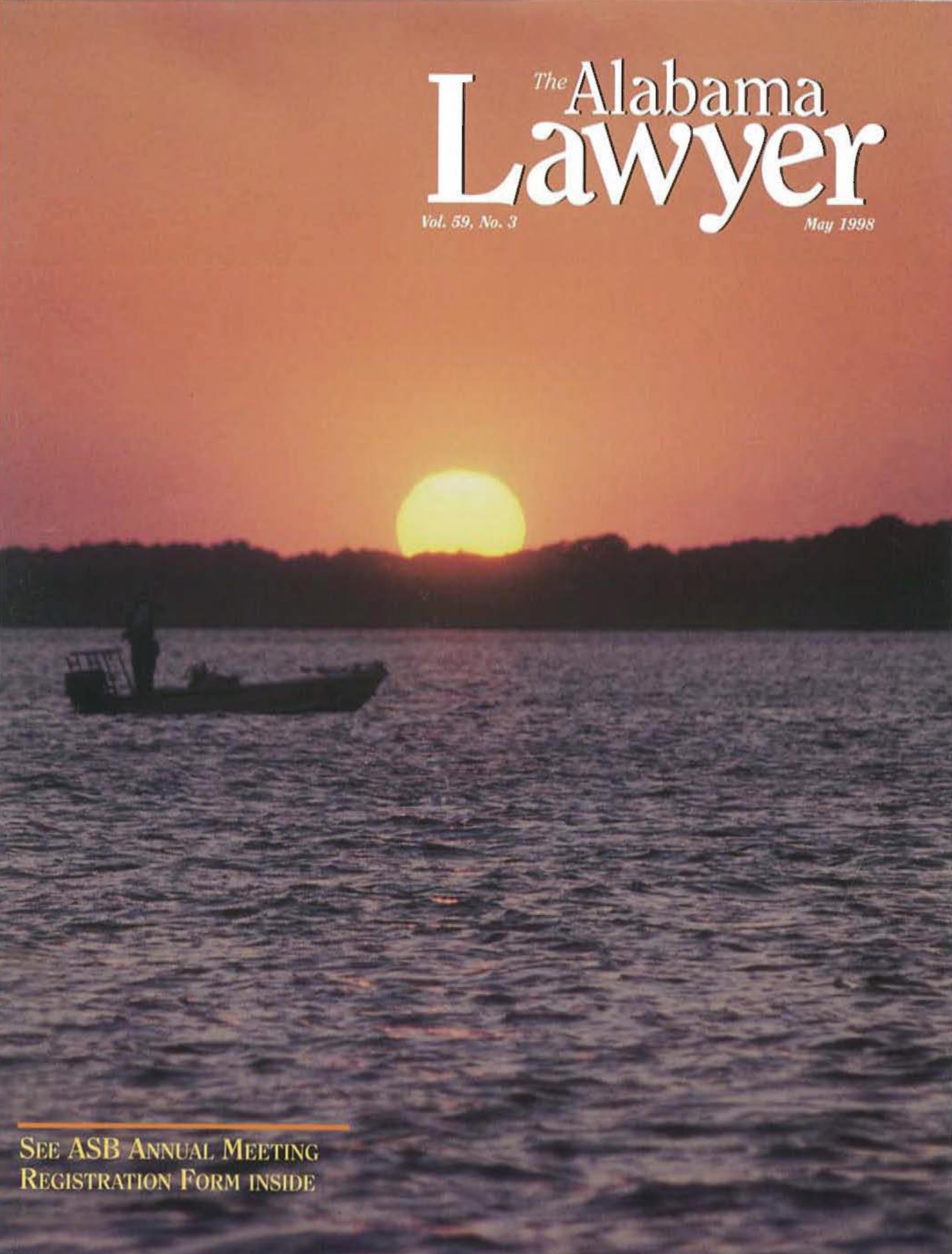

The Alabama Lawyer

Vol. 59, No. 3 May 1998

See ASB Annual Meeting Registration Form inside

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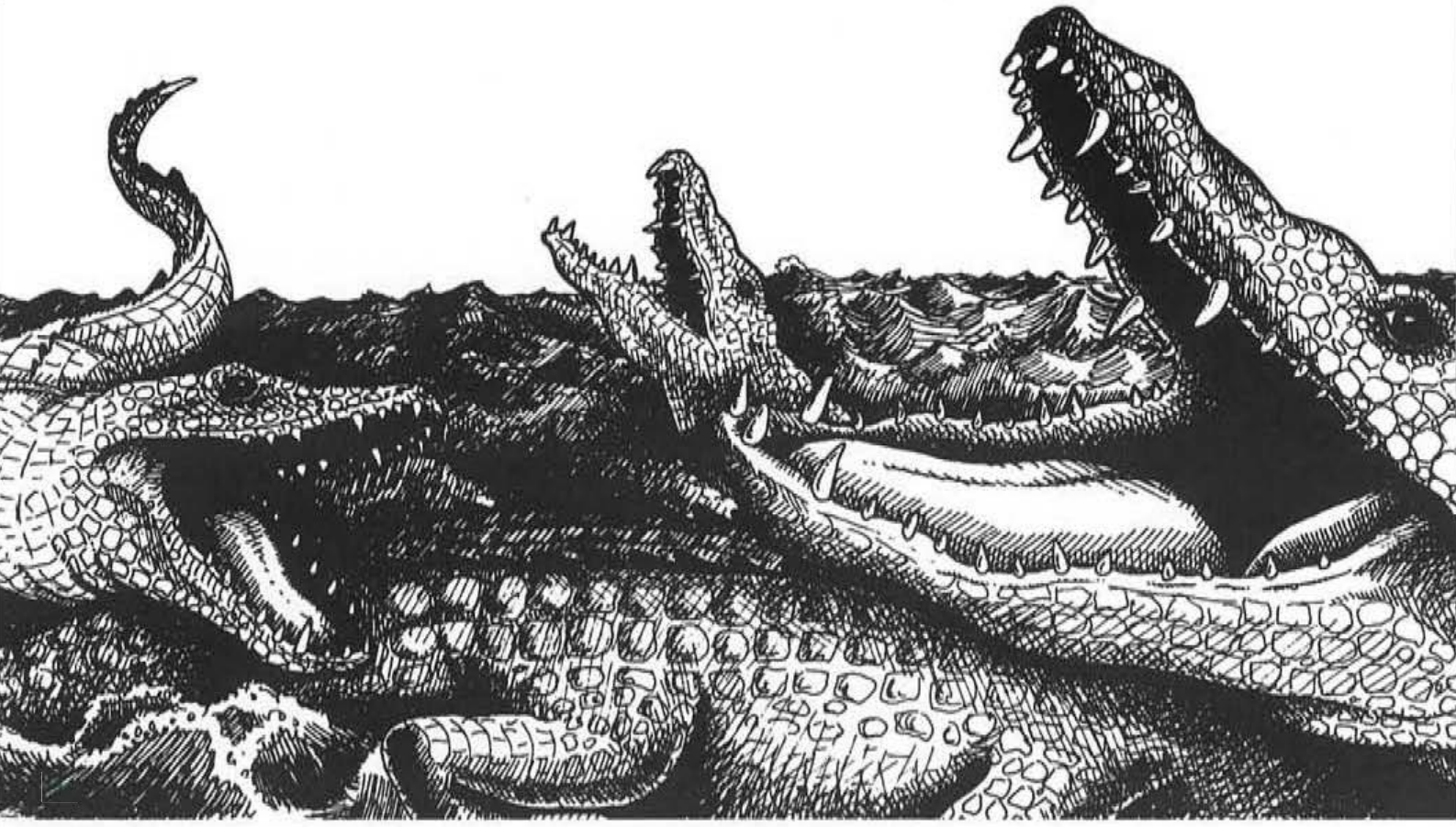

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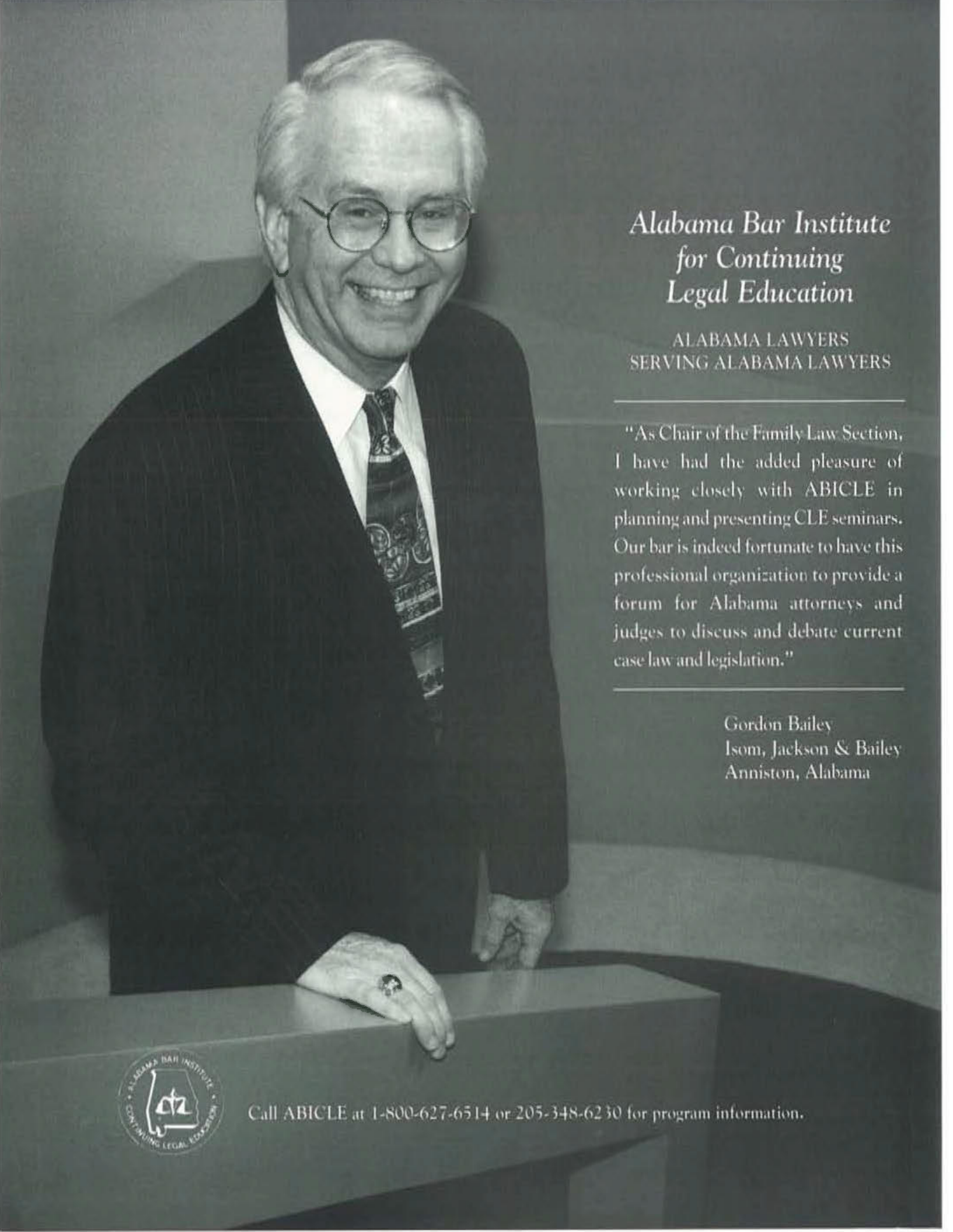

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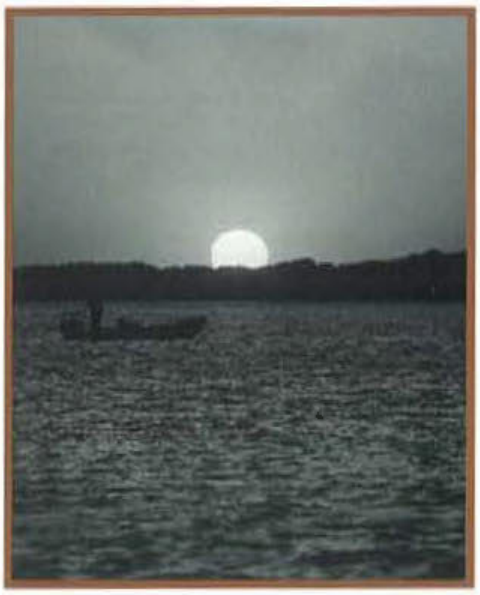

The Alabama Lawyer

Vol. 59, No. 3 May 1998

On the Cover

Sunset near ***Orange Beach, Alabama***, the site of the 1998 Alabama State Bar Annual Meeting. The photograph was taken less than one mile from the Gulf of Mexico.

—Photo by Paul Crawford, JD, CLU

In This Issue

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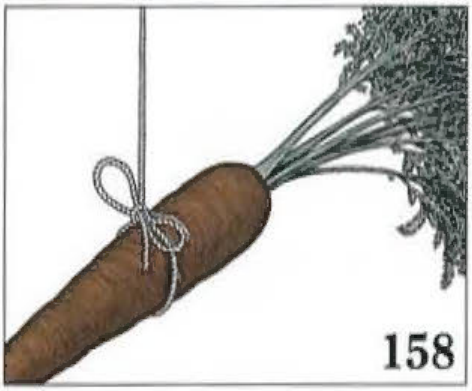

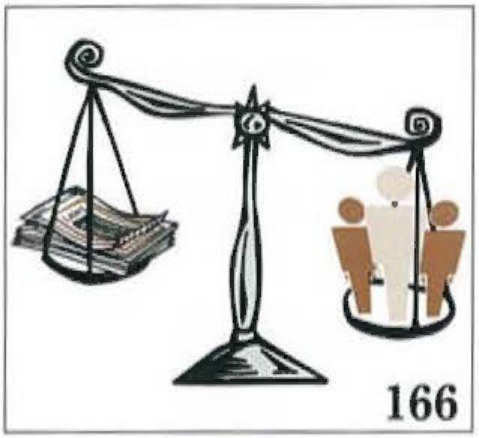

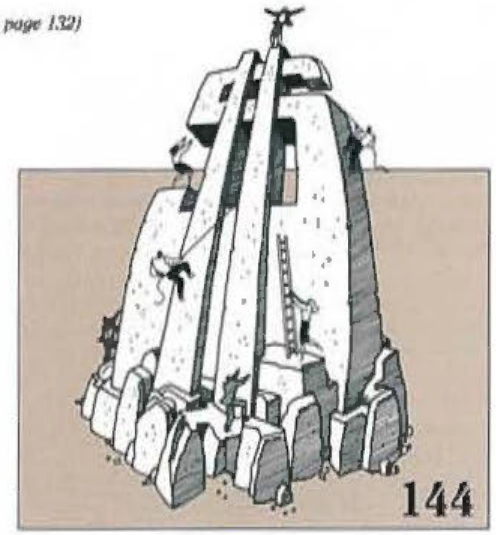

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DEPARTMENTS

Published seven times a year (the June issue is a bar directory edition) by the Alabama State Bar, P.O. Box 4156, Montgomery, Alabama 36101-4156. Phone (334) 269-1515.

The Alabama Lawyer is published seven times a year for $20 per year in the United States and $25 per year outside the United States by the Alabama State Bar, 415 Dexter Avenue, Montgomery, Alabama 36104. Single issues are $5.00 for the journal and $25/$60 for the directory. Periodicals postage paid at Montgomery, Alabama, *and additional mailing offices.*

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A MEMBER SERVICE OF ALABAMA STATE BAR

By Dag Rowe

Dag Rowe Reflects on His Tenure as ASB President

Dag Rowe

Recently, Robert Huffaker, the editor of ***The Alabama Lawyer****, spoke with 1997-98 ASB President Dag Rowe about his year of service and the issues he has had to deal with during his term.*

Robert Huffaker: You are about three-fourths of the way through your tenure as bar President. Tell us about the general state of the bar.

Dag Rowe: I characterize the state of the bar as being very good. From a financial standpoint, we are adequately funded and solvent. I think the commission continues to be a good steward of the bar's funds and resources. We have wonderful facilities here in Montgomery. We have a modern, well-equipped bar headquarters with adequate room for expansion, housing an able and motivated staff. The admissions process is also in good condition. It's understandably stressed somewhat, from time to time, in terms of the workload because there are so many applicants now for admission to the bar. We have no lawsuits or challenges against our admission's process at this time. The disciplinary functions of the State Bar are functioning well. We have experienced attorneys, investigators and other staff people, who have that process well in hand. The cases are handled efficiently, expeditiously and, we believe, fairly. There's not a great backlog. Generally, I think the bar is in excellent condition. That's not to say we have no problems or challenges. There's still plenty to be done, such as in improving the image of our profession.

RH: What has been the focus of your administration?

DR: One important theme is to unify the bar and minimize the trend toward polarization and factionalization. Another is the promotion of professionalism and civility among our members.

Alabama Supreme Court Justice Hugh Maddox presents Dag Rowe with Dream Team appreciation plaque.

We're also encouraging our members to recognize and seize the important opportunities for service in the profession and in the community.

RH: How have you accomplished your goal of reversing polarization in the bar?

DR: From the day I was installed, we have stressed the importance of civility among lawyers and have discouraged the "Rambo-type" conduct that tends to factionalize and divide us. We've also encouraged a realization that the state bar is the common ground for all groups of the profession; there is room at our "table" for plaintiffs lawyers, defense lawyers, women lawyers, black lawyers. To further this unity theme, we've scheduled a day-long program on May 14 at the bar that we are calling a "Summit on the Profession," to foster communication and discuss goals and issues of mutual interest. We have invited the officers of the Alabama Trial Lawyers Association, the Alabama Defense Lawyers Association, the Alabama Lawyers Association, the judges' associations, the Committee on Women in the Profession, the district attorneys, and the

Criminal Defense Lawyers Association.

We have also made a significant effort to partner with the local bar associations, which we believe are a great resource. For example, we want to implement a statewide mentoring program but to do that we need the help of the local bars. Mentoring, by its nature, is inherently local. This cooperation and coordination are already bearing some fruit: in response to the flood in Elba, we had a successful joint initiative with the Montgomery County, Pike County and Coffee County bars to provide counseling and legal assistance on a pro bono basis to flood victims who have legal questions and problems arising out of that disaster, such as landlord and tenant issues, and homeowners' insurance questions.

Vic Lott, ASB president-elect, Dag Rowe, and bar commissioner Wanda Devereaux at Bar Leadership Conference

RH: The bar's annual meeting, which is back at Orange Beach this year, includes programs sponsored by the Defense Lawyers Association and the Trial Lawyers Association. Is this another effort to address the concerns about polarization?

DR: Absolutely. In planning for the annual meeting, a goal we set was to provide programming and activities which would appeal to and attract specialty bars and groups. They are designed to eliminate any misinformation that the state bar is the exclusive domain of older, white males with a defense orientation.

RH: Did you appoint any task forces that you want to highlight?

DR: Yes, three task forces started this year. The first is a task force to study the admissions process. As I indicated before, the number of people applying for the bar continues to swell and that causes problems with having examiners who are exclusively practicing lawyers. The admissions process is so important that we think it's appropriate from time to time to look closer at every aspect of it to see what changes or modifications need to be made in terms of testing products, character and fitness issues, and the optimum structure for the board of bar examiners.

A family of attorneys: Stephen J. Rowe, Benjamin T. Rowe and S. Dagnal Rowe

The second task force is studying our entire disciplinary process. Of course, we continue to be concerned about recidivism, consistency and public perception. The third task force is studying means of providing additional funding for Legal Services within the state. Over the last three or four years, funding nationwide for Legal Services has been reduced by almost a third, resulting in a significant reduction in personnel and in the number of clients served. While our Volunteer Lawyers Program is growing, in Alabama we still need a viable Legal Services. This task force will study alternative sources of funding, and, it is hoped, will formulate a practical strategy to tap one of those funding sources.

RH: How do you feel the disciplinary process is working, now that there are lay people on the panels?

DR: We've suffered none of the problems that were of concern when that change was made. We found that the lay people make a valuable contribution and help to dispel any notion that this is a cozy process by which lawyers "protect their own." In fact, the lay members often say that the lawyers on the panels tend to be harder on those charged than the lay members.

RH: Has the state bar been involved in any legislative efforts this year?

DR: Yes, we have two really important legislative efforts going on right now. One involves increasing the hourly rate for lawyers handling indigent defense in criminal cases. The last time those fees were increased was back in 1981 and we feel they are now woefully inadequate. This legislation would raise those fees to $55 per hour for in-court and out-court time, and would be funded by an increase in filing fees. We're optimistic it can pass if we can get it up for a vote before the session ends.

(Continued on page 170)

Executive Director's Report

By Keith B. Norman

Storm Clouds Gathering on the Horizon for the Legal Profession

Keith B. Norman

Every one remembers Pollyanna, the hopelessly optimistic main character of Eleanor Porter's novel by the same name. I am sure most of you also recall the story of Chicken Little and his famous admonition, "the sky is falling," after being hit on the head by a falling acorn. I find myself somewhere between the optimism of Pollyanna and the panic of Chicken Little about what I perceive to be ominous developments that affect the legal profession.

In Oregon, there are efforts by some to create a "Judicial Council" on which no lawyer or judge would serve and would have the exclusive power and jurisdiction to license and regulate lawyers in that state. This body would be empowered not only to investigate and discipline lawyers, but to assess damages to be paid from the lawyers malpractice insurance. Under the terms of this proposal, a "Special Grand Jury" would be authorized to hear any complaints received about any judge or lawyer. Under a similar "Judicial Reform" initiative, candidates for judicial office would be allowed to express their views on matters which would likely come before them. Incumbent judges would not be permitted to refer to themselves as incumbents in contested elections. A lawyer appointed by the Governor of Oregon to fill a vacancy would not be allowed to run for that position in the next election.

While the Oregon initiatives are extreme, other states, including Florida and South Carolina, have experienced attempts to place the legal profession under the total control of non-judicial agencies. Fortunately, these proposals have not succeeded. But they are appearing more often and, as in the case of Oregon, are becoming more extreme as well. Even on the national level, there have been news stories about some members of Congress who advocate the impeachment of federal judges who have issued rulings with which they disagree.

There are less obvious signs that the legal profession and the judiciary are being singled out in such fashion in Alabama. During the last several legislative sessions, legislation was introduced that would have chipped away at the autonomy and independence of the judiciary. Included among these bills have been ones that would have amended various rules of the *Alabama Rules of Civil Procedure*. As far as I am aware, these bills were introduced without any consultation with the Alabama Supreme Court about the ultimate effect of the proposed changes. One bill would have even allowed parties in civil litigation to exercise one "preemptory strike" of the trial judge handling the case! The fact that none of these bills became law should not lessen our concern.

Although I may sound like Chicken Little proclaiming that sky is falling when it's only a acorn, I do believe we must be vigilant and concerned about these types of incidents. In this regard, President Dag Rowe has called a "Summit on the Profession" this month. Invited to attend are the chief justice and presiding judges of the intermediate appellate courts and presidents of the Circuit, District and Juvenile Judges associations. The following organizations have been asked to participate in the summit as well: Alabama Lawyers Association; Women in the Profession

Committee of the state bar; Alabama Trial Lawyers Association; District Attorneys Association; Alabama Defense Lawyers Association; and the Alabama Criminal Defense Lawyers Association. Leaders of the four largest local bar associations have also been invited.

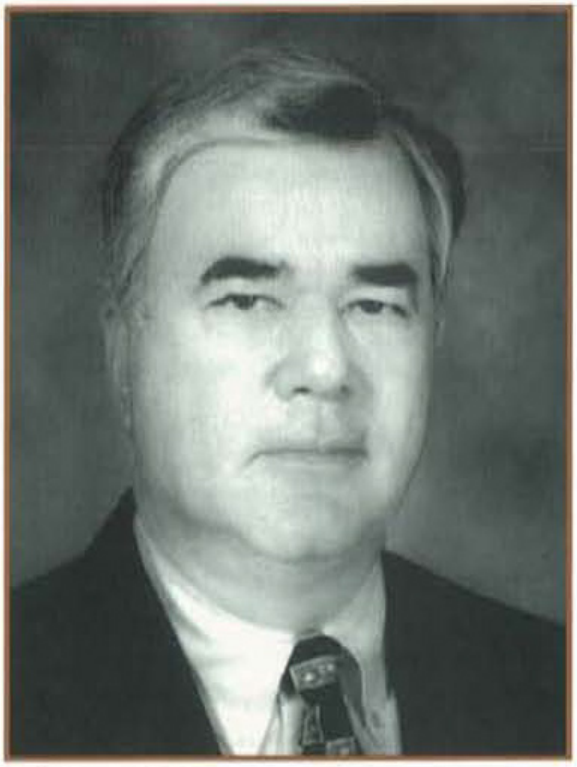
Each representative attending the summit has been asked to list the most important issues facing the profession and justice system. None of problems are likely to be resolved in this meeting. Instead, the most serious issues can be isolated and a working relationship developed to guide the profession in addressing these issues in a positive manner.

Despite the storm clouds that may be gathering, I am optimistic. Whatever difficulties our profession has encountered or may experience in the future, we should view this as an opportunity to set aside the internecine disputes that have caused us to become a factionalized profession. By uniting, we can strengthen the legal profession and protect one of democracy's important bulwarks. ■

PROFILE

Wade Hampton Baxley

Pursuant to the Alabama State Bar's rules governing the election of president-elect, the following biographical sketch is provided of Wade H. Baxley. Baxley was the sole qualifying candidate for the position of president-elect of the Alabama State Bar for the 1998-99 term, and will assume the presidency in July 1999.



Wade Hampton Baxley

Wade H. Baxley was born in Dothan, Alabama on November 1, 1943. He attended public schools in Dothan and received a B.S. in accounting from the University of Alabama in 1965. He received his J.D. from the University of Alabama School of Law in 1968 and was admitted to the state bar that year.

Baxley served as law clerk to Associate Judge Aubrey M. Cates, Jr., of the Alabama Court of Appeals from 1968-69 and he has been in private practice in Dothan since May 1969. He served as city attorney for the City of Dothan from 1973-81 and has been retained counsel for the Dothan-Houston County Airport Authority since 1986. He is presently the senior partner in the firm of Ramsey, Baxley & McDougle.

Baxley is a member of the Houston County Bar Association and served as its president in 1978-79. He is a member of the American Bar Association and served as state bar delegate to the ABA House of Delegates from 1989 to 1993. He has served as a commissioner on the Alabama State Bar Board of Bar Commissioners from 1982 to 1988 and since 1991 from the 20th Judicial Circuit. While serving on the board of bar commissioners, he has been a member of the MCLE Commission, Disciplinary Commission, Character and Fitness Committee and the Supreme Court Liaison Committee. Baxley currently serves as a member of the Executive Council of the Alabama State Bar and served as vice-president of the Alabama State Bar in 1991-92. He served as president of the Alabama Defense Lawyers Association for the 1996-97 fiscal year. He is a member of the Board of Trustees of the Farrah Law Society and has been selected as a Fellow of the American Bar Association.

Baxley is a member of the First United Methodist Church of Dothan, Alabama. He is married to the former Joan Morris of Tuscaloosa, Alabama and they have two sons, Hamp, 26, a student at the University of Alabama School of Law, and Keener, 23, who works for Waddell & Reed in Kansas City, Missouri. ■

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Milton J. Westry announces the opening of his office. The mailing address is P.O. Box 230661, Montgomery, 36123-0661. Phone (334) 279-0783.

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Jerry W. Hauser announces the relocation of his office to 165 E. Magnolia Avenue, Suite 229, P.O. Box 156, Auburn, 36831-0156. Phone (334) 821-7888.

Andrew T. Mayfield announces the relocation of his office to 407 Lay Dam Road, Clanton, 35045. The mailing address is P.O. Box 1546, 35046. Phone (205) 755-7878.

Charles Centerfit Hart announces the relocation of his office to 420 S. 4th Street, Gadsden, 35901. His mailing address remains P.O. Box 26, 35902. Phone (205) 543-1701.

William R. Willard announces the relocation of his office to 420 S. 4th Street, Gadsden, 35901. Phone (205) 546-1945.

Lynneice Olive Powell announces the relocation of her office to 2015 1st Avenue, North, Birmingham, 35203. Phone (205) 458-1100.

Thomas R. Boller announces a change of address to 150 Government Street, Suite 1001, Mobile, 36602. Phone (334) 433-2133.

G. Shane Cooper announces the opening of his office located at 25 S. Lafayette Street, P.O. Box 615, Lafayette, 36862. Phone (334) 864-0300.

Edward B. Parker, II announces the opening of his office located at 235 S. Court Street, Montgomery, 36104. The mailing address is P.O. Box 4992, 36103-4992. Phone (334) 832-9600.

Susan G. Copeland announces a change of address to 2851 Zelda Road, Montgomery, 36106. Phone (334) 270-0020.

Harold F. Herring announces the opening of his office located at 250 Payne Lane, Gurley, 35748. Phone (256) 776-1566.

Ted Taylor announces a change of address to 114 E. Main Street, Prattville, 36067. Phone (334) 365-2221.

Lisa Jo Hill announces the relocation of her office to 2107 5th Avenue, North, Suite 201, Birmingham, 35203. Phone (205) 252-2783.

Robert B. Higgins announces a change of address to 3214 Cliff Road #6, Birmingham, 35205. Phone (205) 879-2556.

Richard D. Greer announces a change of address to 600 Luckie Drive, Suite 412, Birmingham, 35223. Phone (205) 870-4990.

Andrew T. Citrin, formerly a member of Cunningham, Bounds, Yance, Crowder & Brown, L.L.C., announces the opening of his office at 1203 Dauphin Street, Mobile, 36604. Phone (334) 432-5600.

Bryon Todd Ford announces the opening of his office at 110 Washington Street, Suite 207-208, Post Office Building, Livingston, 35470. Phone (205) 652-9114.

R. Stanley Morrow, P.C. announces the relocation of his office to 517 Beacon Parkway, West, P. O. Box 26511, Birmingham, 35260. Phone (205) 942-1421.

Andrew M. Skier, formerly deputy district attorney for the Fifteenth Judicial Circuit, announces that he is entering private practice. His office is located at 505 S. Perry Street, Montgomery, 36104. The mailing address is P.O. Box 4100, 36103. Phone (334) 263-4105.

J. William Mayer, formerly chief deputy district attorney for the Fifteenth Judicial Circuit, announces that he is entering private practice. His office is located at 3005 Jasmine Road, Montgomery, 36111. Phone (334) 269-0511.

Among Firms

Brantley & Wilkerson, P.C. announces that **Amanda Cleveland Carter** has become an associate. Offices are located at 405 S. Hull Street, Montgomery, 36104. Phone (334) 265-1500.

Hub Harrington and **Michael G. Graffeo** announce the formation of **Harrington & Graffeo.** Offices are located at 22 Inverness Center Parkway, Suite 160, Birmingham, 35242. Phone (205) 408-0048, Harrington and (205) 408-0101, Graffeo.

Brinkley & Chestnut announces that **Charles L. Brinkley** has become an associate. Offices are located at 307 Randolph Avenue, Huntsville, 35801. Phone (205) 533-4534.

Constangy, Brooks & Smith, L.L.C. announces that **Charles A. Powell, IV** has become an associate. Offices are located at 1901 Sixth Avenue, North, Suite 1410, Birmingham, 35203. Phone (205) 252-9321. The firm also maintains offices in Columbia, South Carolina;

Nashville, Tennessee; Washington, D.C.; and Winston Salem, North Carolina.

Feld, Hyde, Lyle, Wertheimer & Bryant announces that **J. Fred Kingren** has become a shareholder. Offices are located at 2000 SouthBridge Parkway, Suite 500, Birmingham, 35209. Phone (205) 802-7575.

Tammy C. Woolley, formerly with Cooper, Mitch, Crawford, Kuykendall & Whatley, has become associated with **John D. Saxon, P.C.** Offices are located at 1000 Financial Center, 505 N. 20th Street, Birmingham, 35203. Phone (205) 324-0223.

James D. Moffatt announces that **Joanna Owings Cole** has joined his practice as an associate. Offices are located at 213 S. Jefferson Street, Athens, 35611. Phone (205) 233-5091.

Valentino D.B. Mazzia announces he is no longer *of counsel* with Cunningham, Bounds, Yance, Crowder & Brown. His new address is 120 E. 87th Street, #P14D, New York, NY 10128-1101. Phone (212) 427-1619.

Nakamura & Quinn, L.L.P. announces that **Michael E. Bevers** and **K. Kathy Brown** have joined the firm as associates. Offices are located at 2100 First Avenue, North, Third Floor, Birmingham, 35203. Phone (205) 323-8504.

H.E. Grierson and **Jack T. Noe** announce the formation of **Grierson & Noe, P.C.** Offices are located at 1572 Montgomery Highway, Suite 202, Hoover, 35216. Phone (205) 823-0257 and (256) 287-0666.

Terri L. Bozeman, formerly law clerk to Justice Janie L. Shores, Judge William E. Robertson and Judge Samuel W. Taylor, has been appointed **District Judge of Lowndes County.** The mailing address is P.O. Box 455, Hayneville, 36040. Phone (334) 548-2591.

Randall K. Bozeman and **A. Ted Bozeman**, retired district judge of Lowndes County, announce the formation of **Bozeman & Bozeman**. Offices are located at 10 LaFayette Street, P.O Box 337, Hayneville, 36040. Phone (334) 548-2244.

Lackey, Bridgeman & Johnson announces a name change to **Lackey & Bridgeman**. Offices are relocated at 126 E. Peachtree Street, Scottsboro, 35768. Phone (205) 259-3929.

Freman & Kaou, L.L.C. announces a change of address to 211 S. Cedar Street, Mobile, 36602. Phone (334) 432-2111.

Hand Arendall, L.L.C. announces the opening of a Baldwin County office located at 111 W. Laurel Avenue, Foley, 36535. **Gregory L. Leatherbury, Jr.** and **David A. Ryan** will be located in this office. Phone (334) 970-5511.

Alec Brown & Associates, P.C. announces that **Kyla L. Groff** has joined the firm and the relocation of offices to 217 Madison Street, Alexander City, 35010. Phone (256) 409-9001.

Jimmy S. Calton, Sr. announces that **Jimmy S. Calton, Jr.** is now an associate and the firm name is **Calton & Calton.** Offices are located at 226 E. Broad Street, Eufaula, 36027. Phone (334) 687-3563.

W. Beatty Pearson and **Manley L. Cummins, III** announce that **Michelle M. Hart** has become a partner and the new firm name is **Pearson, Cummins & Hart.** Offices are located at 29000 Highway 98, Suite 101-C, The Summit, Daphne, 36526. The mailing address is P.O. Box 7980, Spanish Fort, 36577. Phone (334) 626-2772.

Donna H. Rainer, Mitzi L. Sears and **Judith C. Van Dyke** announce their association as partners, under the firm name of **Rainer, Sears & Van Dyke, L.L.P.,** and that **Mitzi Sears-Steuer** has formally changed her name to **Mitzi L. Sears.** Offices are located at 2100 Executive Park Drive, Opelika, 36801. Phone numbers for each remain the same, Donna, (334) 742-0167, Judith, (334) 745-4373, and Mitzi, (334) 741-0809.

Craig Olmstead announces the formation of **Olmstead & Olmstead.** Offices are located at 640 S. McKenzie Street, Foley, 36535. Phone (334) 943-4000.

M. Kristi Wallace announces she has joined the firm of **Drew, Eckl & Farnham, L.L.P.** Her mailing address is 800 W. Peachtree Street, Atlanta, 30357. Phone (404) 885-1400.

Allen R. Stoner, formerly with McPhillips, Shinbaum, Gill & Stoner, L.L.P., announces his withdrawal from the firm and that he has relocated his practice to Decatur, under the name of **Summerford & Stoner, P.C.** Offices are located at 701 2nd Avenue, S.E., Decatur, 35601. Phone (205) 350-8885.

Hare, Hair & White announces that **Allan Sidney Jones** has joined the firm. Offices are located at 1901 Sixth Avenue, North, AmSouth/Harbert Plaza, Suite 2800, Birmingham, 35203. Phone (205) 322-3040.

Richard T. Dorman, formerly with McRight, Jackson, Dorman, Myrick & Moore, has joined **Cunningham, Bounds, Yance, Crowder & Brown**. Offices are located at 1601 Dauphin Street, Mobile, 36604. Phone (334) 471-6191.

Theresa S. Jones announces that she is no longer associated with Sadler, Sullivan, Sharp & Van Tassel, P.C. She is now employed with **Mutual Assurance, Inc.**, Suite 500, 100 Brookwood Place, Homewood, 35209. Phone (205) 877-4400.

James William League, III announces that he is no longer associated with

Crosslin, Slaten & O'Connor and has joined the firm of **Siniard, Lamar & McKinney.** Offices are located at 125 Holmes Avenue, P.O. Box 2767, Huntsville, 35804. Phone (205) 536-0770.

Jaffe, Strickland, Beasley & Drennan, P.C. announces a relocation of offices to 2320 Arlington Avenue, Birmingham, 35205. Phone (205) 930-9800.

Jerry A. McDowell; Michael D. Knight; William C. Roedder, Jr.; Edward S. Sledge, III; Forrest C. Wilson, III; P. Russel Myles; Brian P. McCarthy; Walter T. Gilmer, Jr.; and Archibald T. Reeves, IV, all former partners of Hand Arendall, announce the formation of **McDowell, Knight, Roedder & Sledge, L.L.C. Frederick G. Helmsing, Jr., Bradley S. Copenhaver** and **Benjamin H. Kilborn, Jr.** have joined the firm as associates. Offices are located at 63 S. Royal, Suite 500, Riverview Plaza, Mobile, 36602. Phone (334) 432-5300.

Lange Clark, P.C. announces the relocation of its office to 903 New South Federal Savings Building, 215 21st Street, North, Birmingham, 35203. Phone (205) 322-1300.

Berkowitz, Lefkovits, Isom & Kushner announces that **Alane A. Phillips** and **James David Hicks** have become associates. Offices are located at 420 N. 20th Street, Suite 1600, SouthTrust Tower, Birmingham, 35203-5202. Phone (205) 328-0480.

G. Dennis Nabors and **Franklin A. Saliba** announce the formation of **Nabors & Saliba, L.L.C.** Offices are located at 461 S. Court Street, Montgomery, 36104. Phone (334) 263-0999.

McPhillips, Shinbaum, & Gill, L.L.P. announces that **Kathryn Dickey** has become an associate. Offices are located at 516 S. Perry Street, Montgomery, 36104. Phone (334) 262-1911.

Copeland, Franco, Screws & Gill, P.A. announces that **Herman B. Franco** and **Euel A. Screws, Jr.** have become *of counsel,* and **Mitchel H. Boles, Albert D. Perkins, IV** and **James David Martin** have become associates. Offices are located at 444 S. Perry Street, Montgomery, 36104. Phone (334) 834-1180.

Hunton & Williams announces that **T. Thomas Cottingham, III** has joined the Charlotte office as a partner. Offices are located at One NationsBank Plaza, Suite 2650, 101 S. Tryon Street, Charlotte, North Carolina 28280. Phone (704) 378-4700.

Maynard, Cooper & Gale, P.C. announces that **Gregory S. Curran** has become a member and **Carl S. Burkhalter; Sarah Yates Larson; Thomas C. Clark, III; Christopher B. Harmon; Jeffrey A. Lee; Warren B. Lightfoot, Jr.;** and **Robert W. Tapscott, Jr.,** formerly associates, have become members, and **John A. Earnhardt; J. Alan Baty; Stephen Foster Black; Brannon J. Buck; Alexander J. Marshall, III; Marcie E. Paduda; Jennifer R. Smith;** and **Hardwick C. Walthall** have become associates. The firm has offices in Birmingham, (205) 254-1000, and Montgomery, (334) 262-2001. The Montgomery office has relocated to 201 Monroe Street, Suite 1940, 36104.

Akridge & Balch, P.C. announces that **Robert H. Cochran** has become an associate. Offices are located at 1702 Catherine Court, Suite 2-D, Auburn, 36830. Phone (334) 887-0884.

Rushton, Stakely, Johnston & Garrett, P.A. announces that **Kirby H. Williams, William I. Eskridge** and **Edward C. Hixon** have become associates. Offices are located at 184 Commerce Street, Montgomery, 36104. Phone (334) 206-3100.

T. Eric Ponder announces the relocation of **T. Eric Ponder & Associates, P.C.** to The Flatiron Building, Suite 402, 84 Peachtree Street, N.W., Atlanta, Georgia 30303. The new phone number is (404) 581-0920. Offices remain at P.O. Box 240471, Montgomery, 36124. Phone (334) 264-9679.

William M. Pompey and **Brenda Montgomery Pompey,** formerly an administrative judge with the Equal Employment Opportunity Commission, announce the establishment of **Pompey & Pompey, P.C.** Offices are located at 117 Broad Street, Camden, 36726. The mailing address is P.O. Box 189. Phone (334) 682-9032.

Hill, Hill, Carter, Franco, Cole & Black, P.C. announces that **Joana S. Ellis,** formerly a partner in Ball, Ball, Matthews & Novak, P.A., has become a partner. Offices are located at 425 S. Perry Street, Montgomery, 36104. Phone (334) 834-7600.

James A. Harris, Jr. and **James A. Harris, III,** formerly with Harris & Brown, P.C., announce the formation of **Harris & Harris, L.L.P** and that **Nancy Howell** is an associate. The new location is 2100A SouthBridge Parkway, Suite 570, Birmingham, 35209. Phone (205) 871-5777.

Walter A. Steigleman, P.A. announces that **Timothy M. Beasley** has become an associate. Offices are located at 431 Mary Esther Cut-Off NW, Fort Walton Beach, Florida 32548. Phone (850) 244-5678.

Eyster, Key, Tubb, Weaver & Roth announces that **John R. Baggette, Jr.** has become a partner. Offices are located at 402 E. Moulton Street, Decatur, 35601. Phone (205) 353-6761.

Joel M. Folmar, Sr., formerly district attorney of the 12th Judicial Circuit of Alabama, and **Jon M. Folmar,** formerly

assistant attorney general over the Consumer Affairs Division, announce the formation of **Folmar & Folmar, P.C.** and that **J. Matthew Folmar** has become an associate. Offices are located at 510 S. Brundidge Street, Troy, 36081, phone (334) 566-0451, and at 402 Glenwood Avenue, Luverne, 36049, phone (334) 335-4809.

Balch & Bingham announces that **Leslie M. Allen, J. Russ Campbell, Gregory C. Cook, Marcel L. Debruge, Lyle D. Larson** and **Phillip A. Nichols** have become partners. Offices are located in Birmingham, Huntsville, Montgomery and Washington, D.C.

Watson, Harrison & deGraffenried has changed its name to **Watson, deGraffenried & Holley, L.L.P.** Offices are located at 1651 McFarland Boulevard, North, Tuscaloosa, 35406-2212. Phone (205) 345-1577.

Colquett & Associates has changed its name to **Holliday & Associates.** Offices are located at 2 Chase Corporate Center, Suite 120, Birmingham, 35244. Phone (205) 733-8598.

Robert M. Pears and **Regina Rose Hudson** have relocated their office to 1116 23rd Street, South, Birmingham, 35205. Phone (205) 320-0333.

Hoover & Evans, P.C. announces that **Brian D. Turner, Jr.** has become a partner. The firm name has changed to **Hoover, Evans & Turner, P.C.** Offices are located at 5308 Oporto-Madrid Boulevard, Birmingham, 35210. Phone (205) 592-2626.

Corley, Moncus & Ward, P.C. announces that **F. Lane Finch, Jr.** has become a shareholder. Offices are located at 400 Shades Creek Parkway, Suite 100, Birmingham, 35209. Phone (205) 879-5959.

Lange, Simpson, Robinson & Somerville, L.L.P. announces that **L. Griffin Tyndall** has become an associate. Offices are located at 417 20th Street, North, Suite 1700, Birmingham, 35203-3217. Phone (205) 250-5000.

Johnston, Barton, Proctor & Powell, L.L.P. announces that **David M. Hunt** and **Lee M. Pope** have become partners and **Karen M. Ross, Randall D. McClanahan, Brian R. Bostick, James F. Henry,** and **Shannon L. Barnhill** have become associates. Offices are located at 2900 AmSouth/Harbert Plaza, 1901 Sixth Avenue, North, Birmingham, 35203-2618. Phone (205) 458-9400.

Ritchie & Rediker, L.L.C announces that **Patricia Diak** has become a member. Offices are located at 312 N. 23rd Street, Birmingham, 35203. Phone (205) 251-1288.

Gorham & Waldrep, P.C. announces that **Timothy M. Fulmer, Donna Eich Brooks** and **Kim Davidson** have become associates. Offices are located at 2101 6th Avenue North, Suite 700, Birmingham, 35203. Phone (205) 254-3216.

Chambless, Math, Moore & Brown, P.C. announces that **E. Terry Brown,** previously with Copeland, Franco, Screws & Gill, has become a partner. Offices are located at 5720 Carmichael Road, P.O. 230759, Montgomery, 36123-0759. Phone (334) 272-2230.

Walston, Wells, Anderson & Bains, L.L.P. announces that **Julia Boaz-Cooper** has become a partner and that **David Bennet Ringelstein II, Mtesa Patrice Cottemond, John David Moore** and **Erin O'Neill Brooks** have become associates. Offices are located at 500 Financial Center, 505 20th Street, North, Birmingham, 35203. Phone (205) 251-9600.

Stewart G. Springer of **Campbell & Springer** announces a change of address to 2153 14th Avenue, South, Birmingham, 35205. Phone (205) 933-6933.

Vickers, Riis, Murray & Curran, L.L.C. announces that **E.L. McCafferty, III** has become a member. Offices are located at the Regions Bank Building, Eighth Floor, 106 St. Francis Street, Mobile, 36602. Phone (334) 432-9772.

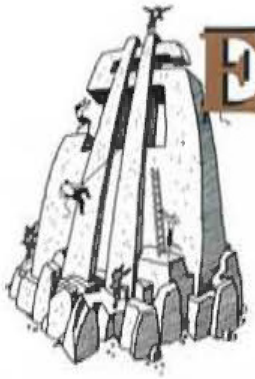
Capell, Howard, Knabe & Cobbs, P.A. announces that **C. Clay Torbert, III** has become a member and **Bryan K. Prescott, Richard H. Allen** and **Richard H. Marks** have become associates. Offices are located at 57 Adams Avenue, Montgomery, 36104. Phone (334) 241-8000.

Price & Pyles, P.C. announces that **David L. Smith** has joined the firm. Offices are located at 120 Dixie Street, Carrollton, Georgia 30117. Phone (770) 830-9000.

William H. Huffman, III, previously with Boardman & Tyra, P.C., announces a change of address to the **United States Securities and Exchange Commission,** at Room 8130, Stop 8-7, 450 Fifth Street NW, Washington, D.C. 20549. Phone (202) 942-4625.

Pittman, Hooks, Dutton & Hollis, P.C. announces that **Leigh Ann King Forstman** has joined the firm. **Myra B. Staggs,** *of counsel,* is no longer with the firm. Offices are located at 1100 Park Place Tower, Birmingham, 35203. Phone (205) 322-8880.

Rosen, Cook, Sledge, Davis, Carroll & Jones, P.A. announces that **Herbert E. Browder** has become a shareholder and that **Joseph K. Beach, W. Bradford Roane, Jr.** and **John T. Fisher, Jr.** have joined the firm. New offices are located at 2117 River Road, P.O. Box 2727, Tuscaloosa, 35401. Phone (205) 344-5000. ■



Enjoying the 'Pay Off' for All Your Hard Work–

Personal Money Management for Lawyers

By James D. Cotterman

Personal money management sounds so simple. Work hard, save aggressively, spend frugally and don't outlive your historically projected life span. If it were just that simple. Alas, it is just too easy to find reasons not to save for the future. The costs of living can be daunting. Tomorrow's plans too often succumb to today's bills. But it doesn't have to be–and shouldn't be–that way. This article is intended to open your mind and engage you in some private reflection about the state of your own financial affairs.

Let's begin. We all know that saving should begin early, liquidity preserved for emergencies and debt avoided except for acquiring appreciating assets. Our first step in an honest appraisal is to acknowledge reality. We do not save enough and debt is everywhere—a mortgage (or two) on a home larger than our needs; debt on automobiles (usually at least two) that cost more than our parents spent on a home; credit cards to finance vacations, credit lines for the boats and summer camps. In addition, there are private schools for the children and entertainment costs appropriate for our station in life. In short, too many of us have built a facade that all is well.

Determining where you stand

Step One—Gather up your financial records; let's look at what we have to work with. Create a balance sheet, which is nothing more than a listing of what you own and what you owe as of a particular date. It's a snapshot of where you are at that point in time. Now is a good time to catch up on reconciling those bank statements. List what you own and note how those assets are owned (yours, your spouse, joint, etc.) If you have investment assets, list what you paid and when you acquired them. This will be a valuable time saver when you sell the asset. Next, list what you owe, including notes (mortgages, auto loans, credit lines), credit card debt, life insurance and pension loans, unpaid taxes (real estate and income) and the like. Include separate balance sheets for any business interests (farms, rental properties and other sole proprietorships). List your capital interest in any partnerships (include investment and business ventures).

Step Two—Next, assemble your financial records to determine sources of income, and major categories of spending. Include taxes (property and income), debt service, shelter, transportation, subsistence and discretionary spending. This can quickly be determined from credit card summaries and checkbook ledgers.

The purpose of this exercise is to realistically assess where we are so that we can chart a realistic path to the future. The "ideal" is to reach retirement age debt free and with sufficient investment assets that, when combined with Social Security and pension income, provide retirement earnings equal to 60–75 percent pre-retirement income.

Historically, we relied on the "three-legged stool" to secure retirement income. The concept was that employer-funded pensions, Social Security and personal savings would each roughly provide one-third of the required retirement income. High-income wage earners quickly reach the Social Security maximum benefit which is considerably short of one-third of pre-retirement earnings. Many young people are even questioning the viability of the Social Security system for their own retirement. Changes in pension law, employer pension philosophy, employee mobility, and tax laws have combined to alter what pensions will likely provide. We are left with personal savings and the need for individual discipline to accumulate sufficient assets for retirement. Today we better plan on providing one-half or more of the asset base necessary for retirement from personal savings.

Unfortunately, personal savings in the United States is low (4 percent of disposable income according to the Bureau of Economic Analysis) and has declined over the past 15 years. This is remarkable considering that the past 15 years brought vastly lower income taxes and some remarkable economic growth periods. In fairness, the period also brought about some severe disruptions to the economy as global markets had an impact on our lives.

Computing what you need

The example on the next page depicts the asset base required to provide for an annual retirement income of $75,000 (in today's dollars) at age 65. This is the target retirement income for individuals earning $100,000 to $125,000 today using the 60-75 percent factors just mentioned. Social Security benefits will provide a portion of the annual retirement income. Estimates used in this project are based on age, earnings and Social Security Administration data.

Description	Age 35	Age 45	Age 55
Single lump sum today to provide benefits	$406,000	$614,000	$927,000
Annual contributions required	$32,000	$56,000	$126,000
Amount of first contribution if graduated with contributions rising at 3.5 percent annually	$22,000	$43,000	$109,000

This individual expects to need income to age 95. This will provide a high degree of confidence that income will be available during the retiree and spouse's lifetime. Pre- and post-retirement inflation will average 3.5 percent annually (approximates the modern long-term average). In order to maintain constant buying power, the retirement income required at age

65 is adjusted for inflation, and the annual retirement benefit is increased 3.5 percent per year. It is not important to provide a sizable estate; therefore, the principal will be liquidated by age 95. Real (inflation adjusted) after-tax returns of 4 percent on pre-retirement assets are projected. A more conservative 2 percent real after-tax return is expected post-retirement.

Now the really hard part begins. From *Step One* and *Step Two*, we know what we own, what we owe, sources and uses of our income and debt service requirements. From the "what you need" computation, we know our retirement saving needs. For most of us, this combination leaves us facing a hard reality–too many uses for our existing sources of income. The solution is simple–more financial discipline. Implementation of the solution is considerably more difficult. That means less expensive homes and cars, less of the "good life" today. Or we must hustle that much harder to increase our earnings sufficiently to cover the gap.

Getting the most out of what you do save

Now, let's turn to how we invest our retirement funds (whether in our 401(k) plans, IRAs or personal after-tax accounts). The typical investment mix has one-third of assets in GICs and money market accounts. But over a generation, only stocks yield a positive return after the impact of inflation and income taxes. Too many of us insist on hedging risk with assets that only lose purchasing power. Being risk adverse is going to hurt you in the long run. You cannot comfortably retire with almost one-third of your life remaining on fixed income, low-risk securities when the cost of living continues to increase at 3.5 percent a year.

One of the great inventions of the modern world is the mutual fund. It combines professional management, portfolio diversification, and purchasing power for investors who often don't have the capital, talent or time to manage an individual portfolio. If you lack any of these, bet your retirement income on mutual funds and reserve your personal investing to a small percent of your assets. The mutual fund industry has succeeded tremendously. Funds can be selected for their investment objective, security focus, risk tolerance, geographic scope, even environmental/political correctness. And, although the vast number of funds in the industry has complicated the purchasing decision, mutual funds remain a first-rate opportunity to build wealth.

However, our objective is to build wealth and beat inflation over time. We already indicated that our after-tax return is important. If mutual funds are our investment vehicle of choice, then we must also consider the impact of mutual fund fees and expenses on investment return.

Mutual funds come in load and no-load form. No-load funds do not have sales commissions, while load funds do. There is no indication that the presence or absence of a load is indicative of fund performance. However, the author has a fundamental aversion to paying sales commissions when there are so many fine no-load funds on the market. Loads come in many forms–front-end load (commission paid when fund is purchased), back-end load (commission paid when fund is sold), level load (commission paid over time), and declining back-end load (rewards holding the fund for longer periods of time). Some mutual funds now offer an array of loads for each portfolio (so-called ABC shares).

The next category of cost to mutual fund investors is the fees and expenses charged by the fund manager which include costs to manage the portfolio and to analyze current and potential investments, 12b-1 fees for advertising expenses, and other operating costs. Again, high or low costs do not necessarily indicate a certain level of performance.

Finally, mutual fund managers actively manage their portfolios. This means the managers will buy and sell securities to achieve the fund's stated objectives. Turnover of a portfolio is influenced by market conditions, fund objectives and investment philosophy. The higher the turnover, the more costs incurred by the fund. Also, turnover increases the realized gains that must be paid out to fund owners and, therefore, recognized as current income (not a problem when the fund is part of an IRA or qualified pension plan).

Loads and taxes are not considered in the promotional materials where funds are required to disclose their historical yields. When reviewing mutual funds, consider the returns after loads and taxes are considered. This tells you what you can take to the bank. That's the best way to analyze any investment opportunity.

Implementing a basic strategy

Where do we go from here? The best advice is to accept the honest look at where we are and to commit to a regimen of debt reduction and asset accumulation. Begin saving immediately and continue to save year after year. Time is the great silent asset builder–let it work for you, not against you.

Think long term, even if you are approaching retirement or are already retired. Accept some risk and stay with stocks. They hold the best and the only real long-term returns. Avoid over-reacting to short-term events. The market reacts largely to the news of the moment. Think rather of basic movements and trends. They can be demographic. There are two age group bulges working their way through the population. Consider what that means to purchasing decisions and needs. They can be lifestyles–how has technology changed our lives and what does the past tell us about the future?

Diversify your investments and let professionals manage the portfolio. Mutual funds give you all this and more. Consider them the foundation of your wealth accumulation plan.

Alter your lifestyle so that you can simultaneously save and reduce debt. It is in your best interests to enter retirement debt free and with significant cash reserves for those transitional expenses, including taxes. Also, keep a cash emergency fund for such items as higher health care costs that could hit unexpectedly. This permits you to avoid selling your investments in a panic.

Use professionals to assist you. Investment advisors, lawyers who specialize in estate planning, accountants, and insurance professionals are good sources of expertise and objectivity. They can counsel or play "devil's advocate" with your objectives and plan of attack.

Finally, make sure that you act and do not put off to tomorrow something you should have done years ago. ■

James D. Cotterman

James D. Cotterman, a licensed certified public accountant, is a principal with Altman Weil Pensa, Inc., specializing in financial and organizational issues. He has an undergraduate degree in operations management and an MBA in accounting, both from Syracuse University. He will be a speaker at this year's Annual Meeting.

MEMORIALS

Judge G. Ross Bell

Whereas, Judge G. Ross Bell was a member of the Birmingham Bar Association and the Alabama State Bar at the time of his death on February 28, 1997, at the age of 75; and

Whereas, Judge Bell was born in Birmingham, Alabama; attended Birmingham public schools; graduated from Birmingham Southern College in 1941; and graduated from the University of Alabama School of Law in 1946; and,

Whereas, Judge Bell began to practice law in the Ensley section of Birmingham in 1948. He was appointed to the Birmingham Municipal Court first as a part-time judge in 1956 and then chief judge in 1963. In 1965 Judge Bell moved to the Juvenile and Domestic Relations Court and was elected a circuit judge in 1968 and assigned to preside over the Family Court of Jefferson County, Alabama where he served until his retirement in 1982; and,

Whereas, Judge Bell was dedicated to improving juvenile justice and served on numerous committees to promote juvenile justice. Among these were the Alabama and National Council of Juvenile Court Judges, the Alabama Council on Family Relations, the Jefferson County Association of Mental Health, Alabama Youth Committee, Juvenile Correction Study Committee, State Advisory Committee for Juvenile Delinquency Planning, the Alabama Advisory Committee on Juvenile Justice and numerous others; and,

Whereas, Judge Bell was very civic-minded. He served on the executive committee of the Birmingham Area Council of the Boy Scouts of America where he received the Vulcan Merit Award (Birmingham Area Council) and the Silver Beaver Award (National Council). He served his church as a teacher, superintendent of Sunday School, trustee and deacon. He was past president of the Ensley Kiwanis Club, Ensley Rotary Club and the Ensley Chamber of Commerce and was a member of many other civic groups; and,

Whereas, Judge Bell's service included membership in the Birmingham Bar Association, the Alabama State Bar, the American Bar Association, where he was a charter member of the Family Law Section, and at least nine other professional associations; and,

Whereas, Judge Bell's other honors and awards are too numerous to list but exemplify his dedication and his years of service; and,

Whereas, Judge Bell is spoken of as a man of compassion when he was on the bench and was noted for his service to the bench, the bar, the public and most of all, children entrusted to his judgment; and,

Whereas, we express our appreciation for his person and his service, and also our sympathy to his family.

It is therefore, resolved, that this resolution be spread upon the minutes of this executive committee and that copies be sent to his wife, Johnnie H. Bell, and other members of his family.

— Stephen D. Heninger
President, Birmingham Bar Association

Richard Allan Thompson, Jr.

Whereas, the Tuscaloosa County Bar Association wishes to honor the memory of Richard Allan Thompson, Jr. a long-standing and distinguished member of this association who died November 18, 1997. Richard Allan Thompson, Jr. known to all as "Dick," was born in Mobile, Alabama. He received his undergraduate degree from the University of Alabama and his J.D. from the University of Alabama Law School in 1950. Dick served in the United States Navy as a fighter pilot and was on active duty during World War II, the Korean War and the Cuban Missile Crisis. Dick also served in the Judge Advocate General's Office while in the Navy. Dick came to Tuscaloosa in 1961 and began his private practice of law which, over the years, primarily involved the representation of defendants in criminal cases. Dick was always a tireless and dedicated defender of the rights of the accused.

Dick was survived by a loving family, consisting of his wife, Dorothy Thompson; his children, Richard A. Thompson, III, David Thompson and Melanie Thompson Masters; seven grandchildren; and his brothers, Robert Thompson and William Thompson.

— G. Stephen Wiggins
President, Tuscaloosa County Bar Association

John William Adams, Jr.

John William Adams, Jr., a distinguished member of this association, died on November 16, 1997, and the Mobile Bar Association desires to remember his name and recognize his contributions both to our profession and to this community; and,

John William Adams, Jr.

John William Adams, Jr. was born in 1925 in Atlanta, Georgia and received his law degree from the University of Alabama and practiced law in Tuscaloosa for three years. He then accepted a position in Mobile in 1951, with the legal department of the Gulf Mobile and Ohio Railroad, and actively participated in trials and hearings in regards to rate cases all over the United States. After the merger of GM&O Railroad with the Illinois Central Railroad, John W. Adams, Jr. continued his active legal profession with the Illinois Central Railroad until his retirement in 1988. Thereafter, John W. Adams, Jr. actively engaged in the practice of law in Mobile until his death in 1997; and,

Whereas, John W. Adams, Jr., in addition to the practice of his legal profession, participated actively in many church, civic, cultural, photography, and gardening matters, and among his many accomplishments, of which he was particularly proud, were:

Being authorized to practice in numerous United States District courts, United States courts of appeal and the Supreme Court of the United States, as well as being an active member of the American, Alabama and Mobile bar associations and the American Arbitration Association; and,

Being a member of St. Paul's Episcopal Church for many years and legal advisor to the Bishop and serving as chancellor of the Episcopal Diocese of the Central Gulf Coast, and on the standing and finance committees of the Diocese of the Central Gulf Coast, and on the vestry of St. Paul's Episcopal Church; and,

Serving as president of the Mobile Chamber Music Society and as an enthusiastic participant in the Mobile Opera Guild; and,

Being a board member of the Mobile Botanical Garden, having attained the designation of master gardner; and,

Whereas, John William Adams, Jr. accomplished many other things in his life, and was an immensely charming gentleman with a magnetic personality, gifted as a trial advocate of his clients' position of any subject matter and was noted for his open-mindedness and creativity in the handling of complicated questions of law and fact and was a recognized expert in the field of transportation law; and,

Whereas, John William Adams, Jr. was survived by his wife of 48 years, Margaret D. Adams and by his daughter, Cynthia A. Tappan, and his son, John William Adams, III, and two grandchildren;

Now, therefore, be it resolved by the members of the Mobile Bar Association that the association mourns the passing of John William Adams, Jr. and does hereby honor the memory of our friend and fellow member who exemplified throughout his long career the highest professional principles to which the members of this association aspire.

— Stova F. McFadden
President, Mobile Bar Association

Peter Vaughn Sintz

Whereas, the Mobile Bar Association honors the memory of Peter Vaughn Sintz, a distinguished member of this organization, who died October 6, 1997. This association desires to remember his name and to recognize his contributions to this honorable profession and to this community, now therefore, be it remembered,

Peter Vaughn Sintz

Whereas, Peter Vaughn Sintz was born July 13, 1940 in Detroit, Michigan and had resided in Mobile since 1967. Pete graduated from Indiana University in 1962. He earned his juris doctor from Emory University in 1967.

Whereas, that same year, Pete began the practice of law with the firm of Brown, Hudgens, Fulford, Sintz & Richardson of Mobile. He subsequently formed the law partnership of Sintz, Pike & Campbell, which then evolved into the firm of Sintz, Campbell, Duke & Taylor.

Whereas, Pete was a preeminent lawyer who quietly, without great fanfare, gave of himself to his clients. A person of the highest integrity, his word was a promise, a bond, and his commitment to fairness and resolution.

Whereas, Pete was devoted to his family who survives him, wife Jule, son Nick, daughter Sandy, mother Roberta and brother Robert.

Whereas, devotion and love for his family was followed by his commitment to the practice of law, while his passion was athletic competition. Pete was a world-class swimmer while in college, and a gold medal recordholder in the free style relay at the Pan American Games. He continued his athletic excellence in the World Masters Games, again establishing records and winning gold medals this time at the age of 45 years.

His athletic abilities also included the game of polo and horsemanship where Pete again excelled and was known for his ability as a trainer of horses. A member of the Louisiana Thoroughbred Breeders Association, and the Thoroughbred Breeders Association he combined his love of horses and athletic competition training polo ponies and playing the game as a member of the Point Clear Polo Club and the United States Polo Association.

Pete's years of athletic excellence also included sharing his abilities with others in the form of coach and mentor, teaching young swimmers for the Skyline Country Club and the Chandler YMCA as well as participating in the administration of various swim meets held in the area.

He shared his exceptional ability as a lawyer, teaching classes for the University of South Alabama Paralegal studies programs, and was a willing participant in the pro bono activities of the Mobile Bar Association.

Pete served numerous area charities, belonged to many social organizations and was a member of St. Paul's Episcopal Church.

Now, therefore, be it resolved by the Mobile Bar Association that the association mourns the passing of Peter Vaughn Sintz and does hereby honor the memory of our friend and fellow member who exemplified throughout his long career the highest professional principles to which the members of this association aspire.

— Cooper C. Thurber
President, Mobile Bar Association

Albert Julian Tully, Sr.

Whereas, the Mobile Bar Association honors the memory of Albert Julian Tully, Sr., a distinguished member of this organization, who died on May 22, 1997, and the association remembers his name and recognizes his contributions to our profession and to this community; now, therefore, be it remembered,

Albert Julian Tully was born in Laurel, Mississippi and resided in Mobile since 1918. Albert attended University Military School of Mobile and graduated in 1935 from the University of Alabama School of Law.

In 1938 Albert joined the law firm of Sullivan, Holberg & Tully and subsequently practiced with Holberg, Tully & Hodnette and Holberg, Tully, Holberg & Danley. Prior to his death he practiced with the firm of Tully & Phillips. Albert was a former United States Attorney for the Southern District of Alabama from 1943 to 1948, and Assistant United States Attorney from 1941 to 1943.

Albert Julian Tully, Sr.

In 1979 Albert served as president of the Mobile Bar Association.

Albert was an outstanding lawyer who faithfully and ably represented his clients. He was, at the same time, a man of the highest integrity, whose word was his bond, who never sacrificed his integrity for personal gain or unfair advantage.

Albert spent 17 years as attorney for the Mobile County Personnel Board until retiring in 1957. He was a former director of the Mobile Area Chamber of Commerce, and chairman of the Mobile County Democratic Executive Committee from 1938 to 1940. Albert served on the advisory board for the Mobile Salvation Army and was past president of the Boys Club of Mobile and the Mobile Mental Health Center.

Albert was a member of the Kiwanis Club since 1939 and was president of the Mobile Kiwanis Club in 1945, governor of the Alabama District in 1948 and president of Kiwanis International from 1959 to 1960. In 1996 he received the Hixon Diamond Level Award presented by the Mobile Kiwanis Club.

Albert was a member of Trinity Episcopal Church. He was a lay reader in the Episcopal Diocese of the Central Gulf Coast, a chancellor from 1971 to 1980 and recipient of the first Diocese Distinguished Service Award in 1975. He was named chancellor emeritus in 1985.

Albert Tully was a man with a strong devotion to his family, and he was preceded in death by his wife, Jane Silverwood Wildman Tully. Albert is survived by one daughter, Jane Silverwood Tully of Dauphin Island, Alabama and one son, Dr. Albert Tully, Jr. of Bessemer, Alabama; five grandchildren and seven great-grandchildren; and other relatives.

Now, therefore, be it resolved by the Mobile Bar Association that the association mourns the passing of Albert Julian Tully, Sr. and does hereby honor the memory of our friend and fellow member who exemplified throughout his long career the highest professional principals to which the members of this association aspire.

— Cooper C. Thurber
President, Mobile Bar Association

John Young Christopher

Whereas, John Young Christopher, a longtime member of the Alabama State Bar, passed away on October 7, 1997;

Whereas, John Young Christopher was born on July 2, 1922, reared in Butler, Alabama and graduated from Choctaw County High School in 1939;

Whereas, John Young Christopher received a scholarship to play collegiate football at Chattanooga College; he later transferred to Howard College in Birmingham, now Samford University and lettered on the football team at Howard College;

Whereas, John Young Christopher enlisted in the United States Navy and served for three years as captain in the European theatre of war;

Whereas, John Young Christopher attended law school at the University of Alabama and received his license to practice law in 1949;

Whereas, after V-E and V-J Day, John Young Christopher conducted a successful practice for many years;

Whereas, John Young Christopher married the former Eleanor Means and has three children, John Y. Christopher, Jr., Pam C. Ezell and Bryan S. Christopher.

Whereas, John Young Christopher was appointed district judge in 1971; he was reelected and served in that position for 18 years;

Whereas, John Young Christopher practiced law and served as judge with honor, integrity and a straightforward manner that commanded respect. He possessed a good sense of humor and was loyal to family and friends.

Now, therefore the Alabama State Bar hereby respectfully, in memorial, honors its member John Young Christopher.

John William Adams, Jr.
Mobile
Admitted: 1949
Died: November 16, 1997

Ozmus Sigler Burke, Jr.
Orange Beach
Admitted: 1965
Died: March 4, 1998

Roy Lockhart Johnson
Marion
Admitted: 1979
Died: February 11, 1998

Harvey Jackson Wright
Guntersville
Admitted: 1951
Died: November 11, 1997

Carl Wayne Albright, Jr.
Tuscaloosa
Admitted: July 30, 1970
Died: December 11, 1997

Jesse Allen Cook, Jr.
Andalusia
Admitted: 1937
Died: December 7, 1997

Hugh Edward Rozelle
Atmore
Admitted: 1948
Died: March 2, 1998

Eugene M. Zeidman
Birmingham
Admitted: 1927
Died: February 17, 1998

John Thomas Black
Scottsboro
Admitted: 1949
Died: October 21, 1997

Donald Cronin, Jr.
Greenville
Admitted: 1953
Died: February 21, 1998

Richard Allan Thompson, Jr.
Tuscaloosa
Admitted: 1950
Died: November 18, 1997

BUILDING ALABAMA'S COURTHOUSES

By Samuel A. Rumore, Jr.

Butler County

Established: 1819

The following continues a history of Alabama's county courthouses—their origins and some of the people who contributed to their growth. 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.

Butler County

Greenville is the county seat of Butler County. It is located in south-central Alabama approximately midway between the eastern and western boundaries of the state. However, the story of Greenville in Butler County could just as easily be the story of Buttsville in Fairfield County. Early settlers came from both Georgia and South Carolina and each group wished to honor persons or places from their former states. How this rivalry was resolved will be explained later, but a peaceful compromise resulted in the names we know today.

In contrast, the early history of the first American settlers in south Alabama with respect to the Indians was anything but peaceful. It was marked by the Creek Indian War. This war was a small piece in a much larger geo-political puzzle. Certainly the American settlers and Creek Indians clashed at times when they came into contact, but some historians believe that the British caused those clashes to turn into a war.

As early as 1811 the Shawnee Indian Chief Tecumseh, encouraged by British agents, traveled from the Great Lakes region to Creek country in Alabama. He sought to unite the Indians against the white settlers. Although his mission to unify the Indians was not successful, he sowed the seeds for the war that soon followed.

Since Britain was fighting a war with Napoleon at this time, and its forces were spread all over the globe, British leaders feared that Canada could be vulnerable to an American attack if war came with the United States. Because of conflicts over the impressment of sailors on the high seas, together with

Markers at site of Fort Dale — First county seat of Butler County

other economic issues, war between America and Britain seemed inevitable. In order to defend their Canadian holdings, one theory is that the British decided to create a distracting disturbance: an Indian war on the American southern frontier. British agents promised weapons to the Indians for their efforts. While it was not "official" British policy to create an Indian war, the Creeks did receive supplies from the British as well as from the Spanish in Pensacola.

When war ended after the Battle of Horseshoe Bend in 1814, much territory was opened for settlement in the land that would become Alabama. Settlers began to move into the future Butler County as early as 1815. Indians still lived in the area and clashes continued for the next few years as the Indians resisted the loss of their lands. By 1818, due to the threat posed by roving bands of warriors, settlers built three stockades for protection. These were forts Gary, Bibb and Dale, all named for local heroes. Thomas Gary was an early settler and Revolutionary War veteran. William Wyatt Bibb was governor of the Alabama Territory. Sam Dale was a pioneer and hero of the Creek Indian War.

Highway marker near site of Butler Massacre outside Greenville on Highway 10

On the evening of March 13, 1818, Indians attacked the home of William Ogly in the future Butler County where the Ogly and Elias Stroud families were sheltered. Two adults and five children were tomahawked and savagely killed. Two other adults and one child managed to survive this incident that became known as the Ogly Massacre.

One week later, on March 20, 1818, Captain William Butler and four companions were ambushed as they traveled between Fort Bibb and Fort Dale. Butler had been born in Virginia and moved to Georgia where he served in the state legislature and the militia. He came to Alabama as a pioneer and likewise served in the Alabama militia. He and two companions were killed in the ambush. Sam Dale located the bodies and buried them near a place that subsequently became known as Butler Springs. Forty years later the remains were moved to the cemetery at Greenville, the county seat town of Butler County.

By the end of 1818, the Indians were driven from the area and peaceful settlement began in earnest. A few families from Georgia came in 1818. In January of 1819, settlers in a wagon train from South Carolina stopped, camped and stayed. This pioneering group consisted of eight families and other single men. They had 12 wagons and 52 horses. They settled near Routan's Creek where they chose home sites and built cabins. More settlers came later that year. The place became known as Buttsville, being named for Samuel Butts.

Samuel Butts was born in South Carolina, but lived as an adult in Georgia. He served as a captain in General Floyd's Georgia troops, who came to Alabama to fight in the Creek Indian War. Butts was killed at the Battle of Calabee Creek in 1814 in present-day Macon County.

The Alabama Territorial Legislature created seven counties on December 13, 1819. These counties were Butler, Greene, Henry, Jackson, Jefferson, Perry, and Wilcox. All of these counties claim to be older than the state of Alabama. That is a true statement, but just barely. The state of Alabama came into being the next day, December 14, 1819.

The bill that created the new county that became Butler County was originally written to name the county "Fairfield." This name comes from the district in South Carolina where many early settlers previously lived. Between the time of the introduction of this bill until its final passage, a controversy over

Highway markers at Butler County Courthouse, Greenville

the name arose. It was finally decided that the county would be named Butler to honor Captain Butler who had been killed by Indians within the borders of the new county the previous year.

When the county was established, Fort Dale became the first county seat. Andrew Crenshaw, for whom Crenshaw County was named, was the first judge. Judge Crenshaw held court at Fort Dale outdoors under the oak trees. The jury sat on logs and adjourned to nearby woods in order to reach their verdicts.

Buttsville was more centrally located in the county than Fort Dale, and it soon became the largest town in the county. On December 24, 1821, the legislature chose Buttsville as the permanent county seat of Butler County. Fort Dale continued as a small community until about the time of the Civil War. By the 1860s it ceased to exist.

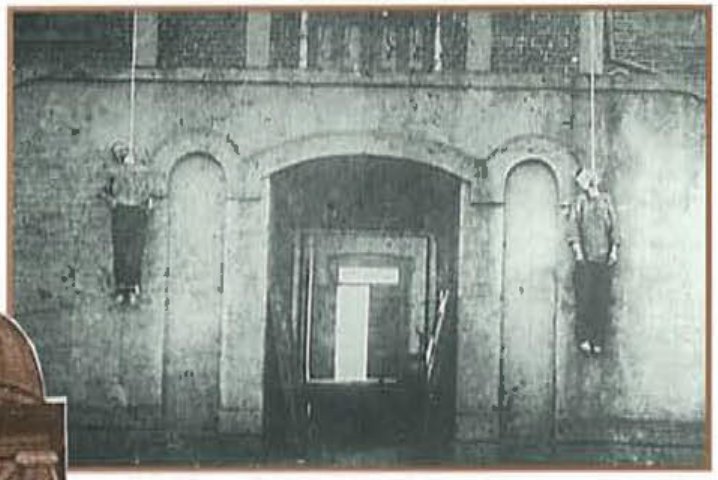
In 1822 a movement began to change the name of the new county seat. As more South Carolinians came into the area, sentiment grew to change the name Buttsville to Greenville in honor of Greenville, South Carolina, former home of many of the pioneers. They also resurfaced the name Fairfield for the county. As often happens with political decisions, the factions compromised. On December 28, 1822, the legislature officially changed the town name of Buttsville to Greenville to satisfy the South Carolinians. The county retained the name Butler in deference to the settlers from Georgia.

The legislature appointed five commissioners to purchase land and superintend the construction of a courthouse. The commissioners selected a site in 1822, and laid off the town with four principal streets radiating from the courthouse site. They named the north-south street Conecuh Street, and the east-west street, which became the principal commercial artery, Commerce Street.

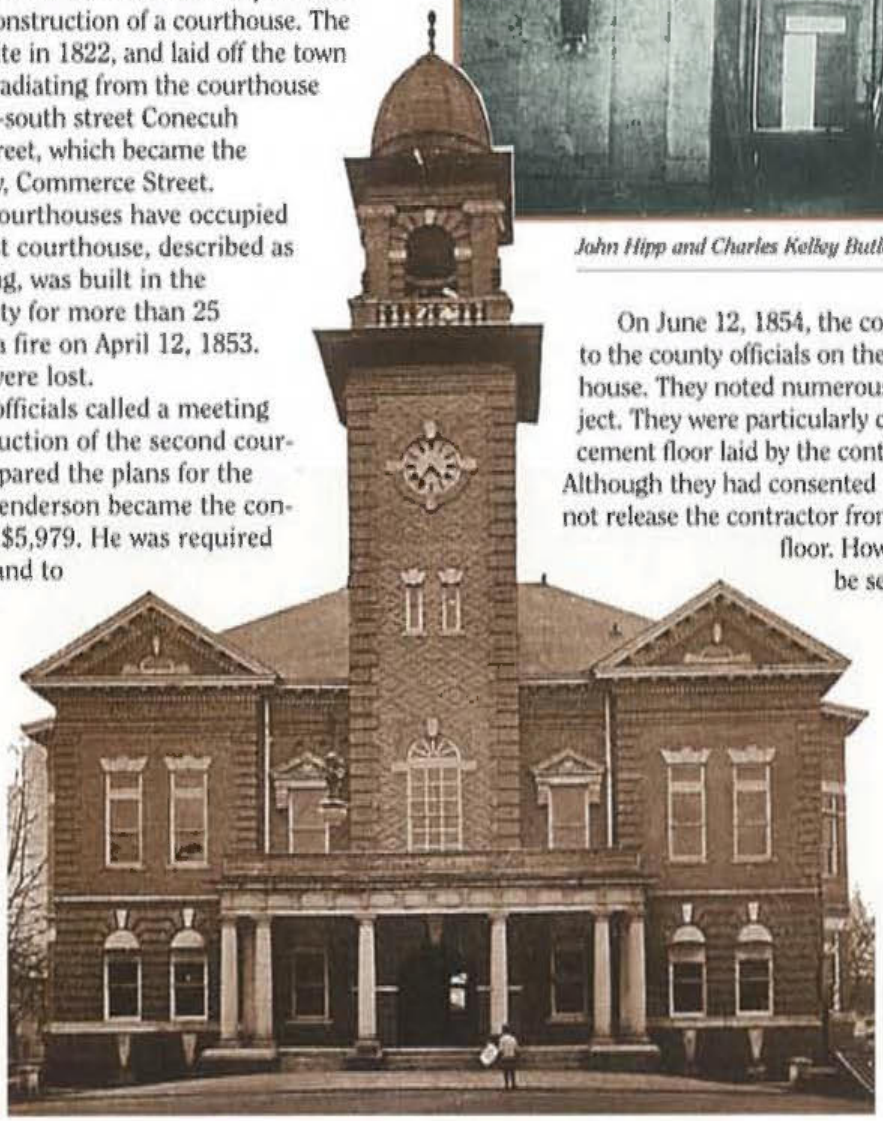
All four Butler County courthouses have occupied the same location. The first courthouse, described as a substantial frame building, was built in the 1820s and served the county for more than 25 years. It was destroyed by a fire on April 12, 1853. All of the county records were lost.

In May of 1853, county officials called a meeting to consider bids for construction of the second courthouse. John K. Henry prepared the plans for the structure. Brockman W. Henderson became the contractor with his low bid of $5,979. He was required to post a bond of $11,958 and to complete the building in a workmanlike manner. The project, which would result in another frame structure, was subject to inspection by a five-member building committee consisting of David G. Dunklin, William P. Routon, William F. Hartley, John K. Henry, and William Wright.

Butler County Courthouse 1871-1903



John Hipp and Charles Kelley Butler — County courthouse 1892



Early view of 1903 Courthouse

On June 12, 1854, the committee made its report to the county officials on the completion of the courthouse. They noted numerous alterations in the project. They were particularly concerned that the cement floor laid by the contractor would not last. Although they had consented to the changes, they did not release the contractor from liability concerning the floor. However, the floor proved to be serviceable and caused no reported problems.

The county continued to grow and prosper. In 1855 community leaders petitioned for a railroad so that produce could be sent to Montgomery and Mobile and supplies returned from those places to Greenville. The railroad was finally completed in 1861. Unfortunately, the Civil War also commenced that year.

Though Butler County was spared the devastation of war within its borders, its territory was reduced and its population declined between 1860 and 1870. A key reason was the creation of Crenshaw County on November 24, 1866. Butler County gave up approximately 220 square miles of land for the new county.

By 1871 the county needed to build its third courthouse. This time the county built its first brick temple of justice at a cost of $12,000. The two-story, red brick structure had a front portico resting on a curved stairway. Under the portico was a doorway to the first floor. The pediment contained a round wheel window just below the apex of the gable. The courthouse had six chimneys.

This Butler County Courthouse proved to be less than a "temple of justice." It was the scene of an incident in 1892 where citizens took the law into their own hands. Two desperadoes, John Hipp and Charley Kelley, were notorious killers in Butler County. They had murdered at least six people, including the tax collector. When they were apprehended, an angry mob forcibly removed them from their jail cells. The two men were summarily strung up from the columns of the courthouse portico. An early photo (on page 152) shows the lynched men hanging from the courthouse.

By the turn of the century, the third courthouse became inadequate for the needs of Butler County. Probate Judge Zell Gaston became the moving force for a new building. The 1871 structure was razed and a new courthouse with a distinctive central clock tower was built on the same site in 1903. The architect was B.B. Smith of Montgomery. The contractors were Dobson & Bynum. This courthouse cost $60,000.

Newspaper articles from 1903 provide some interesting insights into the courthouse project. The county commission issued bonds for the building of the courthouse. The winning firm for the bonds was the Robinson, Humphrey Co. of Atlanta and the interest rate was 5 per cent. Another article described preparations for the laying of the cornerstone. Ceremonies were conducted by the Father Ryan Chapter of the United Daughters of the Confederacy. And a third article described a work accident at the construction site. Mr. Archillus, foreman for the project and a very heavy man, was walking on a wall under construction when some bricks came loose and he fell to the ground. He suffered severe injuries which left him in serious condition.

Butler County Courthouse with new dome following 1997 renovations

The new courthouse was completed by the end of 1903. An early photo shows an impressive building for a small southern town. Also, the presence of an electric street light and wires indicate that Greenville had electricity in 1903. Another feature in the photo is the manhole in front of the courthouse which points out that 1903 Greenville had a sewer system.

The courthouse itself is a good example of a late Victorian structure with eclectic features. The building has a hipped roof with two front ells that are covered by pedimented gable roofs. Corner quoins are found throughout the structure. The entrance to the courthouse contains a covered porch and Doric columns.

The steeple is built of decoratively-patterned brick with an arched window on the second floor and two rectangular windows farther up. Above these windows is the courthouse clock. Continuing to climb, the tower soars to a balustraded platform, above which is the belfry. On top of the belfry is another platform on which rests a cupola topped by a formal finial. The central courthouse section is 107 feet high, or almost 11 stories by today's standards.

Fifty years after the completion of the courthouse, the county faced another decision. Due to the need for additional space, the citizens would either have to build another new courthouse or remodel the existing structure. The county chose the latter course. New storage space was added on the first floor level which was enclosed by a modern stone block facade. The interior was rearranged. Basement space was excavated and utilized. Other improvements included air-conditioning, an iron fence around the outside, a widened sidewalk, and landscaping. The county commission had anticipated the need for these improvements, setting aside sufficient funds to pay for them without incurring any debt for the county.

Rear of courthouse

In October 1995, winds and rain from Hurricane Opal caused significant damage to the Butler County Courthouse tower. It took the county almost two years to complete the repairs. The old dome had to be taken down and replaced by a new one. Also much of the mortar between bricks had deteriorated, and a substantial amount of brick work had to be completed.

Randall Nicholas Builder was the contractor for the approximately $250,000 project. John F. Daughtry of Daughtry Professional Engineering designed the new dome with the idea of replacing the mostly wooden old dome with a nearly identical copper-covered structure. The dome took approximately seven weeks to build and was constructed by Stagley Architectural and Recreational Products, Coker Brothers Construction, and Kevin Ordoyne.

An unpleasant part of the clock tower project was the removal of many decades of accumulated pigeon droppings. Workers had to wear special respirator masks and treat the droppings with a chemical mixture before they could be removed. Spores found in decomposing pigeon excrement can cause hystoplasmosis. Workers safely removed almost a dump truck load of waste matter from the tower.

The old dome was taken down from the courthouse on August 19, 1997. The new dome, approximately 17 feet wide and 17 feet high, was placed on top of the tower on September 30, 1997. As part of the project, the belfry openings were enclosed, thus hopefully eliminating pigeon access and the accumulation of their excrement in the future. The entire project was completed in October 1997.

The author thanks the Greenville-Butler County Public Library, author Madge Jackson, Birmingham attorney Ron Boyd, a native of Greenville, and Mrs. Jerre Turner, Butler County Budget Clerk, for information or photos used in this article. ■

Samuel A. Rumore, Jr.

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

SOURCES:

Butler County in the Nineteenth Century, Marilyn Davis Hahn (Madge Jackson), 1979; *History of Butler County Alabama From 1815 —1885*, John Buckner Little, 1885; *From Cabins To Mansions*, Mary E. Brantley, no date; "The Courthouses of Butler County Alabama," *The Alabama Lawyer*, Vol. 31, No. 3, Pages 335-339, July 1970; "Early Days In Greenville," Myra Ware Crenshaw, *Alabama Life Magazine*, September—October 1978, Pages 68—72; *"The Greenville Advocate"* August 20, 1997 and October 1, 1997.

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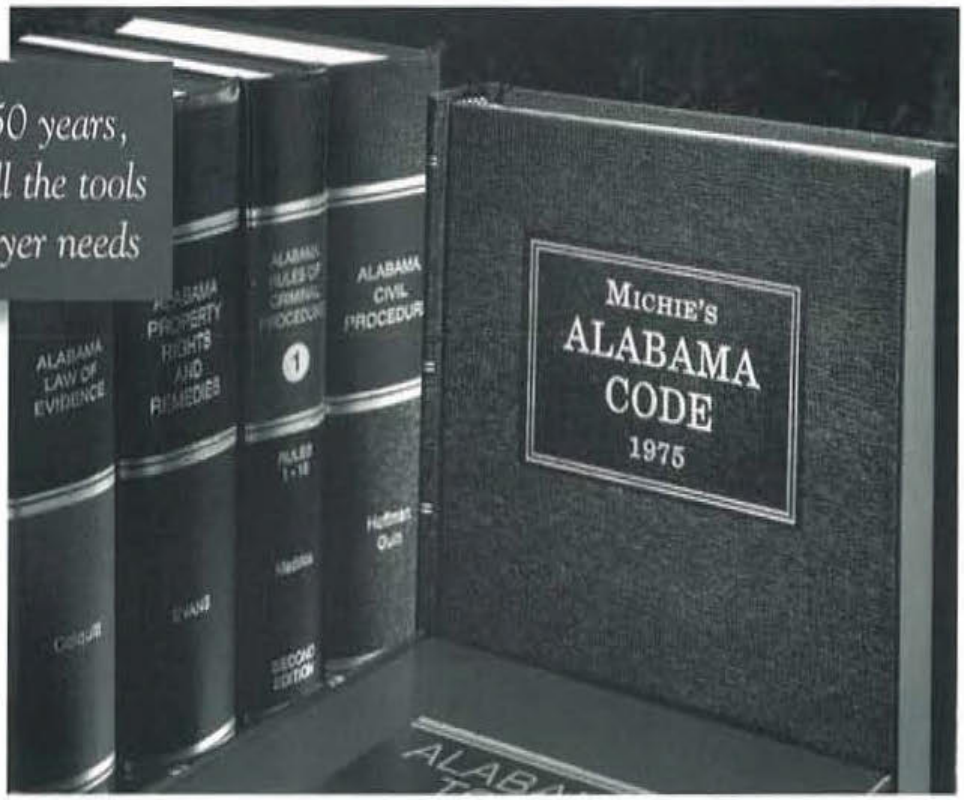

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Opinions of the General Counsel

By J. Anthony McLain, general counsel

RULE 4.2 - Plaintiff's Counsel Contacting Former Employees of Corporate Defendant

J. Anthony McLain

QUESTION:

"I am writing to request an opinion from the Alabama State Bar Association in reference to the application of Rule 4.2 which states:

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

We are currently Plaintiff's counsel in a lawsuit against X Motor Company in Anywhere, Alabama. The lawsuit involves allegations that X Motor Company has polluted a plant site and surrounding land since 1960. The plant has been closed for many years. We propose to take the statements of several former X Motor employees whose testimony is factual in nature. We are not seeking admissions from these employees which would effectively bind X. We are simply trying to ascertain the facts from these former employees concerning what happened and what they saw or know. None of these individuals have a current relationship with X. They were dismissed when the plant was closed in the mid-1980s.

X's attorneys have advised me of their intent to invoke Rule 4.2 of the Alabama Rules of Professional Conduct and to seek sanctions if we attempt to interview these employees. I do not agree with X's position that this Rule should shield them from the consequences of their own wrongdoing and muzzle statements and disclosures of fact from people who have not been employees of X Motor for many years. Nevertheless, I feel compelled to write the Bar Association regarding any potential impropriety of taking these statements and whether we will be allowed to take them. We will, of course, abide by any guidelines you suggest if we are allowed to take statements."

ANSWER:

Rule 4.2, Alabama Rules of Professional Conduct, does not prohibit plaintiff's counsel from contacting former employees of a corporate defendant.

DISCUSSION:

In RO-92-12, the Disciplinary Commission held that Rule 4.2 of the Rules of Professional Conduct prohibits communication about the subject matter of the representation only with a "party" known to be represented by other counsel. In RO-88-34, the Disciplinary Commission had held that plaintiff's counsel in a tort claim action could contact and interview certain current corporate employees without the necessity of obtaining permission from the defendant or giving notice to the defendant's attorney. Plaintiff's counsel may not, without notice and permission, interview current employees who are in a position to bind the corporate defendant. However, ex parte contact with a *former* employee is not subject to the same scrutiny applied to *current* employees of a corporate defendant.

As the Commission stated in RO-92-12,

"... there is a strong argument that Rule 4.2 does not even apply to former employees at any level." The one qualification might be, as discussed in Hazard and Hodes in the treatise *The Law of Lawyering*, those employees who occupied a managerial level position and were involved in the underlying transaction and being privy to privileged information, including a work product, which would prohibit plaintiff's counsel from accessing said information without a valid waiver by the organization and/or discovery and evidence rules. However, such an exception would be restricted to situations wherein these facts exist.

The instant holding of the Disciplinary Commission is supported by ABA Formal Opinion 91-359 (1991). Therein, the ABA Committee on Ethics and Professional Responsibility determined that former employees of a corporation could be contacted by plaintiff's counsel without consulting with the corporate defendant's counsel since the former employees were no longer in a position of authority, and, thus, could not "bind" the corporation. ■

[RO-93-05]

Order–Rule 1(a)

Supreme Court of Alabama

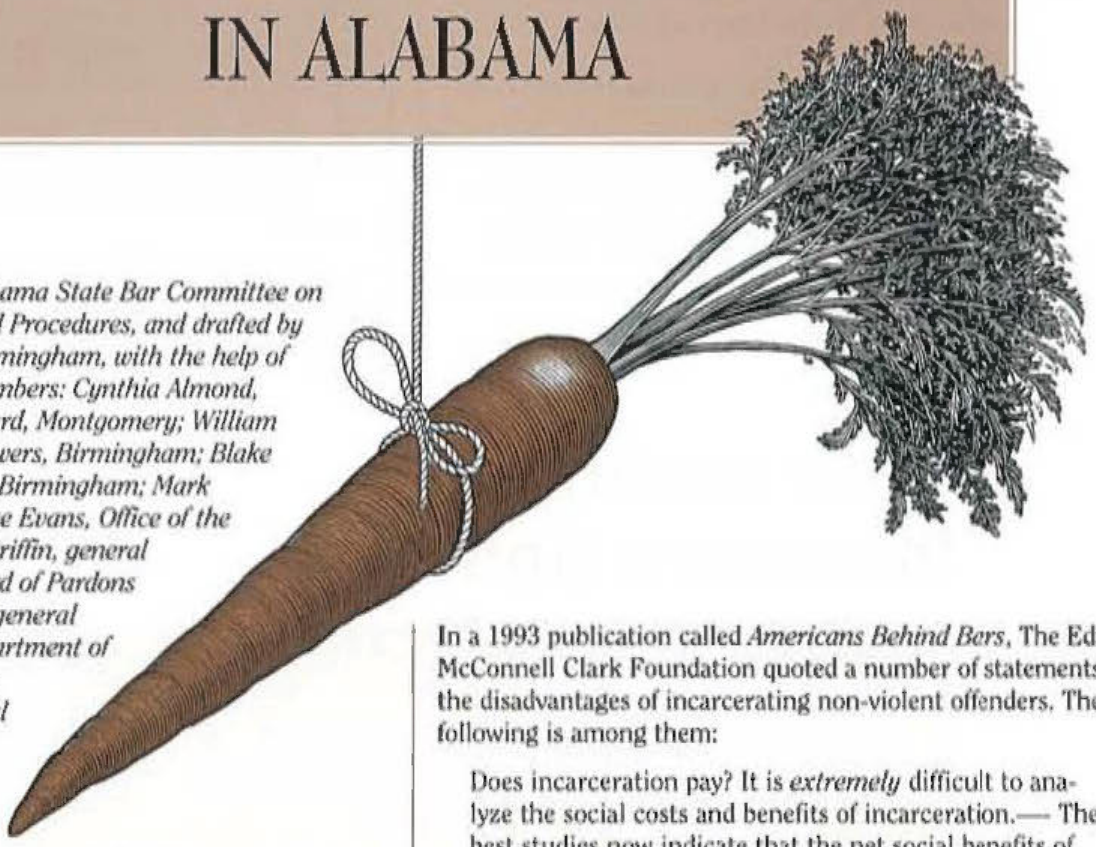
It is ordered that Rule 1(a), Alabama Civil Court Mediation Rules, be amended to read as follows:

"(a) Mediation is an extrajudicial procedure for the resolution of disputes suggested by Rule 16(c)(7), Alabama Rules of Civil Procedure. In some situations, a mediator can assist parties in reaching a settlement of a dispute. Mediation is a process by which the parties submit their dispute to an impartial person—the mediator. The mediator may suggest ways of resolving the dispute, but cannot impose a settlement on the parties."

It is further ordered that this amendment be effective immediately.

Hooper, C.J., and Maddox, Almon, Shores, Houston, Cook, Butts, and See, JJ., concur.

COMMUNITY PUNISHMENT AND CORRECTIONS OF ADULTS IN ALABAMA



Prepared through the Alabama State Bar Committee on Correctional Institutions and Procedures, and drafted by Roberta L. Fulton, chair, Birmingham, with the help of the following committee members: Cynthia Almond, Tuscaloosa; William Blanchard, Montgomery; William Broome, Anniston; Allen Flowers, Birmingham; Blake Green, Dothan; David Vann, Birmingham; Mark Wilkerson, Montgomery; Rose Evans, Office of the Attorney General; Gregory Griffin, general counsel of the Alabama Board of Pardons and Paroles; Andrew Redd, general counsel of the Alabama Department of Corrections; and Judge John England, of the Sixth Judicial Circuit of Alabama

Within the past decade Alabama has enacted several statutes which have increased criminal sentencing options and facilitated the implementation of sanctions within the community. A criminal defense lawyer's thorough understanding of the sentencing possibilities in each particular case is essential to the best representation of the client, and knowledge among all lawyers concerning currently developing programs of community punishment and corrections is vital to the profession's local leadership in legal justice matters.

Background of Community Corrections

During the last two decades prisons all over the country have grown phenomenally, Alabama's among them. In 1980 the state's adult prison population was approximately 5,000. Today, according to the figures of the Alabama Department of Corrections, the number is in excess of 22,000 and the cost of incarcerating these prisoners consumes nearly 17 percent of the scarce resources of our state's general fund budget. By the end of the 1980s, many criminal justice practitioners and public policy commentators began to say that, for a variety of reasons, it was in the best interest of the public to create for non-violent felony offenders some additional form of corrections, which was less restrictive and less expensive than incarceration but more restrictive than traditional probation with minimal reporting.

In a 1993 publication called *Americans Behind Bars*, The Edna McConnell Clark Foundation quoted a number of statements on the disadvantages of incarcerating non-violent offenders. The following is among them:

> Does incarceration pay? It is *extremely* difficult to analyze the social costs and benefits of incarceration.— The best studies now indicate that the net social benefits of incarcerating the typical offender are much, much smaller than earlier research maintained. Instead, recent studies ratify common sense: prison pays for more serious offenders, but not for that fraction of incarcerated persons whom research suggests could be well supervised in the community without jeopardizing public safety.

John diIulio, Jr., professor of politics and public affairs at Princeton University and senior Fellow at the Brookings Institute. Supra, at 28.

Respected current studies continue to assert similar conclusions. (See *CRIME AND PUNISHMENT IN AMERICA* , by Elliott Currie; and *SENSIBLE JUSTICE — Alternatives to Prison*, by David C. Anderson, which cites Birmingham's work in community corrections. Both books were reviewed in *The New York Times BOOK REVIEW* on March 1, 1998.)

Within the recent period of nationwide increases in rates of incarceration, the following three statutes have importantly affected the development in Alabama of community-based sanctions:

> "Split Sentence Act", Acts 1976, no.754, p.1038; Acts 1985, 2nd Ex. Sess., No. 85-905, p. 177, section 1; Acts 1988, No. 88-163, p. 261, section 1; codified as amended at Ala. Code, section 15-18-8 (1975).

"Mandatory Treatment Act of 1990" (The Bennett-Breedlove Act), Acts 1990, No. 90-390, P. 537; codified at Code, section 12-23-1 (1975). and

"Alabama Community Punishment and Corrections Act of 1991, Acts 1991, No.91-441,p.795, section1; codified at Code, section 15-18-170.

The Split Sentence Act

The Split Sentence Act, as amended in 1988, gives a judge discretion to split a prison sentence of 15 years or less by ordering that the defendant serve a maximum of three years in prison, that the remainder of the sentence be suspended, and that the defendant be placed on probation for such period and upon such terms as the court deems best. Thereafter only the sentencing judge (or a successor judge) has the power to shorten the period of incarceration, and the exact length of imprisonment ordered by the judge may not be reduced by the "good time" rules of the Department of Corrections. The statute stipulates that the split sentence is not to be used to shorten mandatory incarceration periods if the conviction for which the offender is being sentenced, or any previous conviction, has been for any of the following violent offenses: "murder, rape first degree, kidnapping first degree, sodomy first degree, enticing a child to enter vehicle, house, etc. for immoral purposes, or arson first degree." Code, 15-18-8(a)(2). (This statute leaves unaffected the result that an offender must be sentenced to incarceration for the full minimum period if his or her sentence is for more than 15 years, whether or not his offenses have been violent and even if those offenses consist only of a series of thefts with no physical threat involved.) The following is, in part, a statement of sentencing principles contained in the Rules of Criminal Procedure promulgated by the Alabama Supreme Court for use beginning in 1991:

> The sentence imposed in each case should call for the least restrictive sanction that is consistent with the protection of the public and the gravity of the crime.—
>
> Judges should be sensitive to the impact their sentences have on all components of the criminal justice system and should consider alternatives to long-term institutional confinement or incarceration in cases involving offenders whom the court deems to pose no serious danger to society. A.R. Crim.P., Rule 26.8

The Committee Comments to Rule 26.8 state:

> For appropriate defendants, judges are encouraged to fashion sentences utilizing alternatives other than basic probation and long-term institutional confinement. Although the alternatives presently available will vary to some degree, depending on the sentencing court's location, some alternatives include [split sentences, "reverse" split sentences, fines, court costs, restitution, drug and alcohol rehabilitation programs, boot camps, community service, work release, community restitution centers, house arrest, and electronic monitoring].

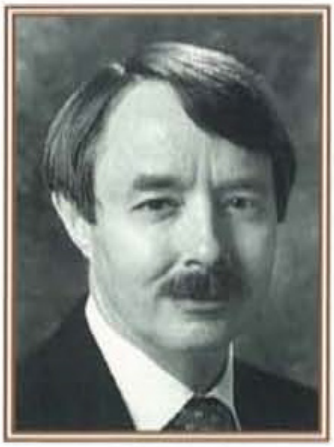
(A "split sentence" divides a sentence so as to order an offender to prison for the first portion and to order a non-prison sanction for the remaining portion. A "reverse split sentence" orders a non-prison sanction for the first portion of the sentence and a period of incarceration for the following portion, with the expectation that if the offender complies well with the first portion, the judge will suspend the order for incarceration.)

Thus, Alabama courts were encouraged ten years ago to issue sentencing orders which created, in effect, a third tier of intermediate sanctions between incarceration and basic probation, however at the time no corresponding personnel within Alabama communities were available to implement those orders. Correctional officers of the Alabama Department of Corrections could provide supervision only to imprisoned offenders, and probation officers within the communities were already stretched thin by case loads of probationers and parolees several times the nationally recommended average. Certainly it would have been unreasonable to expect these probation officers to further increase their loads by adding probationers requiring more detailed and intensive supervision.

The principle here is a carrot-and-stick approach to replace what formerly was only a stick.

The Edna McConnell Clark Foundation helped in the early development of community corrections with seed funding grants, but workable methods of building strong and durable local programs have been evolving slowly. In all communities probation officers are involved to some extent in ensuring compliance with alternative sentencing orders (because offenders sentenced to intermediate sanctions within the community are considered to be "on probation" with especially demanding terms of probation), but if a region has no network of local support other than probation services, it is unrealistic to expect community corrections to succeed. Indeed, without such community corrections support, orders for intermediate sanctions may promote lax implementation and thus convey the destructive impression that a court's orders need not be obeyed.

The term "community corrections program" may be used loosely to mean any entity providing support services to implement criminal sentences carried out within the community, whether such services are for misdemeanants or felons or both. Both the Mandatory Treatment Act of 1990 and the Community Punishment and Corrections Act of 1991 have helped to establish such programs.



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The Mandatory Treatment Act of 1990

The Mandatory Treatment Act specifically addresses the problem of alcohol and drug abuse among criminal offenders. Without question the category of greatest concern in community corrections is substance abuse: its control, punishment and cure or amelioration. It is widely estimated that an astounding 75-80 percent of Alabama's criminal offenders in both urban and rural areas, have some degree of alcohol or drug addiction. (See: Allen Tapley, *Alabama's Criminal Justice System, Planning for the Future*, The Sentencing Institute, 1994.) Consequently community corrections services of almost every kind are permeated and interrelated by concerns associated with the identification and treatment of alcohol and drug abuse.

The Treatment Act states its legislative intent as follows:

> To establish a specialized court referral officer program to promote the evaluation, education and rehabilitation of persons whose use or dependency on alcohol or drugs directly or indirectly contributed to the commission of an offense for which they were convicted in state or municipal courts and to establish mandatory alcohol and drug abuse treatment programs to provide treatment and rehabilitation for these identified offenders." Code, section 12-23-2

This act establishes specific sentencing procedures which call for a new tier of corrections services which are administered by the Administrative Office of Courts and which are not the responsibility of either the Department of Corrections or the Board of Pardons and Paroles.

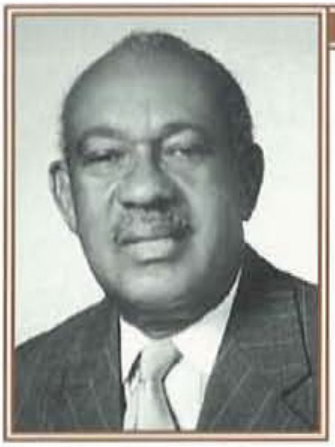
The act provides that the Administrative Director of Courts, with the advice of the presiding judge of the circuit, shall appoint a "court referral officer" (CRO) in every circuit, whose duty it shall be to assess, monitor and refer for suitable treatment offenders who are found to be substance abusers. The CRO reports to the court on an offender's drug status, and if upon conviction the court elects to fashion intermediate sanctions for the defendant, it is able to do so on the basis of informed analysis of any substance abuse problem. If the court chooses to incorporate into a sentence a provision for substance abuse treatment and no treatment is available in the offender's home community, the CRO is empowered to refer the offender to another area for treatment in one of a statewide network of inpatient treatment facilities and halfway houses. (Payment is a problem if an indigent patient is too ill to be employed and some waiting periods can be a problem. Additional resources are needed.)

The Department of Corrections also offers substance abuse treatment in its central prisons, under the direction of Dr. Merle Friesen, and currently maintains approximately 1,500 beds for substance abuse treatment, mainly at its Ventress facility. Even with a good treatment program, the extremely high rate of substance abuse problems among inmates suggests that some abusers reach the end of their prison terms without treatment and then return to their old surroundings with no professional help.

The obvious advantage of in-prison drug treatment is that it provides a secure environment for those addicts perceived as too dangerous to remain free. The obvious advantage of community treatment is that it can integrate treatment into the everyday life of a non-violent substance abuser while he or she is being monitored for drugs and is working to pay for treatment services and for the support of himself and his dependents.

Incorporated within the Mandatory Treatment Act, at Code section 12-13-5, is the provision known as "drug diversion" or "deferred prosecution" authorizing procedure in which a qualifying offender may, at the discretion of the district attorney, undergo drug treatment in lieu of prosecution, and thus achieve "diversion from the criminal justice system."

The principle here is a carrot-and-stick approach to replace what formerly was only a stick. The hope is that a person arrested for a relatively minor drug crime in the early stages of substance abuse will have a powerful incentive to stop using illegal drugs (and thus prevent a lifelong drug problem to himself and society) when he or she knows that in so doing he will escape being branded a criminal and will be helped to become drug-free by the advice of experienced professionals. But the stick remains, in the imminent threat of prosecution if the defendant's unlawful behavior does not change. For some appreciable time before such a case is dismissed the defendant is continuously monitored by random drug screens at the defendant's



David Thomas, assistant director, Community Corrections Center, and head, Alternative Sentencing, Mobile

own expense while becoming, or remaining, gainfully employed and paying some costs of other required services if he is reasonably able to do so.

The statute provides that the Office of Prosecution Services shall establish guidelines, which shall be used by the prosecutor in evaluating a request for diversion from the criminal justice system into rehabilitation and also provides that if a complaint, information or indictment has been filed, the deferral must be approved by the court.

Response to this discretionary provision has been widely disparate among the various Alabama circuits. Mobile, Jefferson and Tuscaloosa counties have developed large, firmly established drug diversion and "drug court" programs, whereas some other counties have never allowed a single such case.

"Drug courts" in the cities mentioned above employ methods similar to those of deferred prosecution, but typically include non-violent offenders whose offenses or prior records are somewhat more serious than those of offenders qualified for deferred prosecution. Drug traffickers are excluded from both groups. In these "drug courts" the defendant must plead guilty (after being informed of his rights) before he or she is accepted into the program; but the judge delays sentencing, intending to set aside the conviction if the defendant maintains a long pattern of successful rehabilitation but to sanction the offender if he or she does not cooperate. Persons in the program are periodically reviewed by the court, with individual approval or censure by the judge. During these review sessions there is a non-adversarial spirit of working together cooperatively toward accomplishing an extremely difficult task. Many participants succeed and many do not; all are carefully monitored and those who continue in substance abuse cannot do so with impunity. In each of the three cities mentioned above, one local judge presides for all such offenders.

Each community has its own individual policies within the general procedures described above. For example, Jefferson County at present allows in its drug court only those offenders whose alleged offense was specifically a drug offense; however, Mobile admits participants whose offense is believed to be secondary to a drug problem: for example, theft of money to buy drugs. Notes for a CLE program two years ago suggest the individuality of each community's policies:

> "The Jefferson County drug court is an evolving program. There have been many meetings and planning sessions between law enforcement, the court, the district attorney, the criminal defense bar, and treatment providers to develop a comprehensive drug court program for Jefferson County. We will continue to evaluate the program andmake adjustments. *The Jefferson County Drug Court*, Judge O. L. "Pete" Johnson, Notes with oral presentation to B'ham Bar Ass'n, 12/95.

One important difference among communities is that a few circuits accept felony pleas (after advice of counsel) at the district court level, often accelerating the start of drug treatment, but most circuits do not accept felony pleas until after indictment, sometimes for the stated reason that court reporters are unavailable in those courts at the district level.

The Alabama Community Punishment and Corrections Act of 1991

The Alabama Community Punishment and Corrections Act of 1991 was passed with the following statement of legislative intent:

> To provide a community punishment and corrections program and procedures as an alternative punishment for eligible offenders; to provide for local community punishment and corrections planning boards in the judicial circuit or counties to qualify for receipt of funding; to provide for the establishment of such alternative plans and programs whereby state funds may be granted or contracted with or through local governments, county or counties, established authorities and qualified nonprofit human service agencies and entities to provide planning, treatment, guidance, training or other rehabilitative services and programs; to provide authorization for the department of corrections to participate in the plan—.
>
> Acts 1991, No. 91-441, p. 795.

Services provided under the Mandatory Treatment Act are state mandated and state regulated, but the Community Corrections Act provides specifically that community punishment and corrections programs for non-violent offenders be established upon the initiatives of the counties themselves, with the approval of the local county commission or, in the case of counties wishing to join together in forming such a program, with the approval of the commission of each participating county. "Community punishment and corrections programs" in this formal sense are those entities which qualify under the terms of the statute to receive certain benefits from the state by participating in qualified community punishment

and corrections plans individually approved by the Department of Corrections. Under this act participation in such a program by each county is purely voluntary; once a county has elected to participate it can, at any time, elect to withdraw at the end of its current grant year.

The Act states its goals in this way:

> (1) To promote accountability of offenders to their local community by requiring direct financial restitution to be made to victims of crime and that community service be made to local governments and community agencies representing the community;
>
> (2) To provide a safe, cost efficient, community punishment and correctional program which provides punishments through the development of a range of sanctions and community services available for the judge at sentencing;
>
> (3) To reduce the number of offenders committed to correctional institutions and jails by punishing such offenders in alternative punishment settings;
>
> (4) To provide opportunities for offenders demonstrating special needs to receive services that enhance their abilities to provide for their families and become contributing members of their community; and
>
> (5) To encourage the involvement of local officials and leading citizens in their local punishment and correctional system.
>
> Code section 15-18-173

The following provision concerns the application of statutory ranges of punishment for criminal offenses:

> Notwithstanding any provision to the contrary, the court is authorized to sentence an eligible offender as defined in this section directly to any appropriate community-based alternative provided, either as a part of or in conjunction with a split sentence as provided for in section 15-18-8 of the Code of Alabama 1975, or otherwise as an alternative to prison.
>
> In sentencing an eligible offender to any community-based alternative to incarceration, the court shall possess the authority to set the duration of the sentence for the offense committed to any period of time up to the maximum sentence within the appropriate sentence range for the particular offense.
>
> Code section 15-18-175(d)(2)

The following provisions, here abridged and paraphrased, are included in the act:

> An eligible offender is one who has committed a criminal offense but has not committed any of the following specified violent offenses: murder, kidnapping in the first degree, rape in the first degree, sodomy in the first degree, arson in the first degree, selling or trafficking in controlled substances, robbery in the first degree, forcible sex crimes, lewd and lascivious acts upon a child, or assault in the first degree if said assault leaves the victim permanently disfigured or disabled.

Additionally, an offender is excluded from community corrections programs if he or she is found by the court in any other respect to "demonstrate a pattern of violent behavior." With respect to the eligibility requirements the Act states that they "shall be interpreted as guidelines for the benefit of the court." (So, presumably, the court has discretion to make reasonable exceptions.)

The terms of an offender's community corrections sentence may require him to remain within certain limits of confinement (such as an order to remain in his home with electronic monitoring) or to return at a certain time to a place of confinement (such as to a residential work release center at the end of each work day). If an offender's sentence includes such terms and the offender willfully fails to comply, that failure is deemed an escape (and as such is punishable as a felony, for which the court may commit him to a state prison).

The Department of Corrections is given the responsibility of developing "minimum standards, policies, and administrative rules for the statewide implementation of this Act." Additionally, the Department is charged with monitoring the plans, conducting public education programs concerning the purposes and goals of community corrections, reporting the effectiveness of the programs in diverting offenders from prisons and jails, providing technical assistance to communities in developing local plans, reviewing community plans and awarding contracts and grants, and conducting annual audits and evaluations of programs receiving contracts and grants.

Community corrections programs may offer corrections services with respect to both misdemeanants and felons but the act continues some previously established distinctions between misdemeanor corrections as a county responsibility (for offenses with maximum penalties of incarceration in county jails for one year), and felony corrections as a state responsibility (for offenses with penalties of incarceration in state prison for more than one year). Within the act misdemeanants are referred to as "county inmates," and felons as "state inmates." The Department of Corrections is assigned the duty to promulgate rules and regulations for participation by "state inmates," and the department is authorized to contract with community corrections programs to provide services in return for reimbursement of some costs of services with respect to "state inmates."

The Act establishes rules for funding and fiscal accounting. It also sets rules for offenders' labor, and specifies that the state or county or municipality may become employers of state or county inmates. When inmates are so employed they must be paid at least the federally established minimum wage, but they are not entitled to certain specified benefits. Suggested types of such employment are, without limitation: road or bridge work, garbage collection and public grounds maintenance.

When an offender is employed for compensation as a part of a sentence plan his wages are to be paid directly to the county and the proceeds are to be disbursed according to the approved plan of each community corrections program. Among the acceptable disbursements are restitution to the offender's victim, user fees to help defray the cost of corrections services to the offender, payment of court costs and fines. "The remainder of the inmate's wages may be credited to his account with the county and may be paid out for dependent care, savings and spending money."

If an offender's sentence includes terms of punishment in the form of community service, the offender must do that work without compensation.

The Act states that "community punishment and corrections funds may be used to develop or expand the range of community punishments and services at the local level" and suggests, without limitation, various types of services as examples of appropriate use of community corrections funds, such as: Intensive supervision costs, short-term or long-term residential programs for treatment of alcohol or drug related problems or for other special needs of offenders, outpatient treatment and counseling for alcohol- or drug-related problems, costs of verification of home confinement/curfew provisions (including electronic monitoring), psychiatric counseling, family counseling, vocational counseling and job training, educational programs leading to GED certificates, and transportation subsidies. The Act also provides that funds may appropriately be expended to acquire, renovate and operate facilities in which to provide the above-suggested services.

Current Community Corrections Activities in Alabama

As the above-quoted Committee Comments to Rule 26.8 observed concerning an earlier year, alternatives available to a sentencing judge still vary greatly among Alabama communities. Obviously, the more extensive a community's support services, the greater are the judges' options. It takes time and usually some trial and error to build sound local community support services sufficient to provide a viable substitute for incarceration of felons deemed too risky for traditional probation. Alabama's largest urban areas have strongly established and interestingly varied community corrections programs, but predictably the more thinly populated areas in many cases have few services to offer beyond basic probation.

The Department of Corrections estimates that throughout the state during the past year it has paid some contractual reimbursement funds with respect to nearly 1,000 convicted felons deemed under department criteria to be persons who would have been sent to central prisons but for the corrections programs in their own home communities.

Although that number seems small compared with the more than 22,000 adults currently incarcerated in central prisons, the figure does not reflect the full impact on incarceration numbers. For one thing, the department (with its own serious problems of basic funding) has highly stringent rules for determining whether an offender is a true prison divertee and is thus appropriately a financial obligation of the department. For another, there is probably no way to adequately estimate how many misdemeanants and serious offenders have been prevented from re-offending, or from offending more seriously, by the community corrections punishment and treatment programs in which they have participated.

Up to the present the following counties and one three-county circuit have organized community punishment and corrections programs. These counties are Calhoun, Cherokee, Cullman, Dekalb, Etowah, Fayette, Houston, Jefferson, Lamar, Madison, Marshall, Mobile, Montgomery, Pickens, Shelby, Tuscaloosa, and Walker, and the three counties of the 17th Circuit: Greene, Marengo and Sumter. Programs in these areas have begun and evolved in a variety of ways. Some have expanded slowly and steadily, some have had periods of expansion and of diminution, and others, after good effort, have diminished.

Community corrections programs now operating in various parts of Alabama include services employed at every stage of criminal cases, from pre-trial release, in which needed jail space is freed up by supervision of selected arrestees otherwise unable to make bail, to the completion of intensively supervised alternative sentences. In a 1996 manual called COMMUNITY CORRECTIONS PROGRAM DEVELOPMENT, FIRST STEPS, the Alabama Association of Community Corrections, Inc. described a number of types of community corrections options by which Alabama judges might enlarge their range of available sanctions. Not all sections of the state have adequate support services at present to make all these options viable in every local court. The following terms and options, which are here paraphrased and abridged, were discussed in that manual.

COMMUNITY SERVICE— An order to work a specified number of hours, without pay, for a community or other nonprofit organization. Requires a knowledge of needed work and analysis of the offender's aptitudes. It may also require instruction in how to do the work, supervision of the work, and verification that the work has been done.

"DAY" FINES—An order to pay a fine based on the gravity of the offense and the offender's ability to pay. (So-called because the amount is partly based on each offender's salary per day.)

PAYMENT OF RESTITUTION TO VICTIM—An order to remunerate the offender's victim for financial loss.

DRUG SCREENING—An order to submit to random urinalysis to verify that an offender who has been known to use illegal drugs is not currently using them.

DRUG AND ALCOHOL TREATMENT—A sentence provision by which the offender agrees to submit to drug and/or alcohol treatment at the appropriate level: detoxification, crisis residential, intensive outpatient, residential rehabilitation, methadone treatment. (Referrals for treatment available in other communities may be obtained through court referral officers.)

ELECTRONIC MONITORING—An order to submit to continuing verification that the offender is in a certain place at a certain time, usually that he or she is at home on house arrest, or is either at home or at work or en route. Requires monitoring devices for continu-

ous signaling of offender's location or a phoning device which periodically verifies offender's presence.

ADDITIONAL EDUCATION—An order that the offender must improve his education, perhaps by acquiring a GED or undertaking a course of vocational education.

CURRENT EMPLOYMENT—An order that the offender must become gainfully employed.

RESIDENCE IN A HALFWAY HOUSE—An order that the offender must change his present living arrangements and move to a "halfway house" which enforces rules providing a stable and structured environment. If such a house is not available in the offender's community, referral to another area may be available through the court referral officer.

PARTICIPATION IN DAY REPORTING—An order that the offender must report as directed to a case manager at a corrections center for advice and supervision concerning a course of acceptable activities.

INTENSIVE SUPERVISION—An order that the offender must undergo intensive supervision by corrections personnel. Requires more personnel than day reporting, as it involves frequent face-to-face contacts and requires close surveillance to protect public safety.

PARTICIPATION IN A WORK RELEASE PROGRAM—An order to live in a work release center where the offender will be confined except for release during work periods. These centers are designed to help with reintegration into the community and to promote the self-respect of offenders while they pursue additional education and vocational training and work to pay restitution and to support themselves and their dependents. The disadvantage of work release centers is that they are expensive and require many services and other resources.

Two fundamental services of community corrections programs are sentence planning and case management.

SENTENCE PLANNING is the creation of an individualized sentence plan to be proposed to the sentencing court as a workable plan for a particular offender in his or her particular community, based upon assessment of the offender and knowledge of available community resources.

CASE MANAGEMENT is the implementation of a comprehensive program for organizing and supervising an offender's compliance with the terms of his sentence. Such comprehensive management is probably the best hope for an offender's successful completion of court-ordered sanctions.

Although some of the above described options can be implemented and verified fairly simply, most require much local support for a successful outcome. Most communities have some accessible services which have been established independently of corrections efforts, for example GED programs or self-help programs such as Alcoholics Anonymous and Narcotics Anonymous.

Each community corrections program has its own distinguishing characteristics. One interesting detail of Mobile's corrections program is that, following the example of a successful pilot program in Portland, Oregon, it established the use of acupuncture as one treatment for drug addiction. Lest that fact cause some to suspect that the program is "far out," it should be said that Mobile's community corrections program has strong local support from bench, bar and elected officials of the City of Mobile and Mobile County. Since fall of 1996, Mobile has hosted two community corrections conferences, one sponsored by a national community corrections organization and the other by an organization including both American and Canadian members.

Madison County has, at Huntsville, the oldest community corrections program in the state-one which has served as a model for others. Madison has always emphasized work release programs. There is one program called "Suspended Work Release," in which most of the offenders are adjudicated misdemeanants. They do not live in a work release center but maintain their jobs, live at home, and report as directed to a sort of day reporting center. There is another program called "Active Work Release" which is a post-adjudicatory program for felons, who live in a work release center located in an annex of the county jail, make payments for their own support, and are released only to go to work. Currently the normal term of residence is 60 days to 18 months and the usual number of offenders participating at one time is about 80, with another 24 living at home on electronic monitoring. The Madison County program does not accept payment from the Department of Corrections for its diverted felons. Madison also has a drug diversion program.

The community corrections program in Jefferson County is the second oldest in the state and operates under the name TASC (Treatment Alternatives to Street Crime). Although TASC operates a full range of community corrections services, it has always emphasized substance abuse treatment programs and it continues to be a leader in that field. TASC is currently the recipient of a large federal grant to establish locally a program called "Breaking the Cycle", now in its second year in Jefferson County. The program concentrates on breaking the drug-crime cycle by intervening with treatment and rehabilitation services at the earliest possible time after the offender's arrest. Unlike "drug court", "Breaking the Cycle" is not directly tied to any particular court procedure, but operates cooperatively as one of Jefferson County's multiple strategies within the overall criminal justice system.

Montgomery is one of the few counties which has experimented with volunteer support personnel. The Sentencing Institute is currently pioneering in the establishment of a pilot program called the Montgomery County Certified Mentor Program in which volunteers are criminal-record checked and trained to assist offenders in various ways to comply with the terms of their sentences, including finding employment, finding a residence, participating in substance abuse programs, and attending GED/vocational education classes. Each offender is, of course, assigned to a professional probation officer to whom the volunteer must report any problem with the offender's compliance with court orders; however, much time-consuming and high quality assistance can be provided by the volunteer. The project sponsors hope to be able eventually to similarly assist parolees.

In January 1998, The Sentencing Institute began to help establish a similar mentoring program in Madison County, and it now has tentative plans to assist in starting additional such programs in several smaller counties.

The foregoing descriptions by no means cover all the strong community corrections programs in the state. A number of small and intermediate size counties are building community corrections programs in imaginative ways, although some have had difficult struggles.

The three-county circuit of Marengo, Greene and Sumter, for example, organized a joint community corrections program some years ago, but had difficulty keeping enough local support to sustain a strong program. A serious impediment in that area is a lack of jobs of a type likely to be available to most offenders. It is especially difficult to restructure living habits while one is unemployed and is low on money and self-esteem. The area does have the asset of an active mental health facility accessible through the services of the local CRO.

Considerations in Proposing Sentence Plans

In each Alabama courtroom there are different practices for proposing a sentence plan or asking that a professional sentence planner create such a plan, and all defense attorneys who do not know the practices in a particular court should ascertain that information early in the case.

The depth of a region's community corrections services is, of course, a limiting factor in the court's sentencing options and in a defense attorney's sentencing proposals. In areas where there is no such supportive corrections personnel, defense attorneys can sometimes fill the gap by knowing the offender's habits, abilities and history of offenses as well as possible and then proposing to the court some locally available sentencing measures which are fairly simply verifiable by a probation officer and which are conducive to the defendant's developing law-abiding practices.

The details of greatest concern to the court are likely to pertain to the ability of the offender to support himself or herself and to remain free of substance abuse. As to the latter concern, the court referral officer is probably the best source of help, and as to employment in his home area the attorney will perhaps be able to suggest where help might be available. Locally available education or vocational training programs or self-help programs might be useful.

Sometimes a case may present circumstances beyond the control of the offender and the defense attorney which make it difficult to assure the court that any realistic sentencing orders will prevent the offender from being a threat to public safety, even though the individual offender may be perceived as personally less blameworthy than other offenders who are not sentenced to prison. If the defendant in such a case hopes to avoid incarceration the attorney can only use all efforts to propose the best available resources to ensure safety.

Even in areas with strong community corrections programs there are a few potential problems to consider because of that very abundance. Experienced corrections personnel have warned that sentence plans which are too complex and demanding may doom to failure some offenders who would have been able to execute well a plan which was simpler yet sufficiently demanding.

One defense attorney has pointed out the possibility of a conflict of interest when an entity under contract to be paid for treatment is the entity charged with advising how long that treatment should continue. No conscious wrong-doing is suggested, but lengthy, expensive proceedings probably call for thoughtful evaluation.

Some have mentioned the hazard of "net-widening" by courts which might enthusiastically order extensive corrections services for even those defendants to whom they would previously have felt free to grant basic probation.

As community corrections programs become more accessible, and as such techniques as drug screening and electronic monitoring become more efficient, there is a need to balance the use of these improvements with vigilance in helping to ensure that each sentence comprehends the court's rule in ordering "the least restrictive sanction that is consistent with the protection of the public and the gravity of the crime." In intermediate sanctions, as in all other areas in which the law is empowered to limit individual freedoms, lawyers should help increase public awareness of constitutional protections and help dispel the common misconception that in our democracy any 51 percent of the people have a right to control all the actions of the other 49 percent.

In a useful series of articles in the *Birmingham Post Herald*, in mid-November of 1997, a group of reporters pointed out that a disproportionate number of black offenders in Alabama are receiving sentences of actual incarceration rather than lesser sanctions, and apparently for similar types of crime. Some observers were quoted as saying the disparity is caused by conscious or unconscious discrimination on the part of the courts, and other observers said they believe the figures are attributable to causes arising from problems of poor neighborhoods in which blacks are disproportionately victimized by crime-causing factors, most notably the scourge of crack addiction. The disparity itself calls for careful scrutiny (and extra help for early crime prevention).

Obviously it is important for every criminal defense lawyer to understand the client's circumstances as thoroughly as possible and to consider what specific, workable plans for the future might satisfy the court that that particular individual could safely be sanctioned without incarceration.

Probably much of the public today still thinks that when a criminal offender is sentenced, the judge either sends him or her to prison or "lets him off." As support services for community corrections gradually build throughout the state, it should become increasingly apparent that for non-violent offenders in Alabama there are alternative community sanctions which are demanding, effective and less expensive than prisons. ■

This article is a product of several years' study of community corrections in Alabama by the Alabama State Bar Committee on Correctional Institutions and Procedures. During this period committee chairs have been Mark Wilkerson, Abigail Van Alstyne and Roberta Fulton.

A Government Of Laws And Not Of Men:

Judicial Restraint and the Doctrine of Separation of Powers

By Associate Justice J. Gorman Houston, Jr.

The preamble to the Constitution of Alabama of 1901 ("1901 Constitution") states:

"We, the people of the State of Alabama, in order to establish justice, insure domestic tranquillity, and secure the blessings of liberty to ourselves and our posterity, invoking the favor and guidance of Almighty God, do ordain and establish the following Constitution and form of government for the State of Alabama:"

In Section 35 of the 1901 Constitution, the drafters of the Constitution simply and yet eloquently defined the very object of government:

"That the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty, and property, and when the government assumes other functions it is usurpation and oppression."

To accomplish this objective of government in a manner that would avoid the dangerous concentration of powers in one man or institution, the people divided the powers of government among the legislative, executive and judicial departments (1901 Constitution, § 42), creating a delicate system of checks and balances. The people, acting through the drafters, entrusted the judicial department with two great powers: (1) the power to determine the constitutionality of legislative enactments and (2) the power to determine the proper meaning of legislative acts. The 1901 Constitution requires the judicial department of the State of Alabama to exercise restraint when determining whether acts of the legislature are unconstitutional and when interpreting or construing legislative acts.

In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803), a case decided 16 years before Alabama became a state, the United States Supreme Court recognized that federal courts possess the power to determine whether the acts of Congress are constitutional. This power has come to be known as the power of judicial review. In that same opinion, Chief Justice John Marshall cautioned the federal judiciary to exercise extreme restraint in exercising the power of judicial review or, as more recent commentators have termed it, "the playing of the constitutional trump card:"

"[T]he framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature."

Marbury v. Madison, 5 U.S. at 179-80. Seven years later, in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 125 (1810), Chief Justice Marshall further cautioned the judiciary:

"The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

The judicial department of the State of Alabama has always possessed the same trump card in interpreting the constitutions of Alabama and acts of the Alabama legislature that the judicial department of the United States possesses in interpreting the Constitution of the United States and acts of Congress. *Ex parte Selma & Gulf R.R. Co.*, 45 Ala. 696, 725-28 (1871). However, the use of this trump card by the Alabama judiciary has been restricted by the strong, express separation-of-powers provisions that have been included in all of Alabama's Constitutions. All previous Alabama constitutions (beginning with the 1819 Constitution, which was ratified nine years after *Fletcher v. Peck* was decided, and including the constitutions of 1861, 1865, 1868 and 1875) have had the following strong separation-of-powers provision:

"No person, or collection of persons, being of one of those departments, shall

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exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

The 1901 Constitution added an even more direct command of the separation of powers:

"In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men." 1901 Constitution, Article III, § 43.

To help it walk that fine line between proclaiming unconstitutional an act that violates the Constitution on one side and unconstitutionally exercising legislative power on the other side, the Supreme Court of Alabama has, over the years, established principles of law that the Court must follow before declaring an act of the legislature unconstitutional. The Supreme Court also has well-established rules of statutory construction that it must follow in interpreting an act of the legislature, in order to make certain that the act is interpreted to express the will of the legislature, not the will of the judiciary. These principles and rules follow the spirit, if not the letter, of the preceding admonishment from Chief Justice Marshall in *Fletcher v. Peck* and of § 43 of the 1901 Constitution.

Principles of Law to Be Followed in Ruling on the Constitutionality of an Act of the Legislature

It is the duty of courts to sustain a legislative act as constitutional unless it is clear beyond a reasonable doubt that it violates the Constitution. *White v. Reynolds Metals Co.*, 558 So.2d 373 (Ala. 1989), cert. denied, 496 U.S. 912 (1990); *Crosslin v. City of Muscle Shoals*, 436 So.2d 862 (Ala. 1983); *Brittain v. Weatherly*, 281 Ala. 683, 207 So.2d 667 (1968); *Riley v. Bradley*, 252 Ala. 282, 41 So.2d 641 (1948); *State ex rel. Wilkinson v. Murphy*, 237 Ala. 332, 186 So. 487 (1939). All presumptions and intendments are indulged in favor of the validity of an act (*House v. Cullman County*, 593 So.2d 69 (Ala. 1992); *State v. Skeggs*, 154 Ala. 249, 46 So. 268 (1908)); therefore, the party who questions the constitutionality of the act has the burden of proving beyond a reasonable doubt that the act violates the Constitution. *State ex rel. Meyer v. Greene*, 154 Ala. 249, 46 So. 268 (1908). "Beyond a reasonable doubt" means "fully satisfied, entirely convinced, satisfied to a moral certainty; and [that] phrase is the equivalent of the words clear, precise and indubitable." *Black's Law Dictionary* 161 (6th ed. 1990).

Whenever a litigant challenges the constitutionality of an act of the Alabama legislature, "the Attorney General of the state [must] ... be served with a copy of the proceeding and [is] entitled to be heard." Ala. Code 1975, § 6-6-227. This is to ensure that the statute is properly defended. Failure to notify the attorney general of a constitutional challenge deprives courts of jurisdiction to resolve claims based on the constitutional challenge, and any order holding the statute unconstitutional is void. *Ex parte Northport Health Service, Inc.*, 682 So.2d 52 (Ala. 1996). If the record of a lawsuit does not show service on the attorney general, then the absence of jurisdiction is apparent on the face of the record, and an appellate court must take notice of its own lack of jurisdiction. *Smith v. Lancaster*, 267 Ala. 366, 102 So.2d 1 (1958). Pursuant to § 6-6-227, the attorney general is entrusted with the duty of defending the constitutional propriety of legislative enactments. In doing so, the attorney general acts on behalf of the legislature but does not violate the separation of powers provided for by the 1901 Constitution. Although the attorney general is part of the executive department of government (Article V, § 112, 1901

Constitution), § 137 of the 1901 Constitution, as amended by Amendment No. 111, provides that the attorney general "shall perform such duties as may be prescribed by law."

When a statute is challenged as unconstitutional and there are two possible interpretations of the statute, one of which would render the statute unconstitutional and one of which would render the statute valid, courts should adopt the construction that would uphold the statute. *Alabama State Federation of Labor v. McAdory*, 246 Ala. 1, 10, 18 So.2d 810, 815 (1944), cert. dismissed, 325 U.S. 450 (1945).

Furthermore, Alabama law has long provided that constitutional provisions designed for the preservation and security of the elementary rights of life, liberty, and property are construed liberally in favor of the citizen. *Sadler v. Langham*, 34 Ala. 311 (1859). This very basic concept is in accord with the genius of our institutions and the traditions of the English common law. This concept was of such great importance to the drafters of the 1901 Constitution that it not only was engrafted into the 1901 Constitution but the concept was also taken a further step conceptually. Article I, § 35, of the 1901 Constitution, sets out a provision that did not appear in Alabama's earlier Constitutions: "[T]he *sole object and only legitimate end of government* is to protect the citizen in the enjoyment of life, liberty, and property, *and when the government assumes other functions it is usurpation and oppression*." (Emphasis added.) Therefore, to be constitutional, all legislation must protect the citizen's enjoyment of life, liberty or property.

The Court's Application of Principles of Judicial Review

Has the Supreme Court of Alabama maintained a level playing field in determining the constitutionality of legislative acts?

For example, Article I, § 11, provides: "[T]he right to trial by jury shall remain inviolate." This section applies to both civil cases and criminal cases. See

"... the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty, and property, and when the government assumes other functions it is usurpation and oppression."

Gilbreath v. Wallace, 292 Ala. 267, 292 So.2d 651 (1974); see also *Alford v. State*, 170 Ala. 178, 54 So. 213 (1910) (in which the dissenting opinion of Justice Mayfield, 170 Ala. at 183-220, 54 So. at 214-25, precedes the majority opinion of Justice Anderson, 170 Ala. at 220-225, 54 So. at 225-27).

In the criminal context, in which a defendant's life, liberty, or property is at issue, Article I, § 11, has been interpreted as ensuring "the right of trial by jury as [it] existed at common law and the time of Alabama's *first state constitution [1819]*." *Crowe v. State*, 485 So.2d 351, 364 (Ala.Crim.App. 1984), rev'd on other grounds, 485 So.2d 373 (Ala. 1985), cert. denied, 477 U.S. 909 (1986) (emphasis added); *Ex parte Giles*, 632 So.2d 577, 580 (Ala. 1993), cert. denied, 512 U.S. 1213 (1994). In accordance with that interpretation, the Supreme Court held in *Giles* that the legislature's action in 1977 to remove a jury's sentencing authority in criminal cases did not violate the Constitution, even though juries had had the right to sentence in most criminal cases at the time of the ratification of the 1901 Alabama Constitution, because juries did not have that right at the time of the adoption of the 1819 Constitution.

However, as Giles' counsel pointed out, in the civil context "Alabama's Constitution effected a 'freezing' of the right to jury trial as of 1901." *Gilbreath v. Wallace*, 292 Ala. 267, 270, 292 So.2d 651, 553 (1974); *Smith v. Schulte*, 671 So.2d 1334, 1342 (Ala. 1995), cert. denied, U.S. , 116 S.Ct. 1849 (1996). In *Ex parte Giles*, 632 So.2d at 580-81, the Court stated, "Giles reads too much into *Gilbreath*. To be sure, that case did hold that § 11 preserved inviolate the right, which existed by statute in 1901.... However, it reached this conclusion only after an extensive analysis of the history of the claimed right. ... Thus, a historical review, although it is not always dispositive, is the starting point in any § 11 analysis."

In *Smith v. Schulte*, a civil plaintiff challenged the constitutionality of the $1,000,000 statutory cap on punitive damages against health care providers in wrongful death actions. A wrongful death action is purely statutory and was not recognized by the common law as being among its old and settled proceedings. Alabama's wrongful death statute was enacted *after* Alabama's first constitution, but *before* the ratification of the 1901 Constitution. The issue in *Smith v. Schulte* was simply whether the legislature could limit the damages that punish and deter in this statutory action, as it could abolish the jury's right to punish and deter in the criminal law? In *Smith v. Schulte*, a majority of the Court answered this question in the negative, holding the statutory cap unconstitutional and stating that "[i]t is well settled in Alabama that § 11 governs (1) those causes of action arising under the common law, *and* (2) those causes of action afforded *by pre-1901 statutes*." 671 So.2d at 1342 (emphasis in the original).

In its attempt to protect the State's right to punish those convicted of criminal offenses, did the Court, in upholding Ala. Code 1975, § 13A-5-2, which authorized the trial court, rather than a jury, to sentence, fulfill its duty to sustain the constitutionality of a legislative act unless it is clear beyond a reasonable doubt that it violates the Constitution? (*Ex parte Giles*, supra.) In its attempt to protect the ability of a civil plaintiff to obtain the full amount of punitive damages that a jury may award in a wrongful death medical malpractice case, did the Court, in striking down Ala. Code 1975, § 6-5-547, which was intended by the legislature to

protect health care providers, fulfill its duty? (*Smith v. Schulte*, supra.)

Rules of Statutory Interpretation to be Followed in Interpreting a Legislative Act

The fundamental rule of statutory interpretation is for the court to ascertain and give effect to the intent of the legislature in enacting the statute. *John Deere Co. v. Gamble*, 523 So.2d 95 (Ala. 1988); *Advertiser Co. v. Hobbie*, 474 So.2d 93 (Ala. 1985). If possible, the intent of the legislature should be gathered from the language of the statute itself. Words used in the statute must be given their natural, plain, ordinary, and commonly understood meaning; where plain language is used, a court is bound to interpret that language to mean exactly what it says. If the language of the statute is clear and unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect. *Ex parte New England Mut. Life Ins. Co.*, 663 So.2d 952 (Ala. 1995); *State Dep't of Transp. v. McLelland*, 639 So.2d 1370 (Ala. 1994); *Tuscaloosa County Comm'n v. Deputy Sheriffs' Ass'n of Tuscaloosa County*, 589 So.2d 687 (Ala. 1991); *Coastal States Gas Transmission Co. v. Alabama Public* [illegible]*e Comm'n*, 524 So.2d 357 (Ala. [illegible] *Alabama Farm Bureau Mut. Cas. Ins.* [illegible]*. v. City of Hartselle*, 460 So.2d 1219 (Ala. 1984).

If a statute's meaning is ambiguous or uncertain, so that a court may construe it, the court may consider conditions that might arise under the provisions of the statute and may examine results that will flow from giving the language in question one particular meaning rather than another. *Clark v. Houston County Comm'n*, 507 So.2d 902, 903-04 (Ala. 1987).

In deciding between alternative meanings to be given to an ambiguous or uncertain statutory provision, a court not only will consider the results that flow from assigning one meaning over another, but also will presume that the legislature intended a rational result, see *State v. Calumet & Hecla Consol. Copper Co.*, 259 Ala. 225, 66 So.2d 726 (1953); *Crowley v. Bass*, 445 So.2d 902 (Ala. 1984) (dictum); 2A N. Singer, *Sutherland Statutory Construction* § 45.12 (Sands 4th ed. 1984); that it intended a result that advances the legislative purpose in adopting the legislation, *see Mobile County Republican Executive Committee v. Mandeville*, 363 So.2d 754 (Ala. 1978); that it intended a result that is "workable and fair," see *State v. Calumet & Hecla Consol. Copper Co.*, supra; *Ex parte*

Hayes, 405 So.2d 366 (Ala. 1981); and that it intended a result that is consistent with related statutory provisions, see *Tate v. Teague*, 431 So.2d 1222, 1225 (Ala. 1983) ("'[T]he intention of the Legislature may be determined by examining the statute as a whole.'") (quoting the trial court's order with approval).

The Court's Application of Statutory Construction Rules

Has the Supreme Court maintained a level playing field in construing acts of the legislature?

In *Tuscaloosa County Comm'n v. Deputy Sheriffs' Ass'n of Tuscaloosa County*, supra, the Supreme Court construed the following statutory language: "The compensation of all law enforcement officers in the sheriff's department in Tuscaloosa County shall not be less than the compensation of a State Trooper." The Court held that the statute was clear and unambiguous. In *Taylor v. Cox*, [Ms. 1960578, February 13, 1998] So.2d (Ala. 1998), a case that involved the construction of a law relating to absentee ballots, the statute to be construed was set out at the beginning of the opinion: "[E]ach application shall be manually signed by the applicant." The Court found the language to be clear and unambiguous and held that it meant "that the applicant for an absentee ballot must himself or herself sign the application for the absentee ballot form." In other words, "shall" meant "shall."

In *State Dep't of Transp. v. McLelland*, supra, the Court interpreted a statute providing that "commissioners *must*, within 20 days from their appointment, make a report in writing." (Emphasis added.) In following the rule of statutory construction that words must be given their natural, plain, ordinary, and commonly understood meaning, and that where plain language is used, a court is bound to interpret that language to mean exactly what it says, the Supreme Court held that the probate court had correctly set aside the commissioner's report because it was untimely. In other words, "must" meant "must."

Eleven months after *McLelland* was decided, the Supreme Court decided *Roe v. Mobile County Appointment Bd.*, 676 So.2d 1206 (Ala. 1995). That was an absentee ballot case. The question certified to the Alabama Supreme Court from the United States Court of Appeals for the Eleventh Circuit was "[w]hether absentee ballots that, on the accompanying affidavit envelope, fail to have two witnesses and lack proper notarization ... meet the requirements of ... Section 17-10-7, to be legal ballots." It was not until the 16th page of the Supreme Court's opinion that the pertinent part of Ala. Code 1975, § 17-10-7, was set out: "'[T]he absentee voter's signature '*must* be witnessed by either: A notary public or other officer authorized to acknowledge oaths or two witnesses 18 years of age or older.'" 676 So.2d at 1222 (emphasis added). In *Roe*, in declaring that absentee ballots did not require the signatures of a notary public or two witnesses in order to be counted as legal votes, the Supreme Court did not mention the rule of statutory construction that "where plain language is used a court is to interpret the language to mean exactly what it says," and it did not refer to the *McLelland* case, decided 11 months earlier, in which "must" was interpreted as plain language.

Alabama's judicial department must be ever cognizant of the mandate of § 43 of the 1901 Constitution: "[T]he judicial [department] shall never exercise legislative ... powers, ...; to the end that it may be a government of laws and not of men." When the judicial department in construing a statute imposes its own meaning upon the statute rather than interpreting the statute as the legislature intended, or when the judicial department misplays the constitutional trump card by crossing the fine line between proclaiming unconstitutional an act that violates the Constitution on one side and unconstitutionally exercising legislative power on the other side, the judicial department unconstitutionally concentrates the legislative and judicial powers into one institution. Such a concentration of power misshapes our government into a government of men and not of laws–a result that the drafters of the 1901 Constitution, like the drafters of the United States Constitution, never intended and made every effort to prevent. ■

President's Page

(Continued from page 135)

The second legislative effort is our barratry statute dealing with improper solicitation of legal work. The statute is designed to define what acts would constitute unlawful solicitation and then provide some real teeth by imposing criminal penalties for offending lawyers, as well as for non-lawyers who are "running" the cases.

RH: I'll ask you the same question I've asked each of your predecessors: Have your services as state bar president been as time-consuming as you expected?

DR: Having been a bar examiner for four years and then having served on the board of bar commissioners for three terms, I was aware of what I had in store for me, so I'm not too surprised. On the other hand, it does take a lot of time. I'm still practicing law, at least some, every day. I am thankful that my family, my firm and my clients have been supportive and patient. I think they realize that the law and this profession have been good to me and that it's appropriate that I take the time "to put a little bread back on the water." One of the things that makes the time and sacrifice worthwhile is the opportunity to work with so many fine lawyers who are also contributing their efforts. Robert, in that regard, I thank you on behalf of the bar for your 15 years of service as editor of *The Alabama Lawyer*. ■

LEGISLATIVE WRAP-UP

By Robert L. McCurley, Jr.

The 1998 Special Session came to a close in April. The House and Senate had over 1,500 bills to review, with the state employees, teachers, county commissioners, probate judges, sheriffs, licensing officials all having bills to raise their salary. In addition, much of the time was spent considering bond issues for highways, schools and the state park system.

With primary election day on June 2nd and the run-off on June 30th, much of the session was posturing for these two days and the November 3rd general election.

State Mandates

Senate Bill 233—The Legislature has proposed a constitutional amendment to be voted on by the people which would prohibit the state from passing unfunded legislation requiring cities and counties to expend money without the Legislature adopting the expenditure by a two-thirds vote or providing funds for these mandates. Exempted from this are minimum salary bills for public officials.

Legal Separation

Act 98-105—This bill, sponsored by Representative Marcel Black, Representative Mike Rogers and Senator Rodger Smitherman, was one of the first bills passed by the Legislature and will become effective January 1, 1999. This new law will authorize a court to enter a decree of a legal separation which will provide for the division of property, custody and support of the children but does not terminate the marital status of the parties. This legal separation can be modified or dissolved only by written consent of both parties and ratified by the court or by the court alone upon proof of material change of circumstances. It does not bar a party from later instituting an action for dissolution of the marriage. This replaces the current § 30-2-30 and -31 relating to divorce from bed and board.

Adoption of Mentally Retarded Adult

Act 98-101—This act allows the adoption of an adult who is totally or permanently disabled or determined to be mentally retarded. It does not define disability.

Sports Agent

House Bill 197—Covers both student athletes and sport agents. It requires agents to notify the colleges and universities of the signing of a contract with an athlete and creates a civil action by colleges and universities for actions against both the student and the agent.

Real Estate Broker Lien

Act 98-160—The new law provides for a commercial real estate broker lien on real estate. The bill further provides when the lien may be made, the procedure for recording of the lien, and enforcement through the circuit court.

Condominium Bylaws

Act 98-149—*Ala. Code* § 35-8A-302 is amended to prohibit a condominium unit owner association from adopting or enforcing a bylaw that restricts an owner from the interior renovation or redecoration of their unit which does not alter the exterior appearance of the condominium.

When this article went to press there were a number of pending bills which could be considered in the final days of the session. Those are:

A. Tort Reform

1. Arbitration—Senate Bill 393 would allow binding arbitration. On March 5, 1998 the Department of Insurance issued "Guidelines for Approval of Arbitration Provisions in Insurance Policies." A copy can be obtained from the Insurance Department. Governor Fob James also issued Executive Order 42 to encourage state agencies to study, develop and implement appropriate procedures within their agencies to allow the use of mediation to resolve disputes among parties whether they be state agencies, their employees or third parties. This was dated March 18, 1998.
2. Punitive Damages—Senate Bill 305 provides an aggregate cap of $175,000 for individuals and small businesses and $750,000 for large businesses. The limit would be three times compensatory damages not to exceed the absolute limit. This also abolishes joint and several liable and the award of punitive damages.
3. Civil Fraud—Senate Bill 323 requires the action be brought within two years after the act or within six months of discovery with an absolute statute of limitations of four years. It also provides there must be some out-of-pocket damages and codifies the reasonable reliance standards for consumer contracts.
4. Mental Anguish—Senate Bill 22 will cap mental anguish at $350,000 or $20,000 times life expectancy in cases involving physical injury and restricting other recovery to only actual economic damages.
5. Criminal Fraud—Senate Bill 149 establishes the crime of criminal fraud which would make the perpetrator guilty of a Class C felony and their superiors criminally liable if they authorized the fraud.
6. Class Actions—Senate Bill 392 would provide a procedure to classify all class action suits.
7. Interest on Judgments—Senate Bill 309 would reduce the interest on judgments from 12 percent to 6 percent.

B. Barristry—House Bill 50 prohibits unlawful practice by non-licensed attorney or those whose license has expired either by disbarment, non-payment of fee or otherwise.

C. Fair Trial Fee—Senate Bill 387 will increase docket fees. Increased fees will fund an increase in the hourly rate appointed council may charge and increase the maximum fee for defending crimes depending on degree of the felony.

You may check the Alabama Law Institute home page on the Internet at www.law.ua.edu/ali for bills which have received final passage by the Legislature. These will also be reported in the July edition of *The Alabama Lawyer*.

For more information concerning the Institute or its projects contact Bob McCurley, director, Alabama Law Institute, P.O. Box 861425, Tuscaloosa, Alabama 35486-0013, fax (205) 348-8411, phone (205) 348-7411. Institute Home Page—www.law.ua.edu/ali ■

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RESPECTING THE RULES: Using & Misusing Rule 14

By Jerome A. Hoffman

Should our public be watching, let me assure it at the outset that most Alabama lawyers and judges know as well or better than I the scope and limits of Rule 14. Furthermore, it may be that all Alabama lawyers and judges apply Rule 14 correctly most of the time. Nevertheless, a few aberrations have appeared in the reports over time, suggesting that a little impromptu review may not be inappropriate. Before we look at the hair-raising cases, let's review briefly the purpose of Rule 14 and the limits of its reach.

Rule 14(a) provides for third-party practice or what is commonly known as impleader. (*Distinguish "impleader" under Rule 14 from "interpleader" under Rule 22 and "intervention" under Rule 24. Distinguish it also from joinder of an additional party under Rule 13(h).*)

Properly employed, third-party practice avoids duplicative litigation by adjudicating a defendant's claim for indemnity or contribution along with the underlying claim for recovery against the defendant. Thus, the practice saves both time and other expenses, allows for consistent results from similar or identical evidence, and eliminates the time lag between a judgment rendered against an original defendant and a judgment rendered against the party liable over to that defendant under this or that theory of derivative liability. (*See Ozley v. Guthrie, 372 So. 2d 860, 861 (Ala. 1979); Campbell Const. Eng'rs, Inc. v. Water Works & Sewer Bd. of the City of Prichard v. Marshall Durbin & Co. of Mobile, Inc., 52 Ala. App. 129, 138, 290 So. 2d 194, 202 (1974) (decided under former ALA. CODE tit. 7, § 259(2) (Recomp. 1958)).*

Rule 14 is procedural and does not

pretend to alter substantive rights. (*See, e.g., Home Ins. Co. v. Stuart-McCorkle, Inc., 291 Ala. 601, 608, 285 So. 2d 468, 473 (1973)*). For example, although Rule 14 provides the procedural mechanism for asserting a claim for contribution against a joint tortfeasor, a claim for such contribution will not survive a Rule 12(b)(6) challenge under Alabama substantive law. (*See, e.g., Quality Homes Co. v. Sears, Roebuck & Co., 496 So. 2d 1 (Ala. 1986)*).

Rule 14(a) contains ten sentences. Sentences one and ten establish the entitlement of "a defending party" to assert a third-party claim. Under Rule 14(a), sentence one, a defendant may assert a claim against **a person** not yet a party to the action **who is or may be liable to him for all or part of his eventual liability to the original plaintiff**. Sentences two and three prescribe procedural limitations upon that entitlement. Sentences four, five and six specify what a third-party defendant's response to a third-party complaint must or may contain. Sentences seven and eight specify the responsibilities of original plaintiffs and third-party defendants concerning claims by the former against the latter. Sentence nine provides the Rule's link to procedural devices by which the parties and the trial court can keep the cumulative joinder authorized by Rule 14 from becoming unwieldy. The tenth and last sentence of Rule 14(a) authorizes a third-party defendant to assume the role of a "fourth-party" plaintiff by asserting a claim for indemnity or contribution against a "fourth-party" defendant. (*Ex parte R.B. Ethridge & Assoc., Inc., 494 So. 2d 54, 55 & n. 1 (Ala. 1986)*). In theory, at least, a fourth-party defendant might then assume the role of a fifth-party plaintiff, and so forth, but as a practical matter out-of-court relationships are seldom complicated enough to support such joinder factually. (*But see Tucker Motor Co. v. Davenport, 396 So. 2d 101, 102 (Ala. Civ. App. 1981): "Third, fourth, fifth and sixth party defendants were added, which individuals and/or entities were alleged to be predecessors to Tucker in the truck's chain of title."*)

Unlike Rule 13(h), Rule 14 authorizes the addition of a new party by a claim asserted only against that party. A defendant may assert a claim against a person not yet a party to the action who is or may be liable to him for all or part of his eventual liability to the original plaintiff. In doing so, a defendant assumes an additional role, i.e., that of a third-party plaintiff. When served with process as prescribed by the Rule 4 complex, the person added becomes a third-party defendant.

Under the second sentence of Rule 13(g), a cross-claimant may allege that his co-defendant is or may be liable to him for all or part of the claim asserted against him. Thus, this sentence provides a procedural mechanism for asserting a claim for contribution or indemnity against a person already a party, just as Rule 14 provides a procedural mechanism for asserting a claim for contribution or indemnity against a person not yet a party. When proceeding under Rule 13(g), a cross-claimant for indemnity or contribution need not serve his cross-defendant with process under the Rule 4 complex, but must serve him as prescribed by Rule 5.

We come now to the distinction that a few lawyers and judges have not always clearly remembered or understood. Although a third-party defendant will often, if not always, be directly liable to the original plaintiff or the original defendant, Rule 14(a) does not authorize the joinder of a person who is liable only to the original plaintiff or who, whether or not liable to the original plaintiff, is liable to the original defendant only on some theory other than indemnity, contribution, or something like them. (*See, e.g., Opinion of the Clerk, 345 So. 2d 1338, 1340 (Ala. 1977): "An impleader under Rule 14 requires that the liability of a third party be dependent upon the outcome of the main claim." See generally 3 MOORE'S FEDERAL PRACTICE ¶ 14.07 1989)*). In the bad examples reviewed here, some lawyer or court forgot this black-letter proposition and misused Rule 14. The cases fall into three categories: (1) cases in which the Alabama Supreme Court caught and corrected the misunderstanding of Rule 14, (2) cases in which the Alabama Supreme Court did not catch the misunderstanding of Rule 14, but the misunderstanding did no apparent harm, and (3) cases in which the Alabama Supreme Court did not catch the misunderstanding, and the misunderstanding did or may have done harm.

Alabama Supreme Court caught and corrected misuse

In *Sidwell v. Wooten*, 473 So. 2d 1036 (1985), an action by Wooten for breach of contract against Sidwell, two realtors, not original parties, filed what was actually a complaint in intervention, although they styled it a "third-party complaint." (*Id. at 1037.*) No original party objected to either the intervention or the mislabelling of the pleading, and the realtors won a judgment. On appeal, but on its own motion, the Alabama Supreme Court addressed the question whether it

should reverse the judgment for the realtors "because they were never properly made parties plaintiff in the circuit court having filed a 'third-party complaint' [Rule 14] instead of a motion to intervene [Rule 24]." (*Id.*) Already having properly assumed and served its teaching function by spotlighting and correcting the misunderstanding, the court went on to show itself at its best, saying: "[T]he interests of justice will best be served by treating the realty companies' 'third-party complaint' as one of intervention, because...[1] Sidwell had notice of the claims [in intervention] and was afforded due process in the current litigation, [2] [n]either Sidwell nor the circuit court, on its own motion, raised any issue or argument regarding whether the realty companies were proper parties, and [3] [t]o void the judgment would not comply with the spirit of our procedural rules, which must be construed 'to secure the just, speedy and inexpensive determination of every action' on its merits. Rule 1(c)." (*Id. at 1038.*) In this case, perhaps the parties confused only Rule **numbers** rather than the substance of Rules.

In *Taylor v. Baldwin Nat'l Bank*, 473 So. 2d 489 (Ala. 1985), the bank sued Taylor to recover on a promissory note. Taylor counterclaimed for damages for slander of title in that the bank had filed *lis pendens* notices against Baldwin County properties of Taylor as to which the bank had no colorable claim. To his counterclaim against the bank, Taylor joined claims for slander of title against two individual agents of the bank. These additional claims were properly joinable under Rule 13(h), although Taylor styled them "third-party complaints". (*Id. at 489.*) Although nothing but a commendable attention to disciplined discourse turned on it, the Alabama Supreme Court observed that Taylor's claims against the bank officer and bank's attorney were "not technically third-party complaints." (*Id. at 490-91, n. 1.*)

In *Centon Electronics, Inc. v. Bonar*, 614 So. 2d 999 (Ala. 1993), AmSouth Bank sued Bonar to recover certain drafts on Bonar's account that had become overdrafts when Centon stopped payment on the large check to Bonar that would have covered the drafts. Bonar counterclaimed, "alleging negligence and misappropriation of funds." (*Id. at 1001.*) To his counterclaim against AmSouth, Bonar joined a claim against Centon, "alleging breach of contract and promissory fraud" for stopping the check. (*Id.*) This additional claim was properly joinable under Rule 13(h), but Bonar apparently styled it a "third-party complaint." (*Id.*) Pursuant to a written settlement agreement, AmSouth dismissed its claim against Bonar, and Bonar dismissed his counterclaim against AmSouth. Centon then contended, both in the trial court and on appeal, that "AmSouth's dismissal of its claim against Bonar with prejudice precluded liability on Bonar's third-party complaint as a matter of law." (*Id. at 1002.*) The Alabama Supreme Court properly rejected this contention. Only Bonar's mislabelling of his Rule 13(h) claim against Centon as a "third-party complaint" gave Centon even a colorable ground for making such a contention. Bonar's claim against Centon clearly was **not** a third-party claim. Bonar did not seek indemnity or contribution from Centon. He alleged Centon's primary liability for "breach of contract and promissory fraud." (*Id. at 1001.*) Once the court saw that, it became, or should have become, clear to all that the dismissal of AmSouth's claim against Bonar and Bonar's counterclaim against AmSouth in no way procedurally affected the pendency of Bonar's claim against Centon.

Dismissal of parts of a multiclaim action leaves other parts standing, with no formal necessity to invoke Rule 21.

Alabama Supreme Court did not catch misuse, but misuse apparently did no harm

In *Ozley v. Guthrie*, 372 So. 2d 860 (Ala. 1979), for example, the Alabama Supreme Court apparently overlooked a misuse of Rule 14, although the court's silence was arguably not unjustified. In the previous action that controlled the result in *Ozley*, Collins had sued Ozley to have the boundary between their properties judicially determined. Ozley had joined Guthrie, his predecessor in interest, on the ground that Guthrie had misrepresented the location of the boundary. It would seem that Guthrie's liability, if any, to Ozley did not depend upon a determination that Ozley was liable to Collins for a recovery upon which Guthrie would then be liable over to Ozley. (*For opinions using the customary formulation "liability over" or "liable over," respectively, see* ***Modernage Homes, Inc. v. Wooldridge****, 55 Ala. App. 68, 70, 313 So. 2d 190, 191 (1975);* ***United States***

***v. Raefsky**, 19 F.R.D. 355 (E.D.Pa. 1956)*). That is, Ozley's "third-party" action against Guthrie was not related in any recognized way to a theory of indemnity or contribution. (*See 3 MOORE'S FEDERAL PRACTICE ¶ 14.07.*). If this point is well taken, then Guthrie was misjoined, and either Collins or Guthrie could have objected under Rule 21. Neither did, however, and the circuit court granted Guthrie a directed verdict on the merits against Ozley. Ozley then commenced the action reported in *Ozley v. Guthrie*, asserting the same grounds. The supreme court properly affirmed the circuit court's determination by summary judgment that the judgment in the previous action was *res judicata* against Ozley. Its silence on the misjoinder question should not be deemed a holding that Ozley's joinder of Guthrie in the previous action was authorized by Rule 14 or any other joinder Rule, but only that the parties had waived their objection to misjoinder.

In *Martin v. Robbins*, 628 So. 2d 614 (Ala. 1993), the former Mrs. Robbins sued Robbins for relief, perhaps both equitable and legal, for alleged fraudulent misrepresentations inducing her to relinquish title to certain real property to Elan, Inc., in which Robbins had an interest. Robbins counterclaimed, alleging that Mrs. Robbins and one Martin, the majority stockholder in Elan, Inc., "had conspired to deprive him of assets and property rights." (*Id. at 616.*) To his counterclaim against Mrs. Robbins, Taylor joined a claim against Martin. This additional claim was properly joinable under Rule 13(h), but Robbins styled it a "cross-claim." (*Id.*) In a footnote, the court observed that Robbins's claim against Martin was not properly styled a cross-claim, because "Martin had not previously been a defendant in the case." (*Id., n. 1.*) The court went on to speculate that "[t]he trial court apparently treated this as a claim brought by Mr. Robbins as a third-party plaintiff, pursuant to Rule 14." (*Id.*) From aught that appears in the report, however, calling Robbins's pleading a third-party complaint would have been as wrong as calling it a cross-claim. Robbins's claim against Martin depended not upon a theory of derivative liability, e.g., indemnity or contribution, but upon a theory of primary liability, i.e., Martin had conspired with Mrs. Robbins to deprive Robbins of assets and property rights. The misunderstanding did not affect the disposition of the case.

In *Stone v. Gulf Amer. Fire & Cas. Co.*, 554 So. 2d 346 (Ala. 1989), Hank Williams, Jr. and others sued Stone for "a declaration that Stone was barred from establishing that she is the natural child of Hank Williams and from asserting any claim or entitlement to his estate or to any interest or royalties flowing therefrom." (*Id. at 348.*) Stone counterclaimed, apparently for a counter-declaration. To her counterclaim against Williams, Stone joined a claim against Gulf American and others, alleging "an intentional, willful, fraudulent, and conspiratorial concealment from the court of her identity and potential claim to the estate of Hank Williams." (*Id.*) From aught that appears in the opinion, this additional claim was properly joinable under Rule 13(h), but Stone apparently styled it a "third-party complaint." (*Id.*) The Alabama Supreme Court never challenged this mischaracterization. And a mischaracterization it almost certainly was. Only the possibility that something not reported in the opinion might have lurked in the record on appeal stands in the way of complete certainty. From aught that appears, Williams asked nothing of Stone for which she could then demand reimbursement from others. Thus, the "third-party defendants" could not "be liable to [her] for all or part of [Williams]'s claim against [her]." (*Rule 14(a), sent. 1.*) Notwithstanding Williams's opportunist attempt to capitalize on Stone's mistaken characterization of her pleading, (*id. at 373*), she did not ask and (for aught that appears in the report) could not have asked for indemnification by the parties she brought into the action. Her complaint sought punitive damages from them for "an intentional, willful, fraudulent, and conspiratorial concealment from the court of her identity and potential claim to the estate of Hank Williams." (*Id. at 348.*) That is, it sought to hold them **primarily** liable, not **derivatively** liable. The oversight did not affect the disposition of the case.

In *Wood v. Tricon Metals & Services, Inc.*, 548 So. 2d 138 (Ala. 1989), Wood (a shareholder of Tricon) sued Tricon and Ferguson (another shareholder of Tricon) for a declaration voiding certain stock option agreements concocted by Ferguson and Bell (a now deceased shareholder of Tricon) to dilute Wood's shareholdings. The Alabama Supreme Court affirmed the circuit court's summary judgment against Wood, rendered on the ground that Wood's claim was precluded by the determination of an earlier action in which Wood could and should have asserted it. In that earlier action, Tricon had sued Wood and Transam (Wood's own corporation) for "a declaratory judgment and an injunction restraining Wood and Transam from engaging in further competition with Tricon." (*Id. at 140.*) In response, Wood had asserted a "third-party complaint," in Tricon's action, against Ferguson and Bell apparently for equitable relief against the stock option agreements they had concocted. (*Id.*) The opinion does not say whether Wood had joined this claim with a counterclaim against Tricon. If so, it fell within the authorization of Rule 13(h). If not, if it stood alone, no provision of the Alabama Rules of Civil Procedure authorized it, unless it prayed indemnity. If so, of course, Rule 14 would have authorized it. From aught that appears in the report, Tricon asked nothing of Wood for which he could then demand reimbursement from Ferguson and Bell. Thus, Ferguson and Bell could not "be liable to [Wood] for all or part of [Tricon]'s claim against [him]." (*Rule 14(a), sent. 1.*) Nevertheless, the Alabama Supreme Court did not challenge Wood's mischaracterization of his reactive claim against Ferguson and Bell, referring to it throughout the opinion as a "third-party complaint." The misunderstanding did not affect the court's disposition of the case, but a proper understanding of Rule 14 might have saved Wood from complicating the first action in a way that came back to haunt him in the second.

Alabama Supreme Court did not catch misuse, and misuse did or may have done harm

In *Snead v. Cheetah Boat Company*, 585 So. 2d 809 (Ala. 1991), Mrs. Snead brought a wrongful death action against the manufacturer (Cheatah Boat Company) and the seller (Roger's Outdoor Sports, Inc.) of the boat from which her husband had been thrown to his death. In response, Cheetah asserted a cross-

claim against co-defendant Roger's Outdoor that could have been maintained only upon the unsupportable theory that the seller would be liable to the manufacturer for any sum the manufacturer might have to pay the plaintiff. This is the theory which, when applicable under substantive principles, supports third-party complaints under Rule 14 and cross-claims under Rule 13(g), sentence 2. For ought revealed by the opinion, Cheetah could not maintain a cross-claim under Rule 13(g), sentence 1, because it had suffered no independent injury by whatever negligence of Roger's Outdoor had caused the wrongful death of Mrs. Snead's husband. And it could not maintain a cross-claim under Rule 13(g), sentence 2, because it asserted no viable claim for indemnity or contribution. (*Cheetah may have misunderstood the proper scope of indemnity under Alabama substantive law, rather than the proper procedural use of Rule 14.*) Therefore, upon appropriate motion by the plaintiff, or even on its own motion, the circuit court should have stricken the purported but illusory "cross-claim," which was, after all, only a disguised assertion of Cheetah's negative defense (properly assertable by denial in its answer) that it was not negligent at all. Because no one challenged the cross-claim, it went to trial along with Mrs. Snead's originating claim. The jury returned a verdict for $100,000 for Mrs. Snead against Cheetah and for $100,000 for Cheetah against Roger's Outdoor. The Alabama Supreme Court reversed and remanded for a new trial, agreeing with Mrs. Snead that the disappointingly small verdict for her was inconsistent with the verdict for Cheetah against Roger's Outdoor. (*Id. at 811. By its decision, the court confirmed that a claim for indemnity did not lie on these facts.*) With Cheetah's spurious cross-claim out of the case, there would have been no verdict upon it that could have been inconsistent with the jury's small verdict for Mrs. Snead against Cheetah. Thus, because the other parties and the trial court did not save Cheetah from its mistaken use of Rule 13(g), sentence 2 (Rule 14's twin provision), Cheetah subjected itself to the risk of a higher verdict at a second trial.

In *Shelby County Comm'n v. Bailey*, 545 So. 2d 743 (Ala. 1989), a wrongful death action, counsel for codefendant Shelby County argued that blame for the fatal accident fell upon one Farley, a truck driver who was not a party to the action. In response, plaintiff's counsel argued that the county would have brought Farley into the action, if it really thought him liable. The county assigned this jury argument as a ground of error, asserting that no procedure allowed it to bring Farley into the action. It was in response to this argument that the Alabama Supreme Court seems actively to have espoused error, saying: "Using the third-party practice procedure of Rule 14, Ala.R.Civ.P., representatives of the estate of Louis Cosby could have filed a wrongful death action against Farley [wrong!]; Shelby County could have filed an action against Farley for any economic losses it suffered in the accident [wrong!]." (*Id. at 748*). Of course, either of the court's examples could have been asserted as an independent action, but neither could properly have been asserted as a third-party claim in the case at bar, because neither depended upon a theory of indemnity or contribution. The court *held* the plaintiff's jury argument nonprejudicial at least partly upon the mistaken premise that the county could have brought Farley into the action.

In *Whisman v. Alabama Power Co.*, 512 So. 2d 78 (Ala. 1987), Whisman sued Alabama Power to recover damages for the loss of goods destroyed in a warehouse fire. The Alabama Supreme Court affirmed the circuit court's summary judgment against Whisman, rendered on the ground that Whisman's claim was precluded by the determination of an earlier action to which Whisman was a party. In that earlier action, Culp Iron & Metal, Inc. had sued Alabama Power to recover damages for the loss of its warehouse destroyed in the same fire that destroyed Whisman's goods. In response, Alabama Power had asserted a "third-party complaint" against Whisman and others, alleging that "their negligence caused the fire and resulting property damage to [Alabama Power]'s substation." (*Id. at 80.*) From aught that appears in the report, Alabama Power did not seek indemnity or contribution from Whisman and the others. Without a prayer resting on a theory of derivative liability, Alabama Power invoked Rule 14 without justification. Nevertheless, the Alabama Supreme Court did not challenge Alabama Power's mischaracterization of its reactive claim against Whisman and the others, referring to it throughout the opinion as a "third-party complaint." The opinion does not say whether Alabama had joined its claim against Whisman and the others with a counterclaim against Culp. If so, it fell within the authorization of Rule 13(h). If not, if it stood alone, no provision of the Alabama Rules of Civil Procedure authorized it, since it did not, for aught that appears, pray indemnity. If this is true, Whisman lost needlessly to *res judicata* in the second action, because he had failed to challenge Alabama Power's claim against him on an available procedural ground in the first action.

Rule 14 affords defendants a convenient, modern procedural device for joining the old common law "action over" with the action giving rise to it. Plaintiffs' counsel who know their procedure will not permit defendants to invoke Rule 14 as an all-purpose license to clutter their actions with collateral claims unjoinable under any other Rule. Not everyone may agree that the Alabama Rules of Civil Procedure afford gripping bedtime reading. Perhaps, however, this story about misadventures with Rule 14 can persuade us all that reading and respecting the Rules can contribute to our success and protect us against professional embarrassment. ■

Jerome A. Hoffman
Professor Hoffman received his A.B. degree in 1962 and his J.D. in 1965 from the University of Nebraska, where he graduated Order of the Coif and served as editor-in-chief of the *Nebraska Law Review*. He was in private practice in California from 1965-68, and an assistant professor of law at the University of New Mexico from 1968-71. Professor Hoffman came to the University of Alabama School of Law as an associate professor in 1971 and was a professor of law at the University of Missouri-Columbia during the fall semester of 1983-84. He teaches civil procedure and evidence, and is the Elton D. Stephens Professor of Law.

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7th	12th	35th
8th	14th	36th
11th	17th	37th
16th	18th	38th
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Bessemer Cut-off	24th	
(division of 10th	25th	
Circuit)	26th	

Attorney Calendar Conflict Resolution Order

Because of questions raised among the bench and bar regarding the Attorney Calendar Conflict Resolution Order, the chief justice appointed a committee to study the order and make recommendations.

After committee discussion, it was initially determined that an information effort was necessary to ensure that all attorneys were familiar with the order and its requirements.

The Attorney Calendar Conflict Resolution Order was entered as an administrative order of the Alabama Supreme Court effective October 22, 1990. It is not a rule. The order requires that attorneys take several steps before a court is informed of a conflict, and the required steps are, as follows:

The order places the burden upon an attorney to immediately note whether he or she has any conflicts with hearings or trials. Immediately upon noting a conflict, an attorney shall:

(1) Attempt to make adequate arrangements for representation of each client's interest by substitution of counsel; or

(2) Shall otherwise attempt to resolve the conflict by consulting with counsel representing the adverse parties in conflicting cases to resolve the conflict; or

(3) If the above steps fail, the attorney shall promptly attempt to resolve the conflict by filing an appropriate motion with one or more of the courts involved; or

(4) If step 3 is not successful, the attorney shall consult with the judges involved in the conflicting cases and notify them of the efforts that he or she has made to resolve the conflict and of the fact that these efforts have been unsuccessful.

When an attorney is aware of a trial conflict well prior to trial, it may be that closer to trial the conflict will resolve by settlement or dispositive rulings, et cetera. The consensus of the committee is that upon learning of a trial conflict it is advisable to alert the courts of the potential conflict; however, as time passes and a conflict becomes more certain, the attorney is responsible for taking the steps required by the order.

Please note that when you notify the court of a conflict under step 4, you are required to tell the court the efforts made and steps taken to resolve the conflict. Although the phrase "certify to the court" is not used, this is essentially a certification requirement.

Finally, please note that the order does not provide that when there are trial conflicts, the oldest case shall be tried first. While this may be a common sense approach to many conflicts, there are circumstances when it is neither advisable nor necessary to try the oldest case first.

The committee is continuing to review the order and comments are invited from the bench and bar on the manner in which the order is working and whether the order should be amended. **Please forward any comments to Judge William Gordon, P.O. Box 1667, Montgomery, Alabama 36102-1667.**

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RECENT DECISIONS

By Wilbur G. Silberman and David B. Byrne, Jr.

United States Supreme Court—Criminal

Bruton still viable

***Gray v. Maryland*, No. 96-8653 ___ U.S. ___ (March 9, 1998).** The United States Supreme Court held, five to four, that a written confession of a co-defendant (Bell) in which he implicated the other defendant (Gray), whose name was redacted in open court by substituting the word "delete" or "deletion" for Gray's name, falls within the protective rule of *Bruton v. United States*, 391 U.S. 123 (1968).

Anthony Bell confessed to the police that he, Gray and another man participated in the beating that caused Williams' death. After the third man died, a Maryland grand jury indicted Bell and Gray for murder, and the State of Maryland tried them jointly. When the trial judge permitted the State to introduce a redacted version of Bell's confession, the detective who read the confession to the jury said "deleted" or "deletion" whenever the name of Gray or the third participant appeared. Immediately after reading the confession, the prosecutor asked the detective on the witness stand the following: "After Bell gave you that information, you subsequently were able to arrest Gray; is that correct?" The State also introduced a written copy of the confession with the two names omitted, leaving in their place blanks separated by commas. The judge instructed the jury that the confession could be used as evidence only against Bell, not Gray. The jury predictably convicted both defendants.

Maryland's intermediate appellate court held that *Bruton v. United States* prohibited the use of the confession and set aside Gray's conviction. The Maryland Supreme Court disagreed and reinstated the conviction.

The *Bruton* case involved two defendants tried jointly for the same crime, with the confession of one of them incriminating both himself and the other defendant. The Supreme Court in *Bruton* held that "despite a limiting instruction that the jury should consider the confession as evidence only against the confessing co-defendant, the introduction of such a confession at a joint trial violates the nonconfessing defendant's Sixth Amendment right to

cross-examine witnesses." The Court explained that this situation, in which powerfully incriminating extrajudicial statements of a defendant are deliberately spread before the jury in a joint trial, is one of the contexts in which the risk that the jury will not, or cannot, follow limiting instructions is so great and the consequences of failure so devastating to the defendant, that the introduction of the evidence cannot be allowed. *See* 391 U.S. at 135-36.

However, *Bruton's* scope was limited by *Richardson v. Marsh*, 481 U.S. 200, 211 (1987), in which the Court held that the confrontation clause is not violated by the admission of a nontestifying co-defendant's confession with a proper limiting instruction when the confession is redacted and eliminates not only that defendant's name, but any reference to his or her existence.

The case *sub judice* reasoned that "... Unlike Richardson's redacted confession, the confession refers directly to Gray's 'existence'. Redactions that simply replace a name with an obvious blank space, or a word such as 'deleted', or a symbol or other similarly obvious indications leave statements that, considered as a class, so closely resemble Bruton's unredacted statements as to warrant the same legal results.

Federal bribery law can apply to local corruption

***Salinas v. United States*, No. 96-738 ___ U.S. ___ (December 2, 1997).** The Supreme Court ruled that persons can be convicted under a federal bribery law, 18 U.S.C. §666, even when the transaction did not involve or have any demonstrated effect on federal funds. The high court's unanimous decision upheld the bribery conviction of a former Texas jailer who accepted payments for giving an inmate special privileges. The Court also ruled, again unanimously, that a conspiracy conviction under the Racketeer Influenced and Corrupt Organizations Act (RICO) can be valid even if the conspirator never agreed to commit two of the predicate acts RICO forbids.

Justice Anthony M. Kennedy, writing for the Court, said that the bribery law "does not require the government to prove the bribe in question had any particular influence on federal funds." The law is aimed at barring bribes to state and local officials employed by agencies receiving federal money. As to the RICO provision, Justice Kennedy relied on a line of Supreme Court rulings that held that a conspiracy may exist even if a co-conspirator does not agree to commit or facilitate each and every part of the substantive offense.

No-Knock right applies whether there is property damage or not

***United States v. Ramirez*, No. 96-1469 ___ U.S. ___ (March 4, 1998).** Police with search warrants do not need extra justification to enter a home without knocking first, even if the entry results in property damage.

The Supreme Court, in two previous rulings, held that the so-called "no-knock" entries by police are justified when officers have a reasonable suspicion that announcing their presence would be dangerous or inhibit the effective investigation of a crime.

Chief Justice Rehnquist, writing for the Court, critically noted, "Neither of these cases explicitly addressed the question whether the lawfulness of a no-knock entry depends on whether property is damaged in the course of the entry. It is obvious from their holdings, however, that it does not."

In an interesting side note, the Chief Justice acknowledged that "excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search are not subject to a suppression." But he said no violation occurred in this case.

Bankruptcy

Confirmed plan listing debtor's tax at zero does not bar IRS from collecting later

(Read this case to tell you what to do.)

IRS v. Dudley Davis Taylor, (5th Cir.), 132 F.3d 256 (Jan. 6, 1998). The confirmed chapter 11 plan fixed the debtor's liability for a tax penalty at zero. The bankruptcy and district courts held that the IRS was barred from collecting the penalty tax against a corporate officer for failure to remit trust fund, Social Security and withholding taxes. The debtor's chapter 11 plan, as well as his disclosure statement, provided that there was no debt due for taxes or penalties. The IRS filed proof of claim for unpaid personal income taxes, the debtor objected, and after an audit, the IRS withdrew its claim. The IRS did not appear at the confirmation hearing, nor did it appeal the confirmation. Subsequent thereto, the IRS began collection procedures for the penalty of some $96,000. The debtor went back to the bankruptcy court with a declaratory judgment proceeding in which on summary judgment, the court barred the IRS from proceeding. The district court affirmed, *but not the Fifth Circuit*.

The Fifth Circuit first reviewed conflicting cases in its circuit as to whether a confirmed plan acted as *res judicata* to later efforts to collect, and in so doing distinguished the prior cases. First, it held that Congress in sections 502 and 506 provided that a secured creditor could preserve its lien without participating in

the bankruptcy process, and that once a proof of claim is filed, it is considered allowed unless objection is made. It then referred to *Simmons v. Savell*, 765 F.2d 547 (5th Cir. 1985) which held that a plan could not substitute for an objection to a secured claim, and that the same policies hold for a §6672 tax penalty, as the IRS may preserve such without filing a claim in chapter 11. This is because of the provision in §1141(d)(2) and §523 of the Bankruptcy Code that debts excepted from discharge by §523 include taxes described in §507(a)(8), regardless of a claim being filed or allowed.

The court then instructed that the normal procedure for determination of a tax debt is for the debtor or IRS to file a motion for determination by the court under §505 of the Bankruptcy Code, which authorizes the bankruptcy court to determine the amount or legality even though previously assessed. Such determination will be a contested proceeding under Bankruptcy Rule 9014, and instituted by a motion which states with particularity the grounds and relief requested. As an alternative, the debtor may file a proof of claim for the IRS, and then contest it. In this case as the debtor did neither, the IRS was not barred.

COMMENT: The debtor also contended that the IRS should be barred for withdrawing its income tax claim, or that the IRS should be estopped because the debtor relied on the failure of the IRS to file a claim. The court summarily disposed of both stating they were not valid arguments. As stated, this case furnishes a primer for efforts of a debtor to dissolve a tax claim.

U.S. Supreme Court holds judicially determined malpractice claim against doctor is dischargeable

Kawaahau v. Geiger, 1998 WL.85302(U.S.), ___S.Ct.___, March 3, 1998 (Ginsberg, I.). Kawaahau (patient) sued Geiger for malpractice in causing her leg to be amputated, which suit resulted in a $355,000 judgment. Geiger was uninsured, and upon wages being garnished, filed a chapter 7 petition. The patient claimed under §523(a)(6) that her claim was not dischargeable. The cited statute provides that an individual debtor cannot obtain a discharge on a debt arising "for willful and malicious injury." The bankruptcy and district courts agreed, but the Eighth Circuit reversed on the ground that non-dischargeability is restricted to debts for "an intentional tort," and that a malpractice debt normally is dischargeable being based upon negligent or reckless conduct. The Supreme Court affirmed.

Justice Ginsberg first noted that the debtor claimed he had given less than the standard procedure because the patient deliberately elected "less than standard treatment" because of a desire to reduce expense. The patient claimed this to be willful and malicious. The court then inquired as to whether this intentional act causing injury is non-dischargeable, or only if dischargeability relates only to acts done with actual intent to cause injury. Justice Ginsberg defined "willful" as "deliberate or intentional," and as "willful" modifies "injury" in the Act, then to be non-dischargeable

it must be intentional or deliberate. She furnished examples of an unintended result if the plaintiff's view held. She further said that such a view would make superfluous §523(a)(9), which provides for non-dischargeability when substance abuse while operating a motor vehicle leads to an accident. Justice Ginsberg distinguished the prior Supreme Court case of *Tinker v. Colwell*, 193 U.S. 473, 24 S.Ct. 505 (1904) by stating that its holding was solidly within the traditional intentional tort category, and is not in conflict with the court's ruling that the judgment debt must be "for willful and malicious injuries." She disposed of the plaintiff's contention that as a policy matter, malpractice judgments, when no insurance is carried, should be non-dischargeable as being a matter for Congress, not for the courts.

COMMENT: Is this decision going to cause more professionals to go "naked"? I doubt it, as bankruptcy still is not a happy alternative. However, the decision does clear the conflict in the circuits.

Recent Decisions from the Alabama Supreme Court—Criminal

DNA: Alabama adopts the *Daubert* standard

***Turner v. State*, 32 ABR 1231 (Ala., January 1998).** This is an important opinion authored by Justice See which every Alabama practitioner should read. This case concerns the admissibility of DNA evidence under §36-18-30, *Code of Alabama (1975)*. The trial court held that DNA evidence was admissible to show Andrew Dwight Turner was connected to the murder scene. The jury convicted him of two counts of capital murder. The court of criminal appeals reversed the conviction, *Turner v. State*, [Ms. CR-93-1940, April 19, 1996] ___ So.2d ___ (Ala.Crim.App. 1996), holding that the State had failed to satisfy the standard set forth in *Ex parte Perry*, 586 So.2d 242 (Ala. 1991), for the admissibility of its DNA evidence.

The supreme court granted certiorari to determine whether §36-18-20 *et seq.*, which were added to the Code in 1994, supersede the *Perry* standard. The supreme court held that the *Perry* standard no longer applied and employed instead the *Daubert* analysis.

In the 1991 *Perry* decision, the supreme court addressed the admissibility of DNA evidence as follows:

In Alabama, whether novel scientific evidence is admissible is determined normally by using the test established in *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923).

In *Perry*, the supreme court embraced the *Frye*-plus standard, that is, general acceptance of the type of theory and technique relied upon plus an examination of the performance of the techniques in the particular case.

In 1993, two years after the supreme court's decision in *Perry*, the United States Supreme Court overruled the "austere" *Frye* standard for the admissibility of expert scientific evidence in federal trials. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

The reliability prong of the *Daubert* admissibility test requires the party proffering the scientific evidence to establish that the evidence constitutes "scientific knowledge." *Daubert*, 509 U.S. at 590. The evidence need not represent immutable scientific fact, but rather, it must be derived by use of the "scientific method." "The trial court should focus its inquiry on the expert's principles and methodology, not on the conclusions that they generate." *Id.* at 595. Thus, the reliability inquiry should address the scientific validity of the principle asserted, that is, whether the principle supports what it purports to show.

The relevance prong of the *Daubert* admissibility test requires the party proffering the scientific evidence to establish that the evidence assists the trier of fact to understand the evidence or to determine a fact in issue. *Daubert*, 509 U.S. at 591. Thus, the trial court should focus on the connection between the proffered scientific evidence and the factual issues, and in addition to the relevance inquiry, should address the "fit" between what the scientific principles and methods are supposed to show and what must be shown to resolve the factual dispute at trial.

In 1994, the Alabama Legislature specifically addressed the admissibility of DNA evidence when it established a state DNA data bank. §36-18-20(d), (e) and (f), *Code of Alabama (1975)*. The Legislature chose the more flexible admissibility standard established in *Daubert* (flexible reliability and relevance).

Justice See observed that the Legislature's choice was purposeful and effective. Most importantly, Justice See critically noted:

> We hold that if the admissibility of DNA evidence is contested, the trial court must hold a hearing, outside the presence of the jury, and pursuant to §36-18-30, determine whether the proponent of the evidence sufficiently establishes affirmative answers to these two questions:
>
> Are the theory and the technique (i.e., the principle and the methodology), on which the proffered DNA evidence is based 'reliable'? and
>
> Are the theory and the technique (i.e., the principle and the methodology), on which the proffered DNA evidence is based 'relevant' to

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

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

understanding the evidence or to determining a fact in issue?

...In making that assessment, the courts should employ the following factors: (1) testing; (2) peer review; (3) rate of error; and (4) general acceptance.

Trial courts should make the 'relevance' assessment by addressing the 'fit' between what the scientific theory and technique are supposed to show and what must be shown to resolve the factual dispute at trial.

This is a case of first impression regarding the proper test for admissibility under §36-18-30. However, the supreme court limits, to some extent, this holding with the following words:

...Only with this opinion have we established methods for the admission of DNA evidence under §36-18-30. The record is unclear as to whether this standard was met with respect to the DNA population frequency statistical evidence. And, the potential impact of Turner's case is dramatic. Therefore, we remand this case for the Court of Criminal Appeals to remand it for the trial court to conduct an evidentiary hearing to determine the admissibility of the DNA population frequency statistical evidence. If the trial court determines that the evidence was not admissible, it should order a new trial. ■

ASB Dream Team is a Reality

Once again, the Alabama State Bar has taken action to provide legal assistance to indigent persons in Alabama. The Committee on Access to Legal Services, chaired by Pam Bucy of Tuscaloosa, has pulled together a VLP Dream Team of 12 outstanding Alabama lawyers who will serve as Continuing Legal Education speakers in designated areas of the state. The goal of the VLP Dream Team is to increase the number of lawyers serving in the Volunteer Lawyers Program, which provides legal assistance to qualified persons who cannot afford to pay for such services.

Special one-hour CLE programs will be held, before which a speaker will explain the VLP program and encourage attorneys to join.

A special "kick-off" ceremony was held at the state bar on February 13.

The 12 Dream Team members and their county presentation locations include: The Hon. Harold Albritton, Montgomery; former Governor Albert P. Brewer, Jefferson; Charles Gamble, Dallas; Nat Hansford, Houston; Dawn Wiggins Hare, Dale; Hon. Champ Lyons, Baldwin; Gene Marsh, Etowah/Calhoun; Dag Rowe, Tuscaloosa; Ken Simon, Lee; Alyce Spruell, Madison; Cleo Thomas, Jr., Morgan; and former Chief Justice C.C. Torbert, Jr., Tallapoosa.

DISCIPLINARY NOTICE

Notice

- **Jesse Eldridge Holt,** whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of March 15, 1998 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB Nos. 92-505, 92-530, 93-22, 93-422 and 94-20 before the Disciplinary Board of the Alabama State Bar.

Reinstatement

- By order of the Disciplinary Board of the Alabama State Bar **James Walthall Mims, Jr.** was reinstated to the active practice of law on February 5, 1998. Mims was interimly suspended on September 26, 1997. [Rule 20(a); Pet. No. 97-12]

Suspensions

- On March 13, 1998, the Disciplinary Commission of the Alabama State Bar interimly suspended Birmingham lawyer **Whitmer A. Thomas** from the practice of law. [Rule 20(a); Pet. No. 98-004]

- Mobile attorney **John Thomas Kroutter** was interimly suspended from the practice of law by order of the Disciplinary Commission, effective March 13, 1998. [Pet. No. 98-03]

Public Reprimands

- Hartselle attorney **John Lewis Sims, Jr.** received a public reprimand with general publication on February 13, 1998. In May of 1997 Sims plead guilty in the circuit court of Morgan County, Alabama to the criminal misdemeanor offense of failure to timely file state income tax returns for tax years 1987-1990 in violation of Section 40-29-112, Code of Alabama 1975. Sims was sentenced to 18 months in the county jail, however, this sentence was suspended and he was placed on supervised probation for a period of three years. Sims was also required to pay a fine in the amount of $15,000 plus costs and assessments. Sims has also written a letter of apology to the Alabama State Bar which was published in *The Alabama Lawyer*. [ASB No. 97-024]

- Opelika attorney **James Edwin Cox** received a public reprimand without general publication on February 13, 1998. Cox was employed by a client to provide representation in connection with a petition by the client's ex-wife to increase child support. Cox failed to file a response to the petition with the result that a default judgment was entered. Thereafter, Cox represented to the client that he would file a motion to set the default judgment aside, however, he failed or refused to do so. Over the next several months Cox made comments to the client which lead the client to believe that the motion to set aside default had been filed and was awaiting consideration by the court when in fact it had never been filed. Eventually the client employed other counsel who after discovery of Cox's failure to file the necessary motion was successful in having the default judgment set aside. [ASB No. 95-216]

- Phenix City attorney **Gregory Kelly** received a public reprimand with general publication on February 13, 1998. Kelly was employed to obtain an uncontested divorce on behalf of a client. The client paid Kelly in advance. After having been so employed, Kelly failed or refused to file divorce proceedings on behalf of the client or to provide him with other legal services. Kelly also failed or refused to respond to the client's letters or telephone calls or to otherwise communicate with the client concerning the status of the case. After the client filed a complaint against Kelly with the Alabama State Bar, Kelly failed or refused to respond for requests for information or to otherwise cooperate with the investigation of the client's complaint. [ASB No. 97-173]

- Gadsden attorney **Kenneth Paul Robertson, Jr.** received a public reprimand without general publication on February 13, 1998 for failing to take reasonable measures to ensure that his subordinate non-lawyer employees complied with the professional obligations imposed by the Alabama Rules of Professional Conduct and for assisting a non-lawyer employee in the unauthorized practice of law in violation of Rules 5.3 and 5.5, Alabama Rules of Professional Conduct. Robertson hired a legal assistant who, at the time of his employment with Robertson, had previously surrendered his license to practice law in the State of Alabama. During the time that this non-lawyer employee was employed by Robertson, Robertson maintained offices in Gadsden and Mobile. Although there were times where the non-lawyer employee worked under the direct supervision of Robertson, there were other times when the non-lawyer employee worked in one or both of Robertson's offices without direct supervision by Robertson or any other licensed attorney associated with the firm. At times, the non-lawyer employee was allowed to be the exclusive contact between Robertson's firm and some of its clients. Additionally, Robertson allowed the non-lawyer employee to negotiate retainer agreements and attorney's fees with potential clients and to negotiate with other lawyers and non-lawyers regarding the settlement of claims in cases. The non-lawyer's conduct in his relationship with Robertson's firm was such that there were clients of the firm that considered the non-lawyer employee to be their lawyer when, in fact, he was not licensed to practice law in the State of Alabama. The Disciplinary Commission of the Alabama State Bar found that, under the circumstances of this case, Robertson failed to take reasonable measures to ensure that his non-lawyer employee complied with the professional obligations imposed by the Alabama Rules of Professional Conduct and that his failure to act provided opportunities for the non-lawyer employee to engage in the unauthorized practice of law. [ASB No. 97-95(A)] ■

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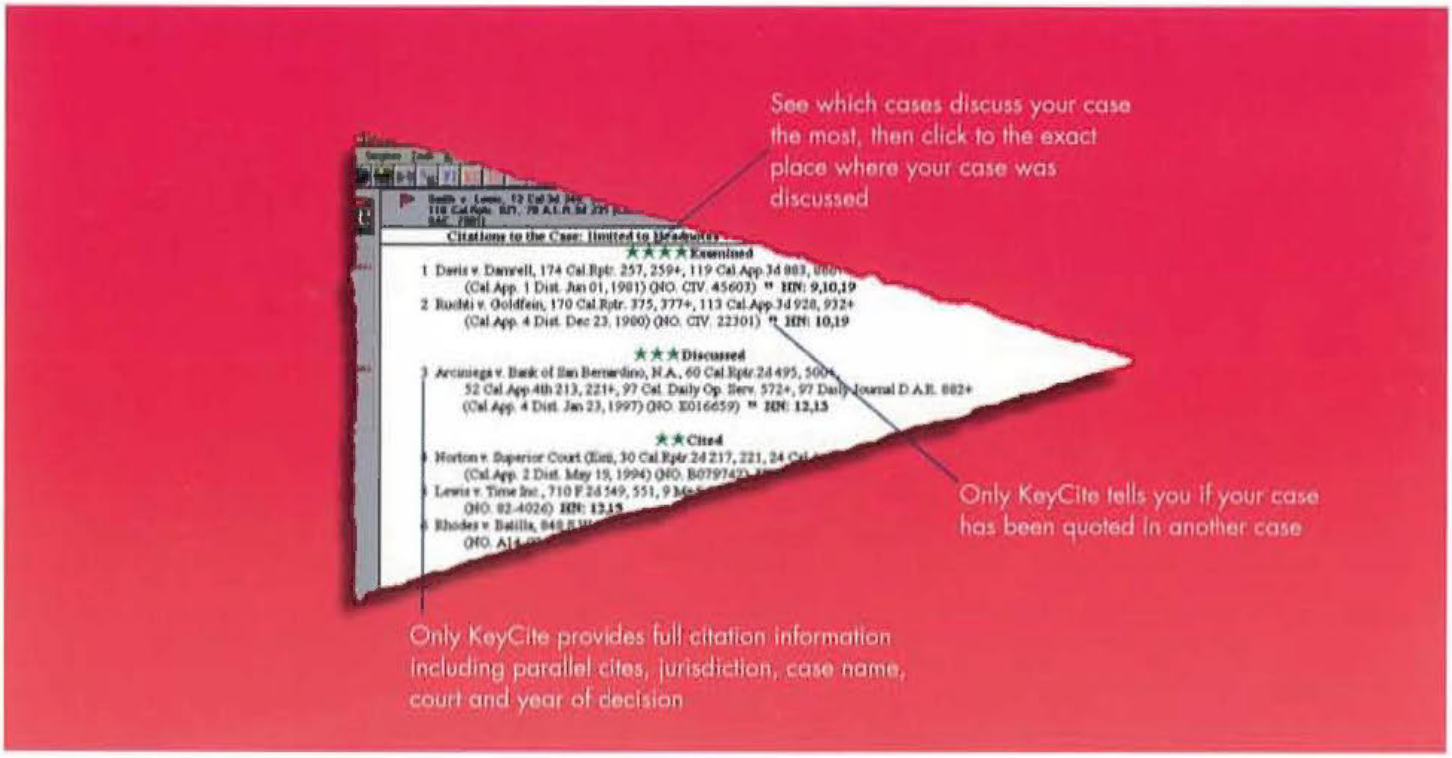

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