Mobile Bar Association to this day, but pays her dues and attends many of the functions. She is critical of those black attorneys who do not participate in local and state bar activities. "We must get involved and participate at all levels," Frankie admonishes.

Today, Frankie contends that black lawyers in Mobile have progressed. Some white law firms have integrated, and one black lawyer is a partner in one of the prominent white firms. Also, black lawyers in Mobile are getting a good share of the legal work, she says.

Frankie's advice to young attorneys, "Make the system work for blacks. Don't be afraid to challenge the status quo."

### The days ahead

These trailblazing pioneers have some advice for young black lawyers practicing today. Mr. Boynton said that black lawyers must be role models to the black youth and instill in them hope that they can make a difference in their lives. Ms. Sanders wants to see more black attorneys get involved in their communities and work with community organizations and in community projects. She said, "To say you don't have the time is an unacceptable excuse; you must make the time."

Mr. Langford feels young attorneys must develop a commitment to work very hard and not try to always hit home runs and make a lot of money very quickly. Adjust your expectations to fit your experience, he says. He also would like to see more involvement by black lawyers with the various bar associations, and advised those lawyers not to rule out running for political office. Mr. Shores suggests that lawyers should not be afraid to take on difficult cases. He said that if a case appears beyond a lawyer's ken, he or she has an obligation to associate another lawyer experienced in the area, then learn from that lawyer's actions and experiences.

Mr. Chestnut thinks that young lawyers need to get far more involved in the grass-root affairs of their communities. "Black lawyers are in a unique position to make really significant contributions to the forward thrust, not only for blacks, but for America." He said that black attorneys have become "more passive and more opportunistic— we don't need any more Clarence Thomases." Referring to money, Mr. Chestnut said, "If you work hard, the money will come, so concentrate on working hard." Regarding the referral of civil rights cases to other major firms, Mr. Chestnut feels that those issues "are vital to the progress of our people and

we can't completely farm that out to other folks. We must pool our money and our talents so [blacks] have involvement, up front, in our struggle—there is a serious problem if we farm that work out; we will farm out our future."

Judge Pearson said that black attorneys must be advocates for constitutional rights and equal opportunities for all Americans. He said that he is not satisfied that this is being done today with the same degree of vigor as once was the case. He feels this may be a result of the greater demand for more money and, while he understands that, he does not like to see "so many important issues go unchallenged." He also said, "Be honest and be prepared."

Mr. Davis agrees that young lawyers need to be prepared. "You have to be so good that you have something that everybody wants a part of—be twice as good as anybody else." Mr. Davis also said that younger lawyers must be "ever vigilant and make sure that nothing occurs that changes the progress that has been made in the last 40 years." Mr. Davis stresses to always be ethical and professional. Finally, Mr. Davis quoted Walt Kelly by saying, "We have met the enemy, and he is us," in reference to the failure of many blacks to get involved in state and local bar associations. Mr. Davis said that there are no impediments or excuses for blacks not getting involved in bar activities. He said that the black lawyers must begin to "break down their mental barriers."

Justice Adams sees black attorneys, like Vernon Jordan and Ron Brown, giving direction in areas where they, heretofore, have not. He feels that when President Clinton and others use the professional skills of black lawyers that will "bring the nation a long way very fast." Justice Adams wants to see black attorneys do more networking. This can be done, he says, by joining the American Bar Association, the National Bar Association, and state and local bar associations. Justice Adams concluded on this issue by saying, "Don't ever forget your identity and your roots."

As to changes in the legal profession in Alabama, some of the veteran warriors had some interesting points. Mr. Boynton would like to see more blacks on the bench and in prosecutorial positions. Mr. Chestnut would like to see Legal Services expanded to give the poor real legal standing in the courts. Judge Pearson would like to see "a more equitable distribution of judges and court personnel in the judicial system, at all levels." Mr. Davis feels that progress must continue in making sure that the major firms hire blacks as attorneys and other personnel. With the pool of excellent black legal talent that is available, he said, there is no excuse not to hire qualified blacks. Justice Adams feels that black lawyers need to obtain more mainstream business, such as representing insurance companies, banks, industries and other major Alabama companies. For years, the doors to many of these companies have been closed to black attorneys, but now a few are beginning to open their doors for the very first time—and that is a good sign, he said. Justice Adams would like to see more white firms reach out and hire qualified blacks. He also would like to see blacks start more law firms and seek out cases in areas such as commercial litigation, tort litigation, social security litigation and environmental law. ■



## Endnotes

1. *Morgan v. Virginia*, 328 U.S. 373, 66 S.Ct. 1050 (1941).
2. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986).
3. In preparing this article, I was unable to effectively communicate with Mr. Billingsley because of health reasons. The following account comes from Mr. J. L. Chestnut in his book, *Black in Selma*, Farrar, Straus and Giroux, 1990. Also referenced, David J. Garrow, *Bearing The Cross*, Vintage Press, 1988.
4. *Boynton v. Commonwealth of Virginia*, 364 U.S. 454, 81 S.Ct. 182 (1960).
5. 78 Stat. 241, 42 U.S.C.A. 2000 *et seq.*, The Civil Rights Act of 1964.
6. *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138 (1896). The Supreme Court refused to invalidate discriminatory state segregation laws. The court held that, in face of a Fourteenth Amendment challenge to such laws, "the case reduces itself to the question whether the statute of Louisiana has a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the [state] legislature. In determining the question of reasonableness it [the state] is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Guided by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children . . .". The reach of *Plessy* extended far beyond rail transportation and virtually approved all aspects of segregation in public life.
7. *Brown v. Board of Education of Topeka*, (Brown II), 349 U.S. 294, 75 S.Ct. 753 (1955).
8. Deceased.
9. *Browder v. Gayle*, 142 F.Supp 707, affd. 352 U.S. 903, 77 S.Ct. 145 (1956).
10. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964).
11. *New York Times v. Sullivan*, *supra*.
12. *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125 (1960).
13. See S.S. Seay, Sr., *I Was There By The Grace Of God*, The S.S. Seay, Sr. Education Foundation, 1990.


**Raymond L. Johnson, Jr.**

Raymond L. Johnson, Jr. is a 1973 graduate of Howard University in Washington, D.C. and a 1976 graduate of the University's School of Law. He is an assistant U.S. Attorney for the Northern District of Alabama and an adjunct professor of law at Cumberland School of Law, Samford University. He previously was in private practice in Beverly Hills, California and also worked with the Alternate Defense Counsel in Los Angeles, California.

He was president of the NAACP, Los Angeles chapter, from 1984-88, and currently serves on the Alabama State Bar's Access to Legal Services Committee and the Board of Editors of *The Alabama Lawyer*.

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AFRICAN-AMERICAN LAWYERS IN ALABAMA

# AFRICAN-AMERICAN FEMALES MAKING A DIFFERENCE IN THE ALABAMA LEGAL PROFESSION

*By CYNTHIA W. CLINTON & ANITA L. KELLY*

*African-American women comprise a little over one percent of the 9,778 licensed active attorneys in the state of Alabama and one-third of all African-American attorneys in Alabama. There are 109 African-American female attorneys practicing law in the public and private sectors. African-American female attorneys defy any stereotype other than of commitment to the profession, family and community. The overwhelming majority of African-American female attorneys were licensed after the early 1970s. The women profiled in this article, along with others not featured in this article like Anita Archie, Beverly Baker, Delores Boyd, Sheryl Harrison, Judge Jo Celeste Pettway, Lynn Sherrod and Carolyn Steverson, are building a strong presence in the Alabama legal community.*

**LaVeeda Morgan Battle**

In one case alone LaVeeda Morgan Battle says that she saved the citizens of Alabama $150 million dollars in increased telephone rates. In 1984 Ms. Battle represented then-Governor George Wallace in the complex multi-million dollar rate case involving divestiture by AT&T of the local operating company, South Central Bell. But for the advocacy skills of this public utility law specialist, who prevailed on behalf of the Governor, the citizens of Alabama, she believes, would inevitably have faced another rate hike.

Ms. Battle says that she "likes" complex litigation and that public utilities law is highly challenging. Her first exposure to public utilities law began when she served as an attorney advisor to the Public Service Commission. This position led to her 1984 appointment to Governor Wallace's Public Staff for Utility Consumer Protection. Of her career, Ms. Battle says that each position has been a building block for the next.

Ms. Battle, a former administrative judge for the Equal Employment Opportunity Commission, also specializes in employment and labor law. She represents the personnel board of Jefferson County and private industry as defense counsel in employment litigation. She has been lead counsel for the personnel board in the Birmingham firefighter case, which she says was based on a United States Supreme Court decision in

1989 which gave rise to the Civil Rights Act of 1991.

The 1978 University of California Davis Law School graduate defines success as a commitment to excellence. She is not content with her success alone as a law partner in the Birmingham law firm of Gorham & Waldrep, P.C., and aspires to open doors to make more options available for the inclusion of women and African-Americans in diverse fields of practice.

Ms. Battle is a working mother and has been an advocate for issues which involve mothers and children. She is married to attorney Lynn Battle.

**Merceria Ludgood**

Born in Mobile, Alabama, Merceria Ludgood made the decision to become a lawyer during her fourth or fifth year in elementary school. While she didn't know any lawyers, she was convinced that this was the career choice for her. Now executive director of the Legal Services Corporation of Alabama, Ms. Ludgood has amply realized her earlier goal.

Ms. Ludgood attended college at the University of Alabama where she received a bachelor of science degree in education. She then attended law school at Antioch School of Law because of its strong clinical program and tradition of public interest law. Ms. Ludgood graduated from Antioch in 1981 and was admitted to the Alabama State Bar in that same year. At the time she graduated from law school, she planned to concentrate in criminal and civil rights law.

After admission to the state bar, Ms. Ludgood practiced with a small private law firm in Mobile, Alabama until 1988. In 1988 she opened her own solo practice in Mobile. Ms. Ludgood says that this solo experience provided her with an entirely new perspective on the private practice of law. In addition to the professional legal work, she also found herself responsible for the business side of operating a law firm. During this time, Ms. Ludgood carried on a general practice in which she represented Mobile County in various county proceedings and practiced probate, family and bankruptcy law.

Ms. Ludgood says that she believes that the practice of law is not just a profession, but a commitment. She has committed herself to including a significant amount of pro bono work in her practice. This commitment is further manifested in her ties to the Legal Services Corporation. Before being appointed executive director, she served on the board of directors for the Legal Services Corporation for approximately ten years. Ms. Ludgood says that she always wanted to come back to Alabama to practice law because she saw vividly the great need for legal services in the Mobile County area. She feels that it is important for her to give back to the community.

One of the highlights of Ms. Ludgood's career involved a state capital murder case in which Ms. Ludgood represented the defendant. On the day she received her bar results, the trial jury came back with a guilty verdict. Ms. Ludgood appealed the case, handling the appellate briefing and oral argument. Eventually, the case was reversed and remanded and Ms. Ludgood's client was set free.

Ms. Ludgood has been executive director of the Legal Services Corporation of Alabama since December 1991. Her office is located at 207 Montgomery Street, 500 Bell Building, Montgomery, Alabama. Ms. Ludgood enjoys her current position with Legal Services. However, she is faced with dealing with what she called the restrictive regulations that came out of the Reagan years on how Legal Services serves clients. Because she is still winding down her private practice in Mobile, Alabama, Ms. Ludgood is required to do a significant amount of travelling between Mobile and Montgomery.

**Judge Vanzetta P. McPherson**

The Honorable Vanzetta Penn McPherson practiced law for 18 years before her April 1992 appointment as a United States Magistrate Judge. Following her graduation from Columbia Law School, she worked with the Wall Street law firm of Hughes, Hubbard & Reed. After a brief stint as an Assistant Attorney General for the State of Alabama, she began a solo practice specializing in constitutional litigation and domestic relations.

Judge McPherson is a self-defining woman. She says that she did not pattern herself after any particular lawyer, but was guided by her desire to be instrumental in removing barriers that prevent people from becoming their "whole selves." Judge McPherson holds

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**Cynthia W. Clinton**

Cynthia W. Clinton received her undergraduate degree from Spelman College and her law degree from the University of North Carolina School of Law. She is an associate with the firm of Thomas, Means & Gillis, P.C. She is a referee for the non-support docket of Montgomery County Family Court. She holds membership in the American Bar Association, the Alabama State Bar, the Montgomery County Bar Association, the American Trial Lawyers Association, the Alabama Trial Lawyers Association, the National Bar Association, the Alabama Lawyers Association, and the Capitol City Bar Association.

**Anita L. Kelly**

Anita L. Kelly received her undergraduate and law degrees from the University of Alabama. She is an associate with the firm Thomas, Means & Gillis in Montgomery, Alabama. She clerked for the Honorable U.W. Clemon, United States district court judge for the Northern District of Alabama. She is a referee/judge for family court in the circuit court for Montgomery County. She is a member of the Alabama State Bar, the National Trial Lawyers Association, the Alabama Trial Lawyers Association, the Montgomery County Trial Lawyers Association, the Montgomery County Bar Association, and the Capitol City Bar Association.

steadfast to the belief that people should have the chance to go as high or sink as low as their abilities permit. Her commitment to others, she says, stems from watching her peers being denied opportunities that were available to her. "I was fortunate to have received a good education and to have had access to cultural enhancement, books, folktales and a full and blossoming family." The Judge's aspiration is to make a difference in life by leaving a legacy of contributing something that is good and taking away something that is bad.

Judge McPherson's most rewarding professional experience was her legal representation of the Scott plaintiff intervenors in *Sims v. Montgomery County Commission*, 766 F. Supp. 1052 (M.D.Ala. 1990), a race discrimination lawsuit. "First, I embraced the aim of the case wholeheartedly as a person and as a lawyer," she said. "Second, the results achieved have had an impact beyond the clients whom I represented. Third, a jurisprudential foundation was laid to ensure that the wrongs have been eliminated. And finally, I was adequately compensated." Judge McPherson says that she would like to see lawyers having more fun. "Lawyers do not seem to be as enthusiastic about their work and purpose. Lawyers should be energetic, physically and mentally." Judge McPherson is married to Thomas McPherson, Jr. and is the mother of Raegan Durant.

**Lateefah Muhammad**

Ms. Lateefah Muhammad is a sole practitioner in Macon County, Alabama. Her office is located at 204-A S. Elm Street, Tuskegee Institute, Alabama. Her areas of practice include entertainment, real estate, wrongful death, personal injury, probate and some international law. As an entertainment lawyer, Ms. Muhammad focuses on the business aspect of the entertainment industry. She is acutely aware of the many ways young, new entertainers are sometimes taken advantage of by others in the industry.

Ms. Muhammad received her bachelor of science degree in marketing from then Tuskegee Institute. She then went on to earn her law degree from Thurgood Marshall School of Law. While in law school, Ms. Muhammad was selected as editor-in-chief of the law review. She was also selected to serve as governor of the 13th Circuit of the American Bar Association Law School Division. This experience allowed Ms. Muhammed to travel and meet people from a wide spectrum. Ms. Muhammed graduated from law school in May 1991 and was admitted to practice in Alabama in April 1992; she is also admitted to practice before the United States District Court for the Middle District of Alabama.

Ms. Muhammad has worked with Ernestine Sapp, also of Macon County, Alabama, Milton Belcher and Courtney Tarver. Ms. Muhammad holds the distinction of being the first law clerk for Magistrate Judge Vanzetta Penn McPherson. She describes the experience as a very positive one and has a high regard for Judge McPherson.

Ms. Muhammad was born and grew up in Armstrong, Alabama, situated in Macon county between Union Springs and Tuskegee. Ms. Muhammad's great, great-grandfather had a hand in the naming of the city. Ms. Muhammad says that she makes a point of going home regularly because she believes it helps keep her grounded. She feels it is this return to the community that gave so much to her that keeps things in focus. Ms. Muhammed says that she credits Allah for all that she is and all that she will become.

Ms. Muhammad feels very strongly that lawyers provide a real service for their clients. One of the rewards she gains from practicing law is the satisfaction of knowing that she is doing what she can to help others. This is a reward, she is quick to explain, that cannot be bought with money. The successes that have so far come to Ms. Muhammad have been successes she not only wanted for herself, but also for her people. She is a strong advocate of persistence and dedication which are reflected in the manner in which she was selected to participate in the CLEO Program the summer before

she entered law school. Ms. Muhammad said that after she was informed that she had been placed on the participant waiting list, she and a mentor called the CLEO office twice a day for four days. After four days, the CLEO program knew it had to find a place for her, she said. The CLEO program provided Ms. Muhammad with a good introductory exposure to law.

Ms. Muhammad has found the private practice of law to be rewarding. She feels that her passing of the bar was a fulfillment of a dream and going into private practice has been a continuation of that dream. Also sharing Ms. Muhammad's dream is her husband, a musician with the group, The Seventh Wonder, and her son, Kareem Muhammad.

**Ernestine S. Sapp**

Ernestine S. Sapp, a partner with the law firm Gray, Langford, Sapp, McGowan & Gray, has been with that firm for 15 years. Ms. Sapp is a graduate of Wiley College and was the first African-American female graduate from Jones School of Law. Ms. Sapp was admitted to the Alabama State Bar in 1977.

After graduating from law school and passing the bar, Ms. Sapp worked as an attorney with the University of Alabama Legal Services System. She also worked as an Affirmative Action Officer for Tuskegee University. During her tenure with the University of Alabama Legal Services System, Ms. Sapp received an invitation from Fred Gray to join his firm. Ms. Sapp accepted the invitation and has been with the firm ever since. She describes her experience of working with Gray as very rewarding. Sapp's areas of practice are general civil practice, domestic relations, bankruptcy, probate, real estate, personal injury, educational institution law, labor law, municipal, corporate, and civil rights law.

Some of Ms. Sapp's professional affiliations include the American, Federal, National, Alabama and Macon County Bar Associations. She is a member of the Executive Committee of the Alabama Trial Lawyers Association, the Alabama Standing Committee on Juvenile Procedure, and the Alabama Supreme Court Advisory Committee on Evidence. She is admitted to practice before the Supreme Court of the United States, the United States Court of Appeals for the Eleventh Circuit, the United States District Court for the Middle and Northern Districts of Alabama and the Supreme Court of Alabama. Ms. Sapp is the first lawyer from Alabama to be elected vice-president of the National Bar Association.

Ms. Sapp has always been extremely actively involved in community affairs. Even before beginning her legal studies, she was generally described as a "community activist" who was committed to improving the local school system. She and her children were regular volunteers with the local Red Cross. Ms. Sapp has continued that activism with her involvement on the National Bylaws Committee of American Association of University Women, the Tuskegee Board of Directors of the Coalition of 100 Black Women and Links, Inc. Ms. Sapp is a member of the Alabama Democratic Conference and an elected member of the Alabama Democratic Executive Committee; she was a 1978 delegate to the National Democratic Convention. Ms. Sapp has traveled extensively with legal teams to China and the Soviet Union.

When Ms. Sapp initially began her practice of civil rights law, she points out that those cases were not cases one would today think of as a civil rights cases. Her clients might have come to her on a traffic ticket matter, but the underlying reason for the issuance of the ticket she says, was that the client was an African-American. She describes the situation during the 1970s as one where seemingly ordinary things would happen to black people, but only because they were black.

Ms. Sapp sees her role as a lawyer as an opportunity to right wrongs. One of the greatest rewards she has gotten from the practice of law, she says, has been the chance to share and see people be happy about the resolution of their problems.

**Carole Catlin Smitherman**

When William Jefferson Clinton was elected the 42nd President of the United States, Carole Catlin Smitherman's name soon appeared on a short list of potential appointees for United States Attorney for the Northern District Of Alabama. The Birmingham-born attorney has already served in the capacities of circuit judge for Jefferson County and municipal judge for the City of Birmingham. She has also acted as deputy district attorney for Jefferson County.

Ms. Smitherman, who graduated from Miles Law School, describes herself as a public servant. "All lawyers are public servants with a responsibility to their communities," she says. Ms. Smitherman's philosophy of public service had its genesis in a tragic experience that left a childhood friend dead, a casualty of opposition to the civil rights movement. Denise McNair, her best childhood friend, was one of four children killed in the 1963 bombing of Birmingham's Sixteenth Street Baptist Church. "I remember not understanding why an arrest was not made and feeling that injustice and hatred were wrong. I felt that I could make a difference by becoming a public servant, an attorney."

Ms. Smitherman's early mentors included Birmingham civil rights attorney Arthur Shores and the deceased Supreme Court Justice Thurgood Marshall. "Arthur Shores and Thurgood Marshall were visible and making a difference. I set out to emulate these men," she said.

Although her early role models were men, Ms. Smitherman believes that it is extremely important that women are active and visible in the legal community as, in her view, women bring a different perspective that is often lost when their concerns are not voiced by women.

Ms. Smitherman practices law with her husband, attorney Roger Smither-

man, in Birmingham, Alabama. She is the working mother of three children.

### Constance Kidd Wadlington

Constance Kidd Wadlington, an assistant district attorney for Tuscaloosa County since August 1990, for a very long time has been interested in the criminal prosecution area of legal practice. Ms. Wadlington wanted quick trial experience and her criminal practice has generally been what she expected.

Wadlington is a 1985 graduate of the University of Alabama, and a 1988 graduate of the University of Alabama School of Law. While in law school, in addition to working, Ms. Wadlington was active in BALSA and clerked with Judge Paul Conger, a circuit court domestic relations judge. Ms. Wadlington also clerked with the cities of Tuscaloosa and Birmingham before completing law school.

Ms. Wadlington's mother worked in the Shelby County District Attorney's office during Ms. Wadlington's early years. Wadlington credits her mother with encouraging her to explore a legal career.

One of Ms. Wadlington's more interesting, if not bizarre, cases involved a defendant on trial for rape. Ms. Wadlington prosecuted the case and after the announcement of the guilty verdict, the defendant ingested a poisonous substance. What would have been a simple case of scheduling a sentencing hearing, took on the very complex issue of determining whether or not the defendant was sufficiently competent to be sentenced.

Ms. Wadlington says that she feels it is very important to give back to the community. She and a group from her church visit a juvenile detention facility in order to support and encourage the young detainees. Ms. Wadlington enjoys doing aerobics with her husband, Zachary, and reading. ■

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AFRICAN-AMERICAN LAWYERS IN ALABAMA

# AN OVERVIEW OF JURY TRIALS: LEGAL AND PROCEDURAL CONSIDERATIONS

*By HON. KENNETH O. SIMON*

*This outline discusses various aspects of a jury trial, including opening statements, jury selection, presentation of evidence, and closing arguments. By becoming familiar with the legal principles underlying the procedural aspects of a trial, counsel can more effectively formulate and execute a trial strategy.*

## Order of proceedings

Unless the right is waived, the plaintiff is entitled to open and conclude every case. *Chamberlain v. Gaillard*, 26 Ala. 504 (1855). When cases have been consolidated for trial, the trial court has discretion to determine which party proceeds first in conducting voir dire, striking the jury, giving opening statements, examining witnesses, and presenting closing arguments. *Smith v. Brownfield*, 533 So. 2d 573 (Ala. 1989).

The order in which proof is presented is in the trial court's discretion. *Alford v. State Farm Fire & Cas. Co.*, 496 So. 2d 19 (Ala. 1986); *Drs. Lane, Bryant, Eubanks & Dulaney v. Otts*, 412 So. 2d 254 (Ala. 1982). Thus, the trial judge may permit the introduction of evidence before other proof which is necessary to make it competent and relevant, *First State Bank of Albertville v. Duvall*, 345 So. 2d 1377 (Ala.Civ.App. 1977), or may permit the examination of witnesses out of order. *Pullman Co. v. Meyer*, 195 Ala. 397, 70 So. 763 (Ala. 1916).

The parties may offer rebuttal testimony at the closing of their cases in chief. Acceptance or rejection of testimony not strictly in rebuttal is within the trial court's sound discretion. *Cahaba Valley Development Corp., Inc. v. Nuding*, 512 So. 2d 46 (Ala. 1987); *White v. Boggs*, 455 So. 2d 820 (Ala. 1984). Similarly, the decision of whether to allow a party to reopen his or her case to submit additional evidence is also within the court's discretion. *Green Tree Acceptance, Inc. v. Strandridge*, 565 So. 2d 38 (Ala. 1990). A case should be reopened when the administration of justice so requires. *Hancock v. City of Montgomery*, 428 So. 2d 29 (Ala. 1983).

## Jury Selection

### A. Voir Dire

#### 1. General

Parties have a right to examine jurors, on voir dire, as to their qualifications, interest or bias that would affect the trial or the verdict. *Alabama Power Co. v. Bonner*, 459 So. 2d 827 (Ala. 1984); *Clark v. State*, 294 Ala. 493, 318 So. 2d 822 (1975). *See generally*, McLeod, "Voir Dire Examination of Jurors," *ATLA Journal*, vol. 1, no. 2, p. 21 (May 1982). Although the parties have the right to conduct a "liberal" inquiry on voir dire, *Clark v. State, supra*, 294 Ala. at 495, the trial judge has broad discretion in controlling the scope and conduct of the examination. *Id.*; *McLeod v. State*, 581 So. 2d 1144 (Ala.Cr.App. 1990); *Corbin v. State*, 551 So. 2d 429 (Ala.Cr.App. 1990). The trial court's discretion may be abused, however, if the parties are unduly restricted from determining juror bias. *Nodd v. State*, 549 So. 2d 139 (Ala.Cr.App. 1989). Voir dire is intended to provide parties information in order that peremptory challenges may be intelligently made. *Alabama Power Co. v. Bonner, supra*, 459 So. 2d at 832; *Vickers v. Howard*, 281 Ala. 691, 208 So. 2d 72 (1968); *Reeves v. State*, 470 So. 2d 1374 (Ala.Cr.App. 1985). Accordingly, voir dire examinations are permitted in

a number of areas, including: (1) whether jurors have formed opinions about the case, *Anderson v. State*, 362 So. 2d 1296 (Ala.Cr.App. 1978); (2) whether jurors are employees of an interested party, *Shelby County v. Baker*, 269 Ala. 111, 110 So. 2d 896 (1959); (3) whether jurors are agents, employees or stockholders of any insurance company that may be liable, in whole or in part, for any judgment that might be entered; *Jones v. Crawford*, 361 So. 2d 518 (Ala. 1978); *Citizens' Light, Heat & Power Co. v. Lee*, 182 Ala. 561, 62 So. 199 (1913); (4) whether any member of the venire is an insurance adjuster, *Burlington Northern R. Co. v. Whitt*, 575 So. 2d 1011 (Ala. 1990), overruling *Cooper v. Bishop Freeman Co.*, 495 So. 2d 559 (Ala. 1986); (5) in the case of a mutual company, whether any juror is a policyholder, *Welborn v. Snider*, 431 So. 2d 1198 (Ala. 1983); or (6) whether any venire member works in the claims department of any company or governmental agency, *Shelby County Comm. v. Bailey*, 545 So. 2d 743 (Ala. 1989). In inquiring about insurance, counsel must be careful to avoid saying or doing anything which would lead the jury to believe that the opponent has insurance coverage. *American Pamcor, Inc. v. Evans*, 288 Ala. 416, 261 So. 2d 739 (1972). For example, an uninsured/underinsurance carrier's right to elect not to participate in a trial against the tortfeasor [as provided in *Lowe v. Nationwide Ins. Co.*, 521 So. 2d 1309 (Ala. 1988)] makes it improper to question venire members concerning their association with the carrier. *McLain v. Routzong*, 27 ABR 336, 338 (Nov. 20, 1992). On the other hand, in *McLain*, the supreme court refused to overturn the trial court's refusal to allow plaintiffs to ask the venire whether they or any family members had ever evaluated claims in their jobs. *Id.* Reversal was unwarranted because no evidence suggested that the excluded question was material to the plaintiffs' right to exercise their peremptory strikes or that the plaintiff's right to select an impartial jury was impaired. *Id.* at 339-40.

**Judge Kenneth O. Simon**

Judge Kenneth O. Simon is a circuit judge in Jefferson County. He is a 1976 graduate of the University of South Alabama, and a 1979 graduate of the University of Alabama School of Law. Judge Simon was appointed to the bench after extensive civil litigation experience in private practice and with the United States Securities & Exchange Commission.

**2. Mode of examination**

The trial court may permit counsel to conduct the voir dire examination or may conduct the examination itself. ARCP 47(a). In the event the court conducts the examination, the parties may supplement the examination as appropriate. *Id.* Counsel's right to question prospective jurors is limited by propriety and pertinence; questions must be reasonable under the circumstances of the case. *McLeod v. State*, 581 So. 2d 1144 (Ala.Cr.App. 1990). The court may control the clarity of questions, *Morris v. Zac Smith Stationery Co.*, 274 Ala. 467, 149 So. 2d 810 (1963); allow or itself ask leading questions, *Flannigin v. State*, 289 Ala. 177, 266 So. 2d 643 (1972); disallow argumentative questions, *Peoples v. State*, 375 So. 2d 561 (Ala.Cr.App. 1979); and disallow questions in the nature of jury instructions as to legal principles applicable to the case. *Bracewell v. State*, 447 So. 2d 815 (Ala.Cr.App. 1983).

**3. Collective v. individual examination**

It is within the trial court's discretion whether to question jurors collectively (in each others' presence) or individually. *Seals v. State*, 282 Ala. 586, 213 So. 2d 645 (1968); *Smith v. State*, 588 So. 2d 561 (Ala.Cr.App. 1991); *Parker v. State*, 587 So. 2d 1072 (Ala.Cr.App. 1991). The primary advantage in individually questioning each juror is to avoid answers and remarks by jurors that may have a prejudicial effect on other jurors. *Heath v. State*, 480 So. 2d 26 (Ala.Cr.App. 1985). *See Battle v. State*, 574 So. 2d 943 (Ala.Cr.App. 1990) (entire venire could have been tainted if prospective juror, who believed she knew too much about the case, had revealed details of what she knew). Some remarks by jurors may be so inherently prejudicial as to be ineradicable. *Holland v. State*, 588 So. 2d 543 (Ala.Cr.App. 1991). If the damaging effect of the remarks can be eradicated, the trial court should promptly investigate to determine whether the remarks had a prejudicial effect on those who heard them, and whether venire members can disregard the remarks, and provide any necessary curative instructions. *Id.*

## B. Challenges for cause

**1. Statutory grounds**

Section 12-16-150 of the *Code of Alabama* (1975) sets forth the general grounds for challenging jurors for cause. These grounds include:

(a) He or she has not been a resident householder or freeholder of the county for the last preceding six months;

(b) He or she is not a citizen of Alabama;

(c) He or she has been indicted within the last 12 months for a felony;

(d) He or she has been convicted of a felony;

(e) He or she has a fixed opinion as to the guilt or innocence of the defendant which would bias his verdict;

(f) He or she is under 19 years of age;

(g) He or she is of unsound mind;

(h) He or she is plaintiff or defendant in a case which stands for trial during the week he or she is challenged or is related by consanguinity within the ninth degree or by affinity within the fifth degree, computed according to the rules of the civil law, to any attorney in the case to be tried or is a partner in business with any party to such case; and

(i) He or she is an officer, employee, or stockholder of or, in case of a mutual company, is the holder of a policy of insurance with an insurance company indemnifying any party to the case against liability in whole or in part or holding a subrogation claim to any portion of the proceeds of the claim sued on or being otherwise financially interested in the result of the case.

**2. Common law grounds**

The statutory grounds for cause challenges are not exclusive. *Poole v. State*, 496 So. 2d 537 (Ala. 1986); *Moses v. State*, 356 So. 2d 712 (Ala.Cr.App. 1978). A common law challenge must involve some matter which imports absolute

bias or favor and leaves nothing for the discretion of the court or a situation which presents a mixed question of law and fact to be determined by the trial court in its sound discretion. *Wallace v. Alabama Power Co.*, 497 So. 2d 450 (Ala. 1986); *Mullis v. State*, 258 Ala. 309, 62 So. 2d 451 (1952). Probable prejudice for any reason disqualifies a prospective juror. *Alabama Power Co. v. Henderson*, 342 So. 2d 323 (Ala. 1976); *Alabama Fuel & Iron Co. v. Powaski*, 232 Ala. 66, 166 So. 782 (1936).

**3. Determination of whether cause exists where juror has fixed opinions, biases or knowledge of facts**

The fact that a juror has bias or a fixed opinion is not a sufficient basis to require removal for cause; the juror's opinion must be so fixed that it would bias his or her verdict. *Stringfellow v. State*, 485 So. 2d 1238 (Ala.Cr.App. 1986). The test to be applied in determining whether a juror should be removed for cause is whether the juror can follow the instructions of law given by the court, eliminate the influence of his or her previous feelings, and render a verdict according to the evidence. *Knop v. McCain*, 561 So. 2d 229 (Ala. 1989); *Rowell v. State*, 570 So. 2d 848 (Ala.Cr.App. 1990); *Barbee v. State*, 395 So. 2d 1128 (Ala.Cr.App. 1981). Jurors need not be totally ignorant of the facts of the case, but only impartial in rendering a verdict exclusively on the evidence. *Ex parte Fowler*, 574 So. 2d 745 (Ala. 1990); *Ex parte Grayson*, 479 So. 2d 76 (Ala. 1985). If a juror indicates that he or she is biased or prejudiced or has deep-seated impressions indicating that he or she cannot be impartial, a challenge for cause must be sustained. *Knop v. McCain, supra*, 561 So. 2d at 234.

A challenge for cause is properly overruled if the prospective juror persuades the court that he or she can render a fair and impartial verdict. *Jarrell v. State*, 355 So. 2d 747 (Ala.Cr.App. 1978). However, if potential jurors exhibit probable prejudice, they should be struck for cause even if they state they can be fair and impartial. *Knop v. McCain, supra*, 561 So. 2d at 232 (two jurors should have been struck where one said people "are too quick to sue" and that the "evidence would have to be overwhelming for [plaintiff] before I would be willing to give her money"; other juror said she "probably" could be fair and impartial although there was "some" doubt).

If a juror makes an initial statement that is vague, ambiguous, equivocal, uncertain, unclear, or reflects confusion, the trial court should inquire further to determine whether the juror can be impartial. *Knop v. McCain, supra*, 561 So. 2d at 234. The trial court has the right to reject jurors for cause *ex mero motu*. *Williams v. State*, 241 Ala. 348, 2 So. 423 (1941).

The trial judge has broad discretion in sustaining or denying challenges for cause. *Ex parte Dinkins*, 567 So. 2d 1313 (Ala. 1990); *Kumar v. Lewis*, 561 So. 2d 1082 (Ala. 1990).

**4. Sufficiency of grounds: particular cases**

Sufficient cause existed in the following cases to require removal of jurors for cause:

(a) Family membership within prohibited degrees of consanguinity or affinity. *Duke v. State*, 257 Ala. 339, 58 So. 2d 764 (1952); *Little v. State*, 339 So. 2d 1071 (Ala.Cr. App. 1976).

(b) Bias in favor of or against a party's attorney. *Ex parte Rutledge*, 523 So. 2d 1118 (Ala. 1988); *Coca-Cola Bottling Co. v. Hammac*, 48 Ala.App. 60, 261 So. 2d 893 (Ala. Civ.App. 1972).

(c) Family member of a material witness. *Ex parte Tucker*, 454 So. 2d 552 (Ala. 1984).

(d) Service as juror in related or companion case or during prior trial of the same case. *Garvin v. Robertson*, 289 Ala. 90, 265 So. 2d 602 (1972); *Davis v. State*, 24 Ala. App. 190, 132 So. 458 (1931).

(e) Business, professional or employment relationship with a party. *Gray v. Sherwood*, 436 So. 2d 836 (Ala. 1983); *Welch v. City of Birmingham*, 389 So. 2d 521 (Ala. Cr.App. 1980); *Kendrick v. Birmingham So. R. Co.*, 254 Ala. 313, 48 So. 2d 320 (1950).

(f) Stockholder of interested party. *Wallace v. Alabama Power Co.*, 497 So. 2d 450 (Ala. 1986); *Mitchell v. Vann*, 278 Ala. 1, 174 So. 2d 501 (1965).

Sufficient cause did not exist to require removal of jurors for cause in the following cases:

(a) Mere fact that prospective juror is personally acquainted with party or member of party's family. To constitute sufficient basis for cause challenge, the personal association must result in partiality or probable prejudice. *Vaughn v. Griffith*, 565 So. 2d 75 (Ala. 1990); *Ex parte Dinkins*, 567 So. 2d 1313 (Ala. 1990); *Bramlee v. State*, 545 So. 2d 151 (Ala.Cr.App. 1988).

(b) Family relationship or acquaintance with a witness. *Johnson v. State*, 502 So. 2d 877 (Ala.Cr.App. 1987); *Moore v. State*, 488 So. 2d 27 (Ala.Cr.App. 1986); *Scott v. State*, 473 So. 2d 1167 (Ala.Cr.App. 1985).

(c) Family member of one of the attorneys' law partners. *Henderson v. State*, 584 So. 2d 841 (Ala.Cr.App. 1988)

(d) In an action involving a city, citizens of the city. *Beaird v. State*, 215 Ala. 27, 109 So. 161 (1926).

(e) Membership in same or related charitable, religious, or other association as a party, absent positive evidence of bias or interest in the outcome. *Birmingham Baptist Hospital v. Orange*, 284 Ala. 160, 223 So. 2d 279 (1969)(membership in Baptist Church); *Alabama Fuel & Iron Co. v. Powaski*, 232 Ala. 66, 166 So. 782 (1936)(membership in labor union); *Tucker v. Houston*, 216 Ala. 43, 112 So. 360 (1927) (membership in Methodist Church).

(f) Engagement in same business or occupation as party. *Finley v. State*, 36 Ala. App. 56, 52 So. 2d 167 (1951).

## C. Peremptory strikes

Peremptory strikes allow the parties to strike at will those jurors not subject to challenge for cause. Each side has six peremptory strikes in a venire of 24 jurors, and one strike for every two additional venire members. The most significant limitation on a party's discretion in exercising peremptory strikes is the unconstitutionality of striking jurors solely on the basis of race. *See Batson v. Kentucky*, 476 U.S. 79 (1986).

## D. Procedures for selection of jurors

The process for selecting jurors and alternates is established in ARCP 47(b),

which supersedes §12-16-140 of the *Code of Alabama* (1975). Rule 38(b) provides that a jury demand is deemed to be a demand for a struck jury. Rule 47(b) provides that jurors shall be selected from a list of at least 24 competent jurors, with the parties alternately striking one from the list until 12 remain. The party demanding the jury may strike first. Not more than six additional jurors may be impaneled to sit as alternate jurors. For the purpose of striking the jury when multiple claims or actions are tried together, Rule 47(c) provides that two or more parties having relatively similar interests may be aligned as a single party. Alternatively, the court may add additional names to the jury venire and permit strikes to be exercised separately or jointly. The plaintiff is generally entitled to half of the total number of strikes allocated to all parties.

Rule 47(b) also states that alternates must have the same qualifications, and be subject to the same examination, as regular jurors. Alternates are struck from a list containing the names of at least three competent jurors for each alternate position. The first alternate juror is the last name stricken before the regular number of jurors was reached; the second alternate is the next to last name stricken and so on until the number of alternates determined by the court is reached. Alternates who are not used are discharged before the jury retires to consider its verdict. Regular jurors who are unable or disqualified to perform their duties before the jury retire shall also be discharged. *See also* §§ 12-16-230 through 233 *Ala. Code* (1975). The parties may stipulate to a jury of fewer than 12 or to a non-unanimous verdict. ARCP 48.



### E. Opening statements

In opening statements, counsel may state their theories of the case and what, in good faith, they expect the evidence to show. *Nationwide Mutual Ins. Co. v. Smith*, 280 Ala. 343, 194 So. 2d 505 (Ala. 1966); *Cook v. Latimer*, 274 Ala. 283, 147 So. 2d 831 (Ala. 1962); *Atlanta Life Ins. Co. v. Ash*, 228 Ala. 184, 153 So. 261 (1934). The opening statement is not evidence, and does not technically constitute "admissions." *Wilkey v. State*, 238 Ala. 595, 192 So. 588 (1940). The time, manner and character of a party's opening statement regarding what he or she expects to prove are within the trial court's discretion. *State v. Hargrove*, 282 Ala. 13, 208 So. 2d 444 (1968). Although opening statements are not evidence, counsel may not introduce immaterial, incompetent or prejudicial matter in the opening statement. *Horton v. Continental Volkswagen, Inc.*, 382 So. 2d 551 (Ala. 1990); *Brown v. Leek*, 221 Ala. 319, 128 So. 608 (1930). Thus, it is inappropriate for counsel to refer to matters which would improperly influence the jury. *Atlanta Life Ins. Co. v. Ash, supra*, 153 So. at 188. Some statements may be so prejudicial as to constitute reversible error when a motion for new trial is denied. *Cups Coal Co., Inc. v. Tennessee River Pulp & Paper Co.*, 519 So. 2d 932 (Ala. 1988) (reference to inadmissible prior conviction); *Horton v. Continental Volkswagen, Inc., supra*, 382 So. 2d at 552 (reference to size or wealth of automobile dealership and owner thereof, a non-party); *Cook v. Latimer, supra*, 147 So. 2d at 285-86 (appeal to the sympathy of the jury).

### F. Presentation of Evidence

#### 1. Witness testimony

As a general rule, the testimony of witnesses is to be taken orally and in open court. ARCP 43(a); *Harrison v. Wienjies*, 466 So. 2d 125 (Ala. 1985). A party has a right on direct and cross-examination to conduct a thorough examination of a witness. Gamble, *McElroy's Alabama Evidence*, § 121.01, 3d ed., p. 249. Leading questions may be asked on cross examination and in the examination of adverse witnesses. ARCP 43(a) and (b). However, a witness has a right to be protected from certain conduct, including mistreatment or being asked to give "yes" or "no" answers when he or she cannot do so or without an explanation. *McElroy's, supra*, at §§ 121.91 and 121.02. Generally, only one counsel on each side may examine a witness. *Id.* at § 121.03. However, all counsel have the right to make objections on behalf of a party. *Id.* The trial court may ask questions, even leading questions, as necessary. *Id.* at § 121.04. Such questions may not leave the impression that the court favors a particular party. *Id.*

#### 2. Documentary and demonstrative evidence

The use of documents, graphs, charts, diagrams, etc. has been encouraged by the supreme court as an aid to the trier of fact. *Crocker v. Lee*, 261 Ala. 439, 74 So. 2d 429 (1954). Documentary evidence should be admitted into evidence before it is read or argued to the jury. *Poole v. Life & Cas. Co. of Tenn.*, 47 Ala. App. 453, 256 So. 2d 193 (1971). However, if a diagram, blackboard drawing or other item is used by either or both parties while interrogating a witness and exhibited to the jury, it becomes evidence even if not formally introduced. *Henley v. Lollar*, 35 Ala. App. 182, 44 So. 2d 791 (1950) (attorney's drawing of intersection where accident occurred); *Arrick v. Fanning*, 35 Ala. App. 409, 47 So. 2d 708 (1950) (diagram of accident scene); *Southern Ry. Co. v. Stonewall Ins. Co.*, 177 Ala. 327, 58 So. 313 (1912) (written instrument); *Reed v. Sears, Roebuck & Co.*, 214 So. 2d 857, 44 Ala. App. 506 (1968) (microfilm shown to the jury).

#### 3. Depositions

The use of depositions at trial is governed by ARCP 32. Rule 32 allows (1) any

party to use the deponent's deposition to contradict or impeach the witness' trial testimony; (2) an adverse party to use a party's deposition for any purpose; and (3) any deponent's deposition to be used if the witness: (a) is dead; (b) is out of state or is more than 100 miles from the location of the trial; (c) is a licensed physician or dentist; (d) fails to attend pursuant to subpoena; or (e) as justice may require.

The procedure for introducing the deposition is as follows: The examining attorney should obtain the services of an individual who acts as the deponent, and as the examining attorney reads questions from the deposition, the individual acting as the deponent reads the deponent's answers; the opposing party then may object to any problematic evidence. *Century Plaza Co. v. Hibbett Sporting Goods, Inc.*, 382 So. 2d 7 (Ala. 1980). A general objection to the form of a question is insufficient to preserve an objection that could be cured at the deposition by identifying the specific problem; thus, the failure to raise a specific objection may serve as a waiver at trial of a curable defect. *McKelvy v. Darnell*, 587 So. 2d 980 (Ala. 1991); *see generally*, McAnnally, "Is an Objection to the Form Enough?", *The Alabama Lawyer*, vol. 53, no. 5, p. 377 (Sept. 1992). If only part of a deposition is offered by a party, an adverse party may require him to introduce all of it which, in fairness, ought to be considered with the part introduced. ARCP 32(a)(4). Any party may introduce any other parts. *Id.* Unless the parties agree otherwise, the actual deposition should not be admitted into evidence as an exhibit. *Century Plaza Co. v. Hibbett Sporting Goods, supra*, 382 So. 2d at 11.

#### 4. In-court demonstrations and tests

Experiments, tests or demonstrations in open court are usually within the trial court's discretion; the court should require similarity of conditions and that the test relate to substantial issues in the case. *Shows v. Brunson*, 229 Ala. 682, 159 So. 248 (1935). See *Birmingham Ry., Light & Power Co. v. Rutledge*, 142 Ala. 195 (1904) (plaintiff permitted to walk before jury to demonstrate injuries); *Birmingham Ry., Light & Power Co. v. Saxon*, 179 Ala. 136, 59 So. 584 (1912) (motorman allowed to demonstrate with his hands the method of stopping the car); *Ensor v. Wilson*, 519 So. 2d 1244 (Ala. 1987) (in medical malpractice action alleging brain damage and retardation of child, demonstration permitted between child and special education therapist to show child's cognitive ability); *Williston v. Ard*, 27 ABR 298, 305-307 (Nov. 20, 1992) (in-court demonstration proper of brain-damaged child's physical disabilities and cognitive abilities in malpractice case).

#### 5. Viewing and inspection

The trial court may permit the jury to view the property or accident scene in question. *Macon County Commission v. Sanders*, 555 So. 2d 1054 (Ala. 1990),; *Rutledge v. Brilliant Coal Co.*, 247 Ala. 40, 22 So. 2d 428 (1945). In determining whether to grant or refuse a motion to view, the court may consider such factors as the issues involved, the status of the evidence and its inferences, whether the view will aid the jury in understanding the issues and evaluating the evidence, the expense and delay involved, the distance to be travelled, and the availability of maps, diagrams and photographs of the scene. *Parker v. Randolph County*, 475 So. 2d 1193 (Ala.Civ. App. 1985); *U.S. Cast Iron Pipe & Foundry Co. v. Granger*, 172 Ala. 546, 55 So. 244 (Ala. 1911). *See also White v. Thorington*, 219 Ala. 101, 120 So. 914 (1929) (view permitted of scene of automobile accident); *Johnson v. Louisville & N.R. Co.*, 240 Ala. 219, 198 So. 350 (1940) (view permitted of railroad crossing where collision occurred); *Kohn v. Johnson*, 565 So. 2d 165 (Ala. 1990) (view refused of homeowner's house where numerous photographs available depicting condition of structure). Although the knowledge a jury acquires during an inspection is unreported, it is nonetheless proper evidence. *Western Ry. of Alabama v. Still*, 352 So. 2d 1092 (Ala. 1977). The trial court must take care to assure that no unsworn testimony is given at the scene. *Macon County Commission v. Sanders*, 555 So. 2d 1054 (Ala. 1990); *Morris v. Corona Coal Co.*, 215 Ala. 47, 109 So. 278 (1926).

### G. Offer of proof

When the trial court sustains an objection to a question that does not, on its face, show the expected answer, counsel must make an offer of proof to preserve any error on appeal. *Ensor v. Wilson*, 519 So. 2d 1244 (Ala. 1987). During the offer of proof, counsel must establish the relevancy, materiality and competency of the expected answer. *Id.* at 1262; *Mersereau v. Whitesburg Center, Inc.*, 47 Ala. App. 146, 251 So. 2d 765 (Ala.Civ. App. 1971). Counsel must lay any necessary predicates and otherwise offer testimony in an admissible form. *Gulf Am. Fire & Cas. Co. v. Gowan*, 283 Ala. 480, 218 So. 2d 688 (1969). Under ARCP 43(c) the court may require the offer to be made out of the jury's presence. The court may add any additional statement to show the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. *See generally*, Hoffman and Schroeder, "Offering and Objecting to Evidence in Alabama," *The Alabama Lawyer*, vol. 47, no. 6, p. 304 (Nov. 1986).

### H. Witness Sequestration: "The Rule"

The rule of sequestration requires non-party witnesses to remain outside the courtroom during the trial. *See generally, Hubbard*, "The Rule on Exclusion of Witnesses: Beyond the Courtroom," *The Alabama Lawyer*, vol. 53, no. 2, p. 126 (March 1992); McLeod, "Invoking the Rule," *ATLA Journal*, vol. 1, no. 3 (Fall 1982). The rule may be invoked by any party or by the trial court. Excluding or excusing witnesses from "the rule" is left largely to the trial judge's discretion. *Nationwide Mutual Ins. Co. v. Smith*, 280 Ala. 343, 194 So. 2d 505 (Ala. 1966); *Erben v. Erben*, 462 So. 2d 377 (Ala.Civ. App. 1984). Judges sometimes excuse expert witnesses from the rule, especially where the expert's presence will assist counsel. *Camp v. General Motors Corp.*, 454 So. 2d 958 (Ala. 1984). If a witness remains in the courtroom in violation of the rule, the trial court has discretion to refuse or allow the witness to testify. *Nationwide Mutual Cas. Co. v. Smith, supra*, 280 Ala. at 350; *Wilson Bros. v. Mobile, O.R. Co.*, 207 Ala. 171, 92 So. 246 (1922). The witness may also be held in contempt. *Chapman v. State*, 380 So. 2d 351 (Ala. 1980).

There has been some question as to whether the rule prohibits *counsel* from informing witnesses of courtroom testi-

mony. The supreme court apparently believes that such communications are not prohibited by the rule. *See Christiansen v. Hall*, 567 So. 2d 1338 (Ala. 1990).

## I. Closing Argument

### 1. General

Counsel have a constitutional right in closing argument to pursue their own lines of argument and methods of dealing with testimony. *1901 Constitution of Alabama*, Art. I, § 10; *Louisville & N.R. Co. v. Tucker*, 262 Ala. 570, 80 So. 2d 288 (1955); *Birmingham News Co. v. Payne*, 230 Ala. 524 (Ala. 1935). Trial courts must give counsel substantial latitude in the content and scope of their closing arguments. *City of Birmingham v. Bowen*, 254 Ala. 41, 47 So. 2d 174 (1950). "Every fact the testimony tends to show, every inference counsel may think arises from the evidence, the credibility of the witnesses, as revealed by their manner, the reasonableness of their story, and many other considerations, are legitimate subjects of criticism and argument." *R.C. Bottling Co. v. Sorrells*, 290 Ala. 187, 190, 275 So. 2d 131 (1973).

### 2. The conduct of closing argument

The conduct and content of counsel's closing argument are matters within the trial court's sound discretion. *Pepsi Cola Bottling Co. of Luverne, Inc. v. Allen*, 572 So. 2d 434 (Ala. 1990). Thus, the trial court may permit counsel to use blackboards and charts in closing argument to clarify, explain, draw inferences, or make calculations. *Massey-Ferguson, Inc. v. Laird*, 432 So. 2d 1259 (Ala. 1983); *Payne v. Jones*, 284 Ala. 196, 224 So. 2d 230 (1969); *Southern Cement Co. v. Patterson*, 271 Ala. 128, 122 So. 2d 386 (Ala. 1960); *McLaney v. Turner*, 267 Ala. 588, 104 So. 2d 315 (Ala. 1958). Moreover, counsel may argue or read law to the jury. *Barber Pure Milk Co. v. Holmes*, 264 Ala. 45, 84 So. 2d 345 (1956); *City of Tuscaloosa v. Hill*, 14 Ala. App. 541, 69 So. 486 (1915). Counsel may also read documents introduced into evidence, *Terry v. Williams*, 148 Ala. 468, 41 So. 804 (1906), and refer to diagrams used by a witness but not formally introduced into evidence. *East Tennessee, V. & G.R. Co. v. Watson*, 90 Ala. 41, 7 So. 813 (1890). The trial court has substantial discretion to control legal arguments to the jury. *McCullough v. L&N R.Co.*, 396 So. 2d 683 (Ala. 1981); *City of Anniston v. Oliver*, 28 Ala. App. 390, 185 So. 187 (1939).

### 3. Improper closing argument

Many types of closing arguments are improper and objectionable. Among them are the following:

(a) Matters irrelevant to the issues and facts in the case. *Johnson v. Howard*, 279 Ala. 16, 181 So. 2d 85 (1965); *Moore v. Crow*, 267 Ala. 325, 101 So. 2d 321 (1958); *Louisville & N.R. Co. v. Atkinson*, 20 Ala. App. 620, 104 So. 835 (1925).

(b) Matters which are not sustained by the evidence and facts which are not in evidence. *Osborn v. Brown*, 361 So. 2d 82 (Ala. 1978); *Cook v. Latimer*, 274 Ala. 283, 147 So. 2d 831 (1962); *Ala. Power Co. v. Goodwin*, 210 Ala. 657, 99 So. 158 (1924).

(c) Evidence which was refused or rejected by the trial court. *Travis v. Hubbard*, 264 Ala. 670, 104 So. 2d 712 (1958); *Porter Coal Co. v. Davis*, 231 Ala. 359, 165 So. 93 (1936).

(d) Comments on failure to produce evidence or to call witnesses that are accessible to both parties or are cumulative in nature. *Olympia Spa v. Johnson*, 547 So. 2d 80 (Ala. 1989). *Wang v. Bolivia Lumber Co.*, 516 So. 2d 521 (Ala. 1987); *Donaldson v. Buck*, 333 So. 2d 786 (Ala. 1976). However, it may not be improper to refer to the failure of a party to testify. *Trahan v. Cook*, 288 Ala. 704, 265 So. 2d 125 (Ala. 1972). The fact that certain facts are peculiarly within the party's knowledge may not be a sufficient basis to bar the adversary from commenting upon a party's failure or refusal to testify. *Hinton & Sons v. Strahan*, 266 Ala. 307, 96 So. 2d 426 (1957). The court should also consider whether the party has personal knowledge of the facts in issue; whether the party's testimony is unnecessary or cumulative; whether the party is unavoidably absent from trial; and whether the party is competent as a witness. *Id.*

(e) Appeals to the jury's sympathy and prejudice in general, *Shelby Iron Co. v. Greenlea*, 184 Ala. 496, 63 So. 470 (1913), and which encourage the jury to ignore the evidence. *Smith v. Blankenship*, 440 So. 2d 1063 (Ala. 1983).

(f) Appeals to the jury's sympathy by inviting jurors to stand in the shoes of the litigant or to put themselves in the litigant's place. *Black Belt Wood Co., Inc. v. Sessions*, 514 So. 2d 1249 (Ala. 1986); *Allen v. Mobile Interstate Piledrivers*, 475 So. 2d 530 (Ala. 1985); *Osborne Truck Lines, Inc. v. Langston*, 454 So. 2d 1317 (Ala. 1984). However, the courts have not been overly restrictive in applying this rule. *Fountain v. Phillips*, 439 So. 2d 59 (Ala. 1983).

(g) Appeals to race or local prejudice. *Donald v. Matheny*, 276 Ala. 52, 158 So. 2d 909 (1963); *Davis v. Common Council of Alexander City*, 137 Ala. 206, 33 So. 863 (1903); *Loeb v. Webster*, 213 Ala. 99, 104 So. 25 (1925).

(h) Appeals to prejudice toward corporations. *Southern Life and Health Ins. Co. v. Smith*, 518 So. 2d 77 (Ala. 1987); *Gordon v. Nall*, 379 So. 2d 585 (Ala. 1980); *Chrysler Corp. v. Hassell*, 291 Ala. 267, 280 So. 2d 102 (1973).

(i) References to the wealth or poverty of either party, how the defendant would satisfy a judgment, or the economic effect of a judgment upon the defendant. *Ashbee v. Brock*, 510 So. 2d 214 (Ala. 1987); *Holt v. State Farm Mut. Auto. Inc. Co.*, 507 So. 2d 388 (Ala. 1986); *Otis Elevator Co., Inc. v. Stallworth*, 474 So. 2d 82 (Ala. 1985); *Southern Electric Generating Co. v. Leibacher*, 269 Ala. 9, 110 So. 2d 308 (1959); *Geer Bros., Inc. v. Walker*, 416 So. 2d 1045 (Ala.Civ. App. 1982).

(j) References to the existence of insurance coverage, *Preferred Risk Mutual Ins. Co. v. Ryan*, 589 So. 2d 165 (Ala. 1991); *Harvey v. Mitchell*, 522 So. 2d 771 (Ala. 1988); *Welborn v. Snider*, 431 So. 2d 1198 (Ala. 1983); as well as to the non-existence of insurance coverage. *Mobile Cab & Baggage Co. v. Busby*, 277 Ala. 292, 169 So. 2d 314 (1964).

(k) Injection of attorney's personal opinion as to any material fact or as to the guilt or innocence of the defendant. *Seaboard Coastline R.R. Co. v.*

*Moore*, 479 So. 2d 1131 (Ala. 1985); *Moseley v. State*, 448 So. 2d 450 (Ala.Cr.App. 1981); *Brown v. State*, 393 So. 2d 513 (Ala.Cr.App. 1981).

(l) Personal attacks on the honesty, ethics or credibility of opposing counsel. *Whitlow v. State*, 509 So. 2d 252 (Ala.Cr.App. 1987); *Hurt v. State*, 362 So. 2d 1163 (Ala.Cr. App. 1978).

*See generally*, Rowe and Pryor, "A Survey of Alabama Law Pertaining to Closing Arguments," *The Alabama Lawyer*, vol. 50, no. 1, p. 9 (January 1989); see also Hammond, "Reversible Error in Argument to the Jury," *ATLA Journal*, vol. 8, no. 4, p. 27 (1980).

**4. Retaliatory statements and arguments**

Parties who have been victimized by improper argument have the right to "reply in kind," i.e., respond in a manner that would otherwise be objectionable. *Smith v. Blankenship*, 440 So. 2d 1063 (Ala. 1983). However, counsel's reply in kind will be deemed improper if it goes beyond the bounds of the adversary's improper argument. *Wiggins v. Perlman*, 583 So. 2d 269 (Ala. 1991); *Stallworth v. Holt*, 534 So. 2d 1063 (Ala. 1988).

**5. Necessity for objection**

The appellate courts generally will not hold the trial court in error for overruling motions for new trial or mistrial unless there is a timely objection to the improper argument or a request for a curative instruction. *Pinckard v. Dunnavent*, 281 Ala. 533, 206 So. 2d 340 (1968); *Cavalier Ins. Corp. v. Gann*, 57 Ala. App. 519, 329 So. 2d 573 (1976). However, if the remark or argument of counsel is so grossly improper and highly prejudicial that neither retraction nor rebuke by the trial court would eradicate its effect, no objection need be made. *Colquett v. Williams*, 264 Ala. 214, 86 So. 2d 381 (1956).

**J. Trial Motions**

**1. Motion *in limine***

A motion *in limine* allows counsel to raise evidentiary issues prior to trial to prevent the introduction of improper matters before the jury. *See Acklin v. Bramm*, 374 So. 2d 1348 (Ala. 1979); *Oliver v. Hayes International Corp.*, 456 So. 2d 802 (Ala.Civ.App. 1984). It "offers a means of escape for the attorney whose historic remedy has been to object and request that the jury be instructed to disregard the evidence, which has the attendant disadvantage of appearing to hide matters ... The motion *in limine* has the advantage of raising evidentiary issues prior to trial that the judge might otherwise be called upon to decide during the heat and hurry of litigation." Gamble, "The Motion *in Limine*: A Pretrial Procedure That Has Come of Age," 33 *Ala.L.Rev.* 1, 8 (Fall 1981). As specifically as possible, a motion *in limine* must apprise the trial court of its object. *Banner Welders, Inc. v. Knighton*, 425 So. 2d 441 (Ala. 1982). In some cases an order granting a motion *in limine* is not absolute, but only preliminary, and the proponent of

the evidence may offer the disputed evidence at trial for a final ruling. *Ex parte Houston County*, 435 So. 2d 1268 (Ala. 1983); *Baxter v. Surgical Clinic of Anniston, P.A.*, 495 So. 2d 652 (Ala. 1986). In the absence of prejudice, the trial court can permit the introduction of evidence that was previously excluded *in limine*. *Cone Building, Inc. v. Kulesus*, 585 So. 2d 1284 (Ala. 1991). The trial court may choose to defer its ruling on a motion *in limine* until the matter arises at trial and evidence is presented by the parties. *Nash v. Cosby*, 574 So. 2d 700 (Ala. 1990).

**2. Motion for mistrial**

A mistrial is made during a trial and operates to discharge the jury prior to verdict. A mistrial may be in order when fundamental errors occur during a trial that prejudice the rights of a party to a fair trial. A motion for new trial implies a miscarriage of justice may result if the trial continues. *Thomas v. Ware*, 44 Ala. App. 157, 204 So. 2d 502 (1967). The trial judge has wide discretion in determining whether incidents occurring during trial affect the right of either party to a fair trial, so as to require mistrial. *General Finance Corp. v. Smith*, 505 So. 2d 1045 (Ala. 1987); *Thompson-Weinman & Co. v. Robinson*, 386 So. 2d 409 (Ala. 1980). It is the trial court's duty to attempt to salvage the trial by curing the error, and the trial court's determination that it has successfully eradicated the prejudice is entitled to great weight. Hoffman and Schroeder, *supra*, 47 *Alabama Lawyer* at 310. However, ineradicable error cannot be cured and justifies a mistrial. *Id.*

**3. Motion for directed verdict**

Motions for directed verdict are authorized by ARCP 50. Such a motion may be made at the conclusion of the opponent's case, and at the conclusion of all the evidence. ARCP 50(a). The purpose of the motion is to test the sufficiency of the evidence and thereby determine whether any issues should be submitted to the jury. *Brillant v. Royal*, 582 So. 2d 512 (Ala. 1991). A directed verdict is proper only if there is a complete absence of proof on an issue material to a claim or where there are no disputed questions of fact on which reasonable people could differ. *Alabama Power Co. v. Williams*, 570 So. 2d 589 (Ala. 1990); *Farley v. CNA Ins. Co.*, 576 So. 2d 158 (Ala. 1991). The "substantial evidence" rule applies to all cases filed after June 11, 1987. *Ala. Code* § 12-21-12 (1975). The "scintilla rule" applies to all cases filed prior to that date. Under the substantial evidence rule, a directed verdict is proper if a party claimant fails to present substantial evidence as to one or more elements of his cause of action or defense. *Danford v. Arnold*, 582 So. 2d 545 (Ala. 1991). A directed verdict is proper under the scintilla rule if the proof does not support a scintilla of evidence in favor of the opposing party. *Otis Elevator of Gadsden, Inc. v. Scott*, 586 So. 2d 200 (Ala. 1991).

## K. Suggestions and food for thought

The quality of advocacy skills in Alabama courtrooms is high. The most effective advocates are those who are the best prepared and who have developed their own styles. Civility is also important. Screaming and name-calling in the courtroom are not only unprofessional, but are ineffective advocacy. Judges and jurors are psychologically inclined to favor advocates who are well-prepared, courteous and candid. Judges have few qualms in ruling against lawyers who are unprepared, discourteous or disingenuous. There are a few other things you should think about as you prepare for trial:

**1. Exhibits**

Resolve as many problems of authentication, reasonableness of and necessity for medical charges, etc., prior to trial. Far too much time can be wasted at trial on such matters. Some judges' pre-trial orders establish a procedure by which exhibits are deemed authentic and/or admissible if exchanged within the proper time and no objections are made.

**2. Witness preparation**

It is shocking how frequently trial witnesses are confronted with inconsistent deposition testimony. This can only mean that attorneys are not taking sufficient time to prepare their witnesses for trial.

**3. Objections**

Carefully gauge the number, frequency and timing of objections. Obviously, unnecessary or petty objections irritate everyone. On the other hand, well-timed (even if not well-taken) objections can disrupt an opponent's otherwise highly effective examination.

**4. Excessive examinations**

Some inexperienced attorneys simply cannot resist temptation. Either they cannot resist the proverbial "one question too many," the answer to which may result in unexpected and devastating blows to their case, or they are unable to accept the good testimony they already have and give hostile witnesses an opportunity to explain or back away from it. Similarly, some examiners are exceedingly long-winded and sit down well after the jury has gone to sleep. Have a game plan before trial that allows you to assess what you need to establish. Resist the temptation to do more.

**5. Jury charges**

Judges are very leery of giving charges that are otherwise covered by the *Alabama Pattern Jury Instructions*. Judges also *detest* giving charges purportedly from *APJI*, but with unannounced deviations. In difficult areas of the law where *APJI* is silent, judges want lawyers to play a productive role and help figure out what the law is or ought to be.

**6. Presentations**

A major weakness in some trials is the disorganized nature of counsels' presentation. Frequently, there is a lack of sequential development of the issues, in highlighting of important points, unnecessary detail, and unexplained technical jargon.

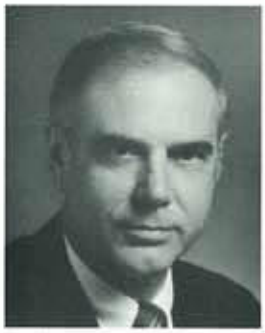
**7. Suggestions for further reading**

Magazines and publications published by the litigation bar contain useful "how-to" articles in virtually every issue. Some helpful articles touching upon some of the topics discussed in this outline include: Wood, "Effective Voir Dire: A Most Important Part of the Trial," *Defense Counsel Journal*, vol. 58, no. 2, p. 170 (April 1991); Morgan, "Trial Preparation-The Whole Picture," *ATLA Journal*, vol. 11, no. 3 (fall 1991); Samples, "Some Thoughts on Cross Examination," *ATLA Journal*, vol. 12, no. 2, p. 12 (spring 1992); Heninger, "Room with a View: Opening Statement," *ATLA Journal*, vol. 12, no. 1, p. 4 (winter 1992); Pate, "The Strike for Cause," *ATLA Journal*, vol. 9, no. 1, p. 40 (1981). ■

# PROFILE

# Broox Garrett Holmes

*Pursuant to the Alabama State Bar's rules governing the election of the president-elect, the following biographical sketch is provided of Broox Garrett Holmes. Holmes is the sole qualifying candidate for the position of president-elect of the Alabama State Bar for the 1993-94 term.*



*Holmes*

Broox Holmes was born in Mobile, Alabama November 15, 1932. He received his undegraduate degree in 1954 from the University of Alabama and his law degree in 1960 from the University's School of Law, where he was a member of the Alabama Law Review, National Moot Court Team, Bench & Bar Honor Society and Phi Delta Phi. Since 1960, he has been in practice with the firm of Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves in Mobile. Between college and law school, Holmes served three years on active duty in the United States Marine Corps, including service in Japan and Okinawa as a platoon leader and company executive officer in the Third Marine Regiment.

Holmes has been a member of the board of bar commissioners since 1987 and was on the Executive Committee in 1990-91. He served on the Alabama State Bar Grievance Committee from 1974-78 and as its chairperson in 1978, for which he received the bar's Award of Merit. He also served as a member of the Judicial Inquiry Commission (1982-86), as chairperson of the state bar's Litigation Section (1990-91) and on other committees and task forces. He is a member of the Alabama Supreme Court Committee on Rules of Evidence, the American Law Institute and the Alabama Law Institute. He is certified as a civil trial advocate by the National Board of Trial Advocacy. Holmes has contributed to continuing legal education as a lecturer and faculty member at various programs and seminars and served on the MCLE Commission.

He has also served on the Executive Committee of the Mobile Bar Association, as chairperson of the Civil Practice Committee and Federal Courts Committee of that bar, and currently serves on the Advisory Committee of the U.S. District Court for the Southern District of Alabama and is a member of the Mobile Chapter of the American Inns of Court.

Holmes is a member and past president of the Alabama Defense Lawyers Association, a member of the National Association of Railroad Trial Counsel, the International Association of Defense Counsel, a Fellow of the American Bar Foundation, and a Fellow of the American College of Trial Lawyers (state chairperson, 1991-92). He is listed in *Who's Who in American Law* and *Best Lawyers in America.*

He is a member of the Mobile Area Chamber of Commerce, Mobile Touchdown Club and other civic organizations in Mobile. For several years, he served as a member and chairperson of the board of trustees of St. Paul's Episcopal School in Mobile and on the vestry of St. Paul's Episcopal Church.

Broox Holmes has been married since 1955 to the former Laura Claire Hays of Mobile and they have three sons: Broox, Jr., a practicing lawyer in Mobile; Hays, a graduate of the University of Alabama School of Law; and Will, a third-year student at Cumberland Law School. ■

# 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.*

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EMPLOYMENT LAW
Birmingham
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

**12 Wednesday**
EFFECTIVE FAMILY LAW PRACTICE IN ALABAMA
Birmingham, Holiday Inn Redmont
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-8525

**14-15**
ANNUAL SEMINAR ON THE GULF
Destin, Sandestin Beach Resort
Alabama State Bar
Young Lawyers' Section
(205) 269-1515

**15 Saturday**
MUNICIPAL ATTORNEYS AND PROSECUTORS
Montgomery, Civic Center
Alabama League of Municipalities
Credits: 6.0 Cost: $60
(205) 262-2566

**21-22**
HEALTH LAW
Orange Beach
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

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National Business Institute, Inc.
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**3 Thursday**
ALABAMA ELDER LAW: THE BASICS AND BEYOND
Huntsville
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-8525

**3-5**
TAX INSTITUTE
Destin, Florida
Alabama Bar Institute for CLE
Credits: 10.0
(800) 627-6514

**8 Tuesday**
ALABAMA SALES & USE TAX FOR MANUFACTURERS
Mobile
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-8525

HOW TO PROTECT SECURED INTERESTS IN BANKRUPTCY
Birmingham
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-8525

**9 Wednesday**
ALABAMA SALES & USE TAX FOR MANUFACTURERS
Montgomery
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-8525

HOW TO PROTECT SECURED INTERESTS IN BANKRUPTCY
Huntsville
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-8525

**15 Tuesday**
BOUNDARY LAW IN ALABAMA
Mobile
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-8525

**16 Wednesday**
BOUNDARY LAW IN ALABAMA
Montgomery
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-8525

EMPLOYMENT AND LABOR LAW
Montgomery
Lorman Business Center, Inc.
Credits: 6.0 Cost: $135
(715) 833-3940

**24 Thursday**
ADVANCED WORKERS' COMPENSATION IN ALABAMA
Huntsville
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-8525

**25 Friday**
ADVANCED WORKERS' COMPENSATION IN ALABAMA
Birmingham
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-8525

**29 Tuesday**
INSURANCE LITIGATION IN ALABAMA
Mobile
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-8525

**30 Wednesday**
INSURANCE LITIGATION IN ALABAMA
Montgomery
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-8525

## JULY

**8 Thursday**
INJURIES IN THE WORKPLACE IN ALABAMA
Mobile
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-8525

**9 Friday**
INJURIES IN THE WORKPLACE IN ALABAMA
Montgomery
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-8525

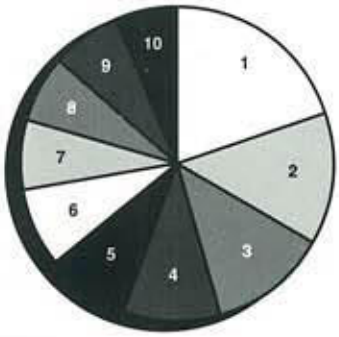
**15-17**
ANNUAL MEETING
Alabama State Bar
Mobile, Riverview Plaza
(205) 269-1515

# A Brief Look at Continuing Legal Education in 1992

In 1992, the MCLE Commission received a total of 3,236 programs seeking CLE accreditation. This was nearly a 10 percent increase from the year before. Of the total number of programs reviewed in 1992, 3,192 were accredited. Five hundred and forty-three of the accredited programs were offered in-state, while the remaining 2,649 were held outside the state. Eight in-state sponsors, however, accounted for more than 50 percent of the total CLE hours attended by state bar members in 1992. Bar members attended a total of 96,265 hours of CLE for the year.

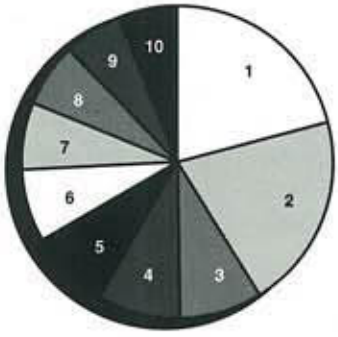
### Top Ten Subject Areas Based on Number of Courses Offered

1. 7.6% - Employment
2. 5.1% - Government
3. 4.7% - Environmental
4. 3.8% - Tax
5. 3.2% - Construction
6. 3.1% - Criminal
7. 2.7% - Recent Developments
8. 2.7% - Wills & Estates
9. 2.7% - Civil Rights
10. 2.4% - Real Property




### Top Ten Subject Areas Based on Lawyer Attendance

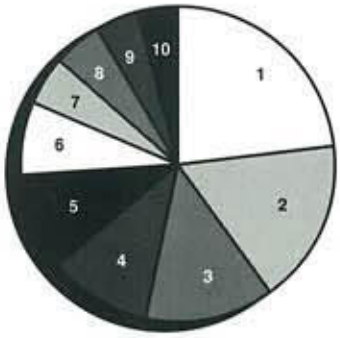
1. 10.4% - Recent Developments
2. 9.9% - Criminal
3. 4.3% - Ethics
4. 4.2% - Litigation
5. 4.2% - Family Law
6. 3.6% - Judicial
7. 3.4% - Advocacy
8. 3.3% - Wills & Estates
9. 3.1% - Workers' Comp
10. 2.9% - Bankruptcy




### Geographical Distribution of Courses (percent by city)

Over 50 percent of all CLE programs accredited in 1992 were held in the ten cities listed below.

1. 11.6% - Washington, DC
2. 8.5% - New York
3. 6.7% - Birmingham
4. 5.2% - Atlanta
5. 5.0% - San Francisco
6. 3.7% - Chicago
7. 2.6% - Nashville
8. 2.4% - New Orleans
9. 2.3% - Montgomery
10. 2.0% - San Diego




Finally, 7,367 or 99.9 percent of the lawyers subject to the CLE rules complied within a timely fashion or filed a deficiency plan as permitted under Rule 6 of the MCLE Rules and Regulations. Only 34 lawyers' names were certified in 1992 to the Disciplinary Commission for noncompliance. ■

# 54TH ABA MIDWINTER MEETING

*by J. Michael McWilliams*

*American Bar Association President J. Michael McWilliams recently addressed a joint meeting of the National Conference of Bar Presidents and National Association of Bar Executives during the 54th ABA Midwinter Meeting in Boston, Massachusetts. He reported on a recently completed ABA membership survey in which the respondent attorneys noted that the continuing effort to promote "justice for all" was the top priority. This finding was consistent with the association's emphasis for Law Day 1993 of "Justice for All/All for Justice", and its Coalition for Justice that was created in San Francisco. In his remarks he noted the coalition had selected problems within the juvenile justice system as its first area of emphasis along with problems of the elderly. Excerpts of his address follow:*

"...Today has been dubbed the ABA's 'Day for Children.' Today, the problems that America's children face are a sad commentary on our society. The problems are many—they are tragic and they are a bane on the future. What they are *not* is insoluble, and we must help solve them.

Novelist Graham Greene once said that "There is always one moment in childhood when the door opens and lets the future in." Well that may be, but in the lives of hundreds of thousands of American children, the door is nailed shut! The door has not opened for these children. The future is *not* coming in.

And recent news reports and government research lead us to seriously question what kind of future many of the children in this country have, *if any*!

I wonder, how many adult Americans over the years have said to a concerned child: 'Don't worry, it'll be alright?'

Well today, how can we say 'Don't worry' when about 415 American children will run away from home before you conclude this morning's meeting?

How can we say 'It'll be alright' when 76 American children are abused or neglected *every* hour of *every* day?

How can we say 'Don't worry' when three American children will die in poverty this morning, and every morning?

How can we say 'It'll be alright' when 135,000 students in this country go to school every day carrying guns?

How can we say 'Don't worry' when a child drops out of school *every eight seconds* of *every school day*?

*J. Michael McWilliams*

How can we say 'It'll be alright' when 900 teachers are threatened, and nearly 40 actually assaulted every hour of every school day?

How can we say 'Don't worry' when during the course of a typical day, 40 children are either killed or injured by gunshot wounds?

We still might say to a concerned child: 'Don't worry, it'll be alright,' but *we* better be worried because it is *not* going to be alright, unless we work for a safer, healthier, and more productive world for our children.

School violence is at an all-time high, and the legal needs of America's children and families are simply not being met. CBS News once broadcast the top seven problems in public schools as identified by the teachers in 1940 as compared to 1980.

In 1940, the top seven problems in public schools were: talking out of turn, chewing gum, making noise, running in the halls, cutting in line, dress-code infractions, and littering. In 1980, the top seven problems in public schools were: suicide, assault, robbery, rape, drug abuse, alcohol abuse, and pregnancy.

This is what America's children face—daily! Socrates urged that we 'pay attention to the young, and make them just as good as possible.' We are *not* paying enough attention to the youth in this country, and what we are doing is simply *not* enough....

Concurrent with your meeting this morning is an ABA Summit Conference on Children at which a Working Group will develop an agenda to address the unmet legal needs of America's children and families. We are most fortunate to have Judge Leon Higginbotham lending his time and talent to chair the Working Group.

The Conference agenda includes child welfare, family support and youth services, paternity and child support, the juvenile justice system and juvenile corrections, healthcare, housing, and court services for children and their families.

While our agenda is crucial to the future of America's children, it is only as good as its ultimate implementation. The ABA will push this agenda at the national level, and I implore all of you, as leaders of your respective state and local bar associations, to pave the way for implementation of the Working Group's recommendations and solutions at the state and local levels.

Much of the work that must be done to change our legal system, and the quality of justice for America's children and families, has to happen at the state and local levels.

And it is *hard work*—it is time, and thought, and energy; it is organization and commitment. Teddy Roosevelt summed it up when he said that 'far and away the best prize that life offers is the chance to work hard at work worth doing.'

I can think of no work that we, as lawyers, can do that is worth *more* than improving our legal system, and the quality of justice in America, for the benefit and protection of our most valuable resource—America's children.

Organized bars around the country have a wealth of resources to help effect change—lobby, to educate, and indeed, to inspire. It has been said that the greatest achievement of the human spirit is to make the most of one's resources.

Let us take up the challenge together, make the most of our resources, and make a difference in the future of this country—because America's future—*is* America's children." ■

# ALABAMA STATE BAR COMMITTEES & TASK FORCES

*The Alabama State Bar's Committees and Task Forces for the 1992-1993 bar year have been busy and productive as excerpts from the following midyear reports indicate:*

### Committee on Access to Legal Services

***F. Luke Coley, Jr., chair***

The committee had three goals this year, which were:

(1) to develop an ongoing pro bono program in Birmingham;
(2) to make contact with and propose a pro bono program to every local bar association in the state; and
(3) to take the idea of pro bono service into every law school, and to every law student, in Alabama.

Through the assistance of the Birmingham Bar Association Pro Bono Committee and its chair, LaBella Alvis, much progress has been made on the first goal. Lawyer recruitment is taking place and referrals are being made in Birmingham. Concerning the second goal, only one local bar has refused to be a part of the pro bono program and four local bars have not responded to any communication, thus far. As for the third goal, visits to classes at the University of Alabama School of Law and the Cumberland School of Law have already been made. Efforts are underway to line up ways for students to gain legal experience through pro bono programs. Contacts are also being made with the other law schools in the state.

### Task Force on Adult Literacy

***Lynne B. Kitchens, chair***

On the state level, the Alabama Literacy Coalition sponsored a conference in November 1992 to bring together decision-makers in the literacy community and support groups to formulate a statewide plan for literacy for the 1990s. A statewide spring literacy conference is scheduled for April 6, 1993 in Montgomery. Both the fall and spring conferences are being partially funded by the Alabama Law Foundation through an IOLTA grant awarded to the Task Force on Adult Literacy. The theme for the spring conference is "Literacy and the Law".

Another project being pursued on the state level by the Division of Adult Education of the State Department of Education is the organization of a court/literacy referral program statewide. Several members of the Task Force on Adult Literacy were appointed to this alternative sentencing committee, which includes representatives from the Administrative Office of Courts, Department of Corrections and Board of Pardons and Paroles.

### *The Alabama Lawyer* Bar Directory

***Teresa R. Jacobs, chair***

The committee completed its objectives for the 1992-93 bar year with the publication of the eighth edition of the directory. Responses received from members of the bar concerning this edition have been overwhelmingly positive. Several suggestions have been made for improvements, some of which can be possibly incorporated in future editions if economically feasible.

### Task Force on Alternative Dispute Resolution

***Marshall Timberlake, chair***

This task force has been extremely active for the past nine months and has accomplished or is in the process of accomplishing the following work: developing a mediation model and comprehensive handbook for use by judges and lawyers; creating a statewide Center for Dispute Resolution; planning the state court judges' mid-winter conference; encouraging local bar associations to create ADR committees; encouraging law firms to adopt the Center for Public Resources' policy statements supporting ADR principles; arranging for mediation training throughout the state; educating the profession about ADR through presentations at local bar associations; maintaining an active liaison effort with other state bar ADR groups; assisting the Federal Court for the Northern District in implementing certain forms of ADR as local procedures and working with the state bar's Corporate Counsel Section to include a lead article on ADR in its first newsletter.

### Task Force on Bench and Bar Relations

***Honorable Joe Phelps, chair***

The committee planned a joint bar, judicial college and CLE function. The program was held January 21, 1993 in Birmingham. The program was very well received with approximately 70 lawyers and over 100 judges in attendance. This joint bar, judicial college and CLE function was the first program that has been planned and carried out on such a cooperative basis. The conference consisted of a one-day instructional course and video on alternative dispute resolution. The social following the day's program was well attended, and enabled lawyers and judges to meet and talk together in a relaxed atmosphere. The task force is presently working with the Alabama

Judicial College toward planning a similar function for the Mobile meeting of the bar.

### Indigent Defense Committee
***E. Hampton Brown, Jr., chair***

At the request of the Administrative Director of Courts, this committee recommended additions, deletions and other changes to proposed legislation to permit legal counsel to contract with the judicial circuit where indigent defense services are to be provided. In addition, the committee is continuing the study on the adequacy and fairness of appointment, use and compensation of counsel throughout the state of Alabama. The committee continues to believe that the defense of indigents is continuing to decline because of the compensation of counsel and because the apparent inadequacy and unfairness of appointment of counsel throughout the state. Without more money for the administration of indigent defense, the crisis will worsen to the point where we may have pro bono appointments in criminal cases.

### Judicial Building Task Force
***Maury D. Smith, chair***

On November 18, 1992, the task force met with Chief Justice Sonny Hornsby, the committee of the courts and the project architect for a progress report and review of the building plan and design. The formative stages of the monumental dome has been completed, and a great percentage of the limestone cladding of the building had been accomplished. The windows are currently being installed.

Presently, the judicial building is more than 75 percent complete. The exterior of the building is mostly completed, with the exception of some work still to be done on the grand stairs leading from the street, which will be clad with stone. Landscaping the grounds is also underway. Construction of the interior of the building continues and involves putting up sheetrock walls and installing built-ins and cabinets, and completion of electrical and plumbing work. Some interior detail work needs to be finished in the courtrooms involving custom case work on the judges' benches and the pews. Due to the interior scaffolding, debris and power equipment, the contractor is discouraging visits to the inside of the building for safety reasons. It is expected the building will be operational and ready for occupany the first part of September 1993.

### Task Force on Judicial Selection
***Robert P. Denniston, Jr., chair***

The task force has monitored Alabama voting rights litigation now on appeal to the Eleventh Circuit, developments nationally concerning merit selection and developments concerning nonpartisan elections. There has been little activity of significance on these three topics. The main emphasis of the task force during the current year has been on the subject of campaign contributions and expenses. The topic has also received exposure in the media. A draft of the report on this subject was circulated among all members of the task force beginning with the current year. The thrust of the draft recommendations in the report is for voluntary action and not for legislative action. Finally, the task force has monitored bills currently pending in the Legislature on the subject of campaign contributions (S.B. 288, 472, 477 and 478 and H.B. 352.)

### Law Day Committee
***Robert E. Lusk, Jr., chair***

The committee was divided into four subcommittees, including the Alabama Public Television program sponsorship subcommittee, mini-spots subcommittee, media subcommittee and statewide essay contest subcommittee. The chairs of these subcommittees are Judy Holt, Chris Christ, Jim Main and Steven Sears, respectively. An IOLTA grant was applied for to sponsor a law-related education series on APT to coincide with Law Day 1993. Unlike last year, an IOLTA grant was not received to produce mini-spots. The media subcommittee is working on having the Governor proclaim May 1 as Law Day in Alabama. Finally, the essay contest subcommittee is sponsoring a statewide essay contest for high school and junior high school students. The statewide contest is comprehensive and will require the assistance of local bar associations. Winners of the contest will be announced in *The Alabama Lawyer* and will receive savings bonds.

### Lawyer Advertising and Solicitation Committee
***Lisa Huggins, chair***

Three subcommittees were appointed by the chair to work on three priority areas. The first subcommittee, headed by Steve Goozee, will study and make recommendations regarding the need to make or change rules relating to direct mail advertisements. This committee will also compare existing rules to those of Texas and Florida and possibly other states. The second subcommittee, headed by Keith Veigas, will study and make recommendations relating to Alabama's advertising rules. The third subcommittee will study unethical solicitation and potential solutions to this problem.

### Lawyers Helping Lawyers Committee
***C. Terrell Wynn, Jr., chair***

This committee met at Still Waters in October 1992. Charley Shults, a rehabilitation alcohol counselor, along with John Pittman Mullins, a substance abuse coordinator, and Ernie Machen, who is very active in the North Carolina Bar, were a part of the program. Another meeting of the committee was scheduled for March 12, 1993 to discuss the implementation of the ALA-PALS Committee.

The committee is receiving more referrals of lawyers with problems. Because the grievance process is not coordinated with the ALA-PALS Committee at this point, the committee will continue to strive to make this a coordinated process.

### Lawyer Referral Service Board of Trustees
***Jimmy Pool, chair***

The committee made several recommendations concerning the Lawyer Referral Service to the Board of Bar Commissioners, which were approved. Effective February 1, 1993: referral service members may charge $25 for the first 30 minutes of consultation; referral service members will be allowed to choose 15 areas of practice preference from the referral application instead of ten, and the referral service application was revised regarding areas of practice preference.

### Local Bar Activities and Services Committee

*Thomas E. Bryant, Jr., chair*

The committee has contacted all local bar presidents to encourage them to utilize *The Alabama Lawyer* as a means of keeping the bar informed about the happenings in their local areas. It is also hoped that by encouraging local bars to provide information about their local activities, this will make *The Alabama Lawyer* more personalized for Alabama lawyers to read.

### Task Force on Membership Services

*George H. B. Mathews, chair*

The task force recently met to consider products and services offered to the bar membership by four different companies. The task force did not feel that two of the products, LaserTech (rebuilder of laser printer cartridges) and Integra (billing software), warranted further consideration. The task force is in the process of obtaining additional information on two other programs, Penny-Wise, an office products catalog company, and TransNational Financial Services, an affinity card company.

A sample brochure has been prepared listing the various services which the bar offers members. The task force is in the process of obtaining a price on printing the needed copies. If a brochure descriptive of bar services is approved, the mailing costs can be avoided by including it in *The Alabama Lawyer.*

### Military Law Committee

*James F. Walsh, chair*

The Military Law Committee is well on its way in preparation of its annual military law symposium to be held at the University of Alabama August 20-21, 1993. Members of the committee have met on several occasions to select the course subjects for CLE and to line up speakers. At least one more meeting is planned to make final arrangements for this program.

### Professional Economics and Technology Committee

*Romaine S. Scott, III, chair*

The committee has met twice and has also communicated on numerous occasions regarding committee members' specific assignments.

Most of the committee's energy has been directed at the completion of a newsletter and preparing an article for *The Alabama Lawyer,* as well as determining the best way to establish a professional economics section. The committee has also been investigating the possibility of establishing a statewide electronic bulletin board similar to the one established by the Washington State Bar Association.

The committee has determined that is desirable to publish a newsletter for the benefit of the general bar membership or for a section membership on a quarterly basis. Also, the committee believes it is desirable to establish an electronic bulletin board by which all members of the Alabama State Bar could access a

## ADDRESS CHANGES

Complete the form below ONLY if there are changes to your listing in the current *Alabama Bar Directory.* Due to changes in the statute governing election of bar commissioners, we now are required to use members' office addresses, unless none is available or a member is prohibited from receiving state bar mail at the office. Additionally, the *Alabama Bar Directory* is compiled from our mailing list and it is important to use business addresses for that reason. NOTE: If we do not know of an address change, we cannot make the necessary changes on our records, so please notify us when your address changes. **Mail form to: Alice Jo Hendrix, P.O. Box 671, Montgomery, AL 36101.**

_____ - _____ - _____ Member Identification (Social Security) Number

Choose one: ☐ Mr. ☐ Mrs. ☐ Hon. ☐ Miss ☐ Ms. ☐ Other _____

Full Name _____

Business Phone Number _____ Race _____ Sex _____ Birthdate _____

Year of Admission _____

Firm _____

Office Mailing Address _____

City _____ State _____ ZIP Code _____ County _____

Office Street Address (if different from mailing address) _____

_____

City _____ State _____ ZIP Code _____ County _____

data base of Alabama case law, briefs, messages to and from each other, articles from *The Alabama Lawyer* and other sources, as well as other information pertinent and helpful to bar members. The committee will continue its study of this concept and prepare a recommendation.

### Task Force on Specialization

***William W. Lawrence, chair***

The board of bar commissioners approved a plan of legal specialization at its meeting in May 1992. The plan calls for the establishment of a board of legal specialization which will evaluate and approve private organizations to certify lawyers as specialists in various fields. Presently, the bar's Permanent Code Commission is considering a modification of Rule 7.7 to accommodate the specialization plan. As soon as this is done and approved by the board of bar commissioners, it is anticipated the entire package will be presented to the Alabama Supreme Court and the steps toward implementation of the board of specialization will commence.

It is anticipated that all these steps will be taken within the next few months, and it is hoped this task force will be able to recommend individuals to serve as members of the board of specialization to begin accepting applications for certifying organizations by the end of the year.

### Committee on Substance Abuse in Society

***Patricia E. Shaner, chair***

The committee is currently working toward the implementation of lawyer/doctor education teams consistent with the guidelines of the partnerships and prevention program of the American Bar Association with the American Medical Association. A subcommittee, chaired by John Ott, was formed to gather information from the various state bar and medical associations which haveimplemented these programs. A report has been made concerning these programs. Additional information is being gathered, and the subcommittee plans to present a tentative program proposal at the next meeting. The consensus of the committee is there is a need for a solid proposal to present to the Medical Association of the State of Alabama.

In addition, the committee was responsible for securing a lawyer/doctor team for a presentation on drug prevention in schools at the Governor's Youth Drug Conference on October 26, 1992. The committee chair served as moderator for three sessions, which were heard by approximately 600 youths from schools throughout the state. Also, committee member Ed George wrote an article for *The Alabama Lawyer* discussing the committee's participation concerning the conference and the committee's project for the year. Committee member Art Sweeney attended a "Drugs in Schools" seminar in November in California. This was done at the request of the executive director of the Center for Law and Civic Education.

Finally, the committee continues in its efforts to provide attorneys as resource persons for drug education programs in cooperation with the Center for Law and Civic Education. The committee provided resource attorneys for four regional meetings of the Alabama Council on Social Studies where five sets of "Drugs in Schools" and training workshops were made available to middle school teachers. ■

# LONELY Is The LAWYER

*By JOHN G. PRATHER, JR.*

*This article, by the president-elect of the Kentucky Bar Association, originally appeared in the winter 1993 edition of the* ***Kentucky Bench & Bar.***


Who tries to justify the existence of lawyers as a meaningful and important part of a free society. The lawyer, who defends the rights of others as a part of his /her professional life, becomes tongue-tied and intellectually sterile in trying to explain that the profession is not a leech on the derriere of society, but rather is the custodian and trustee of the ability of that society to continue to operate and live in an orderly manner.

Fulfilled is the lawyer who justifies the existence of the profession by examples of service, fidelity, and professionalism.


Who achieves much but shares little; who has the time to receive accolades but not the time to help younger or less experienced lawyers learn how those accolades were deserved, and who, while basking in the light of ability, fails to share that ability with those who could not otherwise obtain such service.

Fulfilled is the professional who recognizes a duty to increase the competence of the profession by sharing the capabilities of the best practitioner with the newest practitioner and who thereby increases the competence of all for the benefit of the populace served.


Who cannot achieve because he cannot commit loyalty to the law or to the clients seeking his loyalty.

Fulfilled is the lawyer who realizes that commitment to the law and loyalty to all to whom loyalty is owed provides a basis upon which the trust between attorney and client is built.


Who must question what he/she did yesterday because he/she did not do his/her best research, best reading, and give his/her best honest effort. Lonelier yet is the lawyer who thinks more of keeping a few dollars than insuring the public against his/her errors.

Fulfilled is the lawyer, who without regard to the economic rewards to be achieved from an assignment, after accepting the assignment applies fully all of the talents, abilities, and resources available to him/her in completing the task. Each lawyer, of whatever talent level, has an obligation to the public, to his/her colleagues, and to the profession to insure that when services are rendered assurance is provided to the recipient of those services that an error or an omission by that lawyer will not unduly prejudice the innocent client who sought such services.


Who carries the heaviest load of all—a grudge.

Fulfilled is the lawyer who, having given full measure of talent and loyalty to a client, realizes that each project undertaken is a project on behalf of another. No lawyer owes to a client an obligation to carry hard feelings or to foster ill will toward another person and particularly toward another professional. It is a sign of weakness to act as an objectionable advocate, while it is a sign of strength to act as an advocate objectively.


Who isolates himself/herself—who withdraws from the society that he had chosen to serve—who counts the hours, fills out the time sheet, and becomes a prisoner to the billable hour. Lonely is that lawyer who leaves the office merely to sit alone in his world of television, or to selfishly indulge only in personal recreational activities, only to exist for the next day's repetition.

Fulfilled is the lawyer who understands that economic realities are a means to supporting a profession, but are not the purpose for the existence of the profession. Society requires that we participate in the world around us if society is to progress and if we are to contribute to that progression.


Who can see starving children or homeless people, and not share the fruits of his/her success with the Red Cross, United Way, a church fund, or some charitable organization.

With the visions of the starving children of Somalia, the homeless in our cities, and the devastation of the natural disasters of south Florida and Louisiana fresh in our minds, we cannot conceive of the lawyer, who has great resources of knowledge and finance, ignoring the needs of others. Fulfilled are the lawyers who, on a day-to-day basis, share time through pro bono programs and individual pro bono efforts. We are no more required to contribute our time to providing legal services for the undeserved than we are required to send money to the Red Cross for aid to victims of disaster. Yet, how can we claim to be responsible citizens or responsible professionals if we do not do both?


Who stands only on the fence, taking no positions in fear of sustaining personal or economic risk, and thereby standing for nothing.

Fulfilled is the lawyer who recognizes that the greatest advancements of civilization were created through people taking often unpopular positions (whether it was Moses, Jesus, Gandhi, Jefferson, Lincoln, Anthony, or King), and that lawyers have been afforded unique positions and training to be able to mold public opinion, to debate the advisability of change, and to overcome the passivity of inertia.


Who, having become a judge, finds sudden infallibility in an ivory tower.

Fulfilled is the lawyer who, having become a judge, finds that he/she was, and is, first a lawyer; who finds that the problems once experienced while practicing law continue to be experienced by those continuing to practice; and who enjoys assisting rather than obstructing the legal process by aiding rather than deprecating the participants.


Who, having become a senior counselor, has neither the time nor the inclination to listen to, and actually hear, a junior associate.

Fulfilled is the lawyer who, while having the ability to share his/her experiences and wisdom, first takes the time to listen to the problems or ponderings of a young lawyer and hears the underlying uncertainties and needs before espousing suggestions and advice. Imagine the frustration of the bright associate who takes a position with a law firm hoping to learn the law and the practice of law at the foot and side of a respected icon and who is relegated to the cubicles and libraries without guidance or mentoring. Senior counselors have the unique opportunity to return to the profession a sense of corporate memory and to instill a continued feeling of professional pride and responsibility.


Who criticizes the organized bar, yet has never actively participated in a bar activity.

Fulfilled is the lawyer who participated in (and not just by joining) a section or committee of the bar, who meets and learns to know and enjoy other members of the profession, and who thereby contributes to the welfare of those responsible as custodians of the Rule of Law.


Who uses his/her office as a refuge, avoiding home and family, and gradually loses the ability to enjoy either.

Fulfilled is the lawyer who realizes that the practice of law is a part of life and is not life itself. Fulfilled is the lawyer who learns that the whole person is not made up of just a mass of chemicals nor is the whole personality made up just of fealty to a profession, but that living is participating in the business of life. ■

# YOUNG LAWYERS' SECTION

*By SIDNEY W. JACKSON, III, president*

# REPORT ON POINT CLEAR MEETING

The mid-winter meeting of the Executive Committee of the YLS was held in February at the Grand Hotel in Point Clear. The agenda included discussion of amendments to the by-laws, the Sandestin Seminar, the Youth Judicial Competition and other matters. We were very honored to have as our guest at the meeting Daniel Gurash of Cleveland, Ohio who is the incoming president of the American Bar Association, Young Lawyers' Division, along with Jack Brown, who is a division delegate to the House of Delegates. After introduction of the "Yankees" by Mark Drew of Birmingham, the committee engaged in a spirited and heated debate on the amendment to the bylaws. It was finally voted that the bylaws should be amended, and the amendment will be presented to the board of bar commissioners in the late spring. The changes involve having a representative from each congressional district on the committee, limiting the length of service on the committee, providing for a statewide balloting of officers and automatic appointment to the committee for the president of local bar affiliates. The entire bylaws will be printed in this publication once they are approved by the bar commissioners.

Other accomplishments at the meeting included an undertaking to publish a manual entitled "Law for Youth" which will be coordinated by Candice McGowin of Birmingham. The booklet has helped parents and teachers convey to teenagers the law as it applies to them. The theme of the manual is "ignorance of the law is no excuse." The manual will cover everything from how long a juvenile can expect to be detained at juvenile court to the proper use of motorized skate boards. There will also be advice relative to alcohol, drugs and tobacco, guns and other weapons, recreation, responsibility of parents, students and teachers at school, and torts and contracts. The YLS Executive Committee is working with Jan Loomis, director of the Alabama Center for Law and Civic Education.

**Sidney W. Jackson, III**

### Montgomery Young Lawyers' Section very active

This past November, Montgomery County Young Lawyers sponsored a "Bridge-the-Gap" seminar for recent bar admittees. The seminar was well-attended and featured speakers, including three judges, on basic areas of practice in the federal courts, circuit court, probate court and domestic relations. The Section plans to offer this seminar again this month to be available for spring bar admittees. Several Montgomery young lawyers were involved as "coaches" for the local teams that participated in the Youth Judicial Mock Trial Program. Additionally, Montgomery YLS performed a mock trial during the orientation session for statewide participants in the Youth Judicial Program.

Law Day 1993 will see the Montgomery County Young Lawyers assisting the Montgomery County Bar Association with the most visible public relations and service project during Law Week activities—Lawline '93. Lawline is offered in conjunction with a local television station which publicizes the event. Young lawyers will handle telephone calls from viewers about the law and the court system. A toll-free number will be available. Hundreds of calls are handled each year during the two-night Lawline Program.

On the fun side, Montgomery County Young Lawyers will be sponsoring a chartered bus trip to see the Atlanta Braves take on the Pittsburgh Pirates on July 17, 1993. Montgomery Young Lawyers also are planning regular "after hours" get-togethers during the spring and summer. ■

# OPINIONS OF THE GENERAL COUNSEL

*By ROBERT W. NORRIS, general counsel*

**QUESTION:**

"I read something not too long ago which I cannot now put my hands on. It had to do with attorneys accepting a 'non-refundable retainer fee' in, for example, a divorce case. I believe I recently read somewhere that a non-refundable retainer fee was not allowed under the Alabama Rules of Professional Responsibility. I would appreciate your referring me directly to any opinion or memo issued by your office to that effect. I tried to find this provision in the rules, but I was not able to put my hands on it immediately. If these are strictly outlawed by the bar association, I would appreciate your getting me a copy of whatever it is that outlaws such a practice.

"Secondly, I would like to ask you about an event which recently happened to us in the course of settling a fraud case. Our firm was representing a young lady against a prominent Alabama statewide bank. The case was being settled for a certain sum. The Defendant required that my client enter into a confidentiality agreement which essentially provided that she would not disclose the amount or any of the terms of the settlement itself; however, she was not prohibited from discussing the facts of the case with anyone. However, the Defendants' lawyers went a step further and required our law firm separately from the client to agree not to disclose anything having to do with the case, including but not limited to the facts, terms of the settlement, amount of settlement, etc. We were also required to agree not to disclose any of the information in this case to any publication, newspaper, journal, etc.

"I have grave concerns about the ability of a defendant and a defense law firm imposing on a plaintiff's law firm certain restrictions as a condition of settlements. I can easily see how this type of weapon can be used by the defense bar to create a potential conflict of interest between the plaintiff's existing counsel and the plaintiff herself due to the fact that it is not necessarily in our best interest to settle the case according to the terms imposed upon the law firm alone by defense counsel, whereas it may be in the client's best interest. It seems amazing that, in this case, the Plaintiff is not prohibited from discussing the facts of this case, yet the Plaintiff's lawyers are prohibited from such discussion or communications.

"In an effort to get this case resolved and to prevent any possible conflict with the client, our firm went ahead and agreed to the terms which were being imposed on us by the Defendants. However, before this situation arises again, I would appreciate your advising us on the following points:

1. Does a confidentiality agreement imposed on the Plaintiff's attorneys, which are more restrictive than the confidentiality provisions imposed on the Plaintiff himself, constitute a violation of the Rules of Professional Responsiblity in that they present a potential conflict of interest between the Plaintiff and his attorneys?
2. Can a Defendant impose a confidentiality requirement on plaintiff's counsel in that the Plaintiff's counsel is not a party to the suit and is not receiving any consideration *from the Defendant* for any confidentiality agreement?
3. Are any bonds of limitations placed on such confidentiality agreements by the Rules of Professional Responsibility? If so, what are they?

"I would appreciate your giving us the benefit of your wisdom and insight into these many and complex issues raised by the confidentiality agreements to which Plaintiffs and their lawyers are being 'bound and gagged' and the effect of Professional Responsiblity Rules on them."

**ANSWER, QUESTION ONE:**

The Disciplinary Commission has, on a number of occasions, considered the question of non-refundable retainers and has consistentlty held that there must be some connection between the attorney's fee and the legal services rendered.

**ANSWER, QUESTION TWO:**

The Alabama Rules of Professional Conduct require that a lawyer must abide by a client's decision to accept an offer of settlement in a matter and to defer to the client regarding third parties who might be adversely affected. Consequently, a lawyer may participate in a confidential settlement even though there may be a possibility of adverse consequences on third parties or the public. The Disciplinary Commission recognizes, however, that there may be circumstances where confidential settlements conceal information that might prevent health and safety information from reaching the public. Such circumstances clearly demonstrate the need for a revised approach to confidential settlements either by statute, court rule, or by a rule of professional conduct.

**DISCUSSION, QUESTION ONE:**

With regard to non-refundable legal fees, the beginning principle is that the client has the absolute right to terminate the services of his or her lawyer, with or without cause, and to retain another lawyer of their choice. This right would be substantially limited if the client was required to pay the full amount of the agreed-on fee without the services being performed. In *Gaines, Gaines and Gaines v. Hare, Wynn,* 554 So.2d 445 (Ala. Civ. App. 1989), the Alabama Court of Civil Appeals stated:

"The rule in Alabama is that an attorney discharged without cause or otherwise prevented from full performance, is entitled to be reasonably compensated only for services rendered before such discharge. *Hall v. Gunter*, 157 Ala. 375, 47 So.2d 144 (1908)."

The Court also points out that when a client discharges a lawyer, the discharge ordinarily does not constitute a breach of contract even with a contract of employment which provides for the payment of a contingent fee and that part performance of a

contract, prior to being discharged, entitled one to recover on quantum meruit for those services rendered.

Additionally, Rule 1.16 (d) of the Rules of Professional Conduct provides:

"Rule 1.16 Declining or Terminating Representation

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and *refunding any advance payment of fee that has not been earned*. The lawyer may retain papers relating to the client to the extent permitted by other law." (emphasis added)

Based on the above, the view of the Disciplinary Commission is that no retainer should be non-refundable to the extent that it exceeds a reasonable fee. That is to say, that there should be some nexus between the fee charged and the services performed by the lawyer. For factors for determining the reasonableness of the fee, see *Peebles v. Miley*, 439 So. 2d 137 (Ala. 1983) and Rule 1.5 (a) of the Alabama Rules of Professional Conduct.

The Disciplinary Commission applied the above rule to contingent fee contracts in RO-91-05 holding that a client, after entering into a contingent contract, may discharge the lawyer then being entitled to compensation only on a quantum meruit basis. It must be said, however, that a contingent fee client cannot wait until favorable settlement offer has been received to discharge the lawyer. In that situation, the lawyer can recover on the contract if the discharge was without cause. See *Kaushiva v. Hutter*, 454 A. 2nd 1373 (D.C. App. 1983), cert. denied 464 U.S. 820, 104 S.Ct. 83 (1983).

**DISCUSSION, QUESTION TWO:**

While the Alabama Rules of Professional Conduct do not specifically address the ethical propriety of a lawyer participating in the formation of a confidential settlement they, nevertheless, may be interpreted in a manner making such conduct permissible.

Rule 1.2 of the Rules of Professional Conduct specifically states in sub-paragraph (a) that "a lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter and in the Comment to that rule, that a lawyer should defer to the client regarding 'concern for third parties who might be adversely affected'. Thus, a fair reading of this rule requires the lawyer to abide by a client's decision to enter into a confidential settlement aggreement even if that agreement has potential to harm third parties or the public.

This theme is carried forward in the Comment to Rule 4.4, "Responsibility to client requires a lawyer to subordinate the interest of others to those of his client", but with the caveat that, "that responsiblity does not imply that a lawyer may disregard the rights of third persons." While Rule 4.4 does recognize the rights of third persons, it does not make the lawyer morally autonomous to the extent that he or she could disregard the desires of the client to enter into a confidential settlement even though that settlement might shield the public from adverse health and safety information. Although Rule 2.1 provides that a lawyer in rendering advice may refer to other considerations such as moral and social considerations, nothing in the rules requires the client to follow this advice. Thus, the lawyer is left with the obligation to abide by a client's decision to accept an offer of settlement as clearly provided in Rule 1.2. (See Anne-Therese Bechamps, *Sealed Out-of-Court Settlements: When does the Public Have a Right to Know?* 66 Notre Dame L. Rev. 117 (1990)).

With regard to the specific question listed in your request, it is the commissioner's view that it is not a violation of the Rules of Professional Conduct for a confidential settlement agreement to impose more restrictions on plaintiff's lawyers than the plaintiff. Since the lawyer must abide by the client's decision in this matter, in accordance with Rule 1.2(a), there would be no conflict between the lawyer and his client in such a settlement. Moreover, if there is a conflict in such a situation, it is no more than the conflict inherent in any lawyer/client relationship where a fee is negotiated/charged. With regard to the second specific question, it is the view of the Disciplinary Commission that a defendant or defendant's counsel may require confidentiality as a condition of settlement, even though counsel is technically not a party to the suit. With regard to question three, the current Rules of Professional Conduct place no limitations on the formation of confidential settlements by lawyers.

In reaching the above conclusion, the Disciplinary Commission is not unmindful of the ongoing efforts in state legislatures, Congress and the courts to fashion a solution that would fairly balance the privacy and property rights of the litigants and the safety and public health concerns of the public. (See e.g., *Andrew Blum, Protective Order Battle Continues,* Nat'l L.J., January 11, 1993 at 1 and *Bob Gibbins, Secrecy versus Safety, Restoring the Balance*, A.B.A. J., December 1991 at 74). ■

RO-92-17

# RECENT DECISIONS

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

## SUPREME COURT OF THE UNITED STATES — CRIMINAL

### Drug forfeiture — innocent owner defense

*United States v. A Parcel of Land*, Case No. 91-781, 61 USLW 4189 (February 24, 1993). May a homeowner who did not know the home was bought with the profits of illegal drug trafficking resist government seizure by raising the "innocent owner" defense? The Supreme Court answered yes by a six-to-three margin.

The government filed an *in rem* action against the parcel of land on which the Respondent's home was located, alleging that she had purchased the property with funds given her by Joseph Brenna that were the "proceeds traceable" to illegal drug trafficking, and that the property was therefore subject to seizure and forfeiture under the Comprehensive Drug Abuse Prevention and Control Act of 1970, i.e., 21 U.S.C. § 881(a)(6). The district court ruled *inter alia* that the Respondent, who claimed she had no knowledge of the origin of the funds used to buy her house, could not invoke the "innocent owner defense" in §881 (a)(6), which provides that "no property shall be forfeited...to the extent of the interest of an owner by reason of any act...established by that owner to have been committed...without the knowledge or consent of that owner."

The court of appeals rejected the district court's reasoning and the Supreme Court affirmed. Justice Stevens, joined by Justices Blackmun, O'Connor and Souter, concluded that an owner's lack of knowledge of the fact that her home had been purchased with the proceeds of illegal drug transactions constitutes a defense to a forfeiture proceeding under the statute.

Persons or businesses who become owners of property — land, cars or anything else — financed by drug proceeds may keep it if they did not know about the drug connection. The Supreme Court rejected the Justice Department's broad interpretation of the seizure and forfeiture provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970. Government lawyers had contended that federal ownership of all proceeds vest instanter when the criminal transaction occurs and takes precedence over all subsequent claims of ownership.

The plurality opinion pointed out that the statute's use of the unqualified term "owner" in three places was sufficiently unambiguous to foreclose any contention that the protection afforded to innocent owners is limited to bona fide purchasers. That the funds Respondent used to purchase her home were a gift does not, therefore, disqualify her from claiming that she is such an innocent owner.

It is important to point out that the Supreme Court did not resolve the parties' dispute as to the point at which guilty knowledge of the tainted character of property will deprive a party of an innocent owner defense because the Respondent assumed, in this case, the burden of convincing the trier of fact that she had no knowledge of the alleged source of Brenna's gift when she received it.

### Sentencing guidelines — enhancement for perjury

*United States v. Dunnigan*, Case No. 91-1300, 61 USLW 4181 (February 23, 1993). Does the Constitution permit a court to enhance a defendant's sentence under the United States Sentencing Commission Guidelines if the court finds the defendant committed perjury at trial? The Supreme Court, in an opinion authored by Justice Kennedy, answered in the affirmative.

Dunnigan was charged in a single count indictment with conspiracy to distribute cocaine in violation of 21 U.S.C. § 846. The government's case-in-chief consisted of five witnesses who took part in, or observed, Dunnigan's cocaine trafficking. As the sole witness in her own defense, she denied the witness's inculpatory statements and claimed she had never possessed or distributed cocaine. In rebuttal, the government called an additional witness and recalled one of its earlier witnesses, both of whom testified that the defendant sold crack cocaine to them.

Dunnigan was convicted and sentenced pursuant to the United States Sentencing Guidelines. The district court found that she had committed perjury and enhanced her sentence under §3C1.1 of the Guidelines, which permits an enhancement when a "defendant willfully impeded or obstructed, or attempted to impede or instruct administration of justice during investigation or prosecution of the instant offense." In reversing the sentence, the court of appeals found that a §3C1.1 enhancement based on a defendant's alleged perjury would be unconstitutional.

Justice Kennedy's opinion addressed two principal points. First, the court noted that the commentary to §3C1.1 is explicit that the phrase "impede or obstruct the administration of justice" includes perjury. Perjury is committed when a witness testifying under oath or affirmation gives false testimony concerning a material matter with the willful intent to provide false testimony. Because a defendant can testify at trial and be convicted, yet not have committed perjury — for example, the accused may give inaccurate testimony as a result of confusion, mistake or faulty memory, or give truthful testimony that a jury finds insufficient to excuse criminal liability or prove lack of intent — not every testifying defendant who is convicted qualified for a §3C1.1 enhancement. If a defendant objects to such an enhancement resulting from trial testimony, a district court *must review the evidence and make independent findings necessary to establish that the defendant committed perjury*.

Second, an enhancement sentence for

the willful presentation of false testimony does not undermine the defendant's right to testify in his own defense. The concern that a court will enhance a sentence as a matter of course whenever the accused takes the stand and is found guilty is dispelled by the requirement that a district court made findings to support all the elements of a perjury violation in a specific case. Any risk from a district court's incorrect perjury finding is inherent in a system which insists on the value of testimony under oath. A §3C1.1 enhancement is also more than a mere surrogate for a separate and subsequent perjury prosecution. It furthers legitimate sentencing goals relating to the principal crime, including retribution and incapacitation. Finally, the enhancement under the §3C1.1 is far from automatic. When contested, the elements of perjury must be found by the district court with specificity, and the fact that the enhancement stems from a Congressional mandate rather than from a court's discretionary judgment cannot be grounds for its invalidation.

**David B. Byrne, Jr.**

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

**Terry Alan Sides**

Terry Alan Sides, who covers the civil portion of the decisions, is a graduate of the University of Alabama and Cumberland School of Law of Samford University. He is a member of the Montgomery firm of Hill, Hill, Carter, Franco, Cole & Black.

**Wilbur G. Silberman**

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

### Severance — antagonistic defenses

*Zafiro v. United States*, Case No. 91-6824, 61 USLW 4147 (January 25, 1993). Zafiro and three other defendants were indicted on federal drug charges and tried together pursuant to Federal Rules of Criminal Procedure 8(b), which provides "that defendants may be charged together if they are alleged to have participated...in the same series of acts or transactions constituting...offenses." At various points during the proceeding, each defendant argued that their defense was mutually antagonistic and moved for severance under Rule 14, which specifies that "...if it appears that a defendant or the government is prejudiced by a joinder of...defendants...for trial...the Court may order an election or separate trials of counts, grant a severance of defendants, or provide whatever relief justice requires."

The district court denied the motions to sever. Each defendant was convicted of various offenses. The court of appeals found that the defendants had not suffered prejudice and affirmed the denial of severance.

The Supreme Court, through Justice O'Connor, held that Rule 14 does not require severance as a matter of law when co-defendants present "mutually exclusive defenses." While the Rule recognizes that joinder, even when proper until Rule 8(b), may prejudice either the defendant or the government, it does not make mutually exclusive defenses prejudicial *per se* or require severance whenever prejudice is shown. Rather, severance should be granted *only if there is a serious risk that a joint trial would compromise a specific trial right of a properly joined defendant, or prevent the jury from making a reliable judgment about guilt or innocence.* The risk of prejudice will vary with the facts in each case and the Rule leaves determination of the risk, and the tailoring of any necessary remedy, to the sound discretion of the district court.

### RICO does not reach to accountants and lawyers unless...

*Reves v. Ernst & Young*, Case No. 91-886 (March 1, 1993). May the federal anti-racketering law (RICO) be used to sue accountants or, by extension, outside lawyers and consultants who commit fraud for a business if they did not help manage or operate the business? The Supreme Court, in a seven-to-two decision, said no.

At issue was a RICO provision allowing lawsuits against those who "conduct or participate, directly or indirectly, in the conduct of an illegal enterprise's affairs through a pattern of racketeering activity. In rejecting the Justice Department's expansive reading of RICO, Justice Harry A. Blackmun wrote:

"One is not liable under the provision unless one has participated in the operation or management of the enterprise itself."

## SUPREME COURT OF ALABAMA — CRIMINAL

### Prosecutor's comments on the defense's failure to present evidence — Alabama Supreme Court adopts Eleventh Circuit's position

*McWilliams v. State*, 27 ABR 1475 (January 29, 1993). McWilliams was convicted of three counts of capital murder and sentenced to death. The court of criminal appeals affirmed the conviction and sentence. One of the issues raised by McWilliams on appeal arose from the prosecutor's comment that "neither of the defense attorneys have talked about" various pieces of physical evidence found in McWilliams' possession.

The Fifth and Fourteenth Amendments to the United States Constitution are violated when a prosecutor comments on the accused's silence. *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1976). Likewise, Alabama law clearly holds that where there is the possibility that a prosecutor's comments could be understood by the jury as a reference to the failure of the defendant to testify, Article 1, Section 6 of the Constitution of Alabama is violated. However, the United States Court of Appeals for the Eleventh Circuit has held that a prosecutor's comments "on the failure of the defense, as opposed to that of the defendant to counter-explain the testimony presented

or evidence introduced is not an infringement of the defendant's Fifth Amendment privilege." *Duncan v. Stynchcombe*, 704 F.2d 1213, 1215-16 (11th Cir. 1983).

Justice Ingram, writing for the supreme court, found that the prosecutor's comments did not constitute a direct comment on McWilliams' failure to testify and that the comments did not identify McWilliams as the only possible person who could explain the matters in question. The supreme court concluded, therefore, that the content of the prosecutor's closing argument did not constitute "error which, when examined in the content of the entire case, is so obvious that failure to notice it would seriously affect the fairness, integrity, and public reputation of the judicial proceedings." *See United States v. Butler*, 729 F.2d 1528, 1535 (11th Cir. 1986).

### Affirmative waiver requirement of *Miranda*

*Johnson v. State*, 27 ABR 1215 (January 15, 1993). Johnson was convicted of capital murder; on certiorari to the Supreme Court of Alabama, he contended that an audiotaped statement given to the police following his arrest violated the principles of *Miranda v. Arizona*, 384 U.S. 436 (1966).

The law is clear that an in-custody statement by an accused is *prima facie* involuntary and inadmissible; to overcome this presumption, the State must first establish that before the defendant gave his statement, the police informed him of his rights as required by *Miranda*. *Swicegood v. State*, 50 Ala.App. 105, 277 So.2d 380 (1973). To this end, the State must spell out with clarity and precision the specific *Miranda* warnings the police gave to the defendant.

At trial, a police officer testified that Johnson volunteered to give a statement following his arrest and after being given a *Miranda* warning. The officer testified:

**Q:** All right. Prior to having this conversation with Ricky Johnson, did you read him what is commonly known as his *Miranda* rights?

**A:** I did.

This was the extent of the State's inquiry as to exactly what the police said to Johnson concerning his *Miranda* rights before they took his statement.

In reversing, the Supreme Court held that under the principles of *Swicegood*, this exchange was not sufficient to establish the necessary *Miranda* predicate because the general question of whether the *Miranda* warnings were given does not adequately establish whether the warnings were properly given and understood by the defendant. *See also Arthur v. State*, 575 So.2d 1165 (Ala.Crim.App. 1990), *cert. denied*, 575 So.2d 1191 (Ala. 1991).

### When does reversal trigger double jeopardy clause?

*Grantham v. State*, 27 ABR 1645 (February 12, 1993). The court of criminal appeals affirmed Grantham's conviction on retrial for possession of marijuana. In her appeal, she had attacked that judgment on the basis that the trial court had erred in denying her "petition of former jeopardy." The supreme court granted certiorari review to decide whether the judgment of the court of criminal appeals conflicts with prior opinions or violates the prohibitions against double jeopardy.

In her first appeal, the court of criminal appeals reversed the conviction and remanded for a new trial. The appellate court held that the trial court erroneously admitted the toxicologist's report over Grantham's objection. The court held that the admission of the report to prove an essential element of the State's case without showing that the witness was unavailable violated Grantham's constitutional right to confront the witnesses against her.

Following the reversal and remand by the court of criminal appeals, Grantham filed a "petition of former jeopardy" with the trial court.

The supreme court, speaking through Justice Almon, affirmed the conviction. The supreme court reasoned that:

The Double Jeopardy Clause does not preclude the retrial of a defendant after a reversal based on some error in the proceedings. Reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g. incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt, free from error, just as society maintains a valid concern for insuring that the guilty are punished.

Under the rationale of *Lockhart v. Nelson*, 488 U.S. 33, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988), the admission of the report herein presented a problem only because the trial court committed an error in ruling on the Sixth Amendment objection; the State is not barred by *Burke v. United States*, 437 U.S. 1 (1978) from the opportunity to correct that error.

## BANKRUPTCY

### Execution of deed of trust (mortgage) creates antecedent debt even though debt is that of third party

*In re Perma Pacific Properties*, 23 B.C.D. 1375, 983 F.2d 964 (10th Cir., December 22, 1992). Under a Section 547 preference action, the question to be determined was whether a debt owed to mortgagee qualified as a debt of the bankruptcy debtor. The Court had determined that the mortgagee was an insider and, therefore, the one-year limitation period applied to the transaction. The Tenth Circuit Court of Appeals stated that it was following the U.S. Supreme Court case of *Johnson v. Home State Bank*, 111 S.Ct. 2150 (1991) in which the Supreme Court stated that a security interest in real property secured a creditor's right to repayment even though, in such a case, the debtor's personal liability had been discharged in a Chapter 7 case. In the instant case, the Court held that the debtor, by executing and delivering the mortgage, incurred a separate and independent obligation to be responsible for a loan made to the parent of the debtor, and that to the extent of the value of the security, there was a debt even though there was no recourse against the bankruptcy debtor other than for the property.

**Comment:** I am unable to understand why this case went off on the question of

a Section 547 preference. It appears that there was no consideration for the debtor which was a subsidiary of the primary obligor and the one which received the consideration of approximately $400,000. Apparently, the Court decided that the consideration going to the parent was a valuable consideration to the subsidiary debtor. There is wording in the opinion that the parties did not dispute the fact that the intent of the loan was to pay creditors of the parent in order to keep them from attempting to pierce the corporate veil and threaten assets of the debtor.

### Filing of contingency claim causes loss of jury trial right

*In re Travelers International v. Robinson*, 23 B.C.D. 1381, 982 F.2d 96, (3rd Cir., 1992). Travelers recovered a judgment of over $12,000,000 against TWA on October 22, 1991. TWA paid the clerk of the U.S. District Court $13,693.42 in cash to obtain a stay pending the appeal, and 88 days later filed a Chapter 11 petition. TWA then filed a preference complaint in Bankruptcy Court on a contention that the payment to the clerk was coidable under Sections 547 and 550. The Court set a bar date of May 15, 1992 together with admonition that any creditor required to file a claim which failed to do so would be barred from participating in the distribution of the bankruptcy estate. On May 14, 1992 Travelers filed a contingent proof of claim, in which it stated that it did not waive its jury demand. The Third Circuit held that by filing the proof of claim, Travelers had submitted itself to the Bankruptcy Court's equitable proof and had lost its rights to a jury trial.

### Disqualification causes loss of compensation

*In the matter of Grabill Corporation*, 983 F.2d 773, 23 B.C.D. 1393, 983 F.2d 773, (7th Cir., 1993). Debtor's original law firm, Katten Muchin & Zavis ("Katten"), first represented both the debtor corporation and its 100 percent stockholder. Two days before an involuntary petition was filed against the stockholder, the law firm discontinued representing the stockholder. After the involuntary was filed, it represented the corporation in converting into a Chapter 11. Because of Katten's prior representation of the stockholder, the Bankruptcy Court denied representation, but, nevertheless, services continued for several weeks in the transition period of turning over representation to successor attorneys. Katten later filed a petition for approximately $80,000 for compensation for services rendered between February 3 and September 28, 1989. The Seventh Circuit denied the entire claim for compensation saying that it was not allowable in any respect as the original application had been refused. It did mention that under the circumstances, possibly the approved attorneys could have employed the Katten attorneys to assist them, and then filed for expenses of payment to the Katten law firm.

**Comment:** I am of the opinion that had the attorneys representing the estate employed Katten without court authorization, there would not have been approval of the fees paid to that firm. If this were so, it would be rather simple for a law firm to employ another law firm specially, without seeking permission of the court as is required under Section 327(e).

### Attorney's fees

*In re Drexel Burnam Lambert Group*, 23 B.C.D. 1313, 146 B.R. 84, Bankr.S.D. N.Y. Where bankruptcy intervened before judgment could be obtained, and attorney's fees were allowable only upon judgment, the court refused to allow post-petition claim for attorney's fees arising out of pre-petition litigation. However, the court did state that if the contract sued upon gave an immediate right to attorney fees, there might be a different result.

### FIRREA preempts Bankruptcy Code

*In re W.J.P. Properties, 23 B.C.D. 1317, 149 B.R. 604, Bankr. Cal., December 10, 1992.* The court held that in an RTC bankruptcy case FIRREA (Federal Institutions Reform Recovery and Enforcement Act) preempts bankruptcy law, that the failure of the debtor to follow the procedure regarding claims as provided in FIRREA prevented the Bankruptcy Court from exercising jurisdiction — the legislation superrseded the Bankruptcy Code, it was clear and unequivocal, not allowing room for deviation.

### Limitation of action for bringing voidable transfer case

*In re Mar Stores, Inc.*, 23 B.C.D. 1635, 1993 WL 43860 (Bankr.D.Mass., 1993). Bankruptcy Judge Goodman rejects *Zilkha Energy Co. v. Leighton*, 920 F.2d 520 (10th Cir., 1990) which held debtor-in-possession subject to Section 546(a) two-year limitation from appointment of a trustee, thus causing the period to expire two years from date of order for relief. To the contrary, Judge Goodman held that there was no limitation of time for the debtor-in-possession to institute litigation arising under Section 546(a); it may be brought any time before the close of the case.

**Comment:** As there are no rulings by the Eleventh Circuit Court of Appeals, I suggest, in an abundance of caution, that one not take the chance if representing a debtor-in-possession or a later appointed trustee, but file within the two-year period from the filing of the petition. ■

# OOPS!

We goofed in the March issue. The title of Michael E. DeBow's article, appearing on page 128, SHOULD have been "Oppression of Minority Shareholders: Contract or Tort". (It was listed correctly in the table of contents.)

On page 97, in the notice of the Local Bar Awards of Achievement, the 20th Judicial Circuit was left off the list.

And, in the 1992-93 Bar Directory edition of the *Lawyer*, under the firm roster, the telephone number on page 110 for Rushton, Stakely, Johnston & Garrett SHOULD have been listed as "834-8480".

The editors apologize for any problems these mistakes may have caused.

# DISCIPLINARY REPORT

### Reinstatements

• **John Douglas Tarver**, a Huntsville lawyer, was reinstated to the practice of law effective February 17, 1993 subject, however, to a two-year period of probation. [Pet. No. 90-07]

• **George Nicholas Babakitis**, a Birmingham lawyer, was reinstated to the practice of law, effective February 4, 1993 subject, however, to a two-year period of probation. [Pet No. 92-08]

### Disbarment

• Guntersville attorney **Cecil Malone Matthews** was disbarred from the practice of law by order of the Supreme Court of Alabama, effective June 10, 1992. A total of five charges were brought against Matthews by the Office of General Counsel of the Alabama State Bar. The evidence presented alleged that Matthews failed to file an appellant brief with the court of criminal appeals in nine separate cases, with the result that the cases were dismissed or other counsel had to be appointed, and that he filed untimely briefs with the court of criminal appeals in 21 additional cases. Matthews was also charged with failing to comply with a previous order of the Disciplinary Board. Matthews failed to appear at the disciplinary hearing scheduled to consider the allegations against him. He was found guilty on all charges and disbarred from the practice of law. (ASB Nos. 91-441, 91-442, 92-151, 92-035, 90-701)

### Public Reprimands

• Fort Payne attorney **Charles M. Scott** was publicly reprimanded by the bar on February 12, 1993 for violating Disciplinary Rules 1-102(A)(4) and (6) of the *Code of Professional Responsibility*. Scott was retained to initiate a divorce action on behalf of a client. The client subsequently informed Scott that she and her husband had tentatively agreed to a settlement of the domestic relations matter and inquired of Scott as to what his fee would be for services rendered. Scott initially quoted a fee of $90,000, one-half of which he said would be due him, with the remaining one-half to be for an out-of-state attorney whom Scott represented to the client had to be associated in the case. In a subsequent written statement to the client, Scott reduced his fee to an amount of $37,500. However, Scott was able to document only 48.9 hours legitimately attributable to his efforts on behalf of the client. The client subsequently terminated Scott. Formal charges were filed against Scott with a hearing ensuing thereon. The Disciplinary Board of the Alabama State Bar found Scott guilty of violating the two above-referenced rules for having engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, and/or willful misconduct, and for engaging in conduct that adversely reflected on his fitness to practice law. [ASB No. 88-646]

• Opelika attorney **John Snow Thrower, Jr.** received a public reprimand without general publication on February 12, 1993. Thrower settled a worker's compensation case in which a prior attorney held a recognized claim for $6,301 in attorney's fees. Thrower failed or refused to make payment to this attorney for almost a month and a half. On some occasions, he made promises of payment but did not fulfill them. A check he ultimately provided was not honored by his bank. Only after he was contacted by the attorney who settled the case for the worker's compensation carrier was payment made. Thrower violated Rule 1.15(b), which requires a lawyer to promptly deliver funds to a third person entitled to receive them. [ASB No. 91-065]

• Talladega lawyer **William N. Fannin** received a public reprimand with general publication on February 12, 1993. Fannin had represented the wife in a divorce proceeding. After entry of a decree, the husband appealed, pro se. While the appeal was pending, the husband came to see Fannin to ask why he had just been denied visitation by the then ex-wife. During that conversation, Fannin advised him that during the appeal, neither side had to comply with the provisions of the decree. Fannin specifically stated that neither visitation nor child support payments were required. In reliance on this, the husband stopped making child support payments and Fannin later filed a petition for rule nisi once the appeal was final. At a hearing on the rule nisi, Fannin denied saying that an appeal automatically stayed the court's decree. A tape recording made by the husband during the conversation showed otherwise. The Disciplinary Commission found Fannin's conduct violative of Disciplinary Rules 7-102(A)(5) and 7-104(A)(2). [ASB No. 90-628]

• On February 12, 1993 Millbrook lawyer **Charles Ray Gaddy** was publicly reprimanded for willfully neglecting a legal matter entrusted to him, a violation of DR 6-101(A). Gaddy was retained by a client to seek increased visitation rights of his minor child. Gaddy filed a petition to modify and the ex-wife counterclaimed for arrearage in child support payments. The circuit court struck much of the petition, calling it "...perhaps the worst example of a pleading filed by an attorney in this Court in many years."

A hearing was held May 17, 1990. Gaddy was generally unprepared at the hearing. He conceded $1,500 in arrearage when the client wanted to present evidence to the contrary. The client fired Gaddy at the courthouse on the day of the hearing. He ultimately had to retain another attorney and incurred $3,700 in additional fees, plus an eight-month wait to finally resolve the situation. When the client sought a refund of the $400 originally paid Gaddy, he was given back $32. [ASB No. 91-719]

• **James A. Tucker, Jr.** of Jackson was publicly reprimanded February 12, 1993 for willfully neglecting a legal matter entrusted to him and failing to seek the lawful objectives of his client. Tucker was appointed to handle a criminal appeal in 1987. After the court of criminal appeals affirmed, Tucker took no further action based upon his claimed non-receipt of the court's opinion. When he discovered that the case had been affirmed some six months later, Tucker still took no action. At a hearing to determine disicpline, Tucker admitted that he did not "handle the file properly." [ASB No. 88-087]

• Camden attorney **Donald M. McLeod** has been given a public reprimand without general publication for violation of Rule 1.7 of the Rules of Professional Conduct. In December 1991, while serving as part-time assistant district attorney for the Fourth Judicial Circuit, McLeod was approached by an individual who had been charged with resisting arrest and attempting to elude a law enforcement official. This individual was a personal friend of McLeod's and, at her request, McLeod moved that the cases against her be nol prosed. The court refused to nol pros the cases and another assistant district attorney was assigned to prosecute the individual who subsequently pled guilty to failure to heed the warning of a law enforcement official. [ASB No. 92-150]

• **Keith Ausborn**, a Montgomery lawyer, was publicly reprimanded without general publication for sending letters to a local Montgomery businesssman and a Montgomery business, indicating on the letters that copies were sent to various officials and offices but no copies were actually sent.

The Disciplinary Commission determined the above conduct violated Rule 3.1, taking action merely to harass or maliciously injure another party, and Rule 4.4, regarding respect for the rights of third parties. The Commission also determined that Ausborn's conduct was prejudicial to the administration of justice and adversely reflected on his fitness to practice law, in violation of Rules 8.4(d) and (g). [ASB No. 92-388]

• Birmingham attorney **David Barnes** was publicly reprimanded without general publication by order of the Disciplinary Commission for willfully neglecting a legal matter entrusted to him, in violation of DR 6-101(A).

In September 1986, Barnes' client received an EEOC determination that she had been discriminated against because of race and had been fired in retaliation for making the discrimination complaint. Barnes, in February 1988, undertook representation of the client and filed a Title VII action. In June 1989, the defendant filed a summary judgment motion and brief. The court ordered oral argument on June 26, 1989 with the motion to be submitted on June 30, 1989. At the June 26 hearing, the court, upon learning of the EEOC determination, commented that this determination should automatically defeat the summary judgment motion, that EEOC determinations are admissible and have been held to be highly probative. On June 30, 1989, the submission date, Barnes failed to file any opposition to the motion but did submit, at 4:20 p.m., a request to extend the time. The court denied the request because of the "total lack of effort of counsel to respond to the motion and no showing of justifiable excuse." [ASB No. 92-174]

• Dadeville attorney **Timothy D. Garner** was publicly reprimanded without general publication by order of the Disciplinary Commission for failing to provide competent representation to a client in violation of Rule 1.1, for failing to keep his client informed, in violation of Rule 1.4, and for willfully neglecting a legal matter entrusted to him, in violation of Rule 1.3.

Garner was retained by a husband and wife to file a Chapter 13 bankruptcy and paid the filing fee on September 30, 1991. At that time, they informed Garner that they were behind on their mortgage payments and the bank was threatening foreclosure. Garner failed to proceed with the bankruptcy and on Friday, November 22, 1991 he informed his clients that the bank was indeed foreclosing on their home and it would be sold at auction the following Monday, November 25. Garner also told his clients that he was turning over the case to another lawyer who would attempt to file the bankruptcy and stop foreclosure. After considerable hardship on the part of the clients, the new lawyer and his staff, the bankruptcy was filed just prior to 5 p.m. on that Friday. [ASB No. 92-232]

• Hayneville attorney **Harold L. Wilson** was publicly reprimanded without general publication by order of the Disciplinary Commission. Wilson was retained March 20, 1992 in a child custody matter and received from his client a fee of $500 and an additional $97 for the filing fee. Wilson, thereafter, failed or refused to file any pleadings in the matter. On July 17, 1992 the client asked Wilson for a refund so that she could employ other counsel. He refused, and the client asked him to continue her case. He refused to do so. Wilson was found guilty of violating Rules 1.3, 1.4 and 1.16(d). [ASB No.92-366]

• Huntsville attorney **Barbara C. Miller** was publicly reprimanded without general publication by order of the Disciplinary Board, Panel II, for representing multiple clients with differing interests and failing to decline proffered employment where that employment was likely to result in representing parties with differing interests, in violation of Disciplinary Rules 5-105(a) and 5-105(B). [ASB No. 91-411] ■

# LEGISLATIVE WRAP-UP

*By ROBERT L. McCURLEY, JR.*

## Revised Business Corporation Act

The present Alabama Business Corporation Act, enacted in 1980, is based on the Model Business Corporation Act drafted by the Committee on Corporate Laws of the Corporation, Banking and Business Law Section (now known simply as the Business Law Section) of the American Bar Association. It incorporated significant revisions in the Model Business Corporation Act which had been promulgated in 1969. The present act was a project of the Alabama Law Institute, and succeeded an earlier revision of the Alabama Business Corporation Act which had, in turn, been based in part on the original 1950 version of the Model Business Corporation Act.

In 1984, the ABA Committee on Corporate Laws promulgated the Revised Model Business Corporation Act, the first complete revision of the model act since its original appearance in 1950. The revised act has now been adopted in 15 states. In approximately ten other states, the revised act either is under study, or provisions of the revised act have influenced more limited revisions of the present statute. The original version of the model act was adopted in approximately 35 states, and it seems likely that the total number of states adopting or drawing on the revised act will ultimately reach a similar number.

This act is based on the 1984 Revised Model Business Corporation Act but includes changes recommended by the ABA Committee since 1984. The committee devoted four years to the study of the revised act: it met for its first time in December 1988 and concluded its work with a final meeting in January 1993. Each provision of this act was subjected to intense scrutiny by the members of the committee, who included Alabama State Bar members from every part of the state. Each provision was reviewed at least twice by the committee. Often, the reporters were asked to submit alternative provisions (sometimes incorporating substantive provisions of the present act) for the committee's review.

In addition to drafting this act, the committee also drafted proposed amendments to the Alabama Constitution, the effect of which would be to leave to legislative discretion several areas of corporate law that are presently controlled by certain provisions of the Alabama Constitution that were adopted before Alabama had a general corporation law. While it is hoped that such amendments will eventually be adopted, this act has been drafted on the assumption that the present Constitutional provisions are unchanged. As a result, a number of sections of this act contain phrases such as "subject to the Alabama Constitution." The purpose of such phrases is to alert the user to the possibility that a provision of the Constitution may apply.



The twin themes embodied in this act are change and continuity: while a number of changes from present Alabama law of both a substantive and stylistic character are reflected in this act, in a number of other cases the Alabama committee has preferred the present Alabama provision to the rule proposed in the Revised Model Business Corporation Act.

### 1. Changes in style, format and organization; important general provisions

Some changes are merely a matter of style, organization or format, but are, nevertheless, important, particularly since people in neighboring jurisdictions will be using a statute with the same style, organization and format.

Alabama legislators and lawyers should note that this act, following the example of other modern commercial statutes, such as the Uniform Commercial Code and the Revised Uniform Limited Partnership Act, goes further than the present act in breaking the various provisions into separate "chapters" arranged by topic. The present act is also divided into separate "articles", many of which are continued as separate "chapters" in the new act. Thus, Chapter 2 of the new act, dealing with incorporation, parallels Article 3 of the present act, while Article 8 of the present act, dealing with foreign corporations, is paralleled by Chapter 15 of the new act.

The present act, however, contains one large "Article 2" called simply "Substantive Provisions" which contains 62 sections that encompass all manner of subjects, including corporate powers, corporate names, registered office and agent requirements, issuance of shares and dividends, shareholders, officers and directors, and inspection of books and records, each of which is the subject of a separate "chapter" under the new act.

Within sections, provisions are more frequently broken into subsections, so that there are fewer long subsections in which it may be difficult to locate the applicable rule. As with the Uniform Commercial Code, the numbering of sections signals the chapter in which a provision is located and, thus, the subject matter to which it relates.

Another change has been to expand the range of the definitional provisions in section 1.40 of this act, and to move recurring provisions on execution and filing of documents to Chapter 1.

**2. Formation of the corporation; filing of articles and other documents**

The new act continues the filing system under the present Alabama act under which the principal filing office for corporate documents is the office of the probate judge of the county in which the initial registered office of the corporation is located. This differs from the ABA version of the Revised Model Business Corporation Act, under which the secretary of state's office is the principal filing office. Section 1.25 is the provision of the act that details in which office various documents are to be filed. The requirements for the articles of incorporation have been somewhat streamlined but, unlike the ABA version of the revised act, continue to require that a corporate purpose be stated and that the initial directors be designated. Section 2.02. One change from the present Alabama act is to permit the initial bylaws to be adopted by the directors. Section 2.06(a). The present Alabama act retains the common law rule that the initial bylaws be adopted by the shareholders. The proposed change conforms the Alabama practice to that of virtually every other state.

**3. Corporate purposes and powers**

As under the present Alabama act, Section 3.02 contains an extensive list of corporate powers that every corporation is deemed to possess. The Alabama Drafting Committee added certain clarifying provisions to ensure that accomodation guarantees in "up-stream" transactions (where a subsidiary guarantees the obligation of a parent) and "cross-stream" transactions (one subsidiary guaranteeing the obligations of another subsidiary of the same parent) are within the catalog of corporate powers. Note that the power of a corporation to enter into a partnership, which in the present act is declared in a separate section, Section 10-2A-23, will now be found in Section 3.02(9).

**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.

**4. Corporate name**

It is recommended that the "deceptively similar" test for the availability of a corporate name of the present Alabama act be continued. Section 4.01. The ABA version of the revised act proposed a change to the test of whether the proposed name was "distinguishable on the records of the secretary of state" from names already taken.

**5. Shares and distributions**

The ABA version of the Revised Model Business Corporation Act makes a number of changes in this area, which is found in Chapter 6. In some cases, this act continues the present Alabama rule, sometimes with clarification, and, in some cases, the new revised act rule has been adopted.

**a.** Under the present Alabama act, which tracks the 1969 Model Act, shares can be issued only for money, other property, tangible or intangible, or labor or services actually performed. Promissory notes and future services are expressly excluded as a form of consideration for shares. *Alabama Code*, Section 10-2A-36. The ABA version of the revised act would considerably liberalize this rule, permitting the issuance of shares for any "property or benefit to the corporation," including promissory notes or future services. While there is considerable policy justification for the more liberal rule, the committee felt that it could not recommend that rule in view of Section 234 of the Alabama Constitution, which prohibits the issuance of shares except for "money, labor done, or property actually received." Rather than continuing to employ the language of the present act, which was derived from the prior version of the model act, the committee recommends that the language of Section 234 of the Constitution be codified in section 6.21(b) of this act. Note that if there is an amendment to the Constitution, Section 6.21(b) then could be amended.

**b.** The ABA version of the revised model act eliminates the concept of treasury shares. Section 6.31 of this act continues that concept. The reason for the continuation of the treasury shares concept is related to the restrictions on issuance of shares in the Alabama Constitution, just discussed, since the Alabama Supreme Court has held that a corporation's sale of treasury shares is not an "issuance" subject to the Constitutional restrictions. *Brumfield v. Horn*, 547 So. 2d 415 (Ala. 1989).

**c.** Under the present Alabama act, the legality of distributions is a matter, first of all, of the corporation's solvency, and, second, on whether it possesses "earned surplus" out of which "distributions" can be made. Whether the corporation has surplus, and of the appropriate kind, requires a determination of its "stated capital" which typically is defined in terms of the aggregate "par value" of its issued shares, a concept that also defines the minimum issuance price for the shares. This act, following the revised act (actually these changes to the legal capital rules were adopted in 1979 by the ABA committee and have been adopted in some states that have not yet adopted the revised act) eliminates the "earned surplus" and "capital surplus" tests for the validity of distributions, and retaining an insolvency test as the sole test for determining the validity of a corporate distribution. It should be noted that the insolvency test has both an "equitable insolvency" and a "balance sheet insolvency" aspect. Section 6.40. "Stated capital" and "par value" are also eliminated as a statutory concept, though a corporation may, if it wishes, elect the use of these concepts.

**6. Shareholders**

This act resolves three important issues as to shareholder meetings not addressed in the present act.

While the present act recognizes that a shareholder can expressly waive notice of a shareholder's meeting, *Alabama Code*, Section 10-2A-49, it does not address the question of whether a shareholder's attendance at the meeting constitutes a waiver. Section 7.05(b) of this act provides that unless a shareholder makes an appropriate objection, his attendance at the meeting waives objection to lack of notice. This parallels the rule as to directors under present law. *Alabama Code*, Section 10-2A-65.

A second issue left unresolved under present law is whether a shareholder can withdraw from a meeting and, thereby, "break the quorum". The commentary to

*Alabama Code*, Section 10-2A-52 of the present act, notes that the present act is silent on that question. The ABA version of the Revised Model Business Corporation Act, Section 7.25, does address this issue, and provides that a quorum cannot be broken by a shareholder's withdrawal. The Alabama committee agreed that the issue should be resolved, but concluded that a shareholder should have the power to break a quorum by withdrawal, and redrafted section 7.25 accordingly.

A third issue unresolved under the present act is whether a shareholder voting agreement is specifically enforceable. Section 7.31(a) declares that it is.

The act uses, in Chapter 6 and elsewhere, the term "voting group". This is a new term, defined in Section 1.40(29), often used to provide for situations where what is referred to under the present act as "class voting" may be mandated. However, the term is also used when there is only one "class" and hence, only one "voting group". Section 7.25 is an example of this.

In Section 7.32, this act provides an expanded scope for shareholder agreements. Unlike the present special elective provisions as to close corporations, there is no numerical threshold for the adoption of a shareholder's agreement; however, the agreement would cease to be effective if the shares become traded on a recognized exchange. As a practical matter, shareholder agreements are of value only in closely held corporations. The committee recommends the repeal of the elective special provisions for close corporations in *Alabama Code*, Sections 10-2A-300 through 10-2A-313. These provisions have been little used. Thus, Section 7.32 will become the primary provision by which closely held corporations can vary the corporate norms, for example, by limiting the powers of the board.



**7. Directors and officers**

Chapter 8 of this act deals with matters concerning directors and officers. In a couple of cases, important provisions which, under the present act, are compressed into a single section have become entire subchapters and thereby made considerably more comprehensive. These are the provisions on indemnification, with Subchapter E of Chapter 8, Sections 8.50 through 8.58 succeeding Section 10-2A-21 of the present act, and those on director conflict of interest transactions, with Subchapter F, Sections 8.60 through 8.63 succeeding Section 10-2A-63 of the present act.

While Subchapter E is a considerably more comprehensive statement of the law of indemnification, it parallels closely the provisions of Section 10-2A-21 of the present act, which was derived from section 5 of the prior model act. Prior to undertaking the drafting of the revised model act, the ABA committee had, in 1980, redrafted section 5, but that redrafting came too late for consideration in adopting our present act. Subchapter E of the revised act essentially carries forward the 1980 redraft of old section 5. One change in the ABA version is exclusive; however, the Alabama committee opted to continue the present Alabama rule under which the statutory rights are nonexclusive.

Subchapter F of Chapter 8 is a comprehensive restatement of the law of conflict of interest transactions. Since a transaction in which a director has a conflict of interest may sometimes be worthwhile to the corporation, Subchapter F, like the earlier model act provisions, recognizes three different mechanisms by which a conflict of interest transaction can be validated: approval by disinterested directors, shareholder approval and the fairness of the transaction. The present Alabama statute, though based on the prior model act provision, varied from the model act in requiring fairness as an overriding test, rather using fairness as a third alternative. The Alabama committee recommends a change from the present act under which fairness would be a third alternative mechanism for validating a transaction, rather than an overriding test.

**8. Mergers, share exchanges and sales of assets not in the regular course**

Section 11.03 of this act continues the rule under the present Alabama act under which a two-thirds vote is required to approve a merger or share exchange. Unlike the present act, Section 11.03 permits this voting level to be reduced by a provision in the articles, but not below a majority of the votes entitled to be cast, which is the standard under the ABA version of Section 11.03. A similar rule applies to the vote required to approve a sale of assets not in the regular course under Section 12.02 and for dissolution under Section 14.02.

**9. Dissolution**

Dissolution is dealt with in Chapter 14 of the act. The present act's dissolution provisions adopt a "two-document" procedure, under which the dissolving corporation first files an "Intent to Dissolve" that commences the dissolution process; later, theoretically, a second document known as "Articles of Dissolution" finalizes the process. As a matter of practice, the two documents are typically filed at the same time, with the Articles of Dissolution being filed moments after the Intent to Dissolve is filed. As a result, this act, like the revised act, adopts a "one-document" procedure in which a single document, denominated as the "Articles of Dissolution" but more funtionally akin to the present "Intent to Dissolve", will be filed.

A second change concerning dissolution is the introduction of a mechanism for administrative dissolution. This mechanism, provided for in Sections 14.20 through 14.23, permits the secretary of state to initiate administrative proceedings to dissolve a corporation for various grounds that parallel those for which judicial dissolution has traditionally been available but seldom (if ever) used. The introduction of this mechanism is accompanied by appropriate safeguards permitting the grounds for dissolution to be corrected after notice, and also permitting them to be corrected and corporate status to be reinstated after administrative dissolution. There is a right of judicial appeal from a denial of reinstatement.

**10. Foreign corporations**

This act makes two important changes with respect to foreign corporations.

The first is the introduction of a catalog of activities that do not constitute doing business in this state, so as to require a foreign corporation to obtain a certificate of authority. Section 15.01 (b).

The second is the substitution in section 15.02 of a "door closing" rule for the present act's "death knell" rule in *Alabama Code*, Section 10-2A-247 (and in two provisions of the revenue laws which would also have to be amended). Under the proposed "door closing" rule the courts of Alabama cannot be used by a foreign corporation that has done business in this state without complying, unless it first complies and pays all taxes, penalties and interest. Thus, the "door closing" rule permits noncompliance to be cured. The more drastic "death knell" rule, which is virtually unique to Alabama, declares all contracts entered into by a foreign corporation that does business in this state, without complying, to be void, and the invalidity of such contracts cannot be cured by subsequently complying.

**11. Records and reports**

Section 16.02 of the revised act introduces a two-tiered approach to the matter of shareholder inspection rights. As to certain core documents, the revised act provides virtually automatic inspection with no restrictions. Beyond those core documents, however, the revised act limits the records subject to inspection, and requires the shareholder to particularize the records he wishes to inspect, which must be directly connected to the proper purpose he has stated. However, the revised act does not impose any requirement as to the length of time the shareholder has held his shares or any percentage of share ownership, such as Alabama's present six months or 5 percent rule. As to corporate records beyond the core documents as to which there is an automatic right of inspection, the Alabama committee concluded that Alabama's present rules under which a shareholder has a right, for a proper purpose, to inspect all corporate records, if he has been a shareholder for six months or if he owns 5 percent of any class of stock. The Alabama committee also continued the present rule imposing a penalty on an officer or agent of the corporation who wrongfully denies the right of inspection.

We were fortunate to have Professor Howard Walthall, Cumberland School of Law, and Professor Richard Thigpen, University of Alabama School of Law, as the draftsman and reporter, respectively, for this project. The above review of this act is taken as an excerpt from the Preface to the committee draft by Professor Walthall. The committee was chaired by George Maynard of Birmingham. Other members of the committee are Richard Cohn; James R. Clifton; James F. Hughey, Jr.; Harold B. Kushner; Greg Leatherbury, Jr.; Tommy Mancuso; Tommy Nettles, IV; Vernon Patrick, Jr.; E.B. Peebles, III; Ernest L. Potter; Jim Pruett; Watson Smith; and Robert Walthall.

This act was introduced in the Alabama Senate by Senator Ryan deGraffenreid, Jr. and in the House of Representatives by Representative Jim Campbell.

**Pending Institute legislation presented to the 1993 Regular Session**

**1. Probate Procedure** – introduced in the House of Representatives (H. 193) by Representatives Marcel Black and Jim Campbell, and in the Senate (S. 286) by Senators Don Hale, Michael Figures and Doug Ghee.

**2. Amendments to the Administrative Procedures Act** – introduced in the House of Representatives (H. 93) by Representative Jim Campbell and in the Senate (S. 197) by Senators Butch Ellis, Ryan deGraffenreid, Jr., John Amari and Walter Owens.

**3. Limited Liability Companies** – introduced in the House of Representatives (H. 769) by Representative Hugh Holladay and in the Senate (S. 549) by Senator Steve Windom.

The Alabama Rules of Evidence (see March 1993 *Alabama Lawyer*) have been presented to the Alabama Supreme Court and it is expected that these proposed rules will be published in the Alabama Reporter system as information and comment prior to their adoption.

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


Between
January 28, 1993
and
May 11, 1993,
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 January 28, 1993, please see previous issues of *The Alabama Lawyer*.

ROBERT L. GONCE

PHILLIP J. SARRIS

GEORGE D. SCHRADER

MICHAEL S. SHEIER

# COMPUTER ACCESS TO COURTS

*By LaVeeda Morgan Battle*

*Editor's Note: This article is reprinted from the March 21, 1993 edition of* ***LAWDATA****, the newsletter of the Professional Economics & Technology Committee of the Alabama State Bar.*

No longer must the sole practitioner shut down a practice for a stroll to the courthouse to check out a file on a pending case or call to find out whether a defendant has been served. Today, basic information about activity on a case can be accessed easily through the typical office computer with a modem.

In the federal and state courts, certain basic case information can be retrieved as follows:

- **The PACER System** — offered free of charge by federal courts.
- **The Remote Access System** – offered through subscription by the state court system.

### The PACER System

PACER is the new public information access service provided without charge by the federal courts as a quick and easy way for a lawyer to retrieve information about a specific case. With the system, cases can be searched by party name or case number. In searching by name it is helpful to enter the name exactly as it appears in the court record because of the many variations of how a particular name might be entered into the court record. It might be necessary to make several searches before locating the party. Nevertheless, with PACER, it is possible to locate a case using the name of any party to the litigation. Names representing very active litigants, however, should not be used because the system will spend time searching and will eventually complain that too many cases were selected. To prevent such a result, you should use the most unique name among the parties to the litigation. Cases may not be searched by the names of attorneys or judges.

In tracking the progress of a case, the system allows a lawyer to check quickly for any recent activity, and you can obtain a docket report when something happens. If several cases with a common participant are being tracked and an electronic docket has been obtained in an earlier session, the lawyer can review the last update to determine whether a new docket report is needed. PACER allows you to print any docket report as provided by your communications software.

The only requirement for accessing PACER is that you have a computer, a 1200 or 2400 baud modem and communication software. The service is offered 24 hours a day and on weekends with the exception of one or two hours each day to update the database information.

### The Remote Access System

The Remote Access System was designed by the state court system to provide "off-site" or third-party users such as attorneys with access to basic case information. Users may dial up the State Judicial Information System "(SJIS") and retrieve information about criminal, civil and traffic cases. Typical inquiries will allow you to access service dates, docket dates, judgments and other case-related information. The system is available during business hours (8:00 a.m. – 5:00 p.m.) Monday through Friday. The SJIS system may not be accessed during maintenance periods or on state holidays.

To participate in the SJIS system, you must have a personal computer (IBM compatible), 2400 baud telecommunications modem and a telecommunications software such as "Crosstalk", which is recommended. There is a fee for the service and the Administrative Office of Courts will provide training and documentation in the base fee. ■

# ORDER
# SUPREME COURT OF ALABAMA

It is ordered that Rule VII(C), Rules Governing Admission to the Alabama State Bar, be amended to read as follows:

"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 (herein 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."

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

# • M·E·M·O·R·I·A·L·S •

## William Guy Hardwick

WHEREAS William Guy Hardwick, a respected and distinguished member of the Houston County Bar Association, died January 15, 1993, and;

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

NOW, therefore, be it resolved that William G. Hardwick was born in 1910, in Hartford, Alabama, attended the University of Alabama and received his law degree from the University in 1933. Returning to Dothan, he opened his law practice that same year and married the former Dorothy Creel.

Always a man of public service, Mr. Hardwick served two terms in the Alabama House of Representatives beginning in 1937. Elected for a third term, he resigned in order to enter the Air Force during World War II. He received an honorable discharge as a major after the war, returned to Dothan and was elected to the Alabama State Senate. In 1955 he was elected Lieutenant Governor of Alabama.

His law practice flourished and he served with distinction as a member of the Alabama State Bar for over 59 years. He was a member of the Houston County Bar Association and served as its president in 1939. He established the firm of Hardwick, Hause & Segrest.

While serving in the state Legislature and Senate and as Lt. Governor, Mr. Hardwick worked tirelessly in the creation of the Houston County Hospital Board and to establish the Southeast Alabama General Hospital, now known as the Houston County Health Care Authority and Southeast Alabama Medical Center in Dothan. He served as its legal counsel from inception in 1957 to his retirement in January 1992. The Medical Center recognized his enormous contributions in March 1992 by naming the boardroom at the hospital in his honor.

Mr. Hardwick also served as legal counsel for the Dothan Housing Authority and was on the board of directors for the First National Bank of Hartford. He was an integral part in the building of the Dothan Farm Center and the creation of the Ross Clark Circle. He was instrumental in obtaining George C. Wallace State Community College for this area and for bringing such businesses as Hayes International Corporation to Dothan. He participated in the construction and naming of the Hall National Guard Armory.

An active alumni for the University of Alabama, he was a member of the President's Cabinet for a number of years. He was also a member of the University of Alabama Law Planning committee, and the regional director of the Alabama Law School Completion Campaign. Mr. Hardwick was instrumental in obtaining the Alabama Law Review Room in honor of Judge Keener Baxley. For many years he was a member of the Farrah Law Society at the University. In 1991 he received the Distinguished Alumni Award. He contributed to several scholarship funds for outstanding area youth, establishing scholarships at Dothan High School, in honor of his wife, Dorothy, and Geneva County High School.

Mr. Hardwick was a member of the Masons, Shriners, Dothan Rotary Club, Dothan Country Club, Dothan Elks Lodge, 1887, and the First United Methodist Church of Dothan.

Our colleague was a tireless champion for his clients and a worthy adversary. He demonstrated a constant devotion to the principles of fairness and justice. His character and integrity were shining examples to all who knew him. His life's work acknowledges his compassion, fairness and love for his fellow man. His many contributions to his profession, country and community qualify him as most deserving of our grateful recollections.

Be it further resolved by the members of the Houston County Bar Association in meeting duly assembled that we mourn the passing from our midst of this faithful public servant, William G. Hardwick, and that we herewith extend our sympathy and condolences to his family.

*Michael B. Brown, president*
*Houston County Bar Association*

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# PLEASE HELP US

The Alabama State Bar and *The Alabama Lawyer* have no way of knowing when one of our members is deceased unless we are notified. Do not wait for someone else to do it — if you know of the death of one of our members, please let us know.

Send the information to:
Alice Jo Hendrix, P.O. Box 671, Montgomery, Alabama 36101

# • M·E·M·O·R·I·A·L·S •

## Hulon J. Martin

WHEREAS the Honorable Hulon J. Martin, a well-known and respected Dothan attorney, at age 51 departed this life on the 22nd day of December 1992; and

WHEREAS the Houston County Bar Association desires to remember his name and to officially recognize his unselfish contributions to the legal profession, our community and to this great nation; and

NOW, therefore, be it resolved that Hulon J. Martin, who was born in Houston County, Alabama, entered the United States Army at the early age of 17 and actively and honorably served his country for 23 years. During his tenure in the United States Army, which included assignments outside of the continental United States, he earned numerous commendations, honors and awards. Martin retired from military service after being commissioned in the rank of captain.

Martin continued his formal education throughout his lifetime. While in the military service, he attended several universities and culminated his formal education in 1983 by earning a juris doctor degree from Jones School of Law, where he was selected for membership in the Sigma Delta Kappa Law Fraternity.

Martin returned to Dothan and entered into the practice of law, where he maintained an active practice until his death. He adeptly defended a heavy load of criminal cases, always adhering to the highest legal, intellectual and ethical standards. He was an aggressive, determined advocate of the rights of his clients. Martin was a member of the Alabama State Bar and the American Bar Association. Martin's enthusiasm for the practice of law was equaled only by his love of fishing and hunting.

Martin was instrumental in establishing the Southeast Transplant Organization and served as its first president in 1989. He devoted a vast amount of time to the organization in supporting and counseling its members and their families and in speaking engagements throughout several counties. He was selfless and tireless in his demonstration of compassion, a deep concern, and love for his fellow man. He placed the welfare of others above his own.

Martin was devoted to his family, his church, his wide circle of friends, and his fellow man. Hulon will be remembered for his steadfast friendships among his fellow lawyers. He is survived by a daughter, Helene Martin Hill; a son, Seth Martin; his mother, Louise Martin; six sisters; and four brothers.

Hulon J. Martin was highly respected and he is truly missed by all who knew him.

Be it further resolved by the members of the Houston County Bar Association in meeting duly assembled that we mourn the passing of Honorable Hulon J. Martin and that we extend our sympathy and condolences to his family.

*Michael B. Brown, president*
*Houston County Bar Association*

## Julius S. Swann, Jr.

Julius S. Swann, Jr. received his early education in local schools and received his college preparatory education at Christ School in Arden, North Carolina. He received his college education at University of the South, Sewanee, Tennessee. He graduated from Vanderbilt University School of Law in 1967.

He began his legal career as a clerk for Alabama Supreme Court Associate Justice Thomas Seay Lawson. Subsequently, he returned to Gadsden to practice law with his father in the firm of Lusk, Swann, Burns & Stivender.

Jay Swann served the law in private practice in Gadsden, Alabama from 1968 to 1976. He served as Assistant United States Magistrate from 1970 to 1974. The people of the Sixteenth Judicial Circuit in Etowah County elected him circuit judge in 1976. He so ably fulfilled the duties of his office that he was reelected in 1982 and again in 1988.

Judge Julius Swann, Jr. meted justice with intellect and a high degree of judicial skill. His decisions evidence his genuine concern for human suffering, truth and justice. He possessed both commitment and compassion for all the people of his judicial circuit. Under his leadership as presiding judge, Etowah County became a model for the state in computer tracking of cases.

Those who knew Judge Swann were aware that he was a unique and special person. He had an unparalleled wit. He was an artist, often drawing caricatures of the lawyers appearing before him. He was a poet, a Civil War buff and a sportsman. He touched the lives of the people in his circuit and state in many ways. He served as a member of the executive committee of the Alabama Association of Circuit Judges; as presiding judge of the Sixteenth Judicial Circuit from 1981 through 1991; as immediate past president and board member of the Regional Alcohol Council; as a member of the Alabama Judicial College Faculty association; as the 1986 Lawyer of the Year; and in many other capacities.

Judge Swann was married to Linda Posey Swann. He had two children, Seth Fennell Swann and Juliet Nicole Swann, and two stepchildren, Marcia Lynne Warren and Eugene Lee Warren. He is also survived by his mother, brothers and a sister.

Judge Julius S. Swann, Jr. is sorely missed as an eminent judge, wonderful father, dedicated husband and committed friend as a result of his untimely death on the 4th day of September 1992.

*Gregory S. Cusimano*
*Gadsden, Alabama*

# • M·E·M·O·R·I·A·L·S •

## Frank Jackson Martin

Frank Jackson Martin died on the 30th of April 1992. He had been a member of the bar of this state for almost 65 years and was the fourth generation of his family to have been a lawyer in Alabama. He died respected by all who knew him and his death is mourned by a family who loved him devotedly and by friends who treasure his memory. He had been a soldier for his country and had participated actively in the life of his community. He lived all of his life, except when he was away in school or the Army, in Gadsden, and his home for the 57 years before his death was within 300 yards of his father's house, where he was reared. He was in possession of his faculties and able to be himself right to the very end: courteous, considerate of others, and self-effacing. I don't know how a man could wish for a better life.

Frank's father was Woodson J. Martin, a judge of the circuit court in Etowah County; his grandfather and great-grandfather were lawyers in Calhoun County. He attended the public schools in Gadsden and finished Gadsden High School in the Class of 1921. After high school, he attended the University of Alabama, where he was a member of Sigma Nu, graduating in 1925. After graduation from college, he studied at the University's School of Law. His class was that of 1927 and he was its president, significant recognition in the company of such notables as Francis Hare and Carter Manasco.

After finishing law school, Frank returned to Gadsden and went into practice with Clarence Inzer. The firm continues to this day, though its name has changed several times through the years, as Inzer, Stivender, Haney & Johnson.

On April 27, 1933, Frank married Clara Jackson of Albertville, with whom he lived happily, as the old stories promise, for the rest of his life. They had two children, Ann and Frank, Jr. Frank Martin, Jr. is a lawyer like his father and lives in Virginia and practices in Washington, D.C. Ann married W. T. Goodloe Rutland, also a member of the Alabama bar, and lives in Birmingham. Of his seven grandchildren, one, Frank, Jr.'s daughter, Jessica, also is a lawyer, the sixth generation Martin lawyer in direct line of descent.

At the outset of World War II, although his age and family situation would have kept him safe from the draft, Frank volunteered almost at once and was commissioned into the Judge Advocate General's Department of the Army. After an initial tour of duty at Headquarters, Fourth Service Command at Fort McPherson, Georgia, Frank was posted overseas to the Philippines for service in General Douglas MacArthur's headquarters.

After he was mustered out of active service, Frank returned home, resumed his law practice in Gadsden and maintained it until his retirement on June 30, 1970, when he was 65 years old. He had practiced actively for 43 years. After his retirement, he lived quietly and contentedly, drawing his pleasures chiefly from the company of his family and friends, pleasures considerably augmented by his satisfaction at the performance of the University's football team.

*James D. Pruett,*
*Birmingham, Alabama*

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Jack Glenn Davis
*Birmingham*
*Admitted*: 1976
*Died*: January 26, 1993

John William Gillon, Jr.
*Birmingham*
*Admitted:* 1925
*Died*: December 14, 1992

Edward David Haigler
*Birmingham*
*Admitted*: 1936
*Died:* February 18, 1993

Paul Johnston
*Birmingham*
*Admitted*: 1933
*Died*: December 8, 1992

Gilbert Dewayne Mobley, Sr.
*Birmingham*
*Admitted*: 1955
*Died*: January 31, 1993

Charles Robert Richards
*Russellville*
*Admitted*: 1969
*Died*: October 12, 1992

Roy Walter Scholl, Jr.
*Birmingham*
*Admitted*: 1955
*Died*: December 22, 1992

Elias Calvin Watson, Jr.
*Birmingham*
*Admitted:* 1936
*Died*: March 9, 1993

## NOTICE

Richard G. Alexander, of the firm of Alexander & Associates in Mobile, requests that anyone having information regarding the will of **James Edward Hedrick** contact him at Suite 2500, First National Bank Building, Mobile, Alabama 36602. Phone (205) 438-3666.

## Eleventh Circuit Court of Appeals

# APPELLATE CONFERENCE PROGRAM

The United States Court of Appeals for the Eleventh Circuit has established an Appellate Conference Program. Guidelines and procedures for this program are set forth in Rule 33-1, which took effect October 1, 1992.

Appellate conferences are scheduled by the Court with lead counsel for all parties in selected civil appeals. Conferences are scheduled well in advance of briefing and two to three weeks in advance of the conference date. They are conducted by the Court's conference attorneys, who have had extensive trial and appellate experience and significant training and experience in mediation. Most conferences are initiated by telephone.

The purposes of appellate conferences are to offer participants a confidential, risk-free opportunity to evaluate their case with an informed, neutral mediator and to explore all possibilities for the voluntary disposition of the appeal. Conferences are designed to address any matter that may aid in the disposition of a civil appeal and to reduce the attendant time and expense of the appeal.

Conferences generally begin with an inquiry as to any procedural questions or problems counsel might have that could be resolved by agreement. The discussion then moves to an explanation by the parties of the issues on appeal. The purpose of this discussion is not to decide the case or reach conclusions about the issues but understand the issues and to evaluate the respective risks on appeal. In many cases, a candid examination of the probabilities for various possible outcomes of the appeal is helpful in reaching consensus on the settlement value of the case. This examination may be done in a joint session or with the conference attorney talking privately to one party.

Every effort is made to generate offers and counteroffers until the parties either settle or know the case cannot be settled and the measure of the difference between or among the parties. However, no actions affecting the interests of any party or the case on its merits are taken without the consent of all parties.

The Court, by rule and by verbal agreement of the parties at each conference, ensures that nothing said by the participants, including the conference attorney, is disclosed to anyone on the Eleventh Circuit Court of Appeals or any other court that might address the merits of the case. The Court strictly enforces this confidentiality rule.

**Further information on this new program is available through the Appellate Conference Office, United States Court of Appeals, Eleventh Judicial Circuit, 56 Forsyth Street, NW, Atlanta, Georgia 30303. Phone (404) 730-2820.**

# CLASSIFIED NOTICES

**RATES: Members:** 2 free listings of 50 words or less per bar member per calendar year EXCEPT for "position wanted" or "position offered" listings — $35 per insertion of 50 words or less, $.50 per additional word; **Nonmembers:** $35 per insertion of 50 words or less, $.50 per additional word. Classified copy and payment must be received according to the following publishing schedule: **May '93 issue**—deadline March 31, 1993; **July '93 issue** — deadline May 31, 1993; 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.

## WANTED

- **LAWBOOKS:** Wants to purchase the following books: Complete Southern Reporter, 1st and 2nd Series; Complete Alabama Digest; Complete Appleman on Insurance; Complete Corpus Juris Secundum; and Complete American Juris Prudence. Anyone wanting to sell any of these books please contact Jackson W. Stokes at P.O. Box 356, Elba, Alabama 36323 or phone (205) 897-2894.

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- **LAWBOOKS:** AFTR 1-52; AFTR 2d 1-53; Tax Court (P-H looseleaf) 35-83; BTA & Tax Ct. Memo 1-52; JTax 1970-85. Leave message at (205) 677-4889 (day) or (205) 983-4972 (night). Michael Crespi, Houston County Courthouse, Dothan, Alabama 36303.

## SERVICES

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

- **LEGAL RESEARCH:** $30 hour. Experienced brief writer, member of Alabama State Bar. Access to good law library. Sterling DeRamus, 317 N. 20th Street, Birmingham, Alabama 35203. Phone (205) 328-7208. *No representation is made that the quality of the legal services to be performed is greater than the quality of the legal services performed by other lawyers.*

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- **EXPERT WITNESS:** 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.

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- **TAXATION LAWYER:** Major Alabama law firm is seeking an attorney with an LL.M. and/or experience in tax law in the employee benefits area. The position is in the firm's Birmingham, Alabama office. Experience in the areas of ERISA, qualified profit sharing and pension plans, welfare benefit plans, cafeteria plans, etc. helpful. Confidential reply to P.O. Box 1986, Birmingham, Alabama 35201-1986, Attention: Hiring Attorney.

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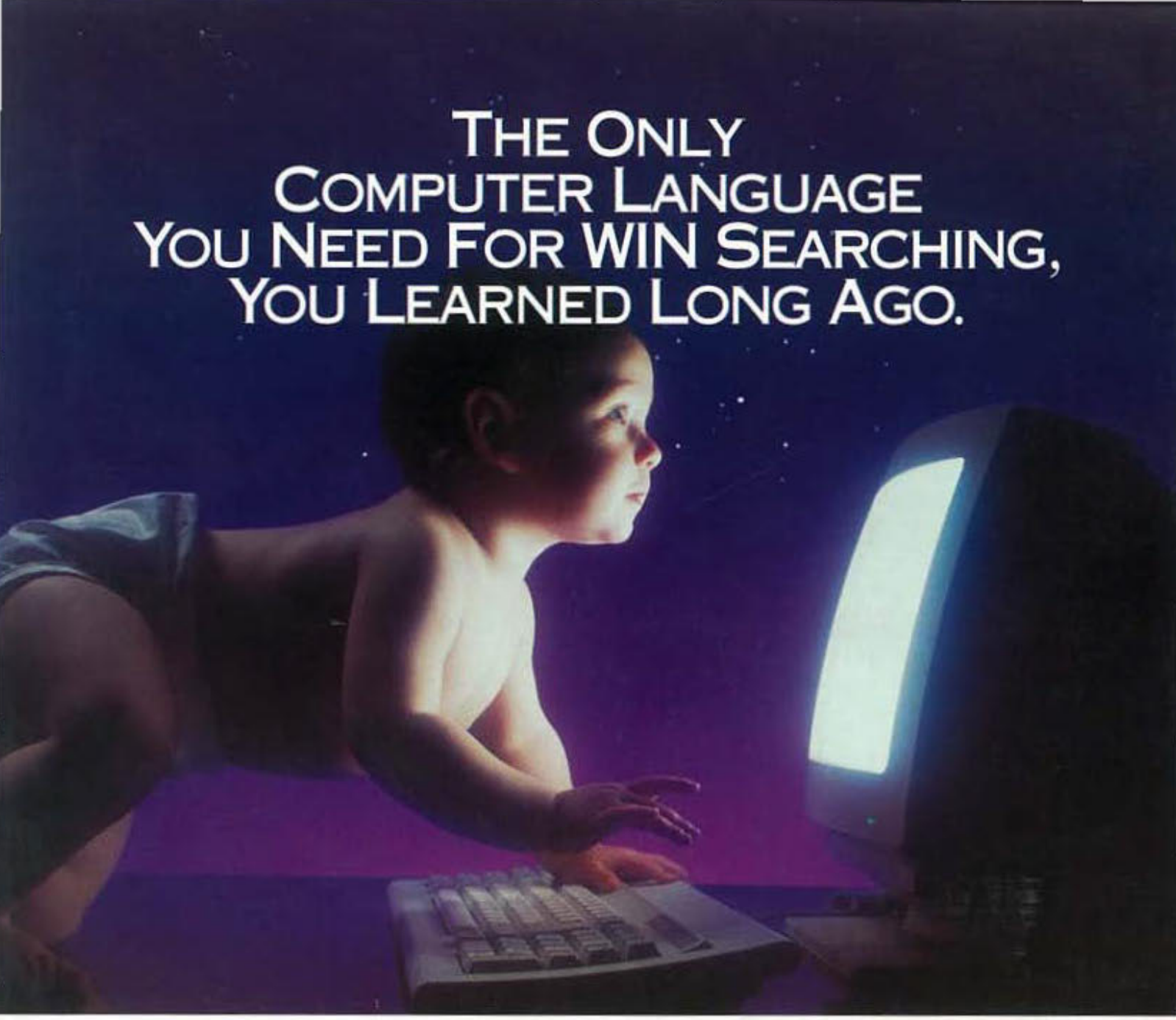
## MISCELLANEOUS

- **DONATION:** The Alabama Historical Commission is trying to locate 19th century or early 20th century law books to be donated to display in museum spaces in the Capitol. Interested persons may contact Terry Chilton, c/o Alabama Historical Commission, Room 21, Alabama State House, Montgomery, Alabama 36130. Phone (205) 242-3750.

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