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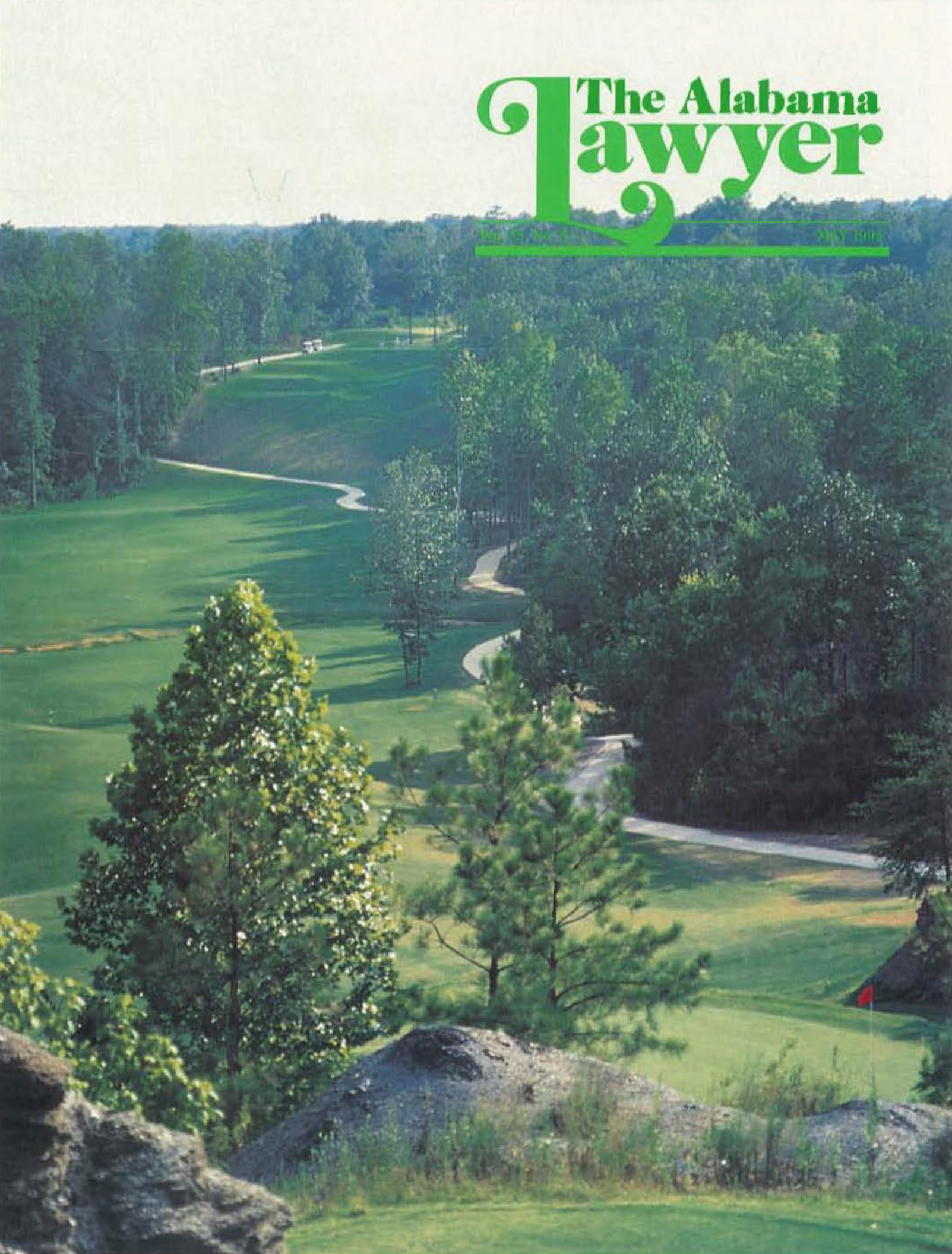

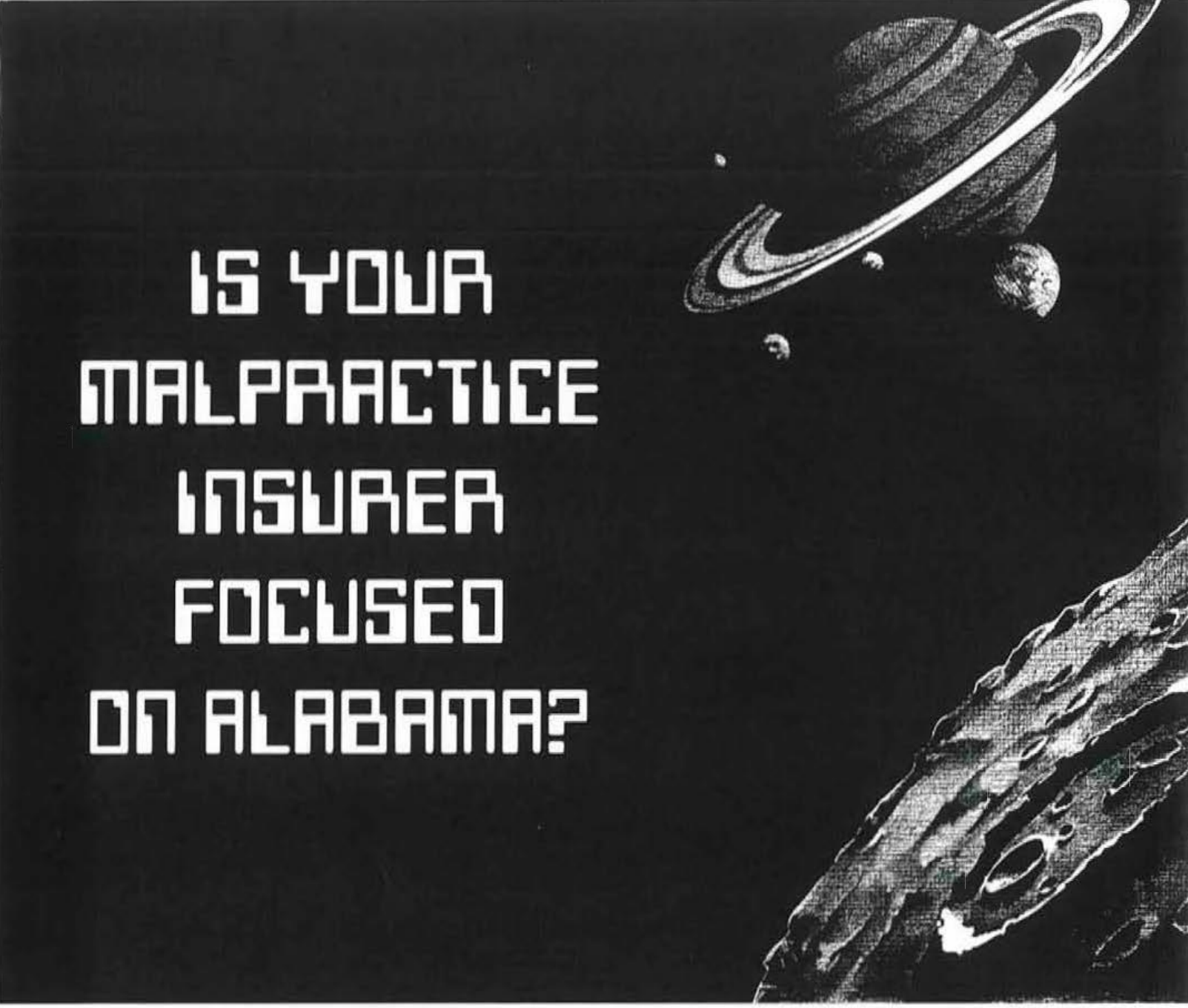

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IN BRIEF

May 1994 Volume 55, Number 3

ON THE COVER:

Part of the Robert Trent Jones Golf Trail, Birmingham's 54-hole Oxmoor Valley facility is sculpted from the peaks and valleys of the Appalachians. Pictured is hole #3 of the Ridge Course. (Thanks to David D. Taylor, Sunbelt Golf Corporation)

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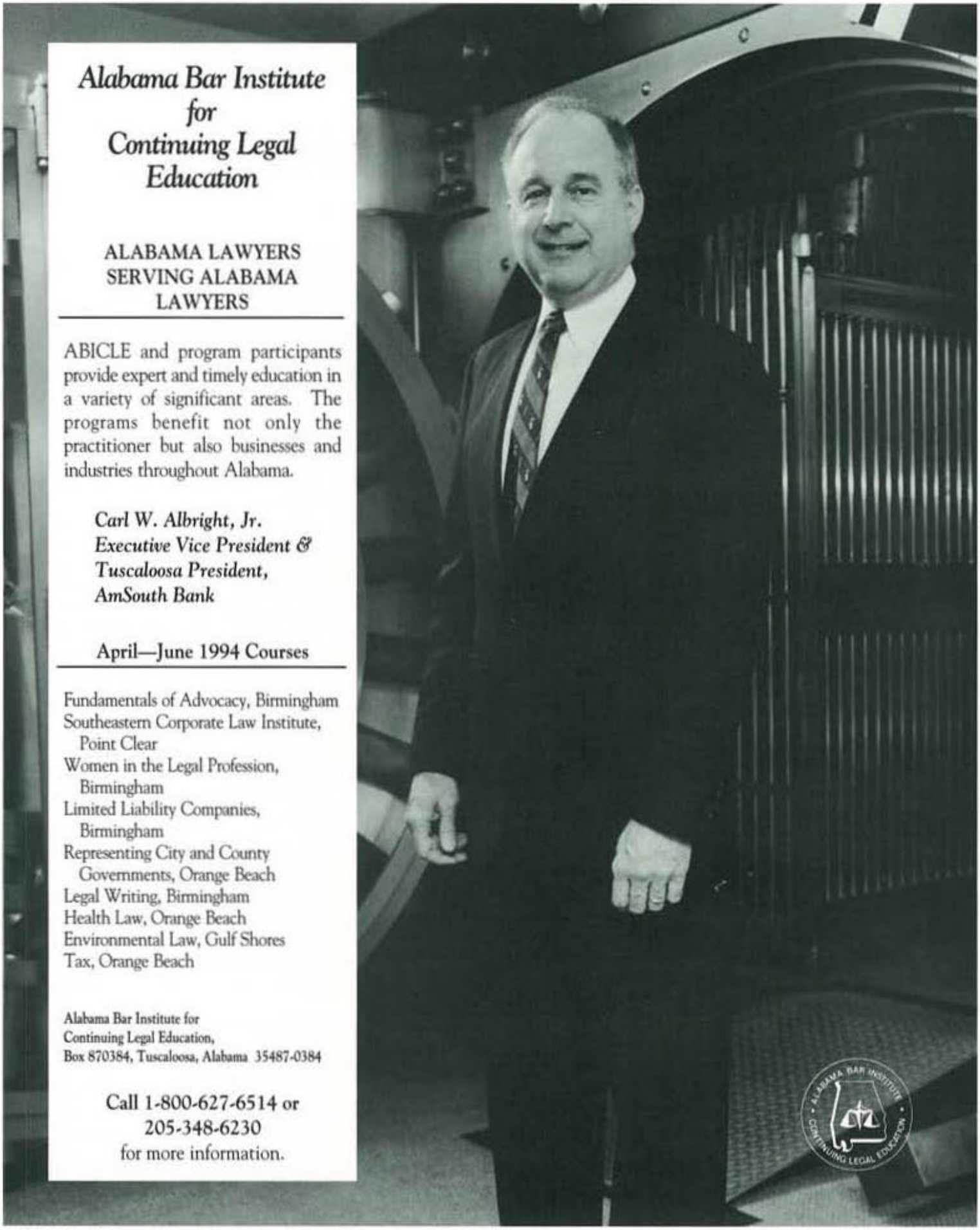

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IS IT TIME NOW FOR CHANGE?

Should judges in Alabama be elected or should they be appointed by the Governor from a list submitted by a judicial nominating commission? If judges are elected, should they be elected in non-partisan races? Should there be a limit on the amount of contributions a judicial candidate can receive from all sources? Based on the number of comments, telephone calls and letters I have received on these questions, these are some of the most troublesome issues facing lawyers and the citizens in Alabama at present. These issues have been raised and brought to the forefront by this being an election year and the uncertainties regarding the future of certain judicial positions created by the cases of *White, et al. v. State of Alabama* (challenging the at-large election of appellate court judges) and *S.C.L.C., et al. v. James H. Evans, et al.* (challenging the at-large election of circuit and district judges).

Spud Seale

Questions involving an elected judiciary are ones which the state bar has considered for more than 25 years. The non-elected selection of judges is commonly referred to as the "Missouri Plan." In simplified terms, the Missouri Plan provides for the appointment of judges by the Governor from a list submitted by a judicial nominating commission. Once a judge is appointed, he/she stands for merit retention based on their record. If the electorate does not vote to retain a judge, then another person is appointed by the Governor under established procedures. Minority participation in judicial selection is insured by establishing a judicial nominating commission with meaningful minority participation.

Although I personally, and I emphasize personally, have been an advocate of the Missouri Plan for four or five years, it has been the ideal for more than 20 years of former state bar President **Rod Nachman**. In an address to the Alabama State Bar on July 18, 1974, he said, "I strongly advocate the merit selection and retention of judges. The best legal system which man can devise is no better than the judges who sit on the bench. Judges must exercise wisdom and the utmost restraint to make sure that their decisions are completely impartial and conform as closely as possible to the letter and spirit of the Constitutions, of the statutes, of case law, and of administrative regulations which they are called upon to interpret and enforce. A great judge has stated that of all the factors that enter into the art of being a judge in the great tradition, the foremost is that 'he shall abstain from substituting his personal choices.' The political selection of judges makes it as difficult as is conceivably possible to secure and retain good judges. How are their political campaigns to be financed? What are to be the limits of their participation in political activity - before and after they go on the bench? What will be the campaign issues - pledges to decide cases for or against certain economic or social groups? A promise to obtain more - or fewer - convictions in criminal cases? Political selection of judges inevitably undermines their essential independence."

The Alabama State Bar's Task Force on Judicial Selection was established in 1988 and initially chaired by former president **L. Drew Redden**. Since 1990, this task force has continued to work diligently under the very capable and tireless leadership of Mobile's **Bob Denniston**. This task force has reported to the board of bar commissioners on several occasions with respect to various aspects of judicial selection. In 1991, the task force recommended to the board of bar commissioners the concept of non-partisan election and the board approved this concept. Unfortunately, the concept of non-partisan election of circuit, district and appellate judges has not received sufficient support from the judiciary or the legislature to accomplish the introduction or passage of the necessary legislation. Additionally, the task force has reported on the desirability of some form of a Missouri Plan as the best method for selection of judges. But, the task force has recognized that regardless of its desirability in the eyes of many lawyers and lay persons, this method of judicial selection would require a higher degree of political support than is presently evident.

In its March 18, 1994 report to the board of bar commissioners, the Task Force on Judicial Selection focused on the one area that was determined to be of greatest concern to members of the bar and the public, that being the large amounts of money being contributed by special interest groups and individuals to candidates for judicial office and the acceptance of such large sums by the candidates. In its report, the task force recommended voluntary guidelines for candidates for judicial offices. In brief summary, these voluntary guidelines, if adopted, would establish the following:

1. Prohibit a judicial candidate or member of the candidate's immediate family from soliciting or accepting campaign contributions. Solicitations and campaign contributions would be handled through a political campaign committee.

2. Contributions could not be solicited nor accepted more than 12 months before the day of the primary election or more than three months after the date of the general election.

3. Contributions from recent litigants, their counsel or persons involved in litigation before a candidate would be limited to one-half of the maximum in Item 4 below.

4. Monetary limits would be established as follows:

   a. Cash contributions:

Cash Contributions	Supreme Court	Court of Appeals	Cir./Dist. Courts
(1) From any individual [not included in (#2)]	$750	$500	$500
(2) From any law firm or its members	$4,000	$2,500	$2,500
(3) From any PAC or other organization	$5,000	$3,000	$3,000

   b. In–kind contributions limited to equivalent of cash contributions.

   c. Indirect contributions would be in violation of guidelines.

   d. Candidates should be aware of contributions from any one source being so large in proportion to the total of all contributions as to give an impression of special advantage or favor.

   e. No contributions allowed in uncontested elections.

   f. No contributions accepted in excess of limit.

   g. No contributions used for private benefit of candidate.

5. Report all contributions to the bar Campaign Monitoring Committee.

6. Avoid personal and demeaning attack on opponents not directly reflecting on judicial qualities of opponent in advertisement or literature and public statements.

7. Establish Alabama State Bar Judicial Campaign Monitoring Committee.

8. Compile a list of contributors giving in excess of $100 to successful candidates.

This report was discussed at some length by the board of bar commissioners in its March 18, 1994 meeting. Although there was considerable support for various aspects of the report, the board voted not to adopt the report in its present form at that time and instructed me to appoint a committee of the bar commission to work on details with the Task Force on Judicial Selection to finalize the recommendations. I appointed to the bar commission committee Commissioners **Sam Franklin** of Birmingham, **Wade Baxley** of Dothan and **John Percy Oliver** of Dadeville.

After the board meeting, I received a very thoughtful letter from **Bob Denniston.** I have set out the full text of his letter at pages 134 through 136 herein. The issues of how judges are to be elected/selected and what limits, if any, should be placed on political contributions to judicial candidates are ones which the bar must address and formulate a position which is in the best interest of the judicial system and citizens of the State of Alabama. I know from individual correspondence and calls to me that this is a matter of significant and continuing concern to many lawyers in our state. I, and your bar commissioners, want to know the views of the lawyers and judges of our state on these matters. Accordingly, I am respectfully requesting that each member of the state bar take the time to write me with your views and share your comments with your own commissioner(s).

I specifically ask you to address the following questions:

1. If judges are elected, do you favor and would you support legislation calling for non-partisan elections in all judicial races?

2. Do you favor a "merit selection" method for selection of judges by means of a nominating committee structure combined with a gubernatorial appointment followed by a retention election system (Missouri Plan)? A nominating commission under such a plan would be structured to ensure meaningful minority judicial participation.

3. Do you think that there should be monetary limits on political contributions to judicial candidates?

4. If so, what should the maximum cash contribution be from any *individual* to candidates for the supreme court, for the court of appeals, and for circuit/district courts?

5. If so, what should the maximum cash contribution be from any *law firm or its members* to candidates for the supreme court, for the court of appeals, and for circuit/district courts?

6. If so, what should the maximum cash contribution be from any *PAC or other organization* to candidates for the supreme court, for the court of appeals, and for circuit/district courts?

7. Should contributions from recent litigants, their counsel or persons involved in litigation currently before candidates be treated differently than contributions from others?

I personally thank you for taking the time to read this article and the time to respond to same. These are critical issues and your input will be helpful in giving the board of bar commissioners some direction on these matters. ■

March 22, 1994

Hon. James R. (Spud) Seale, President
Alabama State Bar
P.O. Box 671
Montgomery, Alabama 36101

Dear Spud:

I appreciated very much the opportunity you provided to me November 5, and again on March 18, to appear before the Commissioners in behalf of the Task Force on Judicial Selection.

The Board has many matters presented for study, debate and decision which are of great importance to the Bar and to the public. As a lawyer, I fully recognize that the lawyers serving as commissioners are the same kind of people most of us are - independent, practical, busy, well-informed, honorable and opinionated - and of diverse political and philosophical backgrounds.

I know you will recognize that, as I appear as an instrument of the Bar to report and respond to questions, I don't think it proper for me to debate issues during the course of the commission's deliberations. I also fully appreciated the role you are obliged to serve as chairman of such a meeting. In view of that I was particularly gratified to hear your personal endorsement of the report from the podium.

Though disappointed that more members did not rally to the support of the motion to approve the report, I am sincere in saying to you that I was neither surprised nor disheartened. I hope and fully expect that with more time for study and soul-searching a majority of the members will approve the report or something reasonably close to it. They will recognize that the principal opposition will stem from three selfish interest groups, with large pockets. Those groups place their own ends above an interest in the integrity and independence of the judiciary. Their selfish interests blind them to the damage being done to the judicial system itself and to the public support and respect for the judiciary which is necessary to our democracy. Ultimately, I think they will "reap the harvest."

In order for the Board to make the right decisions, however, the committee of three you have appointed for further study will have to communicate effectively with the other members of the commission and exercise leadership in pointing out to their peers the crying need for self-discipline to which we lawyers have the opportunity to respond. I am certainly available in person or otherwise to confer with them.

I am comforted by two past experiences with the Board.

In the mid-seventies I was part of a committee appointed to study and recommend on the subject of pre-paid legal plans, then a new phenomenon. It would require revisions to our ethical canons in the area of solicitation. When our report and recommendations were submitted to the President they languished through two or three disinterested or hostile administrations but were somehow kept alive by Reggie. During Alto Lee's administration they were revived by Alto and sailed through at a meeting virtually without dissent and without change, and were then adopted by the Supreme Court.

A few years ago, as you recall, after a "spirited debate" the Board adopted a resolution approving non-partisan election of judges over the opposition of some staunch Democratic Party members. I feel that was a courageous and proper action.

I am aware that some of the problem at the March 18th meeting was not necessarily to the substance of the matter, but the shortness of time for study, and sensitivity to the state of relations with the members of the appellate courts. One solution to the latter problem would be to place the effective date at January 1, 1995 or some such date in the future. However, there are members of those courts who would oppose it at any time so long as they want to hold office. I therefore seriously doubt that they will ever support the proposed changes.

Now, I shall depart from my role as spokesman for the Task Force and volunteer some personal thoughts on the topic of merit selection and related issues, without having had the benefit of Rod Nachman's presentation at your meeting. I am convinced that the adoption of a resolution and introduction of legislation supporting merit selection without much, much more would be hopeless and meaningless. I am certainly no expert. I am also naive politically. To a degree I may be an impractical idealist. Nevertheless, I have studied and thought about it a great deal while serving on the Task Force.

There are extremely powerful forces opposing the concept of merit selection. The Democratic Party controls the Legislature. Both are against it. They have an easy argument which appeals to the uninformed public — popular election involves exercise of the right to vote — instead of deals made in smoke-filled (or smoke-free) rooms. The blacks, thus far, distrust the makeup and decisions of nominating commissions. Changes in our Constitution are difficult — and the normal route begins with the Legislature.

The blacks and the Justice Department apparently have a deep-seated suspicion that *any* proposal by a "state" agency or body is an attempt to preserve the status quo, to protect incumbents, and is therefore to be rejected.

While I readily recognize that the concept of voluntary guidelines and a monitoring committee, and even non-partisan elections, are no more than improvements which will fall short of the best solution to our present dreadful problems involving campaign contributions, I think an attempt directly with the Legislature, and even a brave resolution by the Board approving "merit selection", will get nowhere and demonstrate the weakness of those who attempt it.

Some may feel that a litigant-compromise, court-mandated, quasi merit selection is the best solution. Certainly, most of the sitting appellate judges think so. Whether that will work, and whether the concept can be extended to the trial level, I do not know. Whether or not it survives court challenges I think it is a dreadful mistake. I was greatly relieved to learn from the media that the Board declined to take sides in the litigation at this time.

I personally am deeply disturbed by the core aspect of the proposed settlement. I hope you will believe me when I say that I am not racist. I have the strongest possible conviction that qualified blacks and

other minorities should not only have a full opportunity to become judges, but should be encouraged and assisted in such. I also share the opinion that the concept of single member districts is *extremely* bad. I need not dwell on all the reasons. Despite the language in the statute the members of Congress who adopted it could not possibly have realized what they were doing as far as judges are concerned. Nevertheless, the key to the settlement is the composition of the nominating commission. Regardless of color, creed, race or other factors, to place the control of nominations in the hands of plaintiffs in a litigation and their allies, and over a span of ten years, is wrong. The concept is open to flagrant, selfish abuse, and could permit the submission of totally unqualified names to the Governor. The settlement also gives the *appearance* of serving the selfish interests of the incumbents. Who can say that is better than the possibility of single member districts, particularly for the appellate courts.

Also, instead of giving the people of the state the opportunity to decide which is the lesser evil, it is the present litigants who would impose this decision on the people of Alabama. I strongly believe that an informed electorate should be given an adequate opportunity to make its choices known.

I therefore urge a middle course for consideration by the Board of Commissioners. The Federal Court has had the opportunity only to hear from the parties litigant – the plaintiff class and the attorney for the State – in reality from the incumbent judiciary as I understand it, perhaps with the tacit consent of the executive branch; but on matters normally to be addressed by the voters through their elected representatives. The subject matter is one in which the lawyers of Alabama not only have a particular interest, but are peculiarly qualified to evaluate.

This new lawsuit leapfrogs the trial court case, which has not yet reached the "remedy" phase at which time that court should presumably consider possible remedies in a deliberate and thoughtful manner, inviting comments from various sources on issues of such wide public concern. Hopefully, as the state court has done in the school case, the court would provide the people through the Legislature, a chance to act. If the Legislature ultimately fails to act the court would then be more justified in fashioning its own relief. I now fear that if the Bar does not act the litigants in the trial court case will reach a point at which they will likewise attempt a "quick fix" because of the example set by the appellate judges.

In contrast with the school problems the lawyers of Alabama have a special reason and duty to provide leadership in the matter of judicial selection. We cannot *decide*, but we can help to present to the public in a non-partisan, public interest manner, the problems involved in both lawsuits and the various alternatives, with the hope that a consensus will develop and the people can have the satisfaction of determining their own destiny, whatever the choice may be.

I therefore urge that the Commissioners consider further the matter of filing a brief in the case, not to take sides, but to urge the

court to hold matters in abeyance and provide adequate time for people beyond the immediate circle of litigants to be heard. If time can be gained by that means, then with the appellate court case and the trial court case both in mind I suggest that the Board should take the leadership in developing a broadly based citizens' committee to study the entire problem and organize for widespread public discussion of possible solutions. Even though there is considerable sentiment in the Bar and media for a merit selection solution the citizens group should be asked to weigh all alternatives. In the face of the federal court litigations an open forum approach will be an absolute must. We are in a very different atmosphere than when the prior citizens conferences were staged. They were directed toward a predetermined program.

Regardless of the specific outcome of the effort, it would be successful in informing the public, promoting thoughtful discussion and pointing the way to the best solution.

I know it would require a long, laborious and expensive effort, and that it could even then fail. It would be a statewide *citizens movement*, culminating in one or more citizens' conferences with sufficient breadth and clout to carry weight with the Legislature and the courts. I personally believe that it could help convince the black leadership that to provide them with adequate opportunity for judicial office they will be better off with a well-balanced merit selection/retention vote system. It would require that they convince their constituents of the same. It would require enough local leaders of all races and gender that they could prevail upon the Democratic controlled Legislature to accept whatever changes are proposed by the conferees by making it a campaign issue in a future legislative campaign.

I have some hope that such a citizens' movement could have an impact on the current litigation involving the trial courts also. I think the really right solution to the present crisis is for the people of Alabama to be made sufficiently aware of the crisis, the alternatives facing us, and the possible solutions, to adopt the constitutional changes necessary for the best solution. I am hopeful that this would convince Justice and the courts that the motivation is proper.

We lawyers, and the Board, cannot accomplish the task, but we can start the program and provide leadership and impetus. Early in the life of the Task Force the concept of promoting a citizens' conference was discussed and approved, but the Task Force decided the time was premature, primarily because the litigation involving the trial court was then in a very early stage. The appellate court litigation and proposed settlement place a new crisis urgency on the problem. If you feel that the Task Force should further and presently explore the concept of a citizens' movement please so advise. I am personally prepared to commit some funds for the type of initial study and planning which would be involved.

Respectfully yours,

Robert P. Denniston

Please note:

The publication date of the bar directories has been changed from December 1993 to June 1994.

SUPPLEMENTAL REPORT

To the Board of Commissioners of the Alabama State Bar
in Behalf of the Task Force
on Judicial Selection

March 14, 1994

At its November 5, 1993 meeting the Board considered a *Special Report dated in July, 1992, on Campaign Contributions and Expenditures, Campaign Conduct and Voter Ignorance.* The Board directed the Task Force to submit a set of voluntary guidelines to be provided to all candidates for judicial office. The Board postponed discussion of recommendations for establishment of a monitoring committee until the specific voluntary guidelines have been submitted and further considered. The Board also directed the Task Force to have a study committee explore further the feasibility of compiling the names of all contributions of $100 or more to each successful candidate for judicial office, identifying the contributor, and of making such information conveniently available to the media, attorneys and litigants, and to the respective judges involved.

Since the aforesaid meeting of the Board, a detailed set of voluntary guidelines was circulated among all the members of the Task Force for discussion and comment, and was also the subject of a meeting in Birmingham on March 11th attended by nine members. Written comments from four other members were also received. With the specific guideline recommendations, there was included a detailed structure and charge for a proposed monitoring committee to oversee the matter of conformity with the guidelines, and a report of investigation into the feasibility of compiling and circulating data concerning $100 and more contributions to successful candidates.

The Chairman has not found it practical or deemed it fair for the Task Force to act by formal votes on most matters presented for consideration. Information and recommendations are widely circulated in advance of meetings. Those who are unable to attend meetings are invited to submit written or verbal comments in advance. I do not recall a majority of the 28 member body being actually in attendance since the first meeting or two. The membership is composed of lawyers of diverse views on many topics within the purview of the Task Force. The Chairman has determined it to be more appropriate for the Task Force to act and report by consensus. I am comfortable in representing that the contents of the report which follows is a consensus report, but not unanimous.

This supplemental report is based on the background studies and more general recommendations contained in the 23 page *Special Report* dated July, 1992. The *reasons* for the recommendations are set forth in that document. Nevertheless, the guidelines suggested below are preceded by a "Preface" intended to remind the readers that the guidelines are not regarded as a panacea - a solution to the problem. They are an attempt within the scope of authority available to the Board, to curb some election practice abuses and demonstrate to the Bench, the Bar and the public that the State Bar recognizes a serious problem and is taking such steps as are within its powers to combat the problem.

The Board is informed that a substantial majority of the members of the Task Force share the view that the matter of excessive campaign contributions from litigants, potential litigants and their attorneys can only be effectively eliminated by the adoption of a form of

"merit selection" combined with a following "retention election" format; and are likewise convinced that a proper and balanced composition of the nominating commissions and political pressures on the administrations in office would assure adequate appointment of qualified minorities to judicial office. The same members are also convinced that such a process would assure selection of well qualified candidate because of the screening which is an element of the selection process. However, the Task Force recognizes that such changes would require legislative and constitutional enactments, and would also have to be found acceptable to the Department of Justice. Changes of such a fundamental nature would require massive support throughout the state and acceptance by the political leadership in the state.

Meanwhile, it is the consensus of the Task Force that the steps now recommended will help to alleviate some of the real and perceived problems in the election process.

The following is recommended for adoption by the Board:

Alabama State Bar Board Of Bar Commissioners

Voluntary Guidelines For Candidates For Election To Judicial Office And Establishment Of A Campaign Monitoring Committee

Preface

As a result of the widespread and growing concern on the part of the Bench, the Bar, and the general public on the subject of election campaigns for judicial office in Alabama and other states, and the consequent erosion of public confidence in the judicial system, the Board of Commissioners, with the assistance of a special task force appointed for that purpose, has made a comprehensive study of the problem.

In several judicial circuits the problem has been somewhat alleviated by the establishment of a nominating commission procedure for filling vacancies. Several years ago, on the basis of a study and report by the task force, this Board approved the concept of non partisan election of circuit, district and appellant court judges, but did not receive sufficient support from the judiciary or the legislature to accomplish the introduction or passage of the necessary legislation.

The same task force has also reported that proposals for a "merit selection" method for selection of judges by means of a nominating committee structure combined with gubernatorial appointment followed by a retention election system, however desirable in the eyes of many people, would require legislative and political support not presently available.

The one area of greatest concern to members of the Bar and the public is the unseemly amounts of money contributed by some special interest groups and individuals, and some lawyers and law firms, to candidates for judicial office, and the acceptance of such large sums by the candidates. While some such large contributors may be doing no more in their minds than supporting a well qualified individual who has a similar legal philosophy as the contributor, and are not seeking any special favor in return, the public, and opposing litigants often see the matter in a very different light.

The Board of Commissioners recognizes that, because successful candidates to judicial office sit in judgment on those who have supported and those who have opposed their campaigns, the appearance of impartiality is of equal importance to the exercise of impartiality, for the preservation of confidence in the members of the judiciary.

Canon 7A and Canon 7B of the Canons of Judicial Ethics (See Appendix I) promulgated by the Supreme Court of Alabama establish in broad statements of principles, a mandatory framework for the conduct of election campaigns by candidates for judicial office. These mandatory provisions have been subject to such a wide diversity of interpretation by candidates and their supporters as to demonstrate an urgent need for establishment of uniform standards in the interpretation and application of the Canons to specific situations. The Board has determined that it has the authority and the duty to promulgate voluntary guidelines designed to assist candidates for judicial office and their supporters in conducting election campaigns in a manner which will restore more confidence in the integrity and impartiality of the judiciary.

In adopting the policies set out below the Board of Commissioners notes that election campaigns for judicial offices involve the political process, that candidates have the right and duty to present themselves to the public and solicit votes, that the conduct of election campaigns can be and is often very expensive, and that an adequate opportunity and procedure for solicitation of campaign funds is a necessary ingredient of the political process. The current problems stem from the excesses which have developed in the course of various election campaigns.

While recognizing that the ultimate authority for the promulgation, interpretation and enforcement of the Canons of Judicial Ethics is vested in the Supreme Court, the Board of Commissioners hereby adopts the Voluntary Guidelines which follow, and establishes a Judicial Campaign Monitoring Committee for the purpose of assisting candidates in the interpretation of and compliance with the Voluntary Guidelines:

Voluntary Guidelines For Candidates For Judicial Offices

1. *Use of Political Campaign Committees.* Candidates for judicial office should not personally, or through members of the candidate's immediate family, solicit or accept campaign contributions. All solicitations, acceptance and disbursement of the candidate's campaign contributions should be handled by a single political campaign committee appointed by the candidate, which does not include the candidate or any member of the candidate's immediate family. This guideline shall not apply to a candidate who reasonably expects that contributions to the candidate's campaign for a specific primary or runoff or general election

from sources other than the candidate himself or members of the candidate's immediate family will not exceed $5,000.

2. *Time Limits.* Contributions to or for a candidate's campaign should be neither solicited nor accepted more than twelve (12) months before the date of the primary election preceding the general election, if he or she intends to be a candidate in the primary election, and if not, before the qualifying deadline for participation in the general election; and not more than three (3) months after the date of the general election.

3. *Contributions From Litigants.* Candidates, and their political campaign committees, should neither solicit nor accept campaign contribution from recent litigants, or their counsel, or persons involved in litigations currently before them, in excess of one-half (1/2) of the maximums in Item 4.A.

4. *Monetary Limits.* The following limits should be observed in the solicitation and in the acceptance of campaign contributions by candidates and their political campaign committees with respect to each primary election, each primary runoff election, and each general election, in order to avoid the appearance or impression that the contributor may seek or expect special advantages or favors from the candidate; exclusive of contributions by the candidate and members of the candidate's immediate family:

   A. See Graph A.

   B. *Contributions In Kind.* The reasonable value of in kind contributions shall be deemed to be the equivalent of cash contributions in applying the limits set forth in A, above.

   C. *Indirect Contributions.* Solicitation or acceptance of campaign contributions designed or having the effect of violating these guidelines will be deemed to constitute violation of these guidelines.

   D. *Relationship to Total Contributions.* Candidates and their political campaign committees should be mindful that the relationship of contributions from any one source may be so large in proportion to the total of all contributions as to allow an impression that special advantages or favors may be sought or expected, and should govern solicitation and acceptance of contributions accordingly.

5. *Reporting of Contributions.* In addition to the campaign contributions reporting requirements imposed by law, every candidate for judicial office should mail or deliver to the Campaign Monitoring Committee a copy of each report filed in compliance with the provisions of the Fair Campaign Practices Act, and such further reports (if any) as the Campaign Monitoring Committee may reasonably request.

A. Monetary Limits

Cash Contributions	Supreme Court	Courts of Appeal	Circuit/ District Courts
1. From any individual (not included in #2)	$750	$500	$500
2. From any law firm or its members	$4,000	$2,500	$2,500
3. From any PAC or other organization	$5,000	$3,000	$3,000

   E. *Uncontested Elections.* In the case of uncontested elections, or when it becomes clear that the candidate will be without opposition, no campaign contributions should be accepted.

   F. *Statutory Limitations.* No campaign contributions should be accepted in excess of or in violation of statutory prohibitions or limits.

   G. *Personal Use of Contributed Funds.* As mandated by Canon 7 B.1.(d) a candidate including an incumbent judge should not use or permit the use of campaign contributions for the private benefit of himself. As the contributions when made are intended for use in election campaigns, this prohibition should continue to apply after retirement from office.

6. *Candidate Conduct and Advertising.* Consistent with maintenance of the dignity ascribed to judicial office which is necessary to continued public respect for the judiciary, candidates for judicial office should scrupulously avoid personal and demeaning attacks on their opponents not directly reflecting on the judicial qualities of opponents in all public utterances and advertisements and campaign literature and scrupulously avoid attacks of a discriminatory nature on the basis of race, ethnic background, religion or gender. Criticism of the opponents' character, record, judicial philosophy and other characteristics bearing upon the judicial office should be couched in terms which do not reflect adversely upon the judicial office itself. To conduct himself or herself otherwise reflects adversely on the candidate's own qualifications for judicial office.

Alabama State Bar Judicial Campaign Monitoring Committee

The Board of Commissioners hereby authorizes the establishment of the Alabama State Bar Judicial Campaign Monitoring Committee (the "Monitoring Committee") as follows, and directs the President to implement the provisions hereof as promptly as possible:

1. The Monitoring Committee shall be composed of a total of seventeen (17) persons, including a chairperson, a vice-chair, and fifteen (15) members, all of whom shall be appointed by the President of the State Bar with the approval of the Board of Commissioners. The chair and vice-chair shall be appointed at large. The other members shall be appointed in three sets of five each, consisting of two lawyers, two sitting or retired judges, and one lay person. Each set of five shall be drawn from the area of a designated number of judicial circuits with the state divided into three areas each comprising the same approximate number of judicial positions, except that the area including Montgomery County shall include the appellate judge positions in its number. Appointments shall be for four-year terms. Initially, one lawyer and one judge in each set of five (herein sometimes referred to as "panels") shall be appointed for a two-year term, and all others for four-year terms; thereafter, all shall be appointed for four-year terms. As determined by its bylaws the Committee may sit and act as a whole or delegate functions and authority to the three panels. However, the basic monitoring functions and transmittal and consideration of and decisions on complaints shall normally be the function of the individual panels within their respective jurisdictions.
2. The Monitoring Committee shall adopt its own by-laws and rules of procedure, consistent with this constitutional document, the applicable Canons of Judicial Ethics, and such mandates as the Board of Commissioners may promulgate from time to time.
3. The Monitoring Committee shall consider only matters which have arisen since the formation of the Committee.
4. The Monitoring Committee shall consider only matters (i) referred to it by a candidate, in writing, or (ii) determined by a majority of the entire committee or of any of its panels to require consideration whether or not it has been referred by a candidate.
5. The Monitoring Committee shall consider only those matters (i) arising from actions of the candidates themselves, or (ii) of persons working in a candidate's campaign, whether or not authorized by the candidate.
6. Prior to a hearing, matters concerning a complaint and investigation of the complaint shall be treated as confidential, except that the candidate who is the subject of the complaint shall be promptly informed thereof.
7. The general charge of the Monitoring Committee shall be as follows:

   (a) To monitor compliance by candidates with the Canons of Judicial Ethics and the Voluntary Guidelines promulgated by the Board of Commissioners.

   (b) To broadly disseminate information concerning the Canons and Voluntary Guidelines to candidates, members of the Bar, the media and the general public.

   (c) To utilize such means as it deems appropriate, consistent with a proper regard for the dignity of judicial office, either by means of private communications or public disclosure, or both, to seek in a fair and impartial, non-political manner, compliance with the Voluntary Guidelines; and to report to the appropriate authorities deemed violations of the Canons. During campaigns it should seek to act with sufficient promptness to be effective in promoting compliance with the guidelines.

(d) To develop and make available to local bar associations, for local elections and the State Bar for statewide elections, a recommended, standardized format for the content of and means for circulating and publicizing the results of a bar poll for evaluating candidates for judicial office. The guidelines proposed by the American Bar Association Special Committee on Evaluation of Judicial Performance containing eight (8) specific criteria applicable to sitting judges, and similar ones for candidates, are recommended to the Monitoring Committee for its consideration.

(e) Within four months after each general election, assemble a list of campaign contributions with the identity of the contributors in excess of $100 to each successful candidate, and make such lists readily available upon request at a nominal charge. Successive contributions which together aggregate more than $100 should be included.

(f) Develop and make available to all candidates a recommended format for an information brochure which candidates may use to inform the voting public concerning the candidate's qualifications, listing the categories of information which would be of interest to voters and which will facilitate a comparison of the candidate's qualifications with those of the opponents. Encourage the use of such a format by the candidates in the interest of combatting the problem of voter ignorance concerning candidates for judicial office.

(g) Respond to inquiries from candidates concerning the interpretation of the Voluntary Guidelines in specific factual situations.

(h Report to the Board of Commissioners annually concerning the state of compliance with the Voluntary Guidelines, this charge, and any recommended changes.

Feasibility of Compiling a List of $100 Contributors to Successful Candidates

The Task Force has determined that at several stages during the election cycle all judicial candidates or their political committees must report contributions of more than $100 to the Secretary of State or with the probate judge of the local county under Sections 17-22A-8 and 9 of the Fair Campaign Practices Act. It should be a simple and inexpensive matter for them to send copies to the appropriate panel of the Campaign Monitoring Committee. This will enable the Committee to compare contributions with the voluntary guidelines. Also, after the election it can use the information to prepare and circulate the lists applicable to successful candidates to interested persons. The Committee may need the assistance of the State Bar staff with respect to some reproduction and mailing functions.

Respectfully submitted,

ROBERT P. DENNISTON, CHAIRMAN
TASK FORCE ON
JUDICIAL SELECTION

Appendix I
To Alabama State Bar Board of Bar Commissioners Voluntary Guidelines

Canon 7 A (1) of the Canons of Judicial Ethics reads as follows:

A. Political Conduct in General.

(1) A judge or a candidate for election to a judicial office should endeavor at all times to refrain from political activities inappropriate to the judicial office that he holds or seeks. It is desirable that a judge or a candidate for election to judicial office endeavor not to be involved in the internal workings of political organizations, engage in campaign activities in connection with a political candidate other than candidates for judicial offices and not be involved in political fund solicitations other than for himself. However, so long as judges are subject to nomination and election as candidates of a political party, it is realized that a judge or a candidate for election to a judicial office cannot divorce himself completely from political organizations and campaign activities which, indirectly or directly, may be involved in his election or re-election. Nevertheless, should a judge or a candidate for a judicial position be directly or indirectly involved in the internal workings or campaign activities of a political organization, it is imperative that he conduct himself in a manner at all times to prevent any political considerations, entanglements or influences from ever becoming involved in or from ever appearing to be involved in any judicial decision or in the judicial process.

Canon 7 B of the Canons of Judicial Ethics reads as follows:

B. Campaign Conduct.

(1) A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election:

(a) Should maintain the dignity appropriate to judicial office.

(b) Should prohibit public officials or employees subject to his direction or control from doing for him what he is prohibited from doing under this Canon.

(c) Should not make pledges or promises of conduct in office other than the faithful and impartial performances of the duties of the office; should not announce in advance his conclusions of law on pending litigation; and should not misrepresent his identity, qualifications, present position or other fact.

(d) Should not use or permit the use of campaign contributions for the private benefit of himself. ■

EXECUTIVE DIRECTOR'S REPORT

It's Serious Business–The Bar Exam

Several recent incidents relating to our bar admissions process have generated these thoughts about the process—particularly the **Character & Fitness** procedures and the examination itself—and the fact that those of us directly involved take our responsibilities quite seriously. These processes are not matters in which jokes, unsigned communications, anonymous phone calls and inappropriate remarks are viewed with callous indifference.

Recently, we have seen the Character & Fitness process used as a venue for airing or attempting to reopen domestic travails involving a particular applicant. Usually the adverse comments or belated discovery efforts occur shortly before the scheduled examination. Because of the confidential nature of the Character & Fitness investigation, we resist all efforts to examine the contents of an applicant's file.

Reginald T. Hamner

Likewise, the "last-minute" unsigned letter advising the Character & Fitness Committee it should look into some purported character defect of an applicant, while fully investigated to the extent of information available, generates a certain level of anxiety that is already above normal for an applicant. This is, too often, the ultimate motivation of the informant.

In order to minimize the stress on an applicant, we make every effort to investigate all alleged "last-minute" information without contacting the applicant until it becomes absolutely necessary. No applicant, however, would ever be denied an opportunity to respond to any such information that is developed at the last minute where the facts could result in a deferral or a denial of their right to take the upcoming examination.

Unfortunately, some of the last communications are generated by fellow applicants. One particularly troublesome incident involved communications that were generated by students who had disagreed with the handling of an applicant's problems by the school administration early in the applicant's law student career.

Some applicants summoned before a Character & Fitness panel obviously have been misinformed about the gravity of the need for their appearance. Several have thought nothing of requesting a continuation or a later setting worked around *their* schedule, while others have initially appeared almost callous in the first few minutes of a panel hearing. The chair of the Character & Fitness panel quickly demonstrates to such applicants the seriousness of the business at hand.

My favorite last-minute incidents are the notes slipped under the door advising me that certain applicants or study groups have a copy of the exam. If not for the fact that I had personally accounted for and still had the particular exam under personal security, I would have been concerned.

Thoughtless and misunderstood comments during review courses have created problems. Applicant friendships and employment relationships with examiners should be carefully considered by applicants and others before comments are uttered which could be misconstrued.

Lawyers and judges, too frequently, comment to our examiners about their special interest in an upcoming applicant's success on an exam. Such comments, while hopefully intended to be "just conversation," can be misconstrued, or worse, overheard by others who may already view the process with some degree of suspicion. Examiners are required to report all such contacts. Theirs is a thankless, but most important, responsibility. They need to be able to fulfill their duties without the added burden of such unsolicited comments.

The anonymity of the applicant and integrity of the process are essential to meeting the public responsibility placed upon the board of bar examiners. If a reason does exist to challenge an applicant, fairness to one and all dictates the necessity to have such evidence at an early stage in the process where such evidence is known to exist. Personalized commentary about examinees and directed to an examiner is to be discouraged. A defined review process is in place to be used after the bar results are known. An examiner should not be contacted to explain his or her scoring of an examination except within the already approved review process procedures.

We view our responsibilities quite seriously, and we encourage your help by being sensitive to the need for absolute integrity in the admissions process. ■

Health

Major Medical. Provides personalized comprehensive coverage to Lawyers, employees, and eligible family members. The Southern Professional Trust is totally underwritten by Continental Casualty Company, a CNA Insurance Company.

Life

Family Term Life. Provides benefits for Lawyers, spouses, children and employees. Coverage through Northwestern National Life Insurance Company.

Security

Disability Income. Features "Your Own Specialty" definition of disability with renewal guarantee and benefits available up to 75% of your income for most insureds. Coverage through Commercial Life, a subsidiary of UNUM.

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Business Overhead Expense Insurance. A financial aid to keep your office running if you become disabled. Coverage through Commercial Life, a subsidiary of UNUM.

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LEGISLATIVE WRAP-UP

By ROBERT L. McCURLEY, JR.

After three months the Legislature adjourned without passing the much-published education reform bills. Legislators introduced over 1,600 bills with one legislative day remaining. At printing deadline, the following bills were passed.

Criminal Law

H-7 (Act 94-581) **Hate Crimes**—A person found guilty of a crime motivated by the victim's race, color, religion, national origin, ethnic background, or disability shall receive enhanced punishment.

H-105 (Act 94-580) **Open House Party**—An adult having control of a residence, in attendance where an open house party is held, and who allows persons under 21 years of age to drink alcoholic beverages or use a controlled substance is guilty of a Class B Misdemeanor.

H-688 (Act 94-349) **Basic Rights for Crime Victims**—This Act proposes a constitutional amendment that would require that crime victims be informed and heard in all crucial stages of criminal proceedings.

S-9 (Act 94-321) **Interference with Hunters**—Anyone who attempts to prevent, obstruct or interfere with a person legally hunting is guilty of a Class C Misdemeanor.

S-85 (Act 94-590) **DUI Fourth Offense**—A person who is convicted of a fourth DUI in a five-year period is guilty of a Class C Felony and receives a fine between $2,000 and $5,000.

S-280 (Act 94-652) **Boating Safety**—Anyone operating a boat while under the influence of alcohol will be punished the same as a DUI driver on the highway. Also, all boat operators must be at least 14 years old and, by 1999, all boat drivers must have a license.

H-433 (Act 94-481) **Youthful Offender**—Any person who has attained 16 years of age and commits a capital offense, a Class A Felony, commits any felony with a deadly weapon, causes death or physical injury, commits a felony against certain court or law enforcement officials or traffics in drugs will be tried as an adult. Any subsequent offenses will cause the youth to be tried as an adult.

Business

H-30 (Act 94-245) **Revised Business Corporation Act**—This Act is effective January 1, 1995. Drafted by a committee of the Alabama Law Institute, the act closely follows the Model Business Corporation Act. The format of the act is greatly changed by breaking various provisions into separate articles arranged by topic. For example, the present Article 2 has 62 sections that encompass corporate pow-

ers, 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 now is the subject of a separate article. For a further discussion of the Act *see Alabama Lawyer*, May 1993.

S-121 (Act 94-573) **Church Trustee**—This amends Section 10-4-20 to delete the maximum number of trustees a church may elect.

S-293 (Act 94-104) **Automatic Teller Machines**—This amends Section 5-5A-30 to permit a bank to charge a transaction fee to its customers who use an automated teller machine.

S-419 (Act 94-115) **Consumer Credit Transactions**—This amends Section 5-19-6 to not require disclosures under the Mini-Code other than those required by the Superintendent of Banks, the borrower's right to cancel a real estate loan by the third business day, creditor-required insurance, and certain other fees on real estate loans in §5-19-4(g).

H-443 (Act 94-588) **Foreign Corporations**—This amends Section 10-2A-221 to allow any foreign corporations to act as fiduciaries in Alabama without qualifying to do business in Alabama, provided the foreign corporation's home state grants authority of Alabama corporations to serve in the same capacity in the foreign state.

Property

S-119 (Act 94-117) **Real Estate Appraisers**—This amends Chapter 27A of Title 34 of the Alabama Real Estate Appraisers Act concerning the qualifications of appraisers and their continuing education programs.

S-299 (Act 94-487) **Damage to Underground Facilities**—No person shall excavate a street, highway or easement without notifying the "One-call Notification System". Failure to give notice of excavation or causing damage to a utility line can result in a civil penalty payable to the state general fund.

H-477 (Act 94-582) **Closing Hazardous Highways**—This amends Section 37-2-84 to allow the Alabama Department of Transportation to close any city or county street that crosses a railroad when the Department determines the crossing is dangerous and safety outweighs the inconvenience of re-routing traffic.

Divorce

S-388 (Act 94-575) **DHR Divorce Investigation Fees**—Section 30-3-7 is repealed which authorized the Department of Human Resources to charge a fee between $20 and $35 for investigative services in divorce cases.

H-387 (Act 94-589) **Termination of Income Withholding Orders**—This amends Section 30-3-62 to terminate a withholding order without a hearing upon the sworn affidavit of the obligator that the children have all reached majority and there is no arrearage of child support or spousal support. The obligee may still request a hearing within 20 days after notice.

H-516 (Act 94-213) **Past Due Child**

BAR BRIEFS

Billy Max Paul, left, is sworn in as the new SBA Regional Administrator in the Southeast. Wiley Messick, right, served as acting regional administrator.

• The U.S. Small Business Administration announces the recent appointment of **Billy Max Paul** as the chief administrator for the agency's eight-state southeastern region. The region, based in Atlanta, has more than 430 permanent employees in 13 field offices and an SBA loan portfolio of over $3.6 billion.

A native of Grove Hill, Alabama, Paul is a 1970 graduate of the University of Montevallo and a 1974 graduate of the Birmingham School of Law. He served as district judge for the First Judicial Circuit from 1976-79, worked as a political consultant for several national Democratic candidates, and was Kentucky's associate superintendent of education from 1985-87. He also served in the U.S. Department of the Interior in the Carter Administration and has been recognized in Alabama for his efforts to protect wildlife in the state.

Wiley Messick, also a member of the Alabama State Bar, served as acting regional administrator prior to Paul's appointment. Messick, a native of Pike County, Alabama, graduated from the University of Alabama School of Law in 1953. He practiced law in Abbeville, Alabama and with the legal department for SONAT, served as executive secretary and administrative assistant to U.S. Senator John Sparkman, and, since 1967, has held several positions with the SBA.

Dickerson

• **Mahala Ashley Dickerson**, a 1948 admittee to the Alabama State Bar, recently received an honorary Doctor of Laws degree from the University of Alaska Anchorage. Dickerson, of Anchorage, is Alaska's first female and black attorney, and was admitted to practice there in 1959. She has been active in the American and Alaska civil rights movement and was the first black president of the National Association of Women Lawyers.

Dickerson, a Montgomery native, graduated, *cum laude*, from Fisk University where she was inducted into Phi Beta Kappa. She was admitted to the Alabama State Bar in 1948, and practiced here until 1951, when she moved to Indianapolis, Indiana. She was the second black female to be admitted in Indiana and practiced there for eight years, prior to moving to Alaska. ■

LEGISLATIVE WRAP-UP *Continued*

Support—This authorizes a parent, guardian or the Department of Human Resources to bring a civil action against a non-supporting parent to establish an order of retroactive support for a minor child. The non-supporting parent must be under a court order to support the child and the action must be brought before the child reaches majority.

H-618 (Act 94-579) **Alabama Family Trust Corporation**—This establishes a nonprofit charitable trust to permit contributions by family members and others for the benefit of a person with a mental or physical impairment. This allows the establishment of a charitable trust in which the trustees serve without compensation. This will provide a trust where there are not enough funds to warrant a corporate fiduciary.

Tort Liability

H-341 (Act 94-138) **Architects, Engineers and Contractors**—A suit against an architect, engineer or contractor for faulty design...or defect that results in damage to property, injury or death to a person must be commenced within two years. Further, a rule of repose bars any cause of action 13 years after substantial completion of any construction of an improvement on real property. And, any express warranty is enforceable for the period of time specified in writing but must be com-menced within two years after the cause of action arises.

S-313 (Act 94-244) **Supervision of State Employees**—A state employee who reports a violation of law, regulation or rule may not be fired, demoted, transferred or discriminated against for making the report. This Act creates a cause action against the supervisor but not the State of Alabama.

S-332 (Act 94-576) **Personal Insurance Contracts**—This amends Section 27-14-3 to give a corporation an insurable interest in the life or health of its directors, officers or employees. Further, it permits a corporation by contract with a shareholder to insure a shareholder for the purpose of re-acquiring the shareholder's stock. It also allows a charity to own a life insurance policy on the life of any individual who consents to the charity being the owner.

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

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.

BUILDING ALABAMA'S COURTHOUSES

GREENE 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.*

Greene County

The territory of present-day Greene County was part of the Choctaw Indian lands ceded to the United States government by a treaty dated October 24, 1816. In this treaty the Choctaws gave up all of their tribal lands east of the Tombigbee River, making it legal for settlers to enter the region.

In late 1816, Caleb Russell became one of the first settlers in the area. Other pioneers arrived in 1817 and established a community nearby, called Russell Settlement or Russellville in honor of the Russell family. Soon thereafter, another community called Troy or New Troy was established. It was named to commemorate ancient Troy in Asia Minor. Subsequently, these communities merged and became present-day Greensboro.

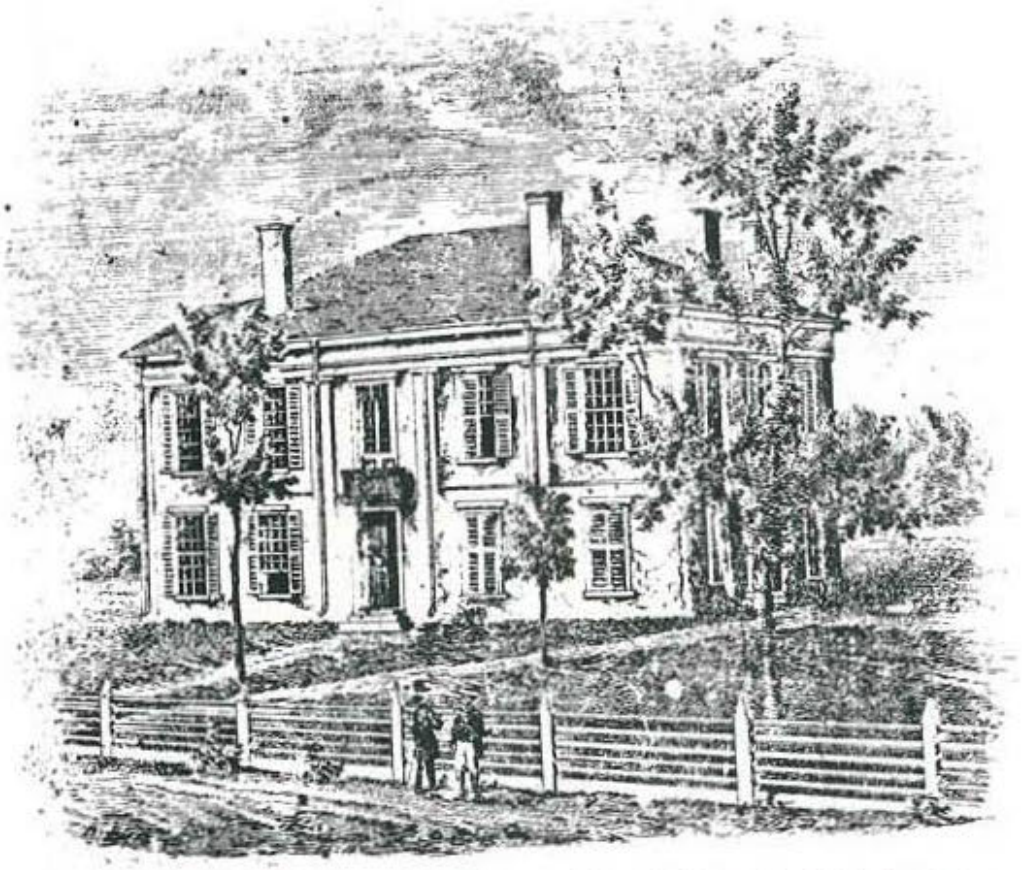
Alabama was made a U.S. territory in 1817. On February 7, 1818, the Alabama Territorial Legislature created Marengo and Tuscaloosa counties. Then, on December 13, 1819, the day before Alabama achieved statehood, the Legislature created Greene County out of parts of Marengo and Tuscaloosa counties. The original Greene County boundaries included most of the land in today's Greene and Hale counties. The original county was divided in two by the Black Warrior River.

Greene County was named for Revolutionary War General Nathaniel Greene. The City of Greensboro in Hale County, originally a part of Greene County, was also named for him. Many historians consider Greene, after Washington, to be America's greatest military leader of the Revolution.

Greene was born in Warwick, Rhode Island in 1742. His family members were Quakers, but because the Quaker Church is opposed to warfare, Greene's interest in military affairs resulted in his expulsion from that church.

Greene served in the Rhode Island colonial Legislature. When war broke out with England, Greene organized a militia company and soon became a Brigadier General in the Continental Army. He took part in the siege of Boston and, in 1776, commanded the army of occupation there with the rank of major general. He fought at Princeton, Trenton, Germantown, Brandywine, and Monmouth. He also served with Washington at Valley Forge.

In December 1780, Greene took command of the Continental Army in the South. He led the colonial forces at the



Sketch of first Greene County Courthouse (1839), Eutaw. V. Gayle Snedecor, map of Greene County, 1856. (Roy A. Swayze Collection.)

battles of Guilford Courthouse and Eutaw Springs. By war's end, he had pushed the British back into Charleston and Savannah.

In gratitude for services during the war, Georgia gave Greene a plantation estate. He died at Savannah in 1786. As a final tribute, the State of Rhode Island placed his statue in Statuary Hall at the Capitol in Washington in 1870.

The first county seat of Greene County, selected by the Alabama Legislature, was the town of Erie on the east bank of the Warrior River. The site of Erie is approximately four miles southwest of Sawyerville and 13 miles west of Greensboro in present-day Hale County. The name Erie is another designation for Eire or Ireland, which was most likely the original home of some of the county's early residents.

The earliest county records reveal that the first Orphan's and County Court convened in Greene County at Erie in July 1820. The first order of business at this session was the payment of $25 to Thomas Steward for a house to be used as a courthouse. The next action was to pay James Monette $110 for furnishings in the structure. Newspapers published in Erie during the period make many references to what was probably a more substantial courthouse built some time prior to 1830 on a courthouse square. Unfortunately, no pictures survive of any such courthouse at Erie.

In 1838, the citizens of Greene County decided to relocate their county seat for several reasons. Erie was located on the Warrior River and had good water transportation, but the roads leading to and from the town were almost impassable during the rainy season. There was also a shortage of good drinking water. The final blow came in 1838, when a yellow fever epidemic took a large number of lives.

After losing the courthouse, Erie began to decline. Most residents moved to the new county seat town of Eutaw, or the older and larger Greensboro. In 1855, the Greene County Directory states that only one homestead remained at Erie, together with the ruins of the courthouse, the jail and a few dilapidated tenements. Today nothing remains of Erie but a few broken pieces of brick or stone where buildings once stood and a handful of graves in the cemetery.

The first election to change the courthouse site took place on August 21, 1838 when the citizens of Greene County chose to move their courthouse by a vote of 985 to 893. Then, at a second election on the second Monday of October 1838, they chose the present location, which, at the time, was the farmland of an early settler, Asa White.

White had acquired land in Greene County as early as 1824. He continued to purchase acreage and by 1838 his holdings exceeded 1,000 acres. His land was located approximately one mile southeast of an early settlement called Mesopotamia, founded in 1818.

Mesopotamia means "high place between two rivers." The name referred to the ancient name of the Tigris-Euphrates River Valley. Since this area in Greene County was on a plateau located between the Tombigbee and Warrior rivers, Mesopotamia was aptly named. It does not survive today, other than as a thoroughfare, Mesopotamia Street, within the town of Eutaw.

In October and November 1838, Asa White, "in consideration that the voters of Greene County...have selected a site as the permanent seat of justice for said county on the lands of the said Asa White," conveyed to the county a 20-acre square in the middle of his holdings. The land was to be used for a courthouse, other civic buildings, and the commercial district for the new town. In December 1838, Robert G. Quarles surveyed and laid out the proposed town. Two sets of parallel streets, one running east and west, and one running north and south, created a grid of nine blocks. The center block was

designated for the courthouse square. The streets were laid out according to the points of a compass without regard to an existing road from Mesopotamia to the Warrior River.

The nine square blocks were divided into 74 lots. An auction to sell the lots took place on December 13, 1818. Prices for them ranged from $100 to $500 and the funds raised from their sale were used by Greene County to pay for its new public buildings.

Meanwhile, Asa White enjoyed a windfall as his remaining properties escalated in value. By 1841, he had surveyed and sold 29 lots. By 1860, he had sold almost 60 more. His sale prices ranged from $50 to $2,595.

The newly created town now required a name. In naming their county seat Eutaw, the people of Greene County chose to again honor General Nathaniel Greene. General Greene's greatest victories had been in the Carolinas and more voters in Greene County had been born in South Carolina than in any other state. Therefore, the choice of Eutaw to commemorate Greene's defeat of the British at Eutaw Springs, South Carolina in 1781 was a natural.

The first courthouse in Eutaw was built by John V. Crossland of Greensboro. The contract price was $26,000 and Crossland received an initial down payment of $4,333 for the project on June 21, 1839. The building he constructed was 45 by 68 feet in dimensions with an extension on the west side containing stairs to a second story. It was built in the Greek Revival style. The first floor consisted of four offices with intersecting 12-foot wide hallways. There were four entrances. The second floor consisted of a large courtroom and a small judge's chamber on the east side.

Greene County held a prominent place in Alabama during the 1850s. It was a center of wealth, agricultural activity and population. The newly established Southern University was chartered in Greensboro in 1856. The census of 1850 showed that the population of Greene County exceeded Mobile, Montgomery, Madison and even Jefferson county. Then, the Civil War came, followed by significant changes for Greene County.

In 1867, after the war, the Legislature divided the county along the Warrior River. The eastern side, which was the larger section with the greater population, became Hale County. The town of Greensboro was made its county seat. The smaller section on the western side of the river remained Greene County. The population, which numbered 30,859 in 1860, was reduced to 18,399 in 1870, a dramatic change in population and tax base.

Then, in 1868, the courthouse that had served the county for almost 30 years burned. It is an accepted opinion among local historians that this courthouse was the victim of arson. During the Reconstruction Period, certain citizens apparently set fire to their courthouse to destroy indictments against local leaders brought by the despised carpetbaggers.

Since the county did not have the money to build a totally new courthouse, the structure was rebuilt with the exact same design using the walls and foundations that survived the fire. The county chose George M. Figh as builder and entered into a contract with

The new Greene County Courthouse

him on July 18, 1868 for $14,660. Figh received $2,500 upon signing the contract with equal installments for the balance at three, six and 12 months. He had one year to complete the building.

The rebuilt courthouse was taller than its predecessor. A tin roof with wide eaves supported by brackets, an Italianate feature, was added to the Greek Revival structure. The brick walls, which remained 18 inches thick, were plastered over with stucco. The building had four wrought iron balconies, one over each entrance, and double-swung green shutters beside all windows. At different times, it has been painted gray, soft pink and white.

Over the years, various out-buildings have been constructed for public use on the Greene County square. In 1842, a structure identified as the sheriff's office on an early map, and later designated the grand jury building, was constructed on the northeast corner. The probate office was built in 1856 on the northwest corner. A library building built in 1931 sits on the southeast corner.

On October 14, 1970, the historic Greene County Courthouse, at that time just over 100 years old, was nominated to be included on the National Register of Historic Places. The structure, described as solidly built and in good condition, was officially added to the National Register on March 24, 1971. Even so, discussions soon began for a proposed new courthouse. The funding source would come from a new industry in Greene County—legalized gambling.

The Greenetrack greyhound park opened in 1977. The legislation legalizing greyhound racing in Greene County required the Greene County Racing Commission to pay 4 percent of the total amount wagered to local governments and agencies. One of the projects for which this money was earmarked was a new Greene County Courthouse.

The architectural firm for the new courthouse was David Jones, Jr. and Associates, Inc. of Birmingham. The contractor was Campbell and Associates, Inc. of Tuscaloosa.

According to David Jones, his involvement with the new courthouse began in the early 1980s with an independent study project he used as part of his Master's degree program at Tuskegee University. His study included questionnaires and initial needs assessment. Further planning and feasibility studies took several more years. Finally, in the fall of 1991, design work began, in the summer of 1992 bids were let, and in the fall of 1993 the courthouse was completed.

The new Greene County Courthouse is named for William McKinley Branch, the county's first black probate judge. The building contains approximately 15,000 square feet and cost approximately $1.2 million.

Jones describes the building as postmodern government architecture that serves the county as a courthouse and administration facility. The structure is one-story with a gable-roofed entranceway that creates a plaza effect. Steps have been eliminated and the courthouse is completely handicapped accessible. The building materials were brick and pre-cast concrete. Jones states that the building was designed both to be sympathetic to the past and to provide a new legacy for future Greene County residents. The new courthouse faces the old court square diagonally, and was built on the block northeast of the old courthouse.

Anticipated uses for the old Greene County Courthouse include conversion to a museum or some other similar public building. However, funds are presently unavailable, and as a minimum the old courthouse will need an elevator and other improvements for the handicapped. Preservationists hope that the historic court square with its courthouse and out-buildings will be restored to serve Greene County into the next century. ■

Sources: *Eutaw, The Builders and Architecture of an Ante-bellum Southern Town*, Clay Lancaster, 1979; *A Goodly Heritage—Memories of Greene County*, Greene County Historical Society, Mary Morgan Glass, editor, 1977; *A Directory of Greene County for 1855-56*, V. Gayle Snedecor, 1856.

The author thanks the following for their contributions: David Jones, architect, Birmingham, Alabama; Robert Kracke, attorney, Birmingham, Alabama; Ralph Liverman, attorney, Eutaw, Alabama; and A.D. Goode, *The Birmingham News*.

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.

PROFILE

Pursuant to the Alabama State Bar's rules governing the election of president-elect, the following biographical sketch is provided of John Arthur Owens. Owens is the sole qualifying candidate for the position of president-elect of the Alabama State Bar for the 1994-95 term.

John Owens was born in Birmingham, Alabama on July 7, 1939 to James King Owens and Beatrice Geer Owens. James King Owens was originally of Troy, Alabama. He moved to Gordo, Alabama to teach school where he met and married Beatrice Geer. James King Owens, at various times, owned and operated a general merchandise store, owned and operated an International Harvester Truck and Tractor-Mercury Automobile Dealership, and was majority stockholder, president and chief executive officer of the Bank of Gordo.

John Owens married Dorothy Terry of Red Level, Alabama, July 7, 1962. They have two children, Apsilah Geer Owens (Appie), who presently practices with the firm of Lanier, Ford, Shaffer & Payne in Huntsville, and Terry Elizabeth Owens, who is an interior designer in Truckee, California.

Owens was educated in the public schools of Gordo, Alabama and graduated from Gordo High School, valedictorian, class of 1957. He graduated from the University of Alabama in May 1961 with a bachelor of science degree in commerce and business administration and a major in accounting. He graduated from the University of Alabama School of Law in January 1967, standing first in the class.

John Arthur Owens

In law school, he received the Lawyer's Title Award for Excellence in the field of real property and served on the law review and Farrah Order of Jurisprudence.

Owens served with the U.S. Navy Reserve while in college, including two summer terms of OCS. He served three years on active duty and remained in the U.S. Navy Reserve for 11 years, attaining the rank of lieutenant.

He was admitted to the Alabama State Bar in April 1967. He has practiced law continuously since then in Tuscaloosa with the firm of Phelps & Owens and its successor firms as a senior partner through March 31, 1994. Effective April 1, 1994 he formed Owens & Carver with Susie Carver. Owens has served as a member of the board of bar commissioners, representing Tuscaloosa County in place number two, since 1987. He served as vice-president of the state bar from 1991-92, and on several committees of the state bar, including chAir of the Committee on Bail and Recognizance and chair of the Committee on the Future of the Profession.

He is a member of the Tuscaloosa County Bar Association, American Bar Association, International Association of Defense Counsel, Alabama Trial Lawyers Association, Tuscaloosa County Trial Lawyers Association, Alabama Defense Lawyers Association, and the Tuscaloosa Chapter of the American Inns of Court in the category of Master of the Bench.

In civic and community service, Owens has been a member of the Tuscaloosa Rotary Club (president 1983-84); board member, vice-chairman and secretary of the Tuscaloosa Academy, 1980-86; president for three terms of the Tuscaloosa County Arts Council, including service as its current president; member and officer of the Tuscaloosa County Solid Waste Authority for approximately five years; chair of the Jemison House fund drive; trustee of First United Methodist Church of Tuscaloosa; member of the original board of directors of the Children's Hands-On Museum; board member of the Tuscaloosa Symphony Orchestra; and recipient of the 1985 Patron of the Arts Award presented by the Arts Council of Tuscaloosa County, Alabama. ■

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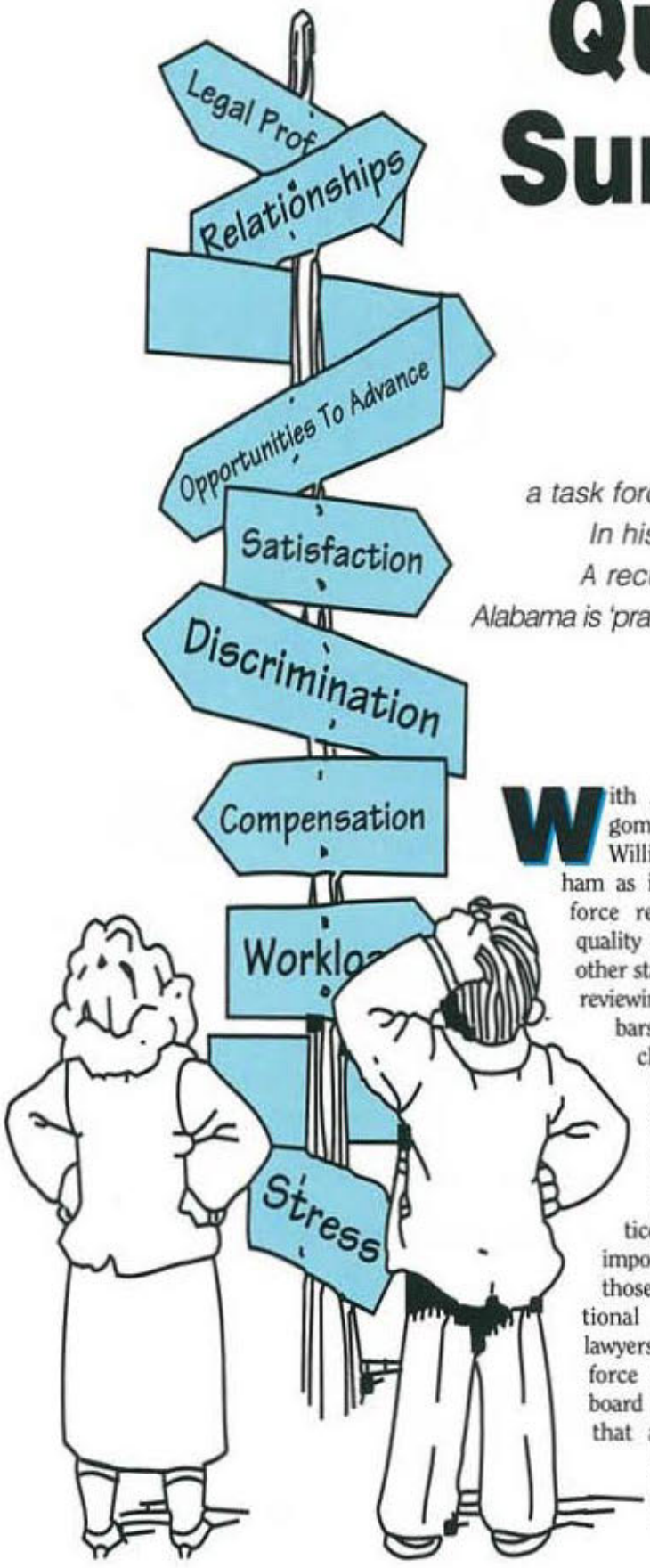
The Alabama State Bar Quality of Life Survey Results



By: Keith B. Norman

In July 1990, President Harold Albritton appointed a task force to examine the quality of life of Alabama lawyers. In his charge to the task force, President Albritton noted: A recurring complaint heard among older lawyers throughout Alabama is 'practicing law is just not fun anymore.' With younger lawyers a frequent comment is 'this is not what I expected the practice of law to be.' Why is this?

With Jerry Wood of Montgomery as its chair, and William Gantt of Birmingham as its vice-chair, the task force reviewed many of the quality of life studies done by other state and local bars. After reviewing the efforts of other bars, the task force concluded that although the general findings of the studies conducted by other bars indicated that the level of dissatisfaction with the practice of law was high, it was impossible to quantify from those findings the satisfactional level for Alabama lawyers. As a result, the task force recommended to the board of bar commissioners that a survey of Alabama lawyers be conducted to determine if Alabama lawyers were experiencing the levels of professional dissatisfaction experienced by their peers in other states. The board approved the task force's recommendation and the Capstone Poll at the University of Alabama was retained to conduct the survey.

The survey was based on a random sample of 500 members of the bar and was proportional with respect to gender and race. Of the sample total, 401 completed the survey conducted telephonically by Capstone Poll employees experienced in telephone interview techniques. The findings were broken down into ten basic components which covered more than 100 pages in the final report prepared by the Capstone Poll. The results of each of those components are summarized below.

Professional demographics

Three-quarters of the lawyers in the sample practice in law firms (53 percent in firms of two-ten lawyers), and the remaining quarter practice as solo practitioners (17 percent) and in other settings such as governmental agencies,

judicial offices, corporations and non-profit agencies. The largest number, 40 percent, describe their major area of practice as litigation. Lawyers were concentrated in the major metropolitan areas of the state, with three-quarters of them practicing in one of the four major metropolitan counties (Jefferson, Madison, Mobile, and Montgomery).

Personal demographics

The sample consists of 81 percent males and 19 percent females with 97 percent whites and 3 percent minorities. Nearly four-fifths of the respondents are married and close to three-fourths have children. Three-fourths of those with children have minor children (i.e., younger than 18 years of age). One in eight of these parents (12.3 percent) has primary responsibility for the care of their children, and three-fifths (60 percent) have shared responsibility. Approximately 40 percent of the married respondents have spouses who do not work outside the home, nearly 12 percent have spouses who are also lawyers, and the remaining 48 percent have spouses in a wide range of other occupations. Roughly 6 percent indicated that they were separated or divorced.

Nearly three-fourths of those surveyed indicated that they were under the age of 46, with nearly 42 percent in the 36-45 age range. Over two-thirds of those surveyed were born in Alabama.

Perceptions of the legal profession

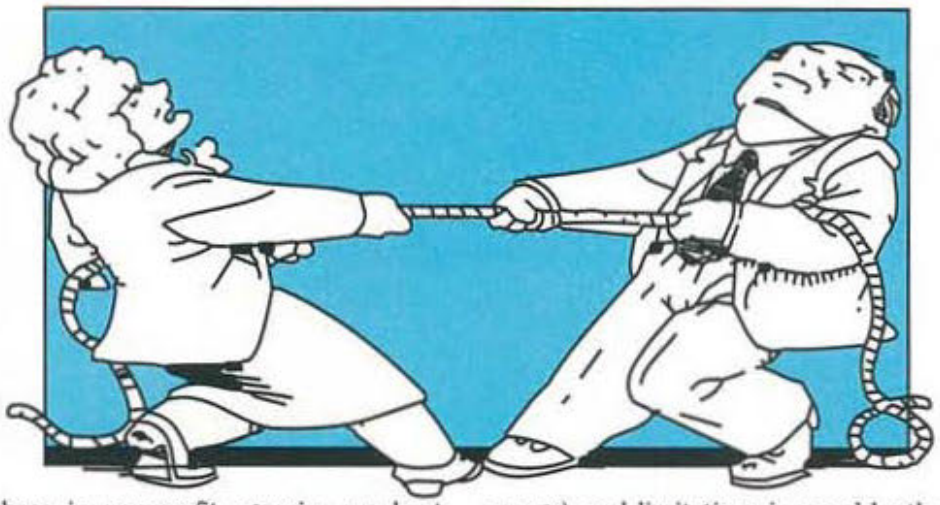
In general, lawyers appear to have a mixed feeling regarding their profession. For example, nearly 81 percent think the legal profession is becoming less of a profession and more of a business, 89 percent believe the public's view of lawyers is becoming less positive, 68 percent perceive the relationships between lawyers are becoming more adversarial, and 65 percent think their career demands affect their ability to have a satisfying private life. On the other hand, only 26 percent think they may not choose the profession again if reliving their lives, 13 percent are sometimes embarrassed to admit they are lawyers, 85 percent are confident they made the right career choice, and 83 percent plan to remain in the legal profession for the rest of their career.

Other perceptions indicate that 92 percent of the lawyers think there is an increase in pressure to specialize, 21 percent feel that new lawyers are paid excessive salaries, 55 percent perceive that clients are retaining counsel more frequently on a transactional basis rather than retainer, and 62 percent believe lawyers are becoming less loyal to their firms or companies. In terms of private matters, 13 percent perceive serious chemical dependency problems among lawyers, and 36 percent indicate that many of their friends from law school have had marital problems. Over 58 percent would like to have more time for professional activities such as pro bono work, community activities, and bar activities. Finally, 51 percent perceive continued discrimination within the profession based on personal characteristics. Interestingly, discrimination within the profession is more likely to be perceived by junior associates (61.8 percent) than by partners (46.3 percent), and most likely be perceived by those in non-profit agencies (100 percent). An additional analysis of the discrimination item reveals that 87 percent of females

perceive discrimination within the profession, while only 43 percent of males perceive such discrimination. There was not a sufficient number of minority respondents to consider this item in terms of racial subgroups.

Overall job satisfaction

The vast majority of respondents are either satisfied (55.1 percent) or very satisfied (39.4 percent) with the challenge and stimulation of their legal work. Those in judicial offices are most likely to be very satisfied (67.7 percent), and



those in non-profit agencies are least likely to be very satisfied (20 percent). Those who are dissatisfied cited reasons such as inability to work on cases they would choose, routine and drudgery after years of the same thing, and the business aspects which interfere with challenging work.

Most lawyers are also either satisfied (43.6 percent) or very satisfied (32.4 percent) with their current opportunities to advance their careers. Those not practicing in firms, however, are somewhat less likely to be satisfied (28.8 percent) and more likely to be dissatisfied (14.9 percent) or very dissatisfied (4 percent). In this subgroup, those in government agencies express the greatest dissatisfaction with opportunities for advancement. Dissatisfaction in this area arises primarily from limitations due to the size or nature of the firm or company, internal politics and demographics (such as age), and limitations imposed by the company.

Current workload is described as overwhelming by 18 percent of respondents; heavy, but manageable by 60.8 percent; about right by 20 percent; and insufficient by less than 1 percent. Junior associates and those in corporations and non-profit agencies are least likely to feel overwhelmed, while those in government agencies and judicial offices are most likely to feel their workload is overwhelming. In all subgroups, the majority of respondents feel their workload is heavy, but manageable.

Corresponding to the heavy workload, 50.4 percent of lawyers describe their level of job-related stress as high, and 20.2 percent describe it as very high. Within law firms, junior associates are more likely to express lower levels of stress; stress level appears to be unrelated to the size of the law firm. Overall, those not in law firms tend to express lower levels of stress compared to those in firms. This difference is accounted for primarily by those in judicial offices and those in non-profit agencies.

As a part of the workload issue, those in law firms were asked to estimate the number of billable hours of legal work they typically complete. This question was not applicable for all respondents in law firms, but 248 were able to give a response to this item. The distribution shows that more that half of these (147 or 59.3 percent) report more than 38 billable hours per week. Twenty-seven percent report more than 45 billable hours per week.

Overall, then, lawyers tend to be satisfied with the nature of their work, but many feel the workload and stress are rather high.

Satisfaction with working relationships

Lawyers appear to be quite satisfied overall with collegial relationships within their offices. Forty-four percent are satisfied and an additional 48 percent are very satisfied, yielding a total of 92 percent in these two categories. Only 4 percent were dissatisfied, with 1 percent very dissatisfied. There is relatively little variation across categories with respondents to this question. Sources of dissatisfaction include issues such as lack of camaraderie, lack of time for relationships, lack of communication, and having little in common.

On the whole, lawyers are either satisfied (50.4 percent) or very satisfied (36.4 percent) with their relationships to clients, although this question was not applicable for many who are not in a firm. Lawyers in non-profit agencies are least likely to be very satisfied with these relationships (0 percent), but most likely to say they are satisfied (80 percent). All respondents were asked to describe any complaints they have regarding clients. These comments are summarized in the full report.

Most lawyers are satisfied with their relationships with other lawyers outside their offices (69.1 percent), and 18.5 percent say that they are very satisfied with these relationships. They are slightly more likely to express dissatisfaction on this question (8.5 percent) than on the preceding questions about relationships.

Please note:

The publication date of the bar directories has been changed from December 1993 to June 1994.

Those most likely to be very satisfied are partners in firms (20.5 percent) and lawyers in judicial offices (40 percent) or non-profit agencies (40 percent). Sources of dissatisfaction include having too little opportunity for such contact, the adversarial nature of these relationships, and lack of trust.

Satisfaction with relationships with the judiciary also is high, with 60.1 percent satisfied and 18.7 percent being very satisfied. Less than 1 percent are very dissatisfied and 7.5 percent are dissatisfied. For those within firms, the pattern is quite similar across position categories. For those not in firms, the greatest satisfaction is expressed by those in judicial offices themselves, and the lowest satisfaction is expressed by those in governmental agencies. The causes of dissatisfaction include the political nature of the judiciary, lack of contact, perceived partiality, and lack of consideration of other demands on lawyers' time. Thus, the vast majority of lawyers indicate that they are either satisfied or very satisfied. Satisfaction appears to be somewhat higher for within-office relationships than for relationships with lawyers outside the office or with the judiciary.

Satisfaction with compensation

Overall, 54.6 percent of lawyers are satisfied and 18 percent are very satisfied with the basis upon which their compensation is determined. Partners and those in non-profit agencies are most likely to be satisfied or very satisfied with the basis for determining their compensation. Approximately 21 percent of respondents are dissatisfied or very dissatisfied with the basis upon which their compensation is determined. When asked why they are dissatisfied, the most frequent response is that the distribution of pay is not equal in terms of amount of work or contributions. This response is most frequent among junior associates and partners. State salary limitations are mentioned often by those in governmental agencies and judicial offices.

When asked about the satisfaction with actual compensation, 59.1 percent are satisfied and 13.2 are very satisfied with their compensation. Partners and those in judicial offices are most likely to be satisfied. A total of 23.4 percent are

dissatisfied or very dissatisfied with their compensation. The primary reason for dissatisfaction is related to perceived inequities relative to the amount of work or relative contributions of others. Those who said their pay is simply too low are most likely to be senior associates and partners.

These satisfaction variables were combined with the reported annual compensation to assess relationships between satisfaction and compensation. The results show that generally, as compensation increases, satisfaction with compensation and the basis upon which it is determined increases.

Compensation does vary, as would be expected, by a position in a firm, with partners having the higher levels of compensation. With regard to the size of firms, the large firms tend to have levels clustered in the $50,000 to $80,000 range, while the small or medium-sized firms have a more defused distribution of compensation levels. For those not in firms, non-profit agencies tend to have the lowest compensation levels. Overall, the compensation of those not in law firms tends to be lower than those practicing in firms.

As with other areas, the majority of lawyers express satisfaction with compensation issues. As would be expected, satisfaction is strongly related to actual compensation. The primary sources of dissatisfaction relate to perceptions of inequity in these matters. The inequity arises both from internal comparisons of time and effort relative to outcomes and from external comparisons of one's own work and compensation relative to that of others.

Satisfaction with professional resources

Eighty percent of lawyers are satisfied or very satisfied with the resources and assistance provided by their firm or office. Over 90 percent have libraries on the premises, two-thirds have computer research capabilities, and three-fourths have personal computers available to them. Approximately 60 percent have paralegals and 60 percent have office managers. Nearly 50 percent estimate that they spend less than 10 percent of their time on office activities; other than practicing law.

Satisfaction with balance between work and other activities

Barely a majority of lawyers express satisfaction with the balance between their work life and other activities (44.4 percent are satisfied, 11 percent are very satisfied). One-third indicate dissatisfaction and approximately 6 percent are very dissatisfied. In general, such dissatisfaction is higher among those in law firms, and there it is greater among junior and senior associates than partners. The other activities referred to in this question include community service, leisure activities, and time with family and friends. Lack of time and heavy workloads are cited as the major causes of dissatisfaction in this area.

When asked specifically about participation in civic or community service activities, 78.6 percent of lawyers indicate they do participate in such activities, and approximately 76 percent are satisfied with their opportunities to do so. Within firms, partners are most likely to be satisfied in this regard; outside of firms, those in judicial offices are most likely to be satisfied. The 21 percent who are dissatisfied or very dissatisfied with their opportunities overwhelmingly cite lack of time as the cause for their dissatisfaction.

Fifty percent of the respondents indicate they participate in pro bono work but most of this is conducted by those in law firms. Approximately 60 percent express satisfaction with the opportunities for pro bono work. Junior associates, in particular, are likely to be dissatisfied with their opportunities to participate in pro bono work (44 percent are dissatisfied or very dissatisfied). Major causes of dissatisfaction are lack of time and regulations prohibiting pro bono work (particularly for government employees).

Overall, 47.9 percent of lawyers are satisfied with the amount of time they have to spend with their family, and only 6.7 percent are very satisfied. Those in governmental agencies and judicial offices are the most likely to be satisfied. Over 40 percent of lawyers are dissatisfied or very dissatisfied in this area.

Respondents who have minor children were asked to indicate their satisfaction with their ability to manage child care responsibilities. As pointed out previously, one-eighth of these parents have primary responsibility for the care of their children and three-fifths have shared responsibility. Two-thirds of the parents (66.4 percent) are satisfied and 13.8 percent are very satisfied with the management of child care responsibilities. Approximately 17 percent are either dissatisfied or very dissatisfied. As with other areas of life, those who are dissatisfied cite a lack of time as the primary difficulty in this area.

Compared to other sections of the survey, the highest levels of dissatisfaction are found in this area of balance between work and other activities. Those who express dissatisfaction are almost unanimous in indicating that their heavy workload precludes many of these other desirable activities.

Open-ended questions regarding work and clients

Many interesting comments were made in response to open-ended questions. Helping people was cited most frequently as the most satisfying aspect of the job, and the heavy workload was cited most frequently as the least satisfying aspect of the job. When asked about specific types of cases or assignments, litigation cases were most often named as the most satisfying, and family or domestic cases were most often named as the least satisfying cases. (There were some people, of course, for whom domestic cases were the most satisfying and for some whom litigation was least satisfying). The most frequently cited complaints about clients were their unrealistic expectations and demands.

Unlike most of the other bar surveys which indicate a high level of dissatisfaction, the Capstone Poll indicates that overall job satisfaction among Alabama lawyers is very high. What makes Alabama lawyers different from their peers in other states in this regard is difficult to say. Despite the overall high degree of job satisfaction, the poll brings to light several areas that require watching or further study. One area is the heavy workload and high stress level experienced by many lawyers. Over time, heavy workloads and high stress could erode satisfaction. The poll already indicates that the lowest levels of satisfaction now occur where lawyers feel that other activities suffer because of pressing workloads.

Another area of concern involves lawyers who work for governmental and non-profit agencies. The evidence suggests that as a group, these lawyers are the ones who are most likely to be dissatisfied with their jobs. This is particularly disturbing because the degree of dissatisfaction among public sector lawyers as revealed by the survey might be having a negative impact on the conduct of the public's business.

Finally, the fact that 87 percent of the responding women lawyers and 43 percent of the responding male lawyers believe that discrimination is a problem merits further study to determine the exact nature of the problems confronting Alabama's women lawyers. Similarly, because the survey sample was too small to be statistically valid, the areas of concern that are unique to Alabama's minority lawyers need to be ascertained.

Copies of the complete Capstone Poll may be obtained by writing or calling the Alabama State Bar. The cost is $12.50 a copy (includes postage) for bar members and $30.00 for nonmembers. ■

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7 Tuesday
ALABAMA PROBATE
Birmingham, Holiday Inn Redmont
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Credits: 6.5 Cost: $138
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15-17
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JULY

12-15
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18-21
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THE ALABAMA CLASS ACTION

In the first part of this article, printed in the March 1994 ***Alabama Lawyer****, the requirements for class certification were discussed. This second part covers class action issues involving jurisdiction and venue, discovery, precertification motions, abatement, certification hearings, appeals, statutes of limitations, notice, settlements, and attorney's fees.*

By: Alan T. Rogers and Gregory C. Cook

JURISDICTION AND VENUE

In Alabama, circuit courts have jurisdiction over class actions. District courts are not allowed to adjudicate class actions, *see* A.R.C.P. 23, District Court Committee Comments, and a circuit court will aggregate the claims of all class members to reach its jurisdictional amount in controversy. *See Thomas v. Liberty National Life Ins. Co.*, 368 So. 2d 254 (Ala. 1979).

Absent federal question jurisdiction, federal diversity jurisdiction may be invoked with diverse citizenship and the requisite amount in controversy. The United States Supreme Court has held that diversity need *only* be maintained between the *named* plaintiffs[1] (as opposed to *each* of the putative class plaintiffs) and the defendants. *Snyder v. Harris*, 394 U.S. 332, 340 (1969). But, as to the requisite amount in controversy, the amount must be shown as to *each* of the named plaintiffs *and* putative class members (*i.e.*, the court will not aggregate the claims of the class to satisfy the amount in controversy). *Zahn v. International Paper Co.*, 414 U.S. 291 (1973); *but see Garza v. National American Ins. Co.*, 807 F. Supp. 1256, 1258 (M.D. La. 1992) (citing cases and commentary and holding that 28 U.S.C. § 1367 overruled *Zahn*).

Venue

No Alabama Supreme Court case has yet specifically addressed venue for class actions, but presumably Alabama would follow the federal case law and apply

Alabama's normal venue rules to the *named* plaintiffs.[2]

The principle of *forum non conveniens*, however, may be particularly suited to class actions that are filed in a venue convenient only to a representative plaintiff. Ala. Code § 6-3-21.1, allowing change or transfer of venue for convenience or in the interest of justice, should be carefully considered when a defendant or a substantial portion of the alleged class reside outside of the venue where the case is filed. Because of the broad scope of class action litigation, venue issues may be much more compelling in these cases, as compared to cases involving only a small number of parties and witnesses.

In federal court, venue for a class action under Rule 23[3] is determined just as it is in a comparable type of non-class action. The court, however, only considers the residence of the *named* class representatives. See 3B Moore's FEDERAL PRACTICE § 23.96 at p. 560.1 n.11 ("Because venue turns upon the convenience of the parties . . . it would make no sense to consider the residency of the other members of the class").

DISCOVERY

In most cases, discovery must proceed for the trial court to have adequate evidence on which to base its certification decision. The Alabama Supreme Court has stated: "The trial court *has the duty* to determine the class action question whether or not a motion is made by either of the parties ... It *must* determine ...that all prerequisites of 23(a) are met and, in addition, that at least one of the three requirements of 23(b) are satisfied." *Bagley v. City of Mobile*, 352 So. 2d 1115, 1118 (Ala. 1977).

At the certification hearing, the trial court must make a *factual determination* that the named representatives have met their burden of proof as to each of the elements discussed in the March 1994 *Alabama Lawyer* article, including numerosity, commonality, typicality and adequacy of representation. Because a decision to certify a class will bind absent class member's

rights (possibly without notice), courts will often allow discovery to insure that a court's factual determination is correct.

In *First Alabama Bank of Montgomery, N.A. v. Martin*, 381 So. 2d 32 (Ala. 1980), the Montgomery County Circuit Court permitted months of discovery regarding issues posed by the class allegations before conducting a hearing on certification. In *Marshall Durbin & Co. v. Jasper Utilities Board*, 437 So. 2d 1014, 1024 (Ala. 1983), the Walker County Circuit Court conducted a class certification hearing lasting three days and then denied certification. The denial was affirmed on appeal in part because *the evidence* showed that the named plaintiffs had claims arguably different from other members of the purported class.

Commentators have also agreed that fact issues are involved in the certification process and that discovery may be necessary in advance of certification. As stated, for example, by NEWBERG ON CLASS ACTIONS, 3d ed., § 7.08 at p. 7-29:

> Discovery ... of class representatives may be appropriate in order to probe the affidavits submitted in support of the class action, to test the plaintiff's alleged typicality of claims, to challenge specific areas which the defendant reasonably believes involve potential conflicts with class members, or otherwise to question the qualifications of the plaintiff to serve as a representative.

Lyons writes:

> Often, some discovery may be necessary before the issue is ripe for judicial intervention.[4]

Discovery requests related to issues of class certification and notification are governed by Rule 23(d) – allowing the court to make such orders as are "appropriate" for the class action. Because the trial court is given flexibility in conducting the class action in general, the trial court is also giving flexibility in designing the timing and scope of discovery. Many federal courts, in adopting discovery orders, have relied on the *Manual for Complex Litigation, Second, 1985*. For instance, federal courts have entered orders limiting

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discovery to class issues until a certification hearing is held.[5]

The United States Supreme Court has held that trial courts in class actions should not require defendants to bear the costs of performing tasks requested by and benefiting the plaintiff. In *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978), the plaintiff sought to obtain a list of all investment fund shareholders. The defendant showed that retrieval of the information would involve substantial costs. The United States Supreme Court held that the defendant should not have to pay the costs of the retrieval:

> The general rule must be that the representative plaintiff should perform the tasks, for it is he who seeks to maintain the suit as a class action . . . . [A] party must bear the "burden of financing his own suit . . . ." Thus ordinarily there is no warrant for shifting the cost of the representative plaintiff's performance of these tasks to the defendant.

437 U.S. at 356.

Courts have also allowed discovery from absent class members for the purposes of determining the propriety of class certification.[6] For example, in *Transamerican Refining Corp. v. Dravo Corp.*, 139 F.R.D. 619, 622 (S.D. Tex. 1991), the court allowed discovery into issues of reliance by the absent class members, their actual damages and the amounts of damage.

PRE-CERTIFICATION MOTIONS

What if class certification has not been reached, but the defendant files a motion to dismiss or for summary judgment? May the trial judge dismiss the claims of a putative class before certification is considered? The answer is yes, although the *res judicata* (but *not* the *stare decisis*) effect of a dismissal may be eliminated for unnamed, putative class members.

While voluntary dismissals are subject to court approval, *see* Rule 23(e), *involuntary* dismissals are an exception. Involuntary dismissals will presumably not involve collusion or benefits to representative plaintiffs at the expense of the class.

Although Justice Maddox opined in a special concurrence in 1981 that precertification dismissal of a class action is rarely appropriate – *Jones v. Southern United Life Ins.*, 392 So. 2d 822 (Ala. 1981) (concurring opinion) – his opinion now may be the minority view, and there are Alabama cases in which motions addressed to the merits were considered in advance of certification.[7] For instance, in *Helms v. First Alabama Bank of Gadsden, N.A.*, 386 So. 2d 450, 454 (Ala. Civ. App. 1980), the court affirmed a summary judgment dismissing the case where there had been no class certification ruling.

In *Amason v. First State Bank of Lineville*, 369 So. 2d 547, 549 (Ala. 1979), the Court affirmed a summary judgment dismissing a case and noted:

> [N]o cases cited to us by the plaintiff mandate a postponement of the determination by the court for further discovery and an evidentiary hearing *when* the uncontroverted facts show affirmatively that the plaintiff does not share the identity of interest required [for class certification].

Federal cases have also allowed dispositive motions prior to class certification. A defendant may move for summary judgment prior to or at the same time as class certification. See, e.g., *Lorber v. Beebe*, 407 F. Supp. 279, 291 (S.D.N.Y. 1975). In so doing, however, the defendant assumes the risk that a judgment in his favor would not protect him from subsequent suits by other potential class members – the defendant must be content with *stare decisis* protection, rather than the protection of *res judicata*. *See, e.g., Roberts v. American Airlines, Inc.*, 526 F.2d 757, 762-63 (7th Cir. 1975). The *Manual on Complex Litigation*, § 30.11, p. 209, agrees, stating: "Often ... the court not only may, but *should* rule on motions under Rule 12 or 56 without awaiting class certification."

Defendants may raise Rule 12 grounds for dismissal. For example, federal cases have held that the requisites of a class action (*i.e.*, the facts) must be

pled by the plaintiff with sufficient specificity for the complaint to withstand a Rule 12 challenge. *See Batsakis v. Federal Deposit Ins. Corp.*, 670 F. Supp. 749, 757 (W.D. Mich. 1987). The class action complaint must allege more than mere conclusory allegations that follow the language of Rule 23. *See Ahrens v. Bowen*, 646 F. Supp. 1041, 1047 (E.D.N.Y. 1986), *overruled on other grounds*, 852 F.2d 49 (2d Cir. 1988).

Pre-certification motions may also help define the scope of the alleged class. For instance, in *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir. 1975), the court of appeals held that the federal securities laws were inapplicable to sales of a corporation's stock to foreign purchasers outside of the United States – thus eliminating from the putative class all purchasers other than those who were residents or citizens of the United States.

ABATEMENT

In a case of first impression, the Alabama Supreme Court recently granted a writ of mandamus ordering a trial court to stay an action brought in an individual capacity. The plaintiff was a member of a class that had already been certified in a separate action against the same defendant regarding the same allegations. *See Ex parte Liberty National Life Ins. Co.*, _____ So. 2d _____, 1993 W.L. 522564 (Ala.). The Alabama Supreme Court broadly wrote that:

> The law is clear that the circuit court in which jurisdiction over a controversy is first invoked has exclusive jurisdiction over that controversy until the controversy is concluded, subject only to appellate review.
>
> . . . .
>
> The Barbour Circuit Court initially exercised jurisdiction over this matter, and it must be permitted to retain jurisdiction without any interference by any other circuit court.

Id.

CERTIFICATION HEARING

Very early in the evolution of class action litigation in this state, the Alabama Supreme Court made clear that a class certification hearing and a deliberative process involving the prerequisites of Rule 23 are *mandatory* if a class is to be certified. In *Bagley v. City of Mobile*, 352 So. 2d 1115 (Ala. 1977), the trial court noted in its final judgment in favor of the plaintiffs that "this action has been properly maintained as a class action." Reversing, the Alabama Supreme Court noted that the record did *not* reflect a class certification hearing or a separate order of class certification. The Court ruled that "an order of determination is mandatory" and that "the trial court has the duty to determine the class action question whether or not a motion is made by either of the parties." *Id.* at 1118.

A hearing may be requested by the one proposing the class, by the one challenging the class suit or by the court on its own motion. The court may permit discovery on questions related to the character and size of the class before the certification hearing and may allow such notice as discretion permits under Rule 23(d)(2).

Class issues and the evidentiary hearing must revolve around the Rule 23(a) requirements and, if a class is to be certified, a determination of Rule 23(b) class *types* must be made – all covered in the first part of this article in the March 1994 edition of the *Alabama Lawyer*.

If a class *is* to be certified, an evidentiary hearing should, at a minimum, involve presentations by the named plaintiffs and their counsel to support their burdens to meet the Rule 23(a) requirements and an opportunity for the defendant to address those same issues through examination of the plaintiff's evidence and presentation of evidence of its own. Although the discretion afforded the trial court in molding class litigation allows certification to be modified or wholly withdrawn, and even recognizing that Rule 23 makes reference to certification taking place as soon as practicable, there is little logic in moving too quickly toward a certification hearing without allowing discovery addressed to the issue. Otherwise, the hearing will take on more of the characteristics of a preliminary exercise than it will a full consideration by the trial court of the Rule 23 requirements.

One federal commentator has noted:

> In determining whether an action brought as a class action is to be so maintained, the trial court should carefully apply the criteria set forth in Rule 23 for the maintenance of a class action to the facts of the case; and if it fails to do so its determination is subject to reversal by the appellate court when the issue is properly before the latter court.

3B Moore's Federal Practice § 23.50 at p. 411.

APPEALS OF CERTIFICATION ORDERS

If certification is denied, may the plaintiffs appeal that order? If certification is granted, may defendants appeal that order? The Alabama Supreme Court has held that "an order *denying* class certification is an *appealable* 'final' order," noting that denial of certification effectively terminates the litigation as to all members of the class other

than the original, named plaintiff (*i.e.*, the death knell doctrine). *Butler v. Audio/Video Affiliates, Inc.*, 611 So. 2d 330, 331 (Ala. 1992). The Court did not address the related question of the *res judicata* effect of the class ruling on any future attempts by class members to assert class rights in separate proceedings.

The federal courts, however, disagree with the "death knell" doctrine and hold that denials of certification are not final, appealable orders. *See, e.g., Gary Plastic Packaging Corp. v. Merrill, Lynch, Pierce, Fenner & Smith*, 903 F.2d 176, 178 (2d Cir. 1990).

As for orders *granting* class certification, the Alabama Supreme Court has ruled that such orders – being inherently provisional in nature, subject to change as the litigation unfolds – are *not* final judgments for purposes of appeal. In *First Alabama Bank v. Martin*, 381 So. 2d 32 (Ala. 1980), the Court indicated its unwillingness to address interlocutory appeals of orders granting class certification, noting that such orders are inherently provisional; that the trial court is at liberty to alter or amend such a ruling at any time; and that the trial court may even terminate the class status at any time after the initial ruling. The *First Alabama* court noted that it did not want to become an advisory panel on certification orders. Federal courts agree.[8]

Later cases, however, reflect a willingness on the part of the Alabama courts to not only review certification orders before a trial on the merits, but to overturn those orders where Rule 23 requirements were not met. For example, in *Ex parte Blue Cross and Blue Shield of Alabama*, 582 So. 2d 469 (Ala. 1991), the Court granted a petition for writ of mandamus and overturned a trial court's certification of a class, the Court finding that the plaintiffs had not met their burden of proving each of the four elements of Rule 23(a).

If class certification is granted, the issue of certification may be raised in an appeal of the entire case. *See, e.g., Harbor Insurance Co. v. Blackwelder*, 554 So. 2d 329 (Ala. 1989); *Bagley v. City of Mobile*, 352 So. 2d 1115 (Ala. 1977).

Because of the broad range of issues included in class certification orders, and because of the provisional nature of these orders, trial courts in Alabama are given a certain amount of latitude or "discretion" in granting or denying class certifications. An oft stated rule is that such rulings will only be reversed for an abuse of discretion. *See, e.g., Butler v. Audio/Video Affiliates, Inc.*, 611 So. 2d 330, 331 (Ala. 1992). Such reversals for abuse of discretion have, however, occurred in some cases where the Alabama Supreme Court reviewed Rule 23 determinations by trial courts.[9]

If the court dismisses the case on the merits – whether or not Rule 23(c)(1) certification took place – the judgment is final and may be appealed. *Nichols v. Mobile Board of Realtors, Inc.*, 675 F.2d 671, 673 (5th Cir. 1982). A dismissal pursuant to settlement approved by the court pursuant to Rule 23(e) is also appealable as a final adjudication. *Gendron v. Shastina Properties, Inc.*, 578 F.2d 1313, 1315 (9th Cir. 1978).

STATUTE OF LIMITATIONS

What happens to the statute of limitations for claims of unnamed, putative class members when certification is denied? That is, if a class suit is filed, but certification is later denied *after* the statute of limitations has run on the class claims, will individual members of the putative class then be barred from bringing their own claims?

Alabama Law

The Alabama Supreme Court has addressed this issue several times, including:

First Baptist Church of Citronelle v. Citronelle-Mobile Gathering, Inc., 409 So. 2d 727, 729 (Ala. 1981)

Class certification was denied and the statute of limitations then expired. A second suit was filed and the defendant raised the statute of limitations. Justice Faulkner, writing for the majority, held that the statute of limitations is tolled from the date of commencement of the action until the date of denial of class certification. Finding that this tolling concept "enhances the policies underlying class action," the majority opinion also stated that the ruling helped avoid multiplicity of suits. In dis-

sent, Justice Torbert observed that the majority opinion would only serve to multiply suits and stale claims.

White v. Sims, 470 So. 2d 1191, 1193 (Ala. 1985)

Again speaking for the majority, Justice Faulkner observed that the statute of limitations is tolled as to all asserted members of a putative class until class certification is denied, regardless of notice to those individual members. Furthermore, "[w]hen a class action is instituted against a class of unnamed defendants, the statute is tolled as to all putative members of the defendant class."

Corbitt v. Mangum, 523 So. 2d 348 (Ala. 1988)

Justice Shores' opinion reiterated the rule of *First Baptist* and *White* and added a twist – although the statute of limitations resumes running when certification is denied, it will be tolled again if an amendment is filed seeking to certify a slightly different class – even though the motion to amend was pending without ruling for one year.

Ex parte Hayes, 579 So. 2d 1343 (Ala. 1991)

Justice Maddox's majority opinion observed that, even where the single, named class representative turned out to have been dead before the suit was even filed, and even though class certification had never been reached, the statute of limitations was tolled by the mere assertion of a class suit, thus allowing – three years later and after the statute of limitations had run – an intervention of a new class representative to move the case toward a certification hearing.

These decisions can be illustrated in this hypothetical: John Doe, purporting to represent a class of customers of ABC, Inc., sues ABC in a class action. The statute of limitations runs the day after the suit is filed. Members of the purported class are never given notice of the suit, and certification is denied one year after suit is filed. The rest of the putative class would then have another day after class certification is denied to file their own claims, even though the statute of limitations had actually run on their claims a year earlier – all because of the fortuity of John Doe having made a class allegation in his own suit. In so doing, John Doe extended by one year the statute of limitations on the claims of the class even though they were not aware of his suit. The clock simply stopped ticking when John Doe's class suit was filed and started ticking again when certification was denied.

The Alabama decisions do not offer any guidance on when the tolling period ceases and the statute commences running once again, under other circumstances. Clearly the conclusion of the litigation would restart the statute of limitations, though *res judicata* issues would be presented in such a situation.

The general proposition in Alabama that it is only the pendency of an action in a court which has jurisdiction that tolls the statute of limitations is presumably applicable to class actions. *See Freer v. Potter*, 413 So. 2d 1079 (Ala. 1982); *Terminal Ry. v. Mason*, 620 So. 2d 637 (Ala. 1993).

Federal Cases

The United States Supreme Court has held that, where class certification is denied, the statute of limitations as to putative class members is tolled from the time of filing suit until the denial of certification. *See American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 551-53 (1974) (tolled where class failed to satisfy numerosity); *Crown Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). This rule has been held to apply even where a (b)(3) class is sought and, after notice, certain members opt out. The rules applies to them as well. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). Note, however, that at least one federal court has declined to follow this tolling rule where the original class plaintiffs had failed to satisfy even the typicality or adequacy of representation requirements of Rule 23 and therefore could not serve as class representatives. *See In re Elscint Ltd. Secur. Litigation*, 674 F. Supp. 374 (D. Mass. 1987). Finally, although the limitations period is deemed tolled during the pendency of a class action for purposes of later intervention or individual suit by a class member, a person seeking to bring a later *class* action may *not* rely upon the tolling effect of an earlier class suit. *See, e.g., Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985).

NOTICE

Rule 23 only *requires* notice for Rule 23(b)(3) type class actions and for settlements, regardless of class type (see Rule 23(e). Rule 23 states:

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (a) the court will exclude the member from the class if the member so requests by a specific date; (b) the judgment, whether favorable or not, will include all members who do not request exclusion; and (c) any member who does not request exclusion may, if he desires, enter an appearance through counsel.

Rule 23(c)(2).

While notice is not required for (b)(1) and (b)(2) type class actions, Rule 23 allows the trial judge to order such notice when, in the judge's discretion,

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it is deemed appropriate. Rule 23(d)(2) states:

> In the conduct of actions to which this rule applies, the court may make appropriate orders . . . requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action.

The failure to provide proper notice, when required, can cause the class action court not to have jurisdiction over those members who are not given notice, and thus may be a basis for collateral attack upon the judgment in the class action, as well as a basis for appeal. *See, e.g., Taylor v. Liberty National Life Ins. Co.*, 462 So. 2d 907 (Ala. 1984) (allowing a collateral attack on a class action in which a (b)(2) class was certified).

In the *Taylor* case, discussing due process requirements for the exercise of jurisdiction over absent class members, the Alabama Supreme Court has written:

> When only injunctive and declaratory relief are sought in a class action, "the due process interest of absent members will usually be safeguarded by adequate representation alone." When individual monetary claims are at stake, however, "the balance swings in favor of some sort of notice."[10]

The court went on to state:

> If analyzed in terms of what the class members have at stake in the different types of class actions, the reason for the different notice requirements for the different type classes is obvious – due process itself requires different notice based on what rights and obligations are at stake in each of the three different class types.[11]

In determining whether notice should be required in Rule 23(b)(1) and Rule 23(b)(2) class actions, courts have generally relied upon the degree of cohesiveness of the class and the degree to which property interests of absent class members are being adjudicated. These two factors bear directly upon whether notice is *constitutionally* required for due process and whether or not the class has been properly labeled as a 23(b)(1) or 23(b)(2) class. Rule 23(b)(1) and Rule 23(b)(2) classes tend to be more cohesive and thus may not have internal, conflicting interests.[12] For instance, in 23(b)(2) classes, it is more likely that judgments obtained by one member of the class will equally affect other members of the class, and it is less likely that there will be special defenses or issues relating to individuals.[13] Because of this cohesion, it is more likely that the named representatives will adequately protect the absent members and everyone will be given their functional equivalent of a day in court.

The more likely that damages on an individually determined basis will be available to individual class members, the more likely that the requirements of Rules 23(b)(1) and 23(b)(2) will not be met and individual notice under Rule 23(b)(3) and Rule 23(c)(2) will be required. One court has said that even certain equitable remedies, if sufficiently individualized, could conceivably require notice to individual class members:

> It is conceivable that certain equitable remedies, such as restitution, are sufficiently individual rather than class in nature as to present the same likelihood of divergent interests and thus the same need for heightened notice, as requests for individual, legal relief.[14]

Where a case predominantly seeks money damages on an individualized basis, individual notice to the class members may be required in order to satisfy the due process nexus necessary for obtaining jurisdiction. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). Currently pending before the United States Supreme Court is *Ticor Title Ins. Co. v. Brown*, D.K. No. 92-1988, raising various issues as to notice and other Rule 23(b)(3) protections as to a class action settled under Rule 23(b)(2) without individual notice.

Costs

Generally, the plaintiff is required to pay the costs of notice. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

Type of Notice

The United States Supreme Court has held that, when notice is required, iden-

STATE OF ALABAMA

PROCLAMATION

BY THE GOVERNOR

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

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

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

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

WHEREAS, this year marks the 35th annual nationwide observance of Law Day, and the Congress of the United States and the President by official proclamation have set aside May 1 as a special day for recognition of the place of law in American life:

NOW, THEREFORE, I, Jim Folsom, Governor of the State of Alabama, do hereby proclaim May 1, 1994, as

LAW DAY U.S.A.

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

GIVEN UNDER MY HAND, and the Great Seal of the Governor's Office at the State Capitol in the City of Montgomery on this the 25th day of February, 1994.

JIM FOLSOM

tifiable class members *should* be given individual notice, despite the cost that may be involved. *See Eisen*, 417 U.S. at 176 ("there is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs"). Rule 23(c)(2) requires that all class members who can be identified through reasonable effort be contacted. The normal procedure is for the court to require the representative plaintiffs to submit a proposed list of persons to whom notice should be sent and then allow the defendant to object or offer a counter proposal.[15]

Typically, such notice is given via mail, although other methods have been used.[16] Individual notice may also be combined with other types of notice to assure that class members who cannot be identified will be provided the best notice practicable under the circumstances. Typically, such notice is done through publication, notification of vendors, etc. If diligent efforts are used to provide notice to individual class members, the fact that individuals may not receive actual notice does not cause the class to lose its effect. *See J. C. Bradford & Co. v. Calhoun*, 612 So. 2d 396, 397-98 (Ala. 1992) ("Failure to receive notice of a class action does not exempt a class member from abiding by limitations set forth in a settlement thereof.").

SETTLEMENTS

Whether or not the class has been certified, there can be no settlement without court approval and notice. Rule 23(e) provides:

> (e) *Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

The purpose of Rule 23(e) is to protect putative class members from unjust settlements or *voluntary* dismissals made because the named class representatives lost interest or fortitude or were able to settle the case to their individual benefit, but not necessarily to the benefit of the class.[17] Class actions are specifically exempted from Rule 41's provision for voluntary dismissals without court approval.

If a settlement is approved by the court and notice provided, the settlement will be *res judicata* to all class members (except for those that may have opted out via Rule 23(b)(3)). *See J. C. Bradford & Co. v. Calhoun*, 612 So. 2d 396, 397-98 (Ala. 1992).

Pre-certification Settlement

In *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 42 F.R.D. 324, 326-28 (E.D. Pa. 1967), three of the 13 defendants in an antitrust class action settled before class certification. The court held that there must be a presumption that there was a proper class action, therefore triggering the Rule 23(e) requirements. The court further noted that its approval of the settlement pursuant to Rule 23(e) could be combined with the consideration of class certification issues pursuant to Rule 23(c)(1). In the alternative, the court stated that it could hold the approval of the settlement in abeyance pending a determination of class certification. The *Philadelphia Electric* procedures have been adopted by other federal courts.[18]

Notice

Court approval of a settlement is not allowed *until* notice has been given to the class members (*i.e.*, the hearing on the fairness of the settlement cannot occur until class members have received notice). However, notice of settlement is *not required* where (1) class certification is denied, (2) the class is dismissed on the merits, or (3) where the case is dismissed for lack of jurisdiction. Remember that, for purposes of case dismissal, notice is required for voluntary dismissals. Note Rule 23's language – notice is required "in such manner as the court directs." This is a discretionary function of the court, there being no single method of notice required under the Rule.

Federal courts have generally preferred written notice sent by mail to each class member, but examples of notices of proposed settlement include:

1. Flyers posted at a correction center giving notice of a prisoners' class action settlement were sufficient even though individual notice may have been practicable. *Van Horn v. Trickey*, 840 F.2d 604, 606 (8th Cir. 1988).
2. Publication of a proposed settlement was acceptable in *Handschu v. Special Services Division*, 787 F.2d 828, 833 (2d Cir. 1986).
3. Individual mail notice and the appointment of a guardian ad litem for any unknown, unborn, incompetent or minor members of a class and notice sent to the state attorney general for any members of the class who were charitable beneficiaries complied with due process. *Meyer v. Citizens & Southern Nat'l Bank*, 677 F. Supp. 1196, 1208-09 (M.D. Ga. 1988).

In at least one case, the Alabama Supreme Court was willing to permit collateral attack on a class action settlement where notice was not properly given to the parties seeking to attack the settlement, presumably on the basis that the failure to give notice was jurisdictional with respect to the class members in question. *See Taylor v. Liberty National Life Ins. Co.*, 462 So. 2d 907 (Ala. 1984).

Trial Court's Review of Settlement

The trial court's function is to assess the settlement under Rule 23(e). Generally, the trial court will hold a hearing on the settlement. One Alabama case has recently stated that the trial judge should give "meaningful evaluation" to a proposed settlement and provide parties opposed to the settlement a "meaningful opportunity to be heard at the fairness hearing." *Ex parte Liberty National Life Ins. Co.*, _____ So. 2d _____, 1993 W.L. 522564 (Ala.). The nature of the hearing is determined by the circumstances of each case – for example, most are evidentiary in nature, some are not.[19] The trial court must determine if the settlement is fair and reasonable. *See, e.g., Allen v. Alabama State Board of Education*, 612 F. Supp. 1046, 1053-55 (M.D. Ala. 1985), *vacated on other grounds*, 636 F. Supp. 64 (M.D. Ala. 1986). One federal court has noted that "such a determination is committed to the sound discretion of

the trial judge. Great weight is accorded his views because he is exposed to the litigants, and their strategies, positions and proofs." *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 34 (3d Cir. 1971). The trial court should support its conclusions in written form to aid appellate review.

The United States Supreme Court has held that the only options for the trial judge in reviewing a proposed settlement are to accept or reject the entire proposal. To reject or accept portions of the proposed settlement, or to actively restructure the proposal, are inappropriate. *Evans v. Jeff D.*, 475 U.S. 717, 726-27 (1986).

In approving a settlement, the court must act as a guardian of the rights of the absentee class members. The burden is on the proponents of the settlement to persuade the court that it is fair, adequate and reasonable. *See, e.g., Holmes v. Continental Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983). Although the adequacy of the settlement is a discretionary decision based upon the facts of each case, among the most important factors for the court to consider are:

1. Strength of the plaintiffs' case versus the amount offered in settlement.
2. The presence of any collusion in reaching the settlement.
3. The reaction of class members to the settlement – after notice.
4. Opinions of counsel.
5. The stage of the proceedings and the amount of discovery completed.
6. The plan for distribution of the proceeds.
7. Whether settlement would waive other viable claims of the class members.
8. Whether proper notice has been made.[20]

Courts have sometimes afforded parties opposed to class action settlements the opportunity to take limited discovery regarding settlement; however, the courts must carefully balance this need against the danger that wide-open discovery will threaten the compromise and thus injure the class members (*e.g.*, discovery can be used as a threat to raise costs).[21] Recently, the Alabama Supreme Court allowed limited discovery directed toward the appropriateness of settlement. *See Ex parte Liberty National Life Ins. Co.*, _____ So. 2d _____, 1993 W.L. 522564 (Ala.) (granting a writ of mandamus to intervenors who sought to compel the trial judge to rule on their discovery motions before the fairness hearing was held on the class settlement).

A trial court's approval of a settlement, put in the form of a final order, is appealable. A member of the class or putative class who appears after notice and objects to the settlement has a right to appeal from the final judgment *approving* the settlement. *See Armstrong v. Board of School Directors*, 616 F.2d 305 (7th Cir. 1980). However, an appellate court will only intervene upon a clear showing that the trial court has abused its discretion. *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 207 (5th Cir. 1981). If the settlement is *not approved*, a writ of mandamus may be sought, but it is rarely issued by an appellate court since the trial court's review of a class settlement is a discretionary function. *See In re Traffic Executive Ass'n – Eastern R.R.*, 627 F.2d 631 (2d Cir. 1980).

ATTORNEY'S FEES

Alabama courts have exercised close supervision of attorney's fees to avoid conflicts of interest developing between the class and its attorneys. *See, e.g., State v. Brown*, 577 So. 2d 1256 (Ala. 1991) (approving an attorney's fee where the circuit court judge did an exhaustive analysis of the proper factors in awarding an attorney's fees); *Reynolds v. First Alabama Bank of Montgomery, N.A.*, 471 So. 2d 1238 (Ala. 1985) (*reducing* attorney's fee in class action).

The Rule 23(e) requirement of court approval for any class action settlement extends to attorney's fees arrangements. This approval by the court may be similar in form to a remittitur.[22] Court approval is necessary for *any* award of attorney's fees, whether by way of settlement or resolution of the case or final judgment. Federal courts have noted a need for close supervision of fee awards in class actions, particularly where the fees will come out of a common fund and diminish class members' recoveries. For instance, in *In re Fine Paper Antitrust Litigation*, the district court noted, in response to an attorney's fee request that amounted to over 40 percent of the settlement fund that:

> These fee petitions are grossly excessive on their face and, regrettably, lend substance to the widely held and mostly unfavorable impressions of the plaintiffs' class action bar, sometimes referred to as the class action industry.

98 F.R.D. 48, 68 (E.D. Pa. 1983).

The typical approaches to fees include the common fund approach of *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939) and the common benefit rule. *See, e.g., Mills v. Electric Auto-lite Co.*, 396 U.S. 375, 392-97 (1970). Courts have applied both a percentage method and a lodestar method (a multiplier based upon the hours worked) to determine attorney's fees, often using both to ensure that no attorney's fee is out of line.[23]

CONCLUSION

Class actions are complex proceedings that should be approached cautiously. Certification of a class involves much more than a belief that there are numerous, potential members of a class. If a class is to be certified, the due process rights of absent class members, who may not receive notice, are dependent upon the adequacy of the representatives and the diligence of the trial judge. The identification of class members and providing notice can be extraordinarily complex and time consuming. The manageability and resolution of class actions can be difficult because of individual issues of reliance, damages and counterclaims. The court must be constantly vigilant against potential conflicts of interest within the class and between the class and its attorneys. ■

Endnotes

1. This article, for simplicity, refers to plaintiff class actions rather than defendant class actions. For purposes of the discussions in this article, there are no distinctions

between these type of classes. Presumably, however, both Alabama and federal courts would be more likely to scrutinize the due process concerns of binding absent defendants as opposed to binding absent plaintiffs. Such a consideration is extremely important in deciding what type of notice to provide. *See infra.*

2. *Compare Ex parte Blue Cross and Blue Shield of Alabama*, 582 So. 2d 469 (Ala. 1991) (applying general venue provisions in a class action context); *compare, e.g.,* Ala. Code §§ 6-3-2, 6-3-3, 6-3-4, 6-3-5, 6-3-6, 6-3-7.
3. This article uses "Rule" to refer to both the Ala. R. Civ. P. and the Fed. R. Civ. P. Ala. R. Civ. P. 23 and Fed. R. Civ. P. 23 are essentially identical and the Alabama courts have stated that federal precedent is persuasive authority for Alabama procedure. *First Baptist Church of Citronelle v. Citronelle-Mobile Gathering, Inc.*, 409 So. 2d 727 (Ala. 1981).
4. C. Lyons, *Alabama Practice: Rules of Civil Procedure*, Annotated, § 23.10 at p. 361 (2nd ed. 1986).
5. *See, e.g., Plummer v. Chicago Journeyman Plumbers' Local Union No. 130*, 77 F.R.D. 399, 402 (N.D. Ill. 1977); *Glass v. Philadelphia Elec. Co.*, 64 F.R.D. 559, 561 (E.D. Pa. 1974). *See also* Newberg on Class Actions, 3d Ed., § 7.08 at p. 7-28.
6. See 7B Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d*, § 1796.1 p. 334 [hereinafter Wright, Miller & Kane].
7. *See, e.g., Jackson v. CIT*, 630 So. 2d 368 (Ala. 1993) (affirming summary judgment and therefore not reaching class certification); *Sanders v. Colonial Bank of Alabama*, 551 So. 2d 1045 n.1 (Ala. 1989) (finding class certification moot because summary judgment was proper).
8. *See* 3B Moore's Federal Practice ¶23.97 p. 23-565.
9. *See, e.g., Ex parte Blue Cross and Blue Shield*, 582 So. 2d 469 (Ala. 1991); *Bagley v. City of Mobile*, 352 So. 2d 1115 (Ala. 1977).
10. *Taylor v. Liberty National Life Ins. Co.*, 462 So. 2d 907, 911 (Ala. 1984), *quoting, Note, Class Actions: Certification and Notice Requirements*, 68 Geo. L.J. 1009, 1028 n.161 (1980).
11. *Id.* at 911.
12. *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 256 (3rd Cir. 1975); *Battle v. Liberty National Life Ins. Co.*, 770 F. Supp. 1499, 1515 (N.D. Ala. 1991); Wright, Miller & Kane § 1786.
13. *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1155 (11th Cir. 1983); *Battle v. Liberty National Life Ins. Co.*, 770 F. Supp. at 1517 & n.50 (citing cases and commentaries).
14. *Battle v. Liberty National Life Ins. Co.*, 770 F. Supp. at 1517, n.50.
15. *See generally* Wright, Miller & Kane § 1786 p. 200-01.
16. *See* Manual on Complex Litigant, 2nd, § 30.211 ("notice by mail should generally be employed and, indeed, may be essential"). *See, e.g., In re Asbestos School Litigation*, 104 F.R.D. 422, 439 (E.D. Pa. 1984).
17. *See, e.g.*, 3B Moore's Federal Practice § 23.80 p. 23-478; Wright, Miller & Kane § 1797 p. 340.
18. *See* Manual on Complex Litigation, 2nd, §30.45; Wright, Miller & Kane § 1797.
19. *See, e.g., Calhoun v. Cook*, 487 F.2d 680 (5th Cir. 1973) (reversing a settlement where the trial court did not hold an evidentiary hearing); *see generally* Wright, Miller & Kane § 1797 at 354-55 (listing cases with and without evidentiary hearings).
20. 3B Moore's Federal Practice § 23.80[4] p. 489-90; Wright, Miller & Kane § 1797.1 (listing example cases).
21. *See* Wright, Miller & Kane, § 1796.1 (pocket part); *In re Amsted Indus., Inc. Litigation*, 521 A.2d 1104 (Del. Ch. Ct. 1986) (denying discovery).
22. 3B Moore's Federal Practice § 23.91 at p. 533-34.
23. *See Mashburn v. National Healthcare, Inc.*, 684 F. Supp. 679 (M.D. Ala. 1988) (discussing the merits and problems of both methods, in depth).

DISCIPLINARY REPORT

Transfer to Disability Inactive Status

•Birmingham attorney **D. Michael Sawyer** has voluntarily transferred to disability inactive status pursuant to Rule 27, Rules of Disciplinary Procedure (Interim), February 2, 1994.

Disbarment

•By order of the Supreme Court of Alabama, attorney **Edward Lewis Hohn** was disbarred from the practice of law in the State of Alabama effective January 24, 1994. Hohn's disbarment was based upon reciprocal discipline administered by the Alabama State Bar. The reciprocal discipline was based upon Hohn's disbarment by the State Bar of Arizona. Hohn consented to disbarment in Arizona based, in part, on his conviction in federal court on multiple counts of mail fraud, false statements and false claims in violation of various provisions of Title 18, United States Code. [Rule 25(a) Pet. No. 93-01]

Suspensions

•Attorney **Kevin Michael Manning** has been suspended from the practice of law in the State of Alabama for a period of three years effective January 5, 1994. In addition to being licensed to practice law in the State of Alabama, Manning was also licensed to practice law in the State of Texas. A default judgment was taken against Manning in a disciplinary proceeding brought by the Texas State Bar. On January 29, 1993, an order was entered by the District Court of Travis County, Texas suspending Manning for a period of three years from the practice of law in the State of Texas. Reciprocal discipline was imposed on Manning by the Alabama State Bar pursuant to Rule 25(a) of the Rules of Disciplinary Procedure (Interim) of the Alabama State Bar suspending Manning for a period of three years. [Rule 25(a) Pet. #92-002]

•On October 27, 1993, **Gregory Dwayne Jones** was temporarily suspended from the practice of law by the Disciplinary Commission pursuant to Rule 20 of the Rules of Disciplinary Procedure. On September 20, 1993, Jones was convicted of extortion in the United States District Court for the Northern District of Alabama, Southern Division. The respondent attorney has failed or refused to communicate in any way concerning the disciplinary matters which are currently pending against him. [Rule 20(a) Pet. #93-006]

Public Reprimands

•On January 28, 1994, Eufaula attorney **Christie G. Pappas** was publicly reprimanded without general publication by the Alabama State Bar. A collections claim was forwarded to Pappas by a collections group. The collections group specifically directed that Pappas not file suit or incur additional expenses in the matter without express authorization from the collections group. Contrary to these instructions, Pappas initiated suit on the claim. In the interim, the collection group's clients had received direct payment from the debtor in question. Pappas even went so far as to issue a garnishment against the debtor in question. The debtor then contacted the creditor complaining that his bank account had been frozen. Upon being informed of these facts by his client, Pappas stated that he was not going to release the garnishment until his fee had been paid. The client demanded that Pappas release the garnishment which he refused to do.

Pappas was found to have violated three separate provisions of the Alabama Rules of Professional Conduct, specifically, Rule 1.2 (a), in that he failed to abide by his client's decision concerning the objectives of his representation, Rule 1.4 (a), in that he failed to keep his client reasonably informed about the status of a matter, and Rule 8.4 (g), in that his actions constituted conduct that adversely reflects on his fitness to practice law. [ASB No. 93-261]

•**Jack Wilmar Smith**, a Dothan lawyer, was publicly reprimanded without general publication and ordered to make restitution to Client A in the amount of $1,000 and to Client B in the amount of $253. On June 19, 1990, Smith was retained by Client A to defend the client in a suit to collect an indebtedness for goods sold and delivered to Client A. Client A had filed an answer *pro se* in the litigation denying the indebtedness prior to retaining Smith. On June 20, 1990, Client A paid Smith $1,000 for representing him in the litigation. He also informed Smith that the case would be tried on June 27, 1990. On that date, Smith failed to attend the trial and a judgment was taken against Client A in the amount of $16,767. Smith filed a motion to vacate on September 26, 1990, which was denied on October 25, 1990, and a Rule 60(b) motion on November 20, 1990. This motion was denied after a hearing on June 16, 1991.

In another matter, in late 1990, Smith was retained by Client B for a fee of $350 to represent her in a custody matter. On December 5, 1990, Smith filed on behalf of Client B an answer and cross-complaint requesting temporary visitation rights and permanent rights upon final hearing. The petition and cross-complaint were set for hearing in Geneva County on February 1, 1991. Smith did not appear at this hearing, thus necessitating its being reset for April 30, 1991. On that date, neither Smith nor Client B appeared, thus necessitating the case to once again be reset on June 4, 1991. On that date, neither Smith nor Client B appeared. Sometime thereafter, Smith worked out a settlement agreement whereby Client B's ex-husband received permanent custody of their son. The ex-husband's lawyer drafted an order in accordance with the agreement and submitted it to Smith by letter dated June 24, 1991. Smith did not respond to this letter and a final order was entered July 9, 1991. Client B states that she did not authorize Smith to enter into an agreement whereby she would lose custody of her

(Continued on page 173)

Secluded courtyards . . . fresh beignets . . . ceiling fans . . . bluesy chords . . . "N'Awlins" is beckoning.

The American Bar Association's Annual Meeting is coming south to the Big Easy, Aug. 4-10. The Annual Meeting is the *largest* ABA event of the year, with a "gumbo ya-ya" of 2,300 meetings, CLE sessions and special events packed into one week. Several hundred nationally and internationally prominent speakers will be featured, and lawyers from around the world will be attending. No matter what field of law you practice, the ABA Annual Meeting has it covered, with more than 500 substantive programs accredited for mandatory CLE.* And you can carry over another year's worth of credit hours into your next MCLE cycle* – *all for one low registration fee.* While you're there, visit ABA EXPO, one of the world's largest exhibitions of products and services for lawyers. Best of all, the ABA Annual Meeting will take place almost in your backyard.

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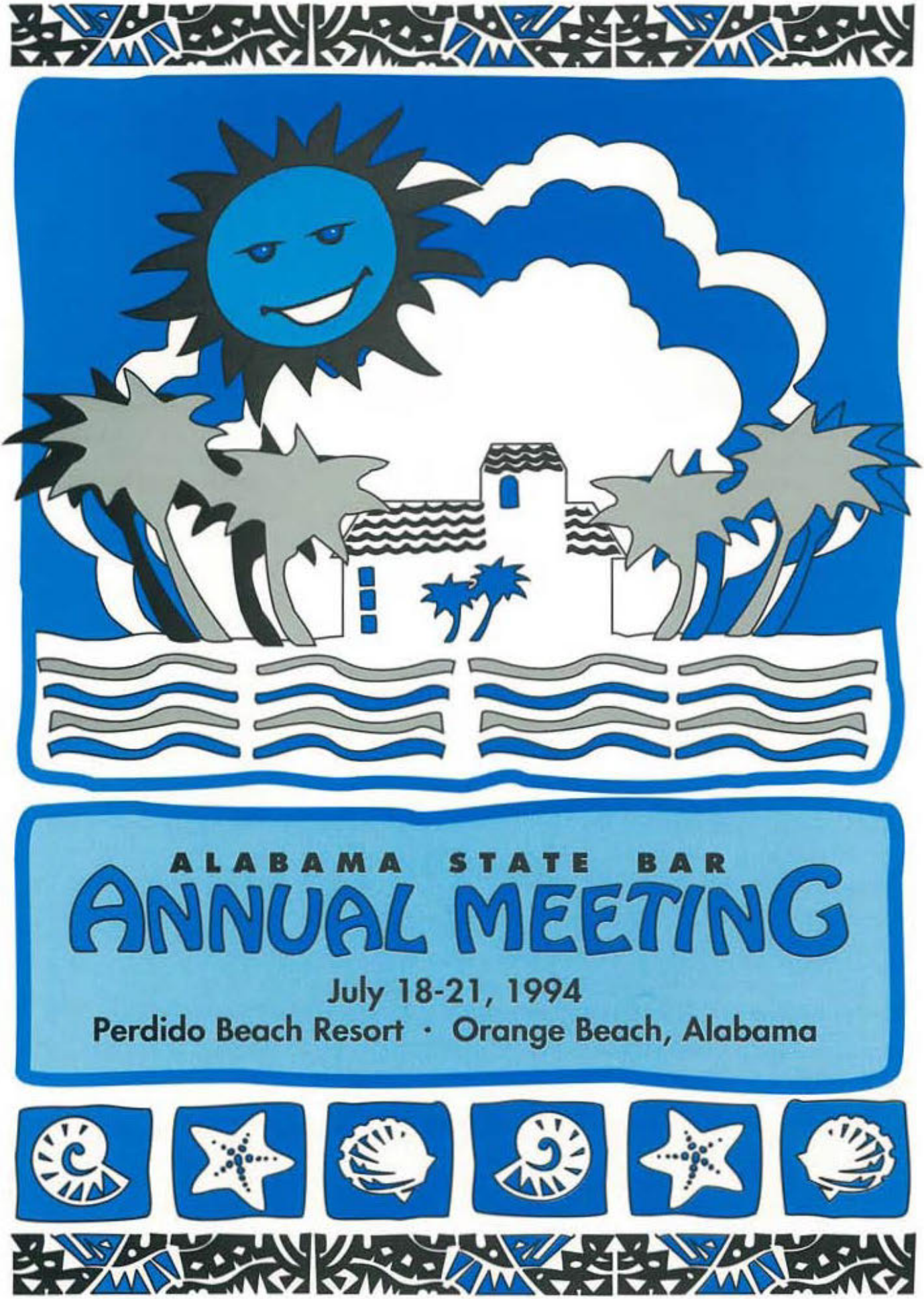
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son. In Smith's response, he stated he did not attend the hearings because it was anticipated that Client B's son would testify that he wanted to remain with his father.

The Disciplinary Commission, on November 5, 1993, accepted Smith's conditional guilty plea to formal charges filed as a result of his representation of clients A and B. The Commission also accepted Smith's conditional guilty plea for failing to purchase a license to practice law from October 1, 1991 to August 9, 1992 and from October 1, 1992 until April 8, 1993. As a result of the conditional guilty plea, the Commission found that Smith failed to seek the lawful objectives of his client, failed to carry out a contract of employment for legal services, and damaged his client during representation in violation of Disciplinary Rules 7-101(A)(1) (2) and (3) of the Code of Professional Responsibility. The Commission also found that Smith neglected a legal matter entrusted to him and that his conduct adversely reflected on his fitness to practice law in violation of Disciplinary Rules 6-101(A) and 1-102(A) (6).

With respect to Client B, the Commission found that Smith willfully neglected a legal matter entrusted to him in violation of Rule 1.3, failed to keep his client reasonably informed in violation of Rule 1.4, and failed to provide competent representation in violation of Rule 1.1. The Commission also found that Smith failed to respond to a demand for information by a disciplinary authority and that his conduct adversely reflected on his fitness to practice law in violation of Rules 8.1 and 8.4. The Commission also found that Smith violated Rule 5.5 in that he engaged in the practice of law without a license. [ASB Nos. 90-693, 92-119(A) and 93-116]

•On January 28, 1994, a public reprimand with general publication was issued to Birmingham lawyer **Dennis Michael Barrett.** Barrett was retained by a client concerning claims the client had arising out of an automobile accident. Barrett subsequently represented to the client that he had obtained a settlement on behalf of the client and that the settlement proceeds would be forthcoming in a short period of time. Subsequently, Barrett informed the client that there were some problems in obtaining the settlement proceeds due to the fact that the insurance company had been placed in receivership.

The client experienced substantial difficulty in communicating with Barrett about the status of the case. The client eventually contacted the insurance commissioner's office in the state where the insurance company was located and was informed that Barrett had not even filed a claim on the client's behalf contrary to Barrett's prior representations. The client was also informed that his claim was now barred as the claims period against the insurance company had passed.

The client contacted Barrett to discuss the matter without disclosing the information the client had learned from the insurance commissioner's office. Barrett again misrepresented to the client that the settlement proceeds would be forthcoming. The client subsequently filed a complaint against Barrett. The investigation of the complaint disclosed that Barrett had prior knowledge of the insurance company being place in receivership, and, in fact, had filed claims on behalf of another client against this same insurance company prior to the expiration of the claims barred deadline.

Barrett tendered a guilty plea to formal charges admitting that he had willfully neglected a legal matter entrusted to him; failed to seek the lawful objectives of his client; prejudiced or damaged his client during the course of the professional relationship; failed to keep his client reasonably informed about the status of his case; failed to promptly notify his client about the receipt of funds; knowingly violated or attempted to violate the Rules of Professional Conduct; engaged in conduct contrary to a disciplinary rule; engaged in conduct involving dishonesty, fraud, deceit, misrepresentation or willful misconduct; and engaged in conduct prejudicial to the administration of justice, all of which adversely reflected on his fitness to practice law. Due to the fact that Barrett's misconduct occurred during the transition from the Disciplinary Rules to the Rules of Professional Conduct, the guilty plea and public reprimand were administered for alternative violations of both the Code of Professional Responsibility and the Alabama Rules of Professional Conduct, specifically as follows: Alabama Rule of Professional Conduct: Rules 1.1, 1.3, 1.4(a), 8.4 (a), 8.4(g), 8.4(c), & 8.4 (d).

Alabama Code of Professional Responsibility: Disciplinary Rules 6-101 (A), 7-101 (A) (1), 7-101 (A) (3), 9-102 (B) (1), (1)-102(A) (1), 7-102(A) (8), 1-106(A) (6), 1-102(A) (4), & 1-102(A) (5). [ASB No. 91-911] ■

About Members, Among Firms

ABOUT MEMBERS

Kathy Perry Brasfield announces her appointment as deputy attorney general, Department of Human Resources. Her office is located at the Gordon Persons Building, Room 2122, 50 Ripley Street, Montgomery, Alabama 36130. Phone (205) 242-9330.

John M. Green, previously *of counsel* to Blackard, Pitts & Murphy in Brentwood, Tennessee, has become a sole practitioner. Green is a 1987 admittee to the Alabama State Bar. His office is located at 511 Enon Springs East, Six Hamilton Place, Smyrna, Tennessee 37167. The mailing address is P.O. Box 467, Smyrna 37167. Phone (615) 459-6189.

Julie A. Palmer announces the opening of her office at 2162 Highway 31, South, Pelham, Alabama 35124. Phone (205) 987-2988.

Charles E. King announces his appointment as assistant trustee and general counsel for the office of the Chapter 13 Standing Trustee for the Northern District of Alabama, Southern Division of the U.S. Bankruptcy Court. His office is located at 505 N. 20th Street, Financial Center, Birmingham, Alabama 35203. The mailing address is P.O. Box 371008, Birmingham 35237-1008. Phone (205) 323-4631.

Betsy Martin Harrison announces the opening of her office at Highway 195, Double Springs, Alabama 35553. The mailing address is P.O. Box 339, Double Springs. Phone (205) 489-8118.

J. Tim Coyle, formerly of Burr & Forman, announces the opening of his office at 1305 4th Avenue, South, Birmingham, Alabama 35233. Phone (205) 458-5007.

AMONG FIRMS

David Vance Lucas announces his appointment as staff attorney for Intergraph Corporation. The address is Mail Stop HQ034, Huntsville, Alabama 35894-0001. Phone (205) 730-2032.

Lange, Simpson, Robinson & Somerville announces that **John B. Tally, Jr.** has become associated with the firm. Offices are located at 417 20th Street, North, Suite 1700, Birmingham, Alabama 35203-3272. Phone (205) 250-5000.

Gorham, Stewart, Kendrick, Bryant & Battle announces that **Leslie Klasing** has become associated with the firm. Klasing is a former clerk to Judge Joseph Phelps in the Circuit Court of Alabama, Montgomery County.

Tanner & Guin announces that **Bert M. Guy** has become a shareholder. Offices are located at 2711 University Boulevard, Tuscaloosa, Alabama 35401. The mailing address is P.O. Box 032206, Tuscaloosa. Phone (205) 349-4300.

Potts & Young announces that **Mark A. Sanderson**, former assistant district attorney of Colbert County, has become associated with the firm. Offices are located at 107 E. College Street, Florence, Alabama 35630. Phone (205) 764-7142.

John A. Owens and **Susie T. Carver**, formerly partners of Phelps, Owens, Jenkins, Gibson & Fowler, announce the formation of **Owens & Carver**. Offices are located at 2720 6th Street, Suite 3, Tuscaloosa, Alabama 35401. Phone (205) 750-0750.

Sheffield, Sheffield, Sheffield & Lentine announce the relocation of its offices and opening of an additional office. The new address is Frank Nelson Building, 205 20th Street, North, Suite 323, Birmingham, Alabama 35203. Phone (205) 328-1365. The new offices are located at 2976 Highway 31, South, Suite A, Pelham, Alabama 35124. Phone (205) 663-7800.

Crittenden & Associates announces that **Gina M. Miller** has joined the firm as an associate. Offices are located at 1044 Park Place Tower, Birmingham, Alabama 35203. Phone (205) 324-9494.

Lyons, Pipes & Cook announces that **Claude D. Boone** and **Kenneth A. Nixon** have joined the firm. Offices are located at 2 N. Royal Street, Mobile, Alabama 36602. Phone (205) 432-4481.

Rodenhauser & O'Dell announces the relocation of its offices to 125 Jefferson Street, Huntsville, Alabama 35801. Phone (205) 536-9626.

Alexander, Corder & Plunk announces that **Robert M. Baker** has joined the firm as a partner and **B. Scott Shipman** as an associate. The firm's new name is **Alexander, Corder, Plunk & Baker**. Offices are located at 213 S. Jefferson Street, Athens, Alabama 35611. The mailing address is P. O. Box 809, Athens 35611. Phone (205) 232-1130.

Gorham & Waldrep announces that **Victoria Franklin Sisson** has become associated with firm. Offices are located at 2101 6th Avenue, North, Suite 700, Birmingham, Alabama 35203. Phone (205) 254-3216.

Donald W. Stewart and **Susanna B. Smith**, formerly of Stewart & Smith, and **Gary P. Cody**, formerly of Longshore, Evans & Longshore, announce the formation of **Stewart, Cody & Smith**. Offices are located at 1131 Leighton Avenue, Anniston, Alabama 36201. The mailing address is P.O. Box 2274, Anniston 36202. Phone (205) 237-9311. Offices are also located in Birmingham and Tuscaloosa.

George L. Beck, Jr. announces that **W. Terry Travis** has become a member of the firm and the firm name has been changed to **Beck & Travis**. Offices remain at 22 Scott Street, Montgomery, Alabama 36103-5019. The mailing address is P.O. Box 5019, Montgomery. Phone (205) 832-4878.

Edgar C. Gentle, III announces that **Deborah A. Pickens**, formerly with

Spain, Gillon, Grooms, Blan & Nettles, has joined the firm. **Carolyn Landon** has become a member of the firm and the new name is **Gentle, Pickens & Landon.** Offices remain at Colonial Bank Building, 1928 First Avenue, North, Suite 1500, Birmingham, Alabama 35203. Phone (205) 716-3000.

Massey & Stotser announce that **Kerry D. Black** and **Rick E. Griffin** have become associated with the firm. Offices are located at 1100 E. Park Drive, Suite 301, Birmingham, Alabama 35235. Phone (205) 836-4586.

E. E. Ball announces the association of **Harold A. Koons, III.** Offices are located at 110 Courthouse Square, Bay Minette, Alabama 36507. The mailing address is P.O. Drawer 1609, Bay Minette. Phone (205) 937-2303.

Burr & Forman announces that **Robert S. W. Given, M. Glenn Perry, Jr., Dent M. Morton** and **Sue A. Willis** have become partners in the firm. **Russell W. Adams, William K. Holbrook, Pamela Morse Arenberg, D. Christopher Carson, Gary L. Howard, Richard C. Keller, Courtnay L. Stallings, Rik S. Tozzi,** and **Amy Gilbert Carter** have become associated with the firm. Offices are located in Birmingham and Huntsville, Alabama.

Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves announces that **Coleman F. Meador** and **Broox G. Holmes, Jr.** have become members and **P. Vincent Gaddy** and **Richard Goodwin Brock** have become associated with the firm. Offices are located at 1300 AmSouth Center, Mobile, Alabama. The mailing address is P.O. Box 290, Mobile 36601.

Veal & Associates announces that **Sandra Gooding Marsh**, formerly clerk to Judge Edwin L. Nelson of the U. S. District Court, Northern District of Alabama, has joined the firm. Offices are located at 2001 Park Place Tower, Suite 525, Birmingham, Alabama.

Maynard, Cooper & Gale announces that **John N. Bolus** and **J. Kris Lowry,** formerly associates with the firm, have become members, **Robert R. Sexton** has become a shareholder, and **John Q. Somerville, Melissa N. Ridgeway, William B. Wahlheim, Jr.** and **Scott A. Abney** have become associates. Offices are located in Birmingham and Montgomery, Alabama. Phone (205) 254-1000 and (205) 262-2001.

Smith, Spires & Peddy announces that **Thomas Coleman, Jr.** has become associated with the firm. Offices are located at 505 N. 20th Street, 650 Financial Center, Birmingham, Alabama 35203-2662. Phone (205) 251-5885.

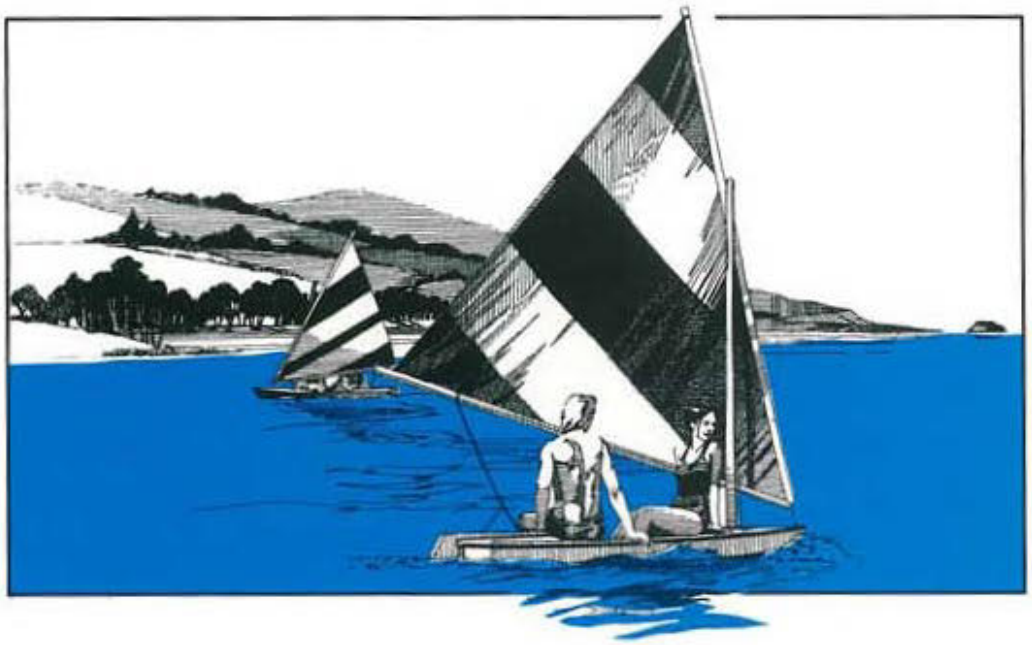
C. S. Chiepalich announces that **John R. Spencer** has become associated with the firm. Offices are located at 1860 Government Street, Mobile, Alabama 36606. The mailing address is P.O. Box 6505, Mobile 36660. Phone (205) 478-1666.

Tanner & Guin announces that **Bert M. Guy** has become a shareholder. Offices are located at 2711 University Boulevard, Tuscaloosa, Alabama 35401. The mailing address is P.O. Box 032206, Florence 35403. Phone (205) 349-4300.

Frank I. Brown, Jon M. Turner, Jr. and **Paul B. Shaw, Jr.** announce the formation of **Brown, Turner & Shaw, LLC.** Offices are located at 211 22nd Street, North, Birmingham, Alabama 35203. Phone (205) 320-1714.

Toffel & Sparks announces that **Steven D. Altmann** has become an associate of the firm. Offices are located at 925 Financial Center, 505 20th Street, North, Birmingham, Alabama 35203. Phone (205) 252-7115.

Holberg & Holberg announces that **Michael Ralph Holberg** has become associated with the firm. Offices are located at 804 Commerce Building, 118 N. Royal Street, Mobile, Alabama 36602. The mailing address is P.O. Box 47, Mobile 36601. Phone (205) 432-8863. ■



AN INTRODUCTION TO THE ALABAMA WATER RESOURCES ACT

By: William S. Cox, III

Introduction

On February 23, 1993, the State of Alabama joined the growing number of Eastern states that have enacted some form of water resource management legislation. Although the Alabama legislation recognizes that "[t]he use of [the waters of the state] should be conserved and managed to enable the people of [Alabama] to realize the full beneficial use thereof and to maintain such water resources for use in the future,"[1] the Alabama Water Resources Act[2] (the "Act") is not intended to "change or modify existing common or statutory law with respect to the rights of existing or future riparian owners concerning the use of the waters of the state."[3] Under certain circumstances, however, the Act requires more than the registration of existing water uses.

The Act contains elements common to both regulatory and registration of use-type water resource management schemes. This hybrid version of "regulated riparianism"[4] recognizes that even within the state's own borders, water resource issues and problems may vary, demanding different and flexible solutions. As a result, the Act allows unique approaches to the variety of water resource issues that may face the state and its citizens.

This article examines the Act. Section II of this article provides some background information regarding water resource issues within the State of Alabama. Section III outlines the Act's significant provisions. Finally, Section IV considers the potential impact of the Act upon future water resource management decisions within Alabama.

Historical background

Like most states east of the Mississippi River, the State of Alabama traditionally followed the common law of riparian rights to resolve water rights disputes. Over time, Alabama's law of riparian rights evolved to reflect changes in the state's economy and to adjust to modifications in the uses of the waters of the state.[5] The Alabama Supreme Court expressed the general rule of riparian rights as follows:

> Every riparian proprietor has an equal right to have [a] stream flow through his lands in its natural state, without material diminution in quantity or alteration in quality. But this rule is qualified by the limitation . . . that each of said proprietors are entitled to a reasonable use of the water for domestic, agricultural, and manufacturing purposes.[6]

In *Crommelin*, a lower riparian (Crommelin) sued to enjoin an upper riparian (Fain) from using a shared stream, alleging that such use would interfere with Crommelin's use of the

water for a public swimming and recreation facility.[7] The Alabama Supreme Court disagreed.[8] The court found that as riparian owners both parties had certain rights to the use of the waters in the stream, that Fain's use of the water was for "domestic purposes," and that the amount of Fain's use was "reasonable" even if it meant that Crommelin's supply of water was reduced.[9] In a few short paragraphs, the Alabama Supreme Court successfully demonstrated one of the basic weaknesses of the riparian rights system: the lack of certainty. In that case, Crommelin used the entire stream for a number of years without any competition from upper riparian owners. He nevertheless was forced to share the stream and possibly to diminish his own water use once another riparian landowner began exercising his rights to the flow of water in the stream.

The uncertainty inherent in the riparian rights doctrine takes on additional significance within the State of Alabama because of the state's inherent dependence upon surrounding states for a great deal of its surface water supply. The State of Alabama has five major river systems. Only one of these systems originates within Alabama; the remaining rivers originate in or flow from other states.[10] As a result, water resources decisions in other states may have a significant impact on the amount and quality of water available within the State of Alabama.[11] The Act allows the State of Alabama to confront both the uncertainties of the traditional riparian doctrine and the potential threats from interstate water rights conflicts.

Alabama Water Resources Act

Prior to the enactment of the Alabama Water Resources Act, the State of Alabama lacked a statewide agency or office charged with the management of quantitative water resources within the state. The State of Alabama did not require water users to report existing or potential water uses and as a result, the state had little, if any, ability to forecast existing and future water demands. The provisions of the Act may be divided into two categories: (1) the establishment of an Office of Water Resources and an advisory commission, and (2) the initiation of a water resources management program within the State of Alabama.

A. Office of Water Resources and Alabama Water Resources Commission

Section 5 of the Act created the Office of Water Resources ("OWR") as a division of the Alabama Department of Economic and Community Affairs.[12] Section 6 enumerates the powers and duties of this office. The OWR may develop long-term strategic plans for the use of the waters of the state; implement water resource programs and projects for the coordination, conservation, development, management, use, and understanding of the waters of the state; and monitor, coordinate, and manage the waters of the state.[13] The OWR may also initiate civil actions against persons violating the provisions of the Act and issue administrative orders assessing civil penalties against violators.[14] Finally, the Act designates the OWR as the state's representative in the negotiation of interstate water compacts.[15]

The Act requires that the Office of Water Resources be under the direction, supervision and control of a "division chief."[16] The division chief is appointed by the head of the Alabama Department of Economic and Community Affairs and must be a "person knowledgeable in the fields of water resource management, development, and conservation" and a "state merit system employee."[17]

The Act also established the Alabama Water Resources Commission ("AWRC") which acts as an advisor on matters relating to the waters of the state; develops, promulgates, adopts, and repeals the rules and regulations authorized by the Act; and hears appeals of administrative actions of the OWR.[18] To ensure diverse representation on the AWRC, the Act contains a complex appointment scheme for the AWRC's 19 members. The Governor (nine appointments), the Lieutenant Governor (five appointments), and the Speaker of the House (five appointments) are the appointing authorities.[19]

The Governor appoints one member from each of Alabama's seven Congressional districts, with at least one, but no more than two, of such members from each "Surface Water Region."[20] The Lieutenant Governor and the Speaker of the House each have an "at-large" appointment.[21] The remaining ten members of the Alabama Water Resources Commission are to be appointed by the designated appointing authorities from lists submitted by various water-related interests.[22] The ten remaining members are selected from lists of five candidates submitted by (a) an organization representing a majority of the rural water systems in the state; (b) a statewide organization representing soil and water conservation districts in the

state; (c) an urban public water system using 90 million gallons of water or more per day on an average daily basis; (d) an organization representing large, self-supplied water users; (e) an organization representing environmental, conservation, or water-related recreation interests; (f) an organization representing a majority of urban public water systems using less than 90 million gallons of water per day from the waters of the state; (g) an organization representing commercial navigation interests; and (h) an organization representing large irrigators.[23]

B. Declarations of beneficial use, certificates of use, critical use studies, and capacity stress areas

The administration, implementation and enforcement of the Act are dependent upon the answer to four key questions. First, what uses of water are subject to the Act? Second, how do those entities comply with the Act? Third, what are "critical use studies"? Fourth, what is a "capacity stress area"?

1. *Who is subject to the Act's provisions?*

There are three categories of water users that are subject to the Act. First, "Public Water Systems" providing piped water to the public for human consumption or other uses that have at least 15 service connections or regularly serve an average of at least 25 individuals at least 60 days out of the year are subject to the Act's provisions.[24] Second, self-supplied water users of 100,000 gallons or more on any day from either surface or ground water are subject to the Act.[25] Third, large irrigators who have the capacity to use 100,000 gallons or more of water on any day for purposes of irrigation are required to comply with the Act.[26] In addition to these three categories, the Act allows the Alabama Water Resources Commission to bring other water users within the scope of the Act where the Commission determines that such action "is necessary to accomplish the purposes of this act."[27]

In addition to the specific categories of water users subject to the Act, the Act explicitly excludes certain types of water use. Impoundments or other similar structures confined and retained completely upon the property of a person which store water where the initial diversion, withdrawal, or consumption of such water is subject to the Act are exempt from the Act.[28] Waste water treatment ponds and waste water treatment impoundments subject to regulation under the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.*, and ponds and impoundments subject to regulation under the Mine Safety and Health Act, 30 U.S.C. §§ 801 *et seq.* or the Surface Min-

ing Control Act, 30 U.S.C. §§ 1201 *et seq.*, are also excluded.[29] Surface impoundments constituting solid waste management units under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.*, are not subject to the Act.[30] In-stream uses of water, such as recreation, navigation and hydropower generation, and impoundments covering less than 100 acres in surface area and used solely for recreational purposes are beyond the scope of the Act.[31]

2. How do persons comply with the Act?

To comply with the Act, the enumerated water users submit a "Declaration of Beneficial Use" to the Office of Water Resources in accordance with a schedule established by the Act.[32] Declarations of Beneficial Use are written documents, signed and certified by, or on behalf of, the person subject to the Act's provisions.[33] The Declaration of Beneficial Use is required to include (i) the name of the person; (ii) the source or sources of the waters of the state subject to such person's beneficial use; (iii) the estimated quantity, in gallons, of the waters of the state used on an annual average daily basis and the estimated capacity, in gallons, of the waters of the state potentially diverted, withdrawn or consumed on any given day by such person; and (iv) a statement of facts establishing that the use of such waters constitutes a beneficial use.[34] The Act defines "beneficial use" as "[t]he diversion, withdrawal, or consumption of the waters of the state in such quantity as is necessary for economic and efficient utilization consistent with the interests of this state."[35] In addition, the Declaration of Beneficial Use must establish that a person's use of water will not interfere with any existing legal use of such water.[36]

The four items in a Declaration of Beneficial Use are important for the purposes of the Act. Information regarding the source or sources of water allows the OWR to identify those sources of water that service a number of different uses. The OWR may prepare water use models of the various surface and ground water resources from this information. In low flow periods affecting "high use" water sources, such information will permit the OWR to address conflicts due to water shortages by identifying the various water users. The OWR may facilitate efforts by such water users to reach potential solutions to such problems. In addition, the OWR may be able to encourage certain water users obtaining water from a "high use" source to develop alternative sources of water or to use water more efficiently.

Information regarding current water use and water use capacity allows the OWR to accomplish its water resource planning function. Such information permits the OWR to develop current water use estimates, i.e., the existing demand for water within the state. By knowing how much water each person subject to the Act may withdraw in the future, the OWR will be able to identify potential problem areas within the state before a water shortage develops and to develop water use projections and plans and programs for the future use of water resources.

One of the key aspects in establishing a person's right to the continued use of water resources is the concept of "beneficial use." Requiring water users to articulate why their use of water is "beneficial" assists the OWR in determining the amount of water resources subject to existing beneficial uses. Equipped with this "beneficial use" information from each major water user in a river basin, the OWR will be able to assess the impact on existing water uses of proposed water projects, particularly those water uses involving the loss of large quantities of water through interbasin diversions or consumptive uses. This information may also help resolve disputes over water rights on an intrastate and interstate basis, because the OWR may be able, through negotiation or otherwise, to prevent water resource decisions that have a significant impact on current water uses.

If the Declaration of Beneficial Use contains the necessary information, the Office of Water Resources must issue a "Certificate of Use" to such person. The Office of Water Resources does not have any discretion in its decision to issue or to deny a Certificate of Use. The issuance of the Certificate is simply a ministerial act.[37] Moreover, the only condition placed upon Certificates of Use is a reporting requirement. Persons who obtain Certificates of Use submit annual reports indicating the amount of water, in gallons, diverted, withdrawn or consumed on a monthly basis.[38]

3. What are "Critical Use Studies"?

"Critical Use Studies" perform the planning and water management aspects of the Act. Under the Act, the term "Critical Use Study" refers to an analysis of the available supply of water resources within an area of the state and an assessment of the existing and reasonably foreseeable future demand for such resources.[39] A Critical Use Study should permit state, regional and local planners to identify immediate and potential prob-

lems and formulate plans to address those problems in areas where the current or future demand for water is found to exceed the available supply.

Under Section 22 of the Act, the division chief notifies the AWRC of those areas of the state for which the OWR will conduct a Critical Use Study.[40] The Act permits the scope of a Critical Use Study to vary. Some studies may be limited to a municipality or a single county while other studies may look at a group of counties or an entire river basin.[41] Regardless of the scope of the study, each Critical Use Study must analyze reasonable alternatives to address the quantitative water resource problems identified during the study. At a minimum, a Critical Use Study will address a "no-action alternative, a conservation alternative, a water resources development alternative, and a restrictive use alternative."[42] During each Critical Use Study, the Office of Water Resources must consult with all persons holding Certificates of Use within the study area and all federal, state and local government agencies prior to the completion of the study.[43] The Office of Water Resources is also required to prepare a draft of the study, including its proposed recommendations to the AWRC, to solicit comments from all persons or entities within the study area, and to conduct a public hearing within the study area on the draft study.[44]

After completing a study, the Office of Water Resources submits a report to the AWRC recommending those actions determined during the study process to be necessary to protect the quantitative water resources of the study area.[45] Significantly, the OWR has no power to implement any portion of a Critical Use Study. Implementation is *solely* the responsibility of the AWRC through its rulemaking powers.[46]

The AWRC reviews each Critical Use Study completed by the OWR and determines if the implementation of water use restrictions is necessary within the study area.[47] If the Commission finds the aggregate existing or reasonably foreseeable uses of water in the study area exceed or will exceed availability and further finds that water use restrictions are required, the Commission may designate the study area as a "Capacity Stress Area."[48] The designation of a Capacity Stress Area requires the concurrence of 13 of the 19 voting members of the Alabama Water Resources Commission.[49]

4. What is a "Capacity Stress Area"?

A "Capacity Stress Area" is an area where the AWRC specifically determines the use of the waters of the state, whether ground water, surface water or both, requires coordination, management, and regulation for the protection of the interests and rights of the people of the state.[50] The AWRC may designate a Capacity Stress Areas only after the OWR performs a Critical Use Study in accordance with Section 22 of the Act.[51]

Designation of a Capacity Stress Area permits implementation of actions recommended by the OWR in its final report for the Critical Use Study or such other action as the Commission determines to be reasonably necessary to protect the interests of the people of the state.[52] Any such implementation must be done in accordance with the Alabama Administrative Proce-

dures Act, Ala. Code §§ 41-22-1 *et seq.*[53] Upon the designation of a Capacity Stress Area, the Act further requires the Commission to implement appropriate conditions or limitations on all Certificates of Use within the area.[54] Such rules or regulations must be approved by 13 of the 19 members of the Commission.[55] Any conditions must also be limited to matters necessary for the protection of the beneficial use of the waters of the state.[56] Finally, the Commission is required to review any conditions on at least an annual basis.[57]

Under Section 24 of the Act, the implementation of any rules or regulations limiting or reducing the quantity of water available to a person holding a Certificate of Use, and the implementation and enforcement of such rules and regulations are vested in the Alabama Department of Environmental Management ("ADEM").[58] Once water use restrictions are imposed, a Certificate of Use will be similar to other discretionary environmental permits, because the issuing agency will be empowered to permit, deny or condition a person's use of water within a Capacity Stress Area. The transfer of authority from the Office of Water Resources to ADEM in such areas recognizes ADEM's expertise in administering discretionary environmental permits. In addition, the transfer of functions to ADEM allows the State of Alabama to maintain a single state agency or point of contact for persons engaged in activities requiring environmental permits or approvals as a condition to the initiation or maintenance of such activities.

C. Implementing regulations

On December 9, 1993, the Alabama Water Resource Commission adopted the initial regulations for the general operation of the OWR and the AWRC; the procedures for administrative hearings and appeals; the procedures for adopting, amending, and repealing rules and regulations governing the OWR and the AWRC; and the administration of declarations of beneficial use and certificates of use. For the most part, the rules and regulations reiterate and expand upon provisions of the Act.[59] These regulations do not include any provision for the implementation of Critical Use Studies or the designation of Capacity Stress Areas.

Conclusion

Alabama's long history of reliance on the common law of riparian rights doctrine led to strong opposition to the Act and raised questions about the need for the Act. However, the State of Alabama could no longer depend solely upon the common law of riparian rights to manage and protect its water resources because of growing interstate and intrastate demands on such resources. Increasing interbasin diversions and consumptive uses within Alabama and neighboring states forced Alabama to develop a program to facilitate some form of water resource management. The Act was the result of a substantial effort by a number of diverse interests, each recognizing that something was needed.

Whether the Act will be a success may not be known for some time. What is clear, however, is that the uncertainty of the riparian rights system should be diminished, because the State of Alabama now has some ability to develop plans and programs to address existing and potential water resource problems. The potential threat from increased water use in neighboring states makes it likely that the initial Critical Use Studies will be performed on those rivers entering the state. If such studies find that one or more areas should be designated Capacity Stress Areas, the OWR may try, through either negotiation or otherwise, to influence water resource decisions in other states to avoid water use restrictions within such areas.

The success of such discussions and the ability of the State of Alabama to secure concessions from its neighboring states will depend upon the quality of the data gathered during the Critical Use Study. Armed with a well-documented and defensible Critical Use Study, the State of Alabama may be able to obtain cooperative agreements from water users within the state and in other states and to avoid protracted legal battles over water rights. If so, the Act should be considered a success. Even if water rights litigation occurs, however, the State of Alabama should have sufficient water use information and the ability to project future water needs. When compared to

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the state's ability to manage water resources prior to the Act, this additional information will strengthen the state's position in any discussions with neighboring states, federal agencies, and others over the use and development of water resources. ■

Endnotes

1. Ala. Code § 9-19B-2 (3) (Supp. 1993).
2. Ala. Code §§ 9-10B-1 *et seq.* (Supp. 1993).
3. Ala. Code § 9-10B-27 (Supp. 1993).
4. The term "regulated riparianism" has been used to describe the development in Eastern states of legislation to replace or to supplement the traditional common law of riparian rights.
5. For an historical overview of the evolution of Alabama's riparian rights doctrine, *see* Putt, "An Analysis and Evaluation of Water Rights In Alabama In Perspective with Other States in the South Atlantic and Gulf Region," 12 Cumb. L. Rev. 47, 59-64 (1981).
6. *Crommelin v. Fain*, 403 So. 2d 177, 184 (Ala. 1981) (citations omitted).
7. 403 So. 2d at 180.
8. *Id.* at 184.
9. *Id.*
10. The five major river systems include (a) the Alabama-Coosa-Tallapoosa River System; (b) The Tennessee River; (c) the Tombigbee River; (d) the Chattahoochee River; and (e) the Warrior River. Only the Warrior River originates within the State of Alabama. The Coosa, Tallapoosa and Chattahoochee rivers originate in the State of Georgia. The Tombigbee River originates in the State of Mississippi. The Tennessee River originates in the states of Tennessee, North Carolina and Virginia.
11. *See* Complaint, *State of Alabama v. United States Army Corps of Engineers*, United States District Court, Northern District of Alabama (Case No. CV-90-H-01331-E). The State of Alabama sued the United States Army Corps of Engineers for violating the national Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, and the regulations of the Corps in connection with a number of water resource proposals within the State of Georgia. *See also* Erhardt, "The Battle Over 'The Hooch:' The Federal-Interstate Water Compace and the Resolution of Rights in the Chattahoochee River," 11 Stan. Envtl. L.J. 200 (1992).
12. Ala. Code § 9-10B-4 (Supp. 1993)
13. Ala. Code § 9-10B-5 (Supp. 1993).
14. *Id.*
15. Ala. Code § 9-10B-6 (Supp. 1993).
16. Ala. Code § 9-10B-7 (Supp. 1993).
17. *Id.*
18. Ala. Code § 9-10B-16 (Supp. 1993).
19. Ala. Code § 9-10B-12 (Supp. 1993)
20. Ala. Code § 9-10B-12 (Supp. 1993). The Act divides the State's 67 counties into five "Surface Water Regions" with each Surface Water Region approximating one or more major river basins. *See* Ala. Code § 9-10B-3 (6).
21. Ala. Code § 9-10B-12 (Supp. 1993).
22. Ala. Code § 9-10B-12 (Supp. 1993).
23. *Id.*
24. Ala. Code § 9-10B 3 (15) (Supp. 1993).
25. Ala. Code § 9-10B-20 (Supp. 1993).
26. *Id.*
27. *Id.*
28. Ala. Code § 9-10B-2 (7) (Supp. 1993).
29. *Id.*
30. *Id.*
31. Ala. Code § 9-10B-20 (c) (Supp. 1993).
32. Ala. Code § 9-10B-20 (Supp. 1993).
33. Ala. Code § 9-10B-3 (8) (Supp. 1993).
34. *Id.*
35. Ala. Code § 9-10B-3 (2) (Supp. 1993).
36. Ala. Code § 9-10B-20 (e) (Supp. 1993)
37. *See* Ala. Code § 9-10B-20 (e) (Supp. 1993) ("The Office of Water Resources shall issue a certificate of use to any person required to submit a declaration of beneficial use upon the submission of a declaration of beneficial use.").
38. Ala. Code § 9-10B-20 (f) (Supp. 1993).
39. Ala. Code § 9-10B-3 (7) (Supp. 1993).
40. Ala. Code § 9-10B-21 (Supp. 1993).
41. Ala. Code § 9-10B-3 (1) (Supp. 1993).
42. Ala. Code § 9-10B-21 (Supp. 1993).
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. Ala. Code § 9-10B-3 (3) (Supp. 1993).
51. Ala. Code § 9-10B-21 (Supp. 1993).
52. *Id.*
53. *Id.*
54. Ala Code §§ 9-10B-22 (Supp. 1993).
55. *Id.*
56. *Id.*
57. *Id.*
58. Ala. Code § 9-10B-23 (Supp. 1993).
59. *See* ADECA Admin. Code R. 305-7-1 through 305-7-12 (December 9, 1993).

ALABAMA STATE BAR

HONOR ROLL

BUILDING FUND

Between December 1, 1993 and March 31, 1994, the following attorneys made pledges to the Alabama State Bar Building Fund.

William Frank Prosch, Jr.

A. Holmes Whiddon, Jr.

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 December 1, 1993, please see previous issues of ***The Alabama Lawyer.***

YOUNG LAWYERS' SECTION

By LES HAYES III, president

Executive Committee winter meeting

On February 18-20, the Alabama Young Lawyers' Section Executive Committee held its annual winter meeting in Point Clear. We were honored to have as our guests several officers from the ABA's Young Lawyers' Division: **Mike Bedke** (chair-elect), **Rick Bien** (speaker of the assembly) and **Jack Brown** (board of governors). Over the years, we have developed somewhat of a tradition of hosting officials of the YLD. These officers spend several months out of each year meeting with attorneys throughout the United States and formulating the YLD's agenda on a national level. Their willingness to take time out from their busy schedules to meet with us at Point Clear speaks very highly of our Alabama Young Lawyers' Section and the national reputation it has attained. I would be remiss if I did not recognize **Mark Drew** (Birmingham). Much of the credit for the strong relationship we have with the ABA/YLD can be attributed to him. Mark has served on various committees and has held several positions with the YLD and has established a solid rapport with its leadership. We are indeed fortunate to have Mark as an Alabama Young Lawyer and appreciate his efforts.

YLD mid-year assembly meeting

The 1994 ABA Annual Mid-Year Meeting was held in February of this year in Kansas City, Missouri. Alabama Young Lawyers **Charlie Anderson** (Montgomery), **Mark Drew** (Birmingham), **Robert Hedge** (Mobile), and I attended and served as delegates to the Mid-Year Meeting Assembly of the YLD. During the assembly several resolutions and bills were considered. Those that passed were then sent to the ABA General Assembly as being representative of the official position of the YLD. A wide range of topics was discussed, including sexual harassment, bar admission requirements and national health care reform.

Les Hayes III

Sandestin seminar

Final arrangements have been made for our annual Sandestin Seminar to take place at the Sandestin Resort, May 20 and 21. If you have not yet made plans to attend please do so now. We have an impressive list of speakers, including Alabama Supreme Court **Chief Justice Sonny Hornsby**. Several social events have also been planned for the afternoons and evenings. I look forward to seeing you in Sandestin. ■

ALABAMA YOUNG LAWYERS' SECTION SANDESTIN SEMINAR

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RECENT DECISIONS

By WILBUR G. SILBERMAN and TERRY A. SIDES

SUPREME COURT OF THE ALABAMA

Failure to comply with §6-11-1 may preclude appellate review of jury's award of damages

In *Clarke-Mobile County Gas District v. Reeves*, [Ms. 1920467, August 20, 1993], ____So.2d____(Ala.1993), the defendant, Clarke-Mobile, appealed from the denial of its motion for a new trial, or, alternatively, to alter, amend, or vacate a judgment in favor of the plaintiffs, the Reeves. The Reeves sued Clarke Gas on claims for intentional trespass to their property. They alleged that without their permission, Clarke Gas employees had buried a gas line on their property and had damaged their property in the process. The Reeves sought both compensatory and punitive damages. The trial court, without objection, instructed the jury in terms of an undesignated award. The jury awarded the Reeves $256,150 in unspecified damages. On appeal, though, the judgment in favor of the plaintiffs was reversed on other grounds, the court noted that because the jury did not apportion its award, it could not determine what the award represented. "This is a critical problem in addressing Clarke Gas's argument that the jury awarded excessive punitive damages. We cannot reasonably determine that the jury, in fact, awarded any punitive damages." *Ala. Code* §6-11-1 (1975), provides:

> In any civil action based upon tort...except actions for wrongful death...the damages assessed by the fact-finder shall be itemized as follows: (1) past damages; (2) future damages; (3) punitive damages.

Where, without objection, the trial court instructs the jury in terms of an undesignated award, such will preclude the appellate court's review of whether the jury's damages award was excessive. *See also City Realty, Inc. v. Continental Casualty Company*, [Ms. 1911427, May 27, 1993], ____So.2d____(Ala. 1993).

Discovery of customer lists and other such evidence—limited to cases involving fraud claims?

In *Ex parte Mobile Fixture and Equipment Company, Inc.*, [Ms. 1921109, August 27, 1993], ____So.2d____(Ala. 1993), the plaintiff sued the defendant on claims alleging theft and conversion and breach of contract, arising out of the defendant's agreement to provide security services for the plaintiff. In the discovery process, the plaintiff filed interrogatories and requests for production, which sought the identity of all of the defendant's customers for the preceding five years and production of the defendant's customer list. The defendant objected to these discovery requests, arguing that the information and materials sought were confidential, privileged and not relevant to the plaintiff's claims. The trial court denied the plaintiff's motion to compel.

On a petition for a writ of mandamus, the plaintiff relied upon *Ex parte Asher, Inc.*, 569 So.2d 733 (Ala. 1990), *Ex parte State Farm Mutual Automobile Ins. Co.*, 452 So.2d 861 (Ala. 1984), and *Ex parte Allstate Ins. Co.*, 401 So.2d 749 (Ala. 1981), as support for its position that the court should direct the trial court to order the defendant to produce the requested information. In an opinion authored by Justice Houston, however, the court recognized that those cases "are distinguishable from this case because each of those cases involved fraud claims; in each, the Court allowed discovery of similar fraudulent acts to prove an alleged fraudulent scheme, plan or design on the part of the defendants....Under the facts of this case, however, [the plaintiff] has not alleged that [the defendant] engaged in any type of fraudulent scheme." Accordingly, the plaintiff's petition for a writ was denied.

***Green Oil* factors and *Hammond* hearing not applicable to questions of excessiveness or inadequacy of jury verdict awarding solely compensatory damages**

In *Pitt v. Century II, Inc.*, [Ms. 1920923, December 22, 1993], ____So.2d____(Ala. 1993), the plaintiff was injured in a crane accident. He sued the crane manufacturer on claims for negligence, wantonness and liability under Alabama's Extended Manufacturer's Liability Doctrine. The plaintiff's claims were all based on the absence of an emergency brake on the crane.

At trial, following the conclusion of all of the evidence, the trial court granted the defendant's motion for a directed verdict as to the plaintiff's claim for wantonness. The plaintiff then voluntarily dismissed his negligence count. This left the AEMLD count as the plaintiff's only remaining claim. The jury subsequently returned a verdict in favor of the plaintiff, and awarded him compensatory damages of $300,000. The defendant moved for a new trial, which the trial court denied conditioned upon the plaintiff's acceptance of a remittitur of $200,000. The plaintiff did not accept the remittitur, and the trial court ordered a new trial.

On appeal, the plaintiff argued that the trial court had erred in ordering a remittitur of the compensatory damages award. The trial judge's remittitur order demonstrated that his reasons for concluding that the jury verdict was flawed and for ordering the $200,000 remittitur were based upon his analysis of the factors set out in *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989), which are the factors for a trial court to consider in determining whether a jury award of *punitive* damages is excessive or inadequate. The plaintiff argued that these factors are not applicable and should not be considered by the trial court when determining whether a jury verdict solely for *compensatory* damages is excessive.

The supreme court agreed. In writing for an unanimous court, Justice Shores noted that, in regard to awards exclusively for compensatory damages, the court's prior holdings have narrowed the scope of *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), so that a *Hammond* hearing is not mandatory "where the award is clearly supported by the record." *See CSX Transp., Inc. v. Day*, 613 So.2d 883 (Ala. 1993). Justice Shores further stated:

> The reason for the difference in approach [in compensatory damage cases *vis a vis* punitive damage cases] is that a review of a jury verdict for *compensatory* damages on the ground of excessiveness must focus on the plaintiff [as victim] and ask what the evidence supports in terms of damages suffered by the plaintiff. A court reviewing a verdict for compensatory damages must determine what amount a jury, in its discretion, may award, viewing the evidence from the plaintiff's perspective. *Bridges v. Clements*, 580 So.2d 1346, 1349 (Ala. 1991).
>
> In contrast, a review of a jury verdict for *punitive* damages on grounds of excessiveness must focus on the defendant. The *Green Oil* factors are not all-inclusive, but they require a reviewing court, whether trial or appellate, to begin and end its review of a *punitive* award by focusing on the defendant and the defendant's conduct. The jury and a reviewing court in a punitive damages case struggle to determine what amount is appropriate to further the aims of punitive verdicts: to punish the particular defendant before the court and to deter others from similar conduct in the future. These considerations have no place in a review of a purely compensatory jury award, where a reviewing court should view the award from the standpoint of the victim.

Accordingly, because this was a case involving only compensatory damages and the trial court considered factors that are relevant only to an award of punitive damages, the trial court erred when it conditioned the denial of a new trial on the plaintiff's acceptance of the $200,000 remittitur.

BANKRUPTCY

Insiders have right to jury trial, but Fourth Circuit says bankruptcy court cannot hold trial

In re Stansbury Poplar Place, 13 F.3d 122, 25 B.C.D. 95, (4th Cir. (Md.), Dec. 27, 1993). In October 1990, five related estates filed Chapter 11 cases; one month later the unsecured creditor's committee was appointed as the party responsible for unsecured creditors in all the cases. Two years later the court authorized the committee to file avoidable transfer proceedings against several insiders, who then filed jury demands. The insiders also requested that the reference be withdrawn contending that the bankruptcy court has no authority to conduct jury trials. The committee contended that because it also had requested an equitable accounting no jury trial was warranted. On reaching the Fourth Circuit, it was held that regardless of the complete disarray of records, if no proof of claim had been filed, the Seventh Amendment entitled a party, whether or not an insider who had control of the business, to a jury trial. Further, filing a proof of claim in a related case would not affect the jury entitlement where no claim had been filed. The court quoted the U.S. Supreme Court that stated, "where both legal and equitable issues are presented in a single case, 'only under the most imperative circumstances...can the right to a jury trial of legal issues be lost through prior determination of equitable claims.'" (*Dairy Queen v. Woods*, 369 U.S. 469-1962).

The court then discussed the authority of bankruptcy courts to conduct jury trials. It declared that there was no legislative guidance either in the wording of the statutes, or in the legislative history. In holding that the bankruptcy court does not have such authority, it adopted reasoning of the Seventh and Eighth circuits that there would have to be a direct allowance by Congress and that authority could not be implied. Finally, the Fourth Circuit stated that the decision whether or not to withdraw the reference immediately is a pragmatic question that should be left to the discretion of the district court, case by case.

Be careful to protect administrative expenses in case converted from Chapter 11 to Chapter 7

In the Matter of DeVries Grain & Fertilizer, 12 F.3d 101, 25 B.C.D. 89, (7th Cir. (Ill.), Dec. 22, 1993). DeVries (debtor) had an involuntary Chapter 11 petition filed against it on January 31, 1986. Hollewell Enterprises sold on open account and also made loans to debtor on May 7, 1986. On June 12, 1989, Hollewell filed an administrative claim of $389,606.11, requesting payment first under §503(b)(1)(A) as an ordinary expense, and secondly under 503(b) (3)(D) as making a substantial contribution to the estate. A hearing took place on September 11, 1989 without an order being issued. On January 18, 1990, the case converted to Chapter 7, and on February 6, 1990, an order issued that claims must be filed within 90 days after the meeting of creditors. Hollewell, which had never filed a proof of claim, ignored the order. Two years thereafter, Hollewell filed a request to have its Chapter 11 expense allowed, which was denied by the bankruptcy and district courts. The Seventh Circuit affirmed, stating that neither the Bankruptcy Code nor Rules provide for allowance of administrative expense

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after conversion from Chapter 11 to Chapter 7 unless a proof of claim under Section 501 is filed either before or after conversion. It also determined that the request for payment of an administrative expense cannot be treated as filing a proof of claim, as no court has ever considered a pre-conversion Chapter 11 request for payment of administrative expense to constitute a claim in Chapter 11. Hollewell's attorney attempted to show "excusable neglect" under *Pioneer Investment*, 113 S.Ct. 1489, which the Seventh Circuit disposed of by stating *Pioneer* applied only to Chapter 11 cases, and actually supported the denial.

Comment: This seems a rather harsh result, especially as the creditor had filed a request with the court during the Chapter 11 pendency. Many Chapter 11 cases fail. Those attorneys who deal in Chapter 11 should keep the holding of this case in mind, and remember that if there is any doubt, be sure to file the proof of claim.

Fifth Circuit rules on dischargeability of out-of-time amendment to list debt

In the Matter of Stone, 10 F.3d 285, 62 USLW 2449, Bankr. L. Rep. P. 75, 651, (5th Cir. (Tex.) Jan. 3, 1994). In a no-asset Chapter 7 case, debtor inadvertently failed to list a creditor to whom they (husband and wife) had owed on the purchase of a condo and later sold prior to the bankruptcy. Prior to the close of the case, but long after the 90-day period for filing claims, the creditor, upon learning of the bankruptcy, filed a complaint in the bankruptcy court claiming non-dischargeability under 523(a)(3)(A) of the Bankruptcy Code. No fraud was alleged. The lower courts ruled the debt non-dischargeable. The Fifth Circuit first reviewed judicial constructions under the old Act reflecting that there had been contradictory interpretations pre-Code. The court then examined present 523(a)(3)(A), stating that although the words are rational, they are ambiguous. The court concluded that the statute must be interpreted with equitable principles in mind, following three principles: (1) reason for failure to list; (2) amount of court disruption likely to follow; and (3) any prejudice suffered by the unlisted creditor, as well as listed creditors. (In discussing the reasons for failure to list, the Eleventh Circuit case of *Batcher,* 781 F.2d 1534 was mentioned as holding there should be no discharge if failure to list was motivated by intention, fraud or done improperly.)

The court found that none of the mentioned factors were present, that the creditor had a full opportunity to litigate the matter in the lower courts, and that there was no prejudice. Thus, the debt was ruled dischargeable, and the lower courts reversed.

Debtor is not "party aggrieved" and thereby not proper party to appeal order allocating payments between secured party and attorney for debtor

In re Ernest Dykes, 10 F.3d 184, 62 USLW 2403, Bankr. L. Rep. P. 75, 615, (3rd Cir. Nov. 30, 1993). Debtors (husband and wife) made 19 payments on a 48-payment contract with GMAC, and then filed Chapter 13. The plan called for the first ten payments of $120 for debtors' attorney, and then for approximately three years for two secured creditors. GMAC objected, and after notice and hearing, the bankruptcy court held that the installment payments would be divided between GMAC and the attorney until she received $1,200. The debtors appealed to the district court and then to the Third Circuit seeking to reinstate the original plan. The Third Circuit said the debtors were unaffected by the bankruptcy court order as they would pay $120 per month regardless. Thus, they were not proper parties to appeal. The court then taxed the costs against the attorney, stating it would not be right to tax the debtors, and also directed the bankruptcy court not to allow attorney's fees for the appeal. ■

PLEASE NOTE!

Alabama State Bar members:
Whenever you are requested to furnish your state bar identification number (pleadings filed with courts, etc.), please refer to your Social Security number, as that is what we keep on record identifying you.

ALABAMA STATE BAR SECTION MEMBERSHIP APPLICATION

To join one or more sections, complete this form and attach separate checks payable to each section you wish to join.

NAME _____

FIRM OR AGENCY _____

OFFICE ADDRESS _____

_____

OFFICE LOCATION _____

_____

OFFICE TELEPHONE NUMBER _____

	SECTION	ANNUAL DUES
_____	ADMINISTRATIVE LAW	$20
_____	BANKRUPTCY AND COMMERCIAL LAW	$20
_____	BUSINESS TORTS AND ANTITRUST LAW	$15
_____	COMMUNICATIONS LAW	$15
_____	CORPORATE COUNSEL	$30
_____	CORPORATION, BANKING AND BUSINESS LAW	$10
_____	CRIMINAL LAW	$10
_____	ENVIRONMENTAL LAW	$20
_____	FAMILY LAW	$30
_____	HEALTH LAW	$15
_____	LABOR AND EMPLOYMENT LAW	$10 IF PRACTICING LESS THAN 5 YEARS, $30 IF PRACTICING 5 OR MORE YEARS
_____	LITIGATION	$15
_____	OIL, GAS AND MINERAL LAW	$15
_____	REAL PROPERTY, PROBATE AND TRUST LAW	$10
_____	TAXATION	$15
_____	WORKER'S COMPENSATION LAW	$20
_____	YOUNG LAWYERS'	0

_____

TOTAL

REMEMBER: ATTACH A SEPARATE CHECK FOR EACH SECTION.

MAIL TO: SECTIONS, ALABAMA STATE BAR, P.O. BOX 671, MONTGOMERY, AL 36101

Alabama Law Foundation Awards Grants

By Tracy A. Daniel

Low interest rates were a boon to home buyers in 1993, but meant the second consecutive year of a decline in IOLTA income to the Alabama Law Foundation. Interest rates paid on lawyers' trust accounts ranged from 2 percent to 3 percent, down from an average of 5 percent just three years ago. In March 1994 the foundation awarded $800,000 in grants to 24 organizations throughout Alabama, a 20 percent decline over the $1 million given in 1993. However, interest rates have shown a slight uptick since the first of the year.

The Grants Committee, chaired by Allan Chason of Bay Minette, had the difficult task of cutting down the $1,291,000 in grant requests received to the $800,000 available. Consequently, the foundation could not fund all requests submitted. All but one of those who received funding in previous years received cuts or level funding. The other members of the committee are Delores Boyd, Montgomery; Richard Hartley, Greenville; Alan Livingston, Dothan; Sam Stockman, Mobile; Jim Pruett, Birmingham; Donna Pate, Huntsville; and Andy Wear, Fort Payne. The foundation is grateful for the time they contribute to review the requests.

The foundation continued its funding of legal aid to the poor through its funding of Legal Services lawyers to provide representation of victims of domestic abuse in legal matters. The Alabama State Bar Volunteer Lawyers Program and the Mobile Bar Association Pro Bono Program both continued to grow, exhibiting the willingness of lawyers to volunteer their time and expertise to help the needy. Over 1,500 Alabama attorneys participate in pro bono efforts, either through accepting cases referred to them or voluntarily reporting the number of pro bono hours they work.

The foundation continued its funding of the Alabama Capital Representation Resource Center, which provides assistance to attorneys appointed to represent defendants in capital cases in the post-conviction stage. The center's help makes it easier for lawyers to provide effective representation for their clients in these complex cases.

Domestic abuse shelters in Birmingham, Huntsville, Gadsden, Anniston, and Mobile received grants to help fund victims' advocates. The advocates work with victims of domestic abuse to help guide them through the court system. They provide assistance in matters as basic as obtaining warrants which often seem overwhelming to someone scared and confused.

The Mobile Bay Area Partnership for Youth and the Young Lawyers' Section/YMCA Youth Judicial Program both received funding for projects involving young people. The former will hold a camp in Prichard this summer for young people at risk of becoming involved in crime. At the other end of the spectrum, the Youth Judicial Program sponsors mock trial competitions to help high school students learn how the judicial system works.

A complete list of grants awarded follows. The foundation thanks the lawyers and banks participating in the IOLTA program for their support. If you do not currently participate in IOLTA or have changed banks or firms and wish to establish a new IOLTA account, please contact Tracy Daniel at 269-1515 or 800-354-6154. ■

1994 Grants

LEGAL AID TO THE POOR

Legal Services Corporation of Alabama	$240,000
Legal Services of North Central Alabama	$75,000
Legal Services of Metro Birmingham	$75,000
Mobile Bar Association	$50,000
Alabama State Bar Volunteer Lawyers Program	$70,000
Montgomery County Bar Pro Bono Project	$10,000
Total	$520,000

ADMINISTRATION OF JUSTICE

Capital Representation Resource Center	$75,000
Alabama Prison Project	$55,000
Alabama State Bar Center for Dispute Resolution	$42,500
Mobile Bay Area Partnership for Youth, Inc.	$10,000
Birmingham YWCA Family Violence Center	$20,000
The Shelter, Inc.	$15,000
HOPE Place, Inc.	$7,500
Penelope House, Inc.	$12,500
2nd Chance, Inc.	$7,500
Total	$245,000

LAW-RELATED EDUCATION

Youth Judicial Program	$10,000
City of Vernon	$1,469
Total	$11,469

LAW LIBRARIES

Calhoun County	$3,500
Chambers County	$3,750
Etowah County	$5,000
Geneva County	$4,000
Madison County	$3,500
Montgomery County	$700
Pickens County	$3,000
Total	$23,450

TOTAL	$799,919

OPINIONS OF THE GENERAL COUNSEL

By ROBERT W. NORRIS, general counsel

QUESTION:

The Standing Committee on Ethics and Professional Responsibility of the American Bar Association issued Formal Opinion 93-379 on December 6, 1993, concerning billing for professional fees, disbursements and other expenses. This office receives numerous requests concerning these subjects and, for that reason, requests the Disciplinary Commission to determine whether or not this opinion correctly states the rule applicable to Alabama lawyers concerning these matters.

ANSWER:

It is the opinion of the Disciplinary Commission that ABA Formal Opinion 93-379 correctly states the rule applicable to Alabama lawyers concerning the billing of professional fees, disbursements and other expenses. Accordingly, Formal Opinion 93-379 is incorporated herein and made a part of this opinion.

American Bar Association Formal Opinion 93-379

Consistent with the Model Rules of Professional Conduct, a lawyer must disclose to a client the basis on which the client is to be billed for both professional time and any other charges. Absent a contrary understanding, any invoice for professional services should fairly reflect the basis on which the client's charges have been determined. In matters where the client has agreed to have the fee determined with reference to the time expended by the lawyer, a lawyer may not bill more time that she actually spends on a matter, except to the extent that she rounds up to minimum time periods (such as one-quarter or one-tenth of an hour). A lawyer may not charge a client for overhead expenses generally associated with properly maintaining, staffing and equipping an office; however, the lawyer may recoup expenses reasonably incurred in connection with the client's matter for services performed in-house, such as photocopying, long distance telephone calls, computer research, special deliveries, secretarial overtime, and other similar services, so long as the charge reasonably reflects the lawyer's actual cost for the services rendered. A lawyer may not charge a client more that her disbursements for services provided by third parties like court reporters, travel agents or expert witnesses, except to the extent that the lawyer incurs costs additional to the direct cost of the third-party services.

The legal profession has dedicated a substantial amount of time and energy to developing elaborate sets of ethical guidelines for the benefit of its clients. Similarly, the profession has spent extraordinary resources on interpreting, teaching and enforcing these ethics rules. Yet, ironically, lawyers are not generally regarded by the public as particularly ethical. One major contributing factor to the discouraging public opinion of the legal profession appears to be the billing practices of some of its members.

It is a common perception that pressure on lawyers to bill a minimum number of hours and on law firms to maintain or improve profits may have led some lawyers to engage in problematic billing practices. These include charges to more than one client for the same work or the same hours, surcharges on services contracted with outside vendors, and charges beyond reasonable costs for in-house services like photocopying and computer searches. Moreover, the bases on which these charges are to be assessed often are not disclosed in advance or are disguised in cryptic invoices so that the client does not fully understand exactly what costs are being charged to him.

The Model Rules of Professional Conduct provide important principles applicable to the billing of clients, principles which, if followed, would ameliorate many of the problems noted above. The Committee has decided to address several practices that are the subject of frequent inquiry, with the goal of helping the profession adhere to its ethical obligations to its clients despite economic pressures.

The first set of practices involves billing more than one client for the same hours spent. In one illustrative situation, a lawyer finds it possible to schedule court appearances for three clients on the same day. He spends a total of four hours at the courthouse, the amount of time he would have spent on behalf of each client had it not been for the fortuitous circumstance that all three cases were scheduled on the same day. May he bill each of the three clients, who otherwise understand that they will be billed on the basis of time spent, for the four hours he spent on them collectively? In another scenario, a lawyer is flying cross-country to attend a deposition on behalf of one client, expending travel time she would ordinarily bill to that client. If she decides not to watch the movie or read her novel, but to work instead on drafting a motion for another client, may she charge both clients, each of whom agreed to hourly billing, for the time during which she was traveling on behalf of one and drafting a document on behalf of the other? A third situation involves research on a particular topic for one client that later turns out to be relevant to an inquiry from a second client. May the firm bill the second client, who agreed to be charged on the basis of time spent on his case, the same amount for the recycled work product that it charged the first client?

The second set of practices involves billing for expenses and disbursements, and is exemplified by the situation in which a firm contracts for the expert witness services of an economist at an hourly rate of $200. May the firm bill the client for the expert's time at the rate of $250 per hour? Similarly, may the firm add a surcharge to the cost of computer-assisted research if the per-minute total charged by the computer company does not include

Formal Opinion 93-379 Billing for Professional Fees, Disbursements and Other Expenses, December 6, 1993, reprinted with permission of the American Bar Association

the cost of purchasing the computers or staffing their operation?

The questions presented to the Committee require us to determine what constitute reasonable billing procedures; that is, what are the services and costs for which a lawyer may legitimately charge, both generally and with regard to the specific scenarios? This inquiry requires an elucidation of the Rule of Professional Conduct 1.5,[1] and the Model Code of Professional Responsibility DR 2-106.[2]

Disclosure of the Bases of the Amounts to Be Charged

At the outset of the representation the lawyer should make disclosure of the basis for the fee and any other charges to the client. This is a two-fold duty, including not only an explanation at the beginning of engagement of the basis on which fees and other charges will be billed, but also a sufficient explanation in the statement so that the client may reasonably be expected to understand what fees and other charges the client is actually being billed.

Authority for the obligation to make disclosure at the beginning of a representation is found in the interplay among a number of rules. Rule 1.5(b) provides that:

> When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

The Comment to Rule 1.5 gives guidance on how to execute the duty to communicate the basis of the fee:

> In a new client-lawyer relationship ... an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fees is set forth.

This obligation is reinforced by reference to Model Rule 1.4(b) which provides that:

> A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

While the Comment to this Rule suggests its obvious applicability to negotiations or litigation with adverse parties, its important principle should be equally applicable to the lawyer's obligation to explain the basis on which the lawyer expects to be compensated, so the client can make one of the more important decisions "regarding the representation."

An obligation of disclosure is also supported by Model Rule 7.1, which addresses communications concerning a lawyer's services, including the basis on which fees would be charged. The rule provides:

> A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:
>
> (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

It is clear under Model Rule 7.1 that in offering to perform services for prospective clients it is critical that lawyers avoid making any statements about fees that are not complete. If it is true that a lawyer when advertising for new clients must disclose, for example, that costs are the responsibility of the clients, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), it necessarily follows that in entering into an actual client relationship a lawyer must make fair disclosure of the basis on which fees will be assessed.

A corollary of the obligation to disclose the basis for future billing is a duty to render statements to the client that adequately apprise the client as to how that basis for billing has been applied. In an engagement in which the client has agreed to compensate the lawyer on the basis of time expended at regular hourly rates, a bill setting out no more than a total dollar figure for unidentified professional services will often be insufficient to tell the client what he or she needs to know in order to understand how the amount was determined. By the same token, billing other charges without breaking the charges down by type would not provide the client with the information the client needs to understand the basis for the charges.

Initial disclosure of the basis for the fee arrangement fosters communication that will promote the attorney-client relationship. The relationship will be similarly benefitted if the statement for services explicitly reflects the basis for the charges so that the client understands how the fee bill was determined.

Professional Obligations Regarding the Reasonableness of Fees

Implicit in the Model Rules and their antecedents is the notion that the attorney-client relationship is not necessarily one of equals, that it is built on trust, and that the client is encouraged to be dependent on the lawyer, who is dealing with matters of great moment to the client. The client should only be charged a reasonable fee for the legal services performed. Rule 1.5 explicitly addresses the reasonableness of legal fees. The rule deals not only with the determination of a reasonable hourly rate, but also with total cost to the client. The Comment to the rule states, for example, that "[a] lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures." The goal should be solely to compensate the lawyer fully for time reasonably expended, an approach that if followed will not take advantage of the client.

Ethical Consideration 2-17 of the Model Code of Professional Responsibility provides a framework for balancing the interests between the lawyer and client in determining the reasonableness of a fee arrangement:

The determination of a proper fee requires consideration of the interests of both client and lawyer. A lawyer should not

charge more than a reasonable fee, for excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession.

> The lawyer's conduct should be such as to promote the client's trust of the lawyer and of the legal profession. This means acting as the advocate for the client to the extent necessary to complete a project thoroughly. Only through careful attention to detail is the lawyer able to manage a client's case properly. An unreasonable limitation on the hours a lawyer may spend on a client should be avoided as a threat to the lawyer's ability to fulfill her obligation under Model Rule 1.1 to "provide competent representation to a client." "Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation." Model Rule 1.1. Certainly either a willingness on the part of the lawyer, or a demand by the client, to circumscribe the lawyer's efforts, to compromise the lawyer's ability to be as thorough and as prepared as necessary, is not in the best interests of the client and may lead to a violation of Model Rule 1.1 if it means the lawyer is unable to provide competent representation. The Comment to Model Rule 1.2, while observing that "the scope of services provided by a lawyer may be limited by agreement," also notes that an agreement "concerning the scope of representation must accord with the Rules....Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1....."[3]

On the other hand, the lawyer who has agreed to bill on the basis of hours expended does not fulfill her ethical duty if she bills the client for more time than she actually spent on the client's behalf.[4] In addressing the hypotheticals regarding (a) simultaneous appearance on behalf of three clients, (b) the airplane flight on behalf of one client while working on another client's matters and (c) recycled work product, it is helpful to consider these questions, not from the perspective of what a client could be forced to pay, but rather from the perspective what the lawyer actually earned. A lawyer who spends four hours of time on behalf of three clients has not earned twelve billable hours. A lawyer who flies for six hours for one client, while working for five hours on behalf of another, has not earned eleven billable hours. A lawyer who is able to reuse old work product has not re-earned the hours previously billed and compensated when the work product was first generated. Rather than looking to profit from the fortuity of coincidental scheduling, the desire to get work done rather than watch a movie, or the luck of being asked the identical question twice, the lawyer who has agreed to bill solely on the basis of time spent is obliged to pass the benefits of these economies on to the client. The practice of billing several clients for the same time or work product, since it results in the earning of an unreasonable fee, therefore is contrary to the mandate of the Model Rules. Model Rule 1.5.

Moreover, continuous toil on or overstaffing a project for the purpose of churning out hours is also not properly considered "earning" one's fees. One job of a lawyer is to expedite the legal process. Model Rule 3.2. Just as a lawyer is expected to discharge a matter on summary judgment if possible rather than proceed to trial, so too is the lawyer expected to complete other projects for a client efficiently. A lawyer should take as much time as is reasonably required to complete a project, and should certainly never be motivated by anything other than the best interests of the client when determining how to staff or how much time to spend on any particular project.

It goes without saying that a lawyer who has undertaken to bill on an hourly basis is never justified in charging a client for hours not actually expended. If a lawyer has agreed to charge the client on this basis and it turns out that the lawyer is particularly efficient in accomplishing a given result, it nonetheless will not be permissible to charge the client for more hours than were actually expended on the matter. When that basis for billing the client has been agreed to, the economies associated with the result must inure to the benefit of the client, not give rise to an opportunity to bill a client phantom hours. This is not to say that the lawyer who agreed to hourly compensation is not free, with full disclosure, to suggest additional compensation because of a particularly efficient or outstanding result, or because the lawyer was able to reuse prior work product on the client's behalf. The point here is that fee enhancement cannot be accomplished simply by presenting the client with a statement reflecting more billable hours than were actually expended. On the other hand, if a matter turns out to be more difficult to accomplish than first anticipated and more hours are required than were originally estimated, the lawyer is fully entitled (though not required) to bill those hours unless the client agreement turned the original estimate into a cap on the fees to be charged.

Charges Other Than Professional Fees

In addition to charging clients fees for professional services, lawyers typically charge their clients for certain additional items which are often referred to variously as disbursements, out-of-pocket expenses or additional charges. Inquiries to the Committee demonstrate that the profession has encountered difficulties in conforming to the ethical standards in the areas as well. The Rules provide no specific guidance on the issue of how much a lawyer may charge a client for costs incurred over and above her own fee. However, we believe that the reasonableness standard explicitly applicable to fees under Rule 1.5(a) should be applicable to these charges as well.

The Committee, in trying to sort out the issues related to these charges, has identified three different questions which must be addressed. First, which items are properly subject to additional charges? Second, to what extent, if at all, may clients be charged for more than actual out-of-pocket disbursements? Third, on what basis may clients be charged for the provision of in-house services? We shall address these one at a time.

A. General Overhead

When a client has engaged a lawyer to provide professional services for a fee (whether calculated on the basis of the number of hours expended, a flat fee, a contingent percentage of the amount recovered or otherwise) the client would be justifiably disturbed if the lawyer submitted a bill to the client which included, beyond the professional fee, additional charges for general office overhead. In the absence of disclosure to the client in

advance of the engagement to the contrary, the client should reasonably expect that the lawyer's cost in maintaining a library, securing malpractice insurance, renting of office space, purchasing utilities and the like would be subsumed within the charges the lawyer is making for professional services.

B. Disbursements

At the beginning of the engagement lawyers typically tell their clients that they will be charged for disbursements. When that term is used clients justifiably should expect that the lawyer will be passing on to the client those actual payments of funds made by the lawyer on the client's behalf. Thus, if the lawyer hires a court stenographer to transcribe a deposition, the client can reasonably expect to be billed as a disbursement the amount the lawyer pays to the court reporting service. Similarly, if the lawyer flies to Los Angeles for the client, the client can reasonably expect to be billed as a disbursement the amount of the airfare, taxicabs, meals and hotel room.

It is the view of the Committee that, in the absence of disclosure to the contrary, it would be improper if the lawyer assessed a surcharge on these disbursements over and above the amount actually incurred unless the lawyer herself incurred additional expenses beyond the actual cost of the disbursement item. In the same regard, if a lawyer receives a discounted rate from a third-party provider, it would be improper if she did not pass along the benefit of the discount to her client rather than charge the client the full rate and reserve the profit to herself. Clients quite properly could view these practices as an attempt to create additional undisclosed profit centers when the client had been told he would be billed for disbursements.

C. In-House Provision of Services

Perhaps the most difficult issue is the handling of charges to clients for the provision of in-house services. In this connection the Committee has in view charges for photocopying, computer research, on-site meals, deliveries and other similar items. Like professional fees, it seems clear that lawyers may pass on reasonable charges for these services. Thus, in the view of the Committee, the lawyer and the client may agree in advance that, for example, photocopying will be charged at $.15 per page, or messenger services will be provided at $5.00 per mile. However, the question arises what may be charged to the client, in the absence of a specific agreement to the contrary, when the client has simply been told that costs for these items will be charged to the client. We conclude that under those circumstances the lawyer is obliged to charge the client no more than the direct cost associated with the service (*i.e.*, the actual cost of making a copy on the photocopy machine) plus a reasonable allocation of overhead expenses directly associated with the provision of the service (*e.g.*, the salary of a photocopy machine operator).

It is not appropriate for the Committee, in addressing ethical standards, to opine on the various accounting issues as to how one calculates direct cost and what may or may not be included in allocated overhead. These are questions which properly should be reserved for our colleagues in the accounting profession. Rather, it is the responsibility of the Committee to explain the principles it draws from the mandate of Model Rule 1.5's injunction that fees be reasonable. Any reasonable calculation of direct costs as well as any reasonable allocation of related overhead should pass ethical muster. On the other hand, in the absence of an agreement to the contrary, it is impermissible for a lawyer to create an additional source of profit for the law firm beyond that which is contained in the provision of professional services themselves. The lawyer's stock in trade is the sale of legal services, not photocopy paper, tuna fish sandwiches, computer time or messenger services.

Conclusion

As the foregoing demonstrates, the subject of fees for professional services and other charges is one that is fraught with tension between the lawyer and the client. Nonetheless, if the principles outlined in this opinion are followed, the ethical resolution of these issues can be achieved. ■

Endnotes

1. Rule 1.5 states in relevant part:
   (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
   (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
   (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
   (3) the fee customarily charged in the locality for similar legal services;
   (4) the amount involved and the results obtained;
   (5) the time limitations imposed by the client or by the circumstances;
   (6) the nature and length of the professional relationship with the client;
   (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
   (8) whether the fee is fixed or contingent.
   (b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.
2. DR 2-106 contains substantially the same factors listed in Rule 1.5 to determine reasonableness, but does not require that the basis of the fee be communicated to the client "preferably in writing" as Rule 1.5 does.
3. Beyond the scope of this opinion is the question whether a lawyer, with full disclosure to a sophisticated client of the risks involved, can agree to undertake at the request of the client only ten hours of research, when the lawyer knows that the resulting work product does not fulfill the competent representation requirement of Model Rule 1.1.
4. Rule 1.5 clearly contemplates that there are bases for billing clients other than the time expended. This opinion, however, only addresses issues raised when it is understood that the client will be charged on the basis of time expended.

[RO-94-02]

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

M. A. Marsal


Marsal

WHEREAS, M. A. Marsal, a distinguished member of this association, passed away on November 4, 1993; and

NOW, THEREFORE, BE IT RESOLVED THAT "Bubba", as he was affectionately known, was born in Mobile, Alabama where he attended public schools. He attended undergraduate school at Spring Hill College and the University of Alabama. He served in the Air Force in World War II and was stationed in Guam. He graduated from the University of Alabama Law School in 1950, when he began the practice of law with Harry Seale. He was a partner with the law firm of Seale, Marsal & Seale, where he practiced law with Harry Seale, A.J. Seale and his son, Tony. Bubba was truly a "lawyer's lawyer" in every sense of the word, being an able and feared trial lawyer representing plaintiffs in personal injury civil actions in which he was able to win a number of large verdicts, as well as defendants in criminal actions, in which he was able to obtain acquittals in numerous capital cases. He was a member of the Alabama State Bar, American Bar Association and Alabama Trial Lawyers Association. He was an avid sportsman who enjoyed hunting, fishing, boats and all outdoor activities.

Bubba Marsal was a devoted husband and father whose loss is felt keenly by all who knew him. He is survived by his wife, Ann, one daughter, Beth McFarlane of Mobile, and three sons, L.A. Marsal of Mobile, J.R. Marsal of Silver Springs, Maryland and W.A. Wing of Orlando, Florida, and nine grandchildren.

D. Richard Bounds
President
Mobile Bar Association

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Montgomery
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Died: December 28, 1993

Kaletah Newell Carroll
Fairfax, VA
Admitted: 1954
Died: December 28, 1993

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Birmingham
Admitted: 1964
Died: March 1, 1994

Norman W. Harris, Jr.
Decatur
Admitted: 1968
Died: March 16, 1994

Samuel Earle Hobbs
Selma
Admitted: 1948
Died: January 4, 1994

Jack Montgomery
Birmingham
Admitted: 1967
Died: February 12, 1994

Virginia Carraway Ramsey
Birmingham
Admitted: 1971
Died: February 8, 1994

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Birmingham
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Died: February 19, 1994

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Birmingham
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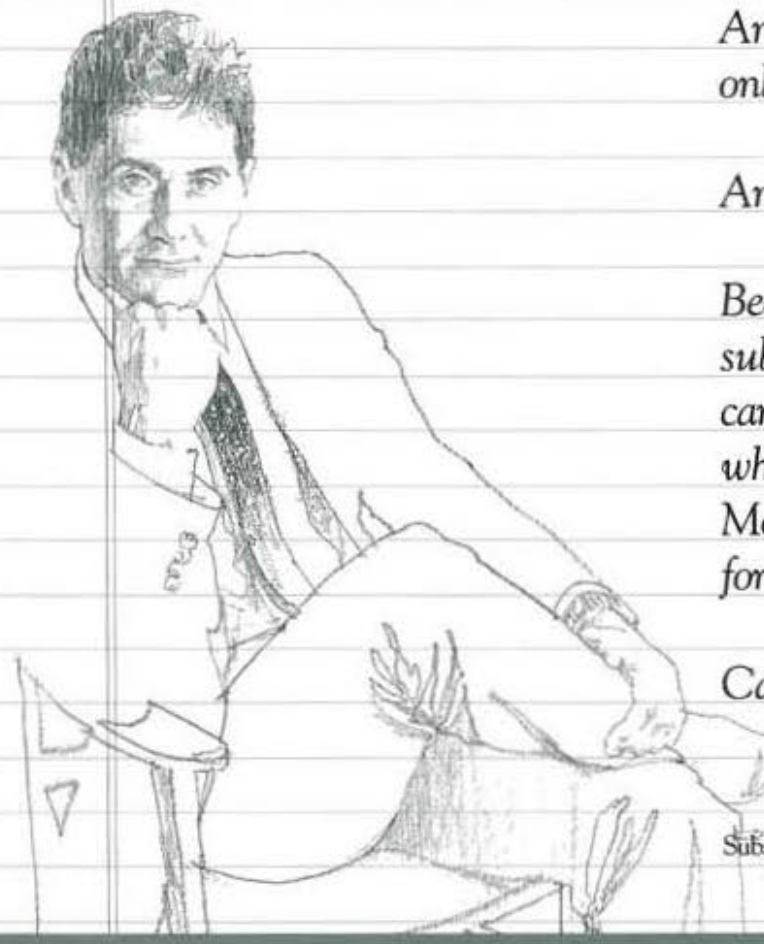

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