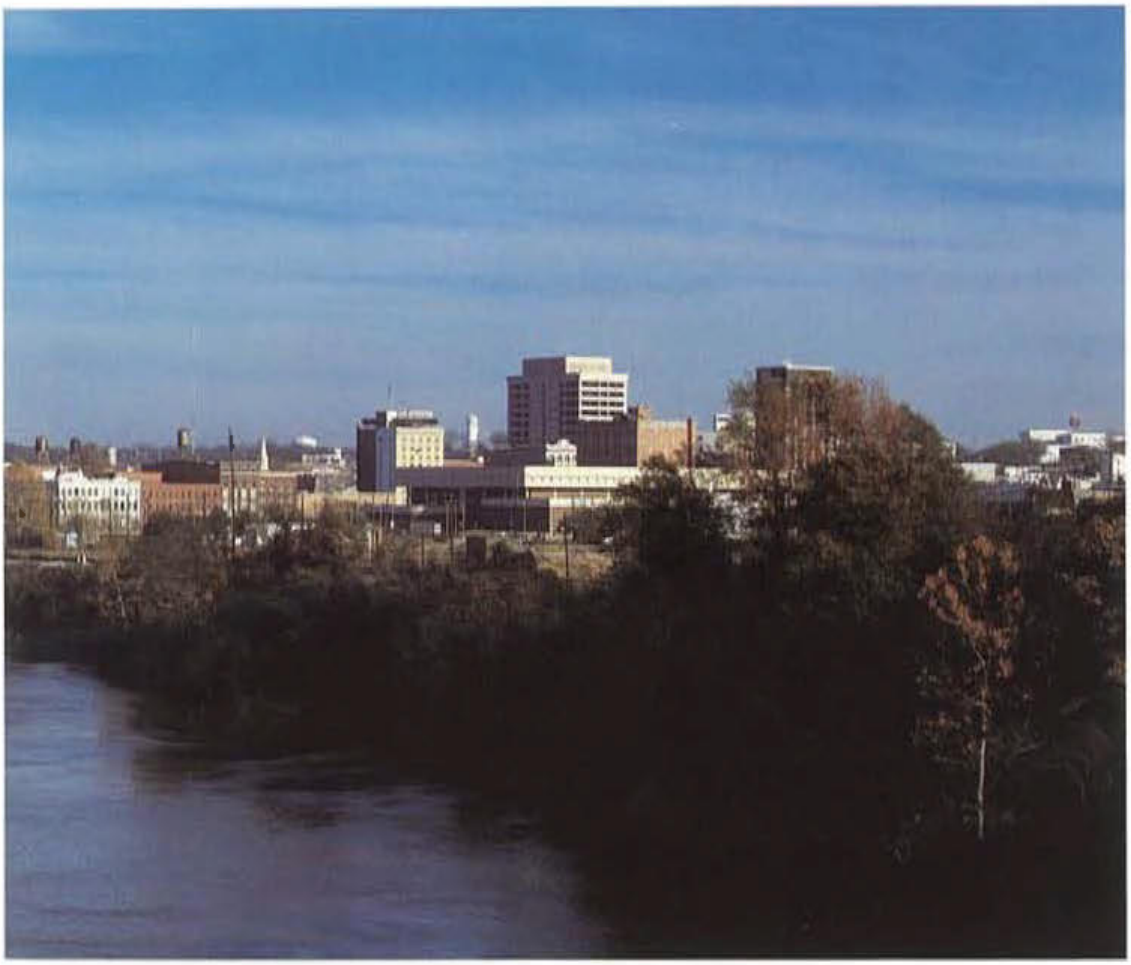
The Alabama Lawyer

Vol. 49, No. 4 July 1988



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The Alabama Lawyer

VOL. 49, NO. 4 JULY 1988

In Brief

Published seven times a year by The Alabama State Bar
P.O. Box 4156 Montgomery, AL 36101
Phone (205) 269-1515
Robert A. Huffaker—Editor
Carol Ann Smith—Associate Editor
Margaret Lacey—Managing Editor

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

The Alabama Lawyer is published seven times a year for $15 per year in the United States and $20 outside the United States by the Alabama State Bar, 415 Dexter Avenue, Montgomery, AL 36104. Single issues are $3, plus postage for the journal, and $15, for the directory. Second-class postage paid at Montgomery, AL.

Postmaster: Send address changes to **The Alabama Lawyer,** P.O. Box 4156, Montgomery, AL 36101.

On the cover—

Pictured is a view of the Gardens Center of the recently dedicated Birmingham Botanical Gardens. The Alabama State Bar's Young Lawyers' Section party, co-hosted by the Birmingham Bar Association's YLS, will be held at the 67-acre site Thursday night, July 21, 9 p.m.-1 a.m.

— photograph by Fletcher Harvey, Birmingham

Correcting the Record on Appeal: a Primer—by G. Houston Howard, II 212

A complete and accurate transcript is an essential element for proper appellate review. What steps must be taken to correct or supplement an incomplete record?

A Current Overview of Alabama's Mechanic's and Materialman's Lien Law—by J. Lister Hubbard . 202

Mechanics and materialmen have long enjoyed certain preferences and priorities with respect to their lien rights. However, perfection and enforcement of these liens may require affirmative action by the lienholder.

Judge Hugo Black and the First Amendment: an Alabama Connection—by Hollinger F. Barnard 220

The appellate opinions authored by Justice Hugo Black represent an eloquent portrayal of his judicial philosophy. His concern for individual freedomes is best exemplified by his writings on the safegurds afforded by the First Amendment.

INSIDE THIS ISSUE

Interview

Ben Harte Harris, Jr.

The following interview of state bar President Ben Harris was conducted last month by Robert Huffaker, editor of The Alabama Lawyer.

Alabama Lawyer: Ben, as you are leaving office, I am sure you have a sense of satisfaction of accomplishing some of your goals. In retrospect, what do you see as the greatest strides that have been made during your administration?

Harris: Well, there are a number of matters, most of which I picked up from my predecessor, Bill Scruggs, that we moved forward on. One would be getting the IOLTA program underway, getting the Client Security Fund re-established. We have also hired a new general counsel and, perhaps, the biggest item on my agenda was whether to go forward with a captive insurance company. On April 1, the board of commissioners voted to do that, and we now have a company organized. So I would say those were the major matters that we have moved forward on. Plus, we have gone to work in the area of post-conviction capital case representation, representation of people on death row.

AL: We all have received copies of the mail-outs from the bar headquarters on the captive insurance company. What has been the response of the members of the bar?

Harris: Well, we raised the organizational funds. We have raised something over $175,000 by lawyers giving $125, with over 1,400 lawyers responding. So we have the organizational funds, and the company has been incorporated and is known as Attorneys Insurance Mutual of Alabama. We hope to be in position to begin promoting and obtaining the capitalization by the time of the bar convention in July.

AL: What is the timetable on trying to have the insurance company in place and writing coverage?

Harris: Realistically it would probably take a year. Hopefully, it would be quicker than that. I would hope we could do it within six months; maybe a year would be more realistic.

AL: What types of coverage will the company be offering?

Harris: It will be essentially a claims-made policy I think and with some tail options on it. Some of the other captives have gotten up where they write coverage up to $3 million and I think up in North Carolina they have gone higher than that at times. But, from our surveys, it looks like a high percentage of our bar would be served by a policy with limits of upwards of a million.

Harris

AL: Who will administer the processing of the claims?

Harris: It will be operated like any other insurance company. I would anticipate that the company would probably hire a professional claims manager. We

will have a claims committee on the board of directors which was recently organized, and Bill Scruggs is chairman of the board and Henry Henzel is going to be president of the company.

AL: You mentioned the appointment of a new general counsel for the state bar. Who is that, and what will his role be?

Harris: We were most fortunate to be able to have General Robert Norris return home. General Norris is presently the Judge Advocate General of the United States Air Force. He is a two-star general, an Alabama lawyer who is retiring effective July 1, and by August 1 or no later than September 1, he will be on board with us. He has had a very broad background in all phases of law throughout his Air Force career. He is up-to-date on the model rules and he is anxious to get to work and wants to make a high priority matter getting in touch with local bars and particularly local grievance committees.

AL: Will he be involved in disciplinary proceedings?

Harris: Yes. Of course, he will be in charge of the office and will have two or three assistants under him but he will be involved in the investigation, prosecution of claims and opinion writing. He will have, basically, a free hand as to how he organizes his own office.

AL: You have been on the board of bar commissioners for a number of years and, of course, been the president this past year; do you see any trends in our disciplinary proceedings?

Harris: I think that overall the number of disciplinary proceedings has increased as the bar has grown. We do have a very large number of complaints, but in Alabama we investigate everything. That is one reason our numbers, when they are shown with other states, seem to be high. But I think we always need to be looking at our rules to see how we can make improvements. Oliver Head is in charge of a task force that is going through that process now and will be reporting within the next few months as to any recommendations to strengthen our procedures.

AL: What are the ongoing areas that were not completed during your tenure that Gary Huckaby will need to address?

Harris: Of course, Gary's number one project is going to be capitalizing the insurance company although it will be done by the board. He, of course, will be very involved and very interested in it and aiming at $2.5 to $3 million capitalization. Seeing that the company gets capitalized and off and running will be one of his major items.

AL: Is stock going to be issued in that company?

Harris: It is going to be a mutual company, but people will purchase the debentures.

AL: We have all read and seen a lot about the IOLTA program. What is the current status of that?

Harris: We have what is known as an opt-out program, and the opt-out date is September 1, I believe. So everyone who has not opted-out will become a part of it September 1, 1988. The response has been good. As of today we have had 1,235 lawyers sign up for the IOLTA program, and we already have $36,500 on hand. I think it is coming along pretty well.

AL: You mentioned that among the programs established during your administration was post-conviction representation. Tell us a little more about the status of that.

Harris: This is a program we got into early this year. Chief Justice Torbert suggested that we look at it because we have over 90 people on death row, and the counsel available to represent them have dwindled. We need trained people who are willing to take these cases and do something about the backlog that has developed and see that these people are properly represented.

AL: What will be the bar's role?

Harris: At this point, we are trying to get funding and have incorporated the Alabama Capital Representation Resource Center, a corporation that will be headed-up by former Governor Albert

Brewer who has been chairing our task force. It will be housed in one of the buildings available through the University of Alabama Law School and provide training and assistance to lawyers appointed in these cases and be involved in recruiting lawyers to take these cases. We have met with Chief Justice Torbert and Justice Houston of the Alabama Supreme Court, all the chief federal district judges in Alabama and Judge Roney, chief judge of the 11th Circuit, to try to put together a coordinated process. Georgia and Florida already have established programs or are further along than we are, being the other two states in the 11th Circuit.

AL: What is the present status of the Client Security Fund?

Harris: There was a mandatory assessment of $25 per lawyer for up to four years that originally included all lawyers. The order recently has been amended to not include special members, but as of this date we have 6,869 lawyers who have made a payment in this year. So we have $171,725 on hand. I think we are well underway in getting this program going.

AL: Is it operational to the extent that claims can be paid out at this stage?

Harris: Yes. We have the money. I do not think there has been a claim yet, but I think it is a very good program. I really know of no other profession that takes on this type of obligation. The idea is to cover a gap in client protection because malpractice policies generally exclude willful thefts of clients' money, and the fund would offer some protection to the public. The payments would be a matter of grace and not a matter of right.

AL: Can you provide us an update on the issue of lawyer advertising?

Harris: We, of course, have our rule, a temporary rule in effect. The board of commissioners adopted model rules of professional conduct and recommended them to the supreme court, along with comments, so we are waiting for our rules to be adopted by the court, whether they be classified as temporary rules. I think that one of the interesting things on the horizon at the moment is in relation to Model Rule 7.3 with respect to targeted direct mail solicitation. The U.S. Supreme Court recently granted cert in the case of *Shapiro v. Kentucky Bar Association* where Kentucky disciplined a lawyer for engaging in targeted direct mail solicitation. As I understand it, in two earlier cases federal circuits approved targeted direct mail solicitation, but in this Kentucky case, the Supreme Court has granted cert. I think we should be getting a definitive answer from the U.S. Supreme Court on that soon.

AL: Does the model rule permit solicitation of this nature?

Harris: The basic model rule does not. Our version is broader than the model rule because of those earlier cases I referred to. So, it may be that if the model rule holds up I would think that we would move to the model rule. Of course, it is up to the Alabama Supreme Court on the wording of our rule.

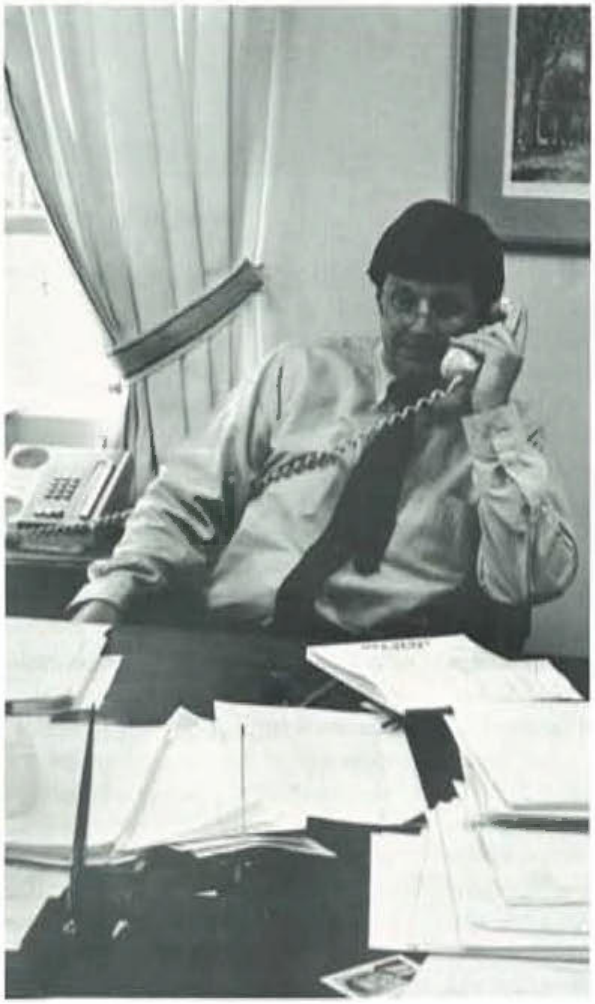
AL: What items of legislation did you see to successful fruition while you were in office?

Harris: I did not have a lot to do with it but the Alabama Legal Services Liability Act was passed during

our recent term of legislature. This act creates one form of action and one cause of action against legal services providers, and we sometime refer to it as the Lawyers' Tort Reform Bill. The favorable aspect for lawyers is that it shortens the statute of limitations to two years with a discovery period where the absolute outer limit can be four years. This was something that was introduced last year and it did not get through the legislature, and it was brought up again and has passed. So, this should be another help along with the captive insurance company as to lowering our professional liability insurance rates.

AL: Is there any other legislation that you foresee being offered for the benefit of the bar in the next year or so?

Harris: I guess it will be a question of what Gary Huckaby and Alva Caine, certainly what their thoughts will be, but I think there is interest again in a non-partisan election of judges. The bar got involved in this a few years ago and I think we actually got a bill introduced but we were not successful, but I am hearing growing concern from lawyers about the need for this. I expect the Uniform Arbitration Act to be re-introduced.



AL: Are there any thoughts that you want to leave with us?

Harris: I have had a great experience, really enjoyed this year and had a tremendous amount of help from a very fine board of commissioners. Of course, as reapportioned it is a much larger body, but I think it has functioned extremely well. I have had a lot of good task force chairmen who have really taken the ball and run with it, which has made my year most enjoyable. I am most grateful for having the opportunity to serve in this office.

AL: So now you can go back to work, and your law partners will be happy to see you back.

Harris: I hope they'll take me back. ■

Executive Director's Report

Bigger is better

The Alabama State Bar is completing its first year under the expanded board of bar commissioners. Thirteen new members joined the governing body July 1, 1987. The governing bodies of most bar associations are considerably smaller than even our original 39-member board. Our neighboring state of Florida, with a lawyer population five times that of Alabama, had the only other 39-member board, tying us for the largest governing body. In 1987, most associations reviewing their structures were looking at reducing their board size to streamline their operations while we were about to experience a one-third increase in size.

I was skeptical that the expanded board would significantly enhance the Alabama State Bar operations when weighed against the cost of expanding. The effectiveness of the one-commissioner-per-circuit board had always impressed me; I honestly felt "bigger" would not be better.

The quality of the new members—in fact the overall caliber of those persons who sought the new positions—was outstanding! I now am convinced that the extraordinarily productive year we are concluding could not have been realized without the expanded board. I cannot recall a more active year, and do not believe the achievements of the past 12 months would have been possible without these additional "working leaders." Consider the following.

The CLIENT SECURITY FUND is a reality; 6,869 members have made their 1988 payments. One thousand two hundred thirteen of these were special members who were subsequently exempted after 1,430 already had paid; only 269 asked for refunds. There are only 344 members who will require follow-up statements. Even though we created a Client Security Fund in 1971, it never achieved viability. Our new board members helped tremendously in educating the bar to the Client Security Fund concept.

IOLTA in Alabama has captured the attention of many of the older and established programs. The recruitment effort of our board has resulted in our reaching over 1,000 participants in 90 days, and income for the first quarter has exceeded $35,000. The real benefits of the program will be realized when the Alabama Law Foundation, Inc., makes its first grants in late 1988.

The MODEL RULES OF PROFESSIONAL CONDUCT are awaiting action by the Supreme Court of Alabama. Work on the project began before the expanded board. The broad experiences of the board members have resulted in a meaningful set of practical rules for all lawyers.

The incorporation of the CAPITAL RESOURCE CENTER to deal with the post-conviction appeal process for death row inmates was accomplished in record time. Broad board support was essential.

AIM (Attorneys Insurance Mutual of Alabama) is incorporated. I hope the capitalization effort can be underway in July 1988. In the undertaking, the leadership of the board of commissioners was essential, and their continued support in the capitalization effort will be the key to AIM's success.

The LEGAL SERVICES LIABILITY ACT is the bar's key legislative accomplishment. The larger board contributed to the highly successful efforts to win passage of this bill. The board was a key element in the bar's ability to gain input in the drafting of other legislation which did not pass, but which would have been significantly better after the bar's input, had it been enacted.

HAMNER

The additional members have enabled the bar to fulfill its professional regulatory function more efficiently. The ability to more readily convene our disciplinary boards has permitted a more expeditious handling of complaints.

Most bars would like to achieve one or two of these goals in an administrative year. Our successes this year are truly remarkable.

The additional board members have made the bar more representative. I do not think any of the new members fully appreciated the demands on their schedules in serving you. It was gratifying to see every one of those persons who were elected for a one-year term seek election to a full three-year term. The future is a bright one. Fortunately, we have not yet been adversely affected by a shrinking volunteer base of capable and willing workers. ■

Norman

Meet Keith Norman

Keith B. Norman, an Opelika native, joined the staff of the Alabama State Bar in early May as director of programs and activities, bringing a broad range of experience to this position, as well as a proven record of volunteer leadership in the profession.

Keith is a graduate of Duke University. He was in the school's Institute of Policy Sciences and Public Affairs. Upon completion of his studies at Duke, he enrolled at the University of Alabama School of Law, graduating in 1981.

Following graduation from law school, he served as assistant director of the Alabama Law Institute. Keith then became staff attorney for senior Associate Justice Hugh Maddox at the Supreme Court of Alabama in 1982, and in 1984, he started with Balch & Bingham in the firm's real estate and litigation sections in its Montgomery office.

Keith has been a member of the board of editors of *The Alabama Lawyer* since 1983. He is active in the Montgomery County Bar's Young Lawyers' Section and served as president last year; Keith also has served on the state Young Lawyers' Section Executive Committee since 1985.

His demonstrated interest in the work of our bar, and the profession in general, caused his selection for his new position to be widely acclaimed and very favorably received, and his firsthand working experience in bar activities allows him to be an effective bar executive. Keith oversees all programs and works closely with our committees and sections. In addition he works with the Mandatory CLE Commission.

His prior experience as counsel to the Judiciary Committee of both the Alabama House (1987) and the State Senate (1988) brings a new dimension to our in-house legislative interests.

Keith is a member of the First United Methodist Church, the Kiwanis Club and the program board of the Montgomery YMCA.

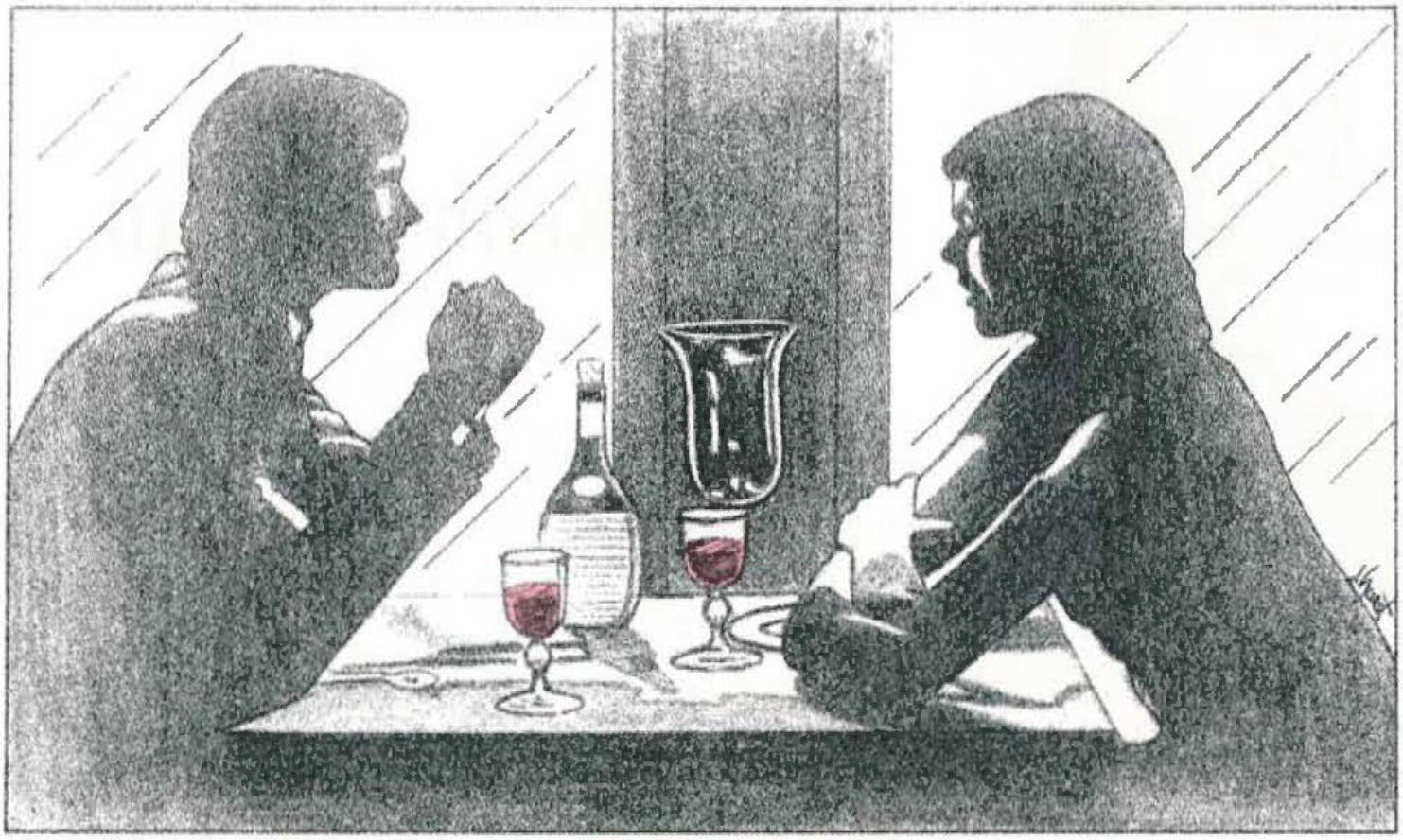
He is married to the former Teresa Miller of Dothan, who is a member of the Alabama State Bar, and staff attorney for Justice Oscar W. Adams of the supreme court.

The writer is particularly pleased to have this most able and extremely well-qualified addition to the bar headquarter's family. ■

RTH

Birmingham Eats Out

by Gregory H. Hawley



Welcome, again, to Birmingham and the Galleria. This enormous mall encloses 1.75 million square feet of shopping space, including a skylight nearly a quarter of a mile long, and offers many stores new to Alabama.

For those who have better things to do than shop, here is a summarized version of the 1986 *Alabama Lawyer's* guide to Birmingham.

Restaurants

The variety of restaurants available in Birmingham is great. The following list is not exhaustive, but merely representative of favorite spots of the Birmingham Bar. For a more complete guide to restaurants, consult your local hotel or telephone directory.

FAMILY RESTAURANTS

John's Restaurant
112 21st Street North
322-6014
11 a.m. to 10 p.m.
Monday-Saturday
Closed Sunday

The seafood is always fresh, the cornbread is good, the slaw cannot be beat and the steaks (I am told) are more than adequate. Do not pass up the softshell crabs if available.

Michael's Sirloin Room
431 20th Street
322-0419
Closed Sunday

If you want your basic meat and potatoes fare and entertain yourself by looking at photos of sports heroes, Michael's is your place.

LaParee Restaurant
2013 5th Avenue North
251-5936
11 a.m. to 10 p.m.
Closed Sunday

Like other restaurants of its kind, it is all-too-frequently compared with John's.

Unfortunately for LaParee, John's usually wins; some say it is a close call. If John's is crowded, try LaParee.

Leo's Seafond and Steak House
401 18th Street South
251-0347
Closed Sunday

Like others, Leo's seems to have followed the John's model. If it is straightforward fried or broiled seafood you want, try Leo's.

UPTOWN

Highland's Bar and Grill
2011 11th Avenue South
939-1400
Closed Sunday
Lunch only on Monday

This is the place to be seen in Birmingham. Until recently, it was clearly the "best" restaurant in town according to Birmingham's yuppies. The martinis are outstanding, the wine list is remarkable and the variety of interesting American and nouvelle cuisine is worth trying. For those who do not want to break the budget, you should go to the bar, have a martini and try some of the crab claws. Then go out and grab a hamburger or barbeque.

The Bombay Cafe
(corner of 7th Avenue South and 29th Street)
322-1930
Closed Sunday

This is the newest "best" restaurant in Birmingham. Bombay has an imaginative menu; the food is superb and the service is very good.

Dexter's on Hollywood (two locations)
354 Hollywood Boulevard
870-5297

Chase Lake
1 Chase Corporate Drive
Hoover
987-8235

Dexter's is a less self-conscious version of Highlands. It is intimate, without being showy, and the service is usually good.

Lakeview Bar & Grill
744 29th Street South
322-2545
Closed Sunday

The atmosphere at Lakeview is even more casual than those above. It is a very good neighborhood restaurant.

Silvertron Cafe
3813 Clairmont Avenue
591-3707

This restaurant is popular with the Forest Park (*i.e.* urban "yuppie"; *i.e.* high percentage of lawyers) crowd. While Silvertron's food and service are both more than adequate, its principal attraction seems to be its location—in walking distance of Forest Park.

Restaurant at the Tutwiler
Tutwiler Hotel
Park Place & 21st Street
322-2100
Open Sunday

The Restaurant at the Tutwiler has very good food and is trying hard to make a reputation for itself. In addition, the bar at the Tutwiler is second only to Highland's.

Jinky's Bar & Grill
2830 7th Avenue South
324-3126

When Jinky's first opened, everyone went to see what this new, small art deco restaurant was about. Because of its small size, it was difficult to find a seat. But with the recent proliferation of new restaurants in Birmingham, it has become fairly easy to get into Jinky's. Do not let the art deco fool you. Jinky's has very good food and some say it has the best steaks in town.

Christian's Classic Cuisine
Embassy Suites Hotel
871-3222
Open Sunday

Reportedly the best French restaurant in Birmingham, it places less emphasis on nouvelle or American cuisine and more on traditional French, with traditional French prices.

Winston's
Wynfrey Hotel
988-5665

Dinner at Winston's is an all-evening affair. The food is very good, and very well-prepared. While some indicate that service is slow, it seems that the service at Winston's is *intentionally* slow—to allow patrons to enjoy a leisurely meal. Winston's is probably the best restaurant at a hotel in Birmingham.

Meadowlark Restaurant
534 Industrial Road
Pelham
663-3941

Meadowlark is just off Highway 31 about 15 minutes south of the Galleria. The owners have turned an old country

Gregory H. Hawley is a graduate of Harvard College and the Georgetown University Law Center. He clerked for U.W. Clemon, United States District Judge, and is an associate with the Birmingham firm of Maynard, Cooper, Frierson & Gale, P.C.

farmhouse into an extremely pleasant place for a relaxed dinner. They grow all of their herbs and spices, as well as most of the flowers, on the premises. While the preparation of the food occasionally misses the mark, the atmosphere provided by its unique country setting makes up the difference.

ITALIAN

Romeo's
7th Avenue South between 21st and 22nd Streets
252-4381

Be careful descending the steps to the basement of Romeo's. Once you are there, however, the Romeo family will take care of you. Romeo's has the real feel of an Italian cantina and, after a glass of Chianti and an appetizer, you will feel as if you are hardly in Birmingham at all.

Franco's
1318 20th Street South
933-3721

To have a good Italian meal served outdoors under the trees and stars, Franco's may be it. It could be the most charming and frequently overlooked dining in Birmingham, and it certainly makes up with atmosphere what it lacks in preparation.

Rossi's
20th Street South
323-7111

or 2737 Highway 280 South
879-2161

While Rossi's claims to be an Italian restaurant, it is more like a Michael's that serves some Italian food.

Baccus
Highway 280 South
991-2895

This is the newest Italian restaurant in town, and perhaps the best.

FERN BARS

The following establishments cater to the after-work crowd in search of a quick dinner, a slow beer and night life in Birmingham.

Billy's
2012 Cahaba Road
English Village
879-2238
Closed Sunday

Wanda June's Deli and Wine Shop
2031 Cahaba Road
English Village
870-0255
Closed Sunday

Dugan's
Corner of Highland Avenue and 20th Street
933-9020

Rube Burrows
Five Points South
20th Street
933-5570

Clyde Houstons
Five Points South
251-0238

Hopper's
Five Points South
251-7243

Cabana Cafe
Brookwood Village
870-1390

Art Galleries

There are a number of art galleries in the Birmingham area; some are listed below.

Maralyn Wilson Gallery
2010 Cahaba Road
English Village
879-0582

Cobb Gallery
One Cobb Lane
(near Five Points)

Little House
2915 Linden Avenue
Homewood

Henderson Fine Arts
2015 Third Avenue North

Village Framers
2000 Cahaba Road
English Village

Antiques

Also, there are numerous places to look for antiques in Birmingham, found principally in three areas: near Magnolia Park-Five Points South, in Mountain Brook Village and in Homewood.

FIVE POINTS SOUTH

Birmingham Antiques Mall
2211 Magnolia Avenue
10:30 a.m. to 5:30 p.m.
Monday through Saturday

Hanna Antique Mall
2200 Magnolia Avenue
Tuesday through Saturday
10 a.m. to 5 p.m.

Magnolia Antiques
2237 Magnolia Avenue

Pyburn's Antiques
912 22nd Street South

HOMEWOOD

Frankie Engel Antiques
2949 18th Street

Antiques South
1722 28th Avenue South

Horse of a Different Color
1813 29th Avenue South

Martin Antiques
1923 29th Avenue South

MOUNTAIN BROOK

King's House Antiques
2418 Montevallo Road

Dande' Lion
2701 Culver Road

Edward's Galleries
66A Church Street ■

About Members, Among Firms

ABOUT MEMBERS

Tim W. Fleming announces the removal of his office to P.O. Box 1459, Highway 59 North, Robertsdale, Alabama 36567. Phone (205) 947-7922.

■

W. Spencer Frawley announces the opening of his office at Suite 200, 700 28th Street, South, Birmingham, Alabama 35233. Phone (205) 326-0960.

■

Kathy Lucile Marine announces the establishment of her office on the Courthouse Square, P.O. Box 414, Carrollton, Alabama 35447. Phone (205) 367-8207.

■

Roland C. Gamble announces the removal of his office to P.O. Box 70, 530 Park Road, Pleasant Grove, Alabama 35127-0070. Phone (205) 744-5161, 744-5162.

■

Eugene W. Fuquay announces his recent retirement from the federal government and the opening of his office at Suite 423, Frank Nelson Building, 205 20th Street, Birmingham, Alabama 35203. Phone (205) 322-6692.

■

Charles H. Self, Jr., formerly legal counsel for the University of Alabama system, office of counsel, announces that he has accepted the position of assistant director of risk management and insurance at the University of Alabama at Birmingham. His new office is located in the Byrd Building, Suite 410, UAB Station, Birmingham, Alabama 35294. Phone (205) 934-5382.

■

Charles L. Sparks announces the relocation of his offices to 3000 Galleria Tower, Suite 800, Hoover, Alabama 35244. Phone (205) 985-3000.

AMONG FIRMS

W. Terry Bullard announces that **Faulkner E. Brodnax** has joined him in the practice of law, with offices located at 108 East Main Street, Suite One, Houston Place, Dothan, Alabama 36301. Phone (205) 793-5665.

■

The firm of **Corley, Moncus & Bynum, P.C.** announces the relocation of its offices to 2100 SouthBridge Parkway, Suite 650, Birmingham, Alabama 35209. Phone (205) 879-5959.

■

Johnston, Hume & Johnston announces that **Tracey L.F. Benedict** has become an associate with the firm. Offices are located at 5 Dauphin Street, Suite 200, Mobile, Alabama 36602. Phone (205) 432-1811.

■

Patrick & Lacy, P.C. announces that **William Marsh Acker, III,** has become associated with the firm. Offices are located at 1201 Financial Center, Birmingham, Alabama 35203. Phone (205) 323-5665.

■

Edward B. Parker, II, and **Paul A. Brantley** announce the formation of **Parker & Brantley,** with offices at 407 South McDonough Street, Montgomery, Alabama 36104. Phone (205) 265-1500.

■

Hamilton, Butler, Riddick, Tarlton & Sullivan, P.C. announces that **Richard E. Corrigan** has become associated with the firm, with offices at Tenth Floor, First National Building, P.O. Box 1743, Mobile, Alabama 36633. Phone (205) 432-7517.

■

Graydon L. Newman and **Victor L. Miller, Jr.,** formerly of Newman & Miller, P.C. and **Rocco J. Leo** and **Horace V. O'Neal, Jr.,** announce the formation of **Newman, Miller, Leo & O'Neal, P.C.** Offices are located at Meadow Brook Corporate Park, Suite 125, 1200 Corporate Drive, Birmingham, Alabama 35242. Phone (205) 995-8111.

■

Balch & Bingham announces that **William S. Wright** and **Susan B. Bevill** have become partners in the firm. Birmingham offices are located at 600 North 18th Street and Financial Center, 505 North 20th Street, P.O. Box 306, Birmingham, Alabama 35201. Phone (205) 251-8100. Montgomery offices are at The Winter Building, 2 Dexter Avenue, P.O. Box 78, Montgomery, Alabama 36101. Phone (205) 834-6500.

■

The firm of **Schoel, Ogle & Benton** announces that it has changed its name to **Schoel, Ogle, Benton, Gentle & Centeno.** The firm also announces that **Melinda L. Murphy,** formerly law clerk to the Honorable George S. Wright, has become associated with the firm. Offices are located at Third Floor Watts Building, 2008 Third Avenue, North, Birmingham, Alabama 35203. Phone (205) 324-4893.

■

Hand, Arendall, Bedsole, Greaves & Johnston, 30th Floor, First National Bank Building, Mobile, Alabama, announces that **Kelly D. Reese** has become associated with the firm. Phone (205) 432-5511.

■

Richard C. Bentley, formerly of Montgomery, announces that he is associated with **Rowland & Rowland, P.C.,** with offices located at the Century Building 312 Gay Street, S.W., Knoxville, Tennessee 37902. Phone (615) 637-8210.

■

Briskman & Binion, P.C. announces that **Richard E. Browning** has become a member of the firm. The firm will continue in the name of **Briskman, Binion & Browning, P.C.** Offices are located at 205 Church Street, P.O. Box 43, Mobile, Alabama 36601. Phone (205) 433-7600.

■

The firm of **Waller, Lansden, Dortch & Davis** announces that **Joseph A. Woodruff** has become associated with the firm. Offices are located at 2100 Commerce Place, Nashille, Tennessee 37239, phone (615) 244-6380. and 809 South Main Street, Columbia, Tennessee 38401, phone (615) 388-6031.

■

Brinkley & Ford announces that **Susan E. Baker** has become an associate of the firm, with offices located at 307 Randolph Avenue, Huntsville, Alabama 35801. Phone (205) 533-4534.

■

Beasley, Wilson, Allen & Mendelsohn, P.C. announces the relocation of its offices to 10th Floor Bell Building, 207 Montgomery Street, Montgomery, Alabama 36104. Phone (205) 269-2343.

■

Stone, Granade, Crosby & Blackburn, P.C. announces that **Eaton G. Barnard** has become associated with the firm, with offices at P.O. Drawer 1509, Bay Minette, Alabama 36507.

■

Shaw, Pittman, Potts & Trowbridge of Washington, D.C., announces that **W. Mike House,** former administrative assistant to U.S. Senator Howell Heflin, has become a partner with the firm. **Gordon G. Martin,** former legislative assistant to Senator Heflin, has become associated with the firm. Offices are located at 2300 N Street, N.W., Washington, D.C. 20037. Phone (202) 663-8000.

■

The firm of **Johnston, Barton, Proctor, Swedlaw & Naff** announces that **John D. Saxon,** formerly special counsel, U.S. Senate Armed Services Committee, has joined the firm as counsel. Offices are located at 1100 Park Place Tower, Birmingham, Alabama 35203. Phone (205) 322-0616. ■

LEGISLATIVE SUMMARY —AVAILABLE—

Each year, at the end of the Legislative session, the Legislative Reference Service compiles a summary of the general laws enacted and Constitutional amendments proposed.

The Alabama State Bar has received permission from Louis Greene, director of the Alabama Legislative Reference Service, to make a copy of this summary available, without charge, to each member of the Alabama State Bar who requests one.

For a complimentary copy, contact Alice Jo Hendrix, Alabama State Bar, P.O. Box 671, Montgomery, AL 36101.

Riding the Circuits

Houston County Bar Association

Recently, the association adopted the following Code of Professional Courtesy and Responsibility. For more information, contact Huey McInish in Dothan.

Houston County Bar Association Code of Professional Courtesy and Responsibility

As a member of the Houston County Bar Association, I hold these truths to be evidence of my conduct as a lawyer and my respect for the law:

1. I adhere to the rule of the law to govern my entire conduct and I acknowledge that the law is above me.
2. Representing my client in a professional manner is my first obligation.
3. I will familiarize myself with the Rules of Professional Conduct and will observe same in my daily practice.
4. I will conduct myself as a lady or gentleman and live my personal and professional life by the Golden Rule to do unto others as I would want them to do unto me.
5. I will be honest with myself.
6. Practicing law is an ongoing, intellectual pursuit in which I intend to advance at every opportunity.
7. My word is my bond.
8. Although the law, the American Bar Association and the State of Alabama Bar Association recognize the legality of public advertising, I will refrain from placing advertisements in the newspaper, radio and television media, deeming same to be contrary to the professionalism I attach to the practice of law.
9. When each adversary proceeding ends, I will shake hands with my fellow lawyer who is my adversary; and if I lose, I will refrain from unnecessary condemnation of the Court, my adversary, or his client.
10. I recognize that procedural rules are necessary as a last resort to order and decoram, therefore, if my adversary is entitled to something, it should be provided without motions, briefs, hearings, orders and other formalities. If something is a fact, it should be stipulated in writing without requests for admission, interrogatories, witnesses and documents. Vigorous advocacy is not inconsistent with professional courtesy. I will stay above the belt. Even though antagonism may be expected by clients, it is not part of my duty to my client. A lawyer is not called (or licensed) to be obnoxious.
11. I will not solicit clients or legal business or engage in any activity which may be considered as solicitation, same being not only unethical, contrary to the Code of Professional Ethics, but is also unprofessional.
12. Ordinarily, I will not notice a deposition until an effort has been made to set it by agreement.
13. I recognize that adversaries should communicate to avoid litigation and remember their obligation to be courteous to each other.
14. I will strive to take and return lawyers' telephone calls as soon as possible, and when a call is placed by or for me, I will be on the telephone when the lawyer answers.
15. I recognize that advocacy does not include harassment.
16. I recognize that advocacy does not include needless delay.
17. I will be ever mindful that any motion, trial, court appearance, deposition, pleading or legal technicality costs someone time and money.
18. I believe that only attorneys, and not secretaries, paralegals, investigators or other non-lawyers, should communicate with a Judge or appear before the Judge on substantive matters. These non-lawyers should not place themselves inside the Bar in the

Last date to get changes
in this year's bar directory is August 15, 1988

Courtroom unless permission to do so is granted by the Judge then presiding.

19. I will stand to address the Court, be courteous and not argue with the Court but may, when requested and permission granted by the Court, state my position to the Court.
20. I have the responsibility to advise my client appearing in the Courtroom of the kind of behavior expected of him (i.e., no chewing gum, no sunglasses, proper attire, etc.).
21. During any Court proceeding, whether in the Courtroom or Chambers, I will dress in a coat and tie to show my respect for the Court and the law.
22. I will always be punctual, or sufficiently in advance of the appointed time, so that preliminary matters may be disposed of in order to start the meeting, trial, hearing or conference on time.
23. I recognize that a lawyer should not become too closely associated with his client's activities, or emotionally involved with his client.
24. I am thankful for the ability and my opportunity to be a lawyer.
25. I appreciate the respect, trust and friendship which other lawyers have given me, and I will act at all times to preserve the mutual feeling of camaraderie among lawyers which exists in this Bar, because without it my clients and I suffer.

ADOPTED MARCH 30, 1988

Talladega County Bar Association

At a recent meeting, the Talladega County Bar Association elected officers for 1988-89. The officers elected were:

President: Edwin B. Livingston, Sylacauga
Vice-president: Huel M. Love, Sr., Talladega
Secretary/treasurer: R. Blake Lazenby, Talladega

Bar association plans for the year included participation with Talladega College in celebration of Law Day 1988 during the latter part of April and the first part of May and The Peoples' Law School to be held in the fall of 1988.■

Bar Briefs

Hansford

Acting UA law dean named to direct school

Nathaniel Hansford was named dean of the University of Alabama School of Law, UA president Dr. Joab L. Thomas announced in April.

Hansford, the William Alfred Rose Professor of Law, has served as acting dean of the school since May 1987.

Dr. Roger Sayers, UA academic vice president, said Hansford was selected after a national search. Hansford joined the UA faculty in 1975. He served as vice dean or associate dean from 1982-86 and was named to the Rose Professorship in 1987. He is the author of a book, "Tilley's Alabama Equity," (second edition), and numerous law review and bar journal articles.

"UCC Transactions Guide," a multi-volume treatise he co-authored, will be published this summer.

A 1968 graduate of the University of Georgia School of Law, Hansford earned an LL.M. degree at the University of Michigan in 1980. He received the Outstanding Commitment to Teaching Award given by the UA National Alumni Association in 1982.

Following graduation from law school, Hansford clerked for Judge Lewis R. Morgan of the U.S. Court of Appeals for the Fifth Circuit. He served in the Judge Advocate General Corps as a captain in the Army from 1970-73 and was associated with the Dalton, Georgia, law firm of Mitchell, Mitchell, Coppedge and Boyett from 1973-75.

Fellows elected to American College of Probate Counsel

John A. Wallace, of Atlanta, Georgia, immediate past president of The American College of Probate Counsel, announced that L. Lister Hill, of Capell, Howard, Knabe & Cobbs, P.A., of Montgomery, and William L. Hinds, Jr., of Bradley, Arant, Rose & White of Birmingham, have been elected fellows of the college. Their elections took place during a recent meeting of the board of regents of the college in Marco Island, Florida.

The American College of Probate Counsel is an international association of lawyers who have been recognized as outstanding practitioners in the laws of wills, trusts, estate planning and estate administration. The College actively pursues improvements in the administration in tax and judicial systems in these areas of law, in addition to providing programs of continuing legal education for its fellows.

Membership in the College, which is a post of honor conferred by the peers of the newly-elected fellow, is by invitation of the board of regents. ■

A Current Overview of Alabama's

Mechanic's and Materialman's

Lien Law

by J. Lister Hubbard

I. Introduction

Much has been written about Alabama's mechanic's and materialman's lien law, and for good reason. Contractors, subcontractors and others who perform in connection with the improvement of real property are acutely interested in securing payment for their work. Construction lenders likewise are interested in securing repayment of loans which enable construction of these improvements and, more particularly, in maintaining the priority of their mortgages over these liens. Property owners and purchasers are interested in maintaining or obtaining clear title, free from the encumbrance of these liens. A significant body of case law has developed out of the battling of these various interests. Uncertainties in the statutory provisions which create these liens also have provided a fertile field for judicial construction, as well as a minefield for the practitioner. See, e.g., *Crane Co. v. Sheraton Apartments*, 257 Ala. 332, 58 So.2d 614 (1952).

This article cannot begin to cover fully the existing body of case law interpreting these statutory provisions. Rather, it will attempt to provide a thumbnail sketch of the significant elements and current issues in three broad areas: (1) claiming and perfecting mechanics' liens, (2) priorities and (3) transferring liens to substitute security.

II. Claiming and perfecting mechanics' liens

A. Nature of lien

Mechanics' and materialmen's liens ("mechanics' liens") are purely statutory creations, unknown under the common law. Generally, such a lien is a lien on realty in favor of those who furnish labor or materials in connection with improvements to real property. See *Emanuel v. Underwood Coal & Supply Co.*, 244 Ala. 436, 14 So.2d 151 (1943). Being purely a creation of statute, such a lien can be established only through strict adherence to the statutory requirements found at sections 35-11-210 through 35-11-234, *Alabama Code*. See *Hartford Accident and Indemnity Co. v. American Country Clubs, Inc.*, 353 So.2d 1147 (Ala. 1977); *First Colored Cumberland Presbyterian Church v. W.D. Wood Lumber Co.*, 205 Ala. 442, 88 So.433 (1921). Mechanics' liens are inchoate, i.e., subject to being lost if not perfected according to statute. *Ex parte Douthit*, 480 So.2d 547, 555 (Ala. 1985). Consequently, the practitioner, whether representing a client perfecting a lien or a client defending a lien, should be thoroughly familiar with the statutory provisions and their construction by the courts.

B. Types of liens

There are essentially two types of liens under the statutory scheme. First, there is an "unpaid balance" lien as provided in the first sentence of §35-11-210 [emphasis added], to-wit:

> "Every mechanic, person, firm or corporation who shall do or perform any work, or labor upon, or furnish any material, fixture, engine, boiler or machinery for any building or improvement on land, or for repairing, altering or beautifying the same, under or by virtue of any contract with the owner or proprietor thereof, or his agent, architect, trustee, contractor or subcontractor, upon complying with the provisions of this division, shall have a lien therefor on such building or improvements and on the land on which the same is situated . . . ; *or, if employees of the contractor or persons furnishing material to him, the lien shall extend only to the amount of any unpaid balance due the contractor by the owner . . . .*"

In *Crane*, the court expanded the applicability of "unpaid balance" liens beyond the literal language of the statute to cover laborers and materialmen of a *subcontractor* as well.

Second, there is a "full price" lien in favor of those with a direct contract with

J. Lister Hubbard, a partner in the Montgomery firm of Capell, Howard, Knabe & Cobbs, P.A., received his undergraduate degree, magna cum laude, from the University of Georgia and his law degree from the University of Alabama School of Law. He is a member of the Alabama State Bar Forum on the Construction Industry and the Alabama State Bar Section on Public Contract Law.

the owner and, as provided by the second sentence of the statute, in favor of a materialman giving advance notice to the owner prior to the furnishing of materials, to-wit:

> "But if the person, firm or corporation, before furnishing any material, shall notify the owner or his agent in writing that such certain specified material will be furnished by him to the contractor or subcontractor for use in the building or improvements on the land of the owner or proprietor at certain specified prices, unless the owner or proprietor or his agent objects thereto, the furnisher of such material shall have a lien for the full price thereof . . . ."

Strangely enough, the statute appears to make the "full price" lien by advance notice available only to a materialman, as opposed to those supplying labor and services. *See Crane*, at 616. A "full price" lien significantly increases the rights of the lienor and, potentially, the size of his encumbrance on the property. Such a lien is based either on a direct contract with the owner, or a constructive contract created by the statute. When the materialman provides the advance notice required and the owner fails to notify the materialman that he will not be responsible for the price of the material, a constructive contract arises between the materialman and the owner, obligating the owner for the full price of the materials supplied. Furthermore, the lien on the property may be pursued to its full amount and, apparently, with some kind of priority over "unpaid balance" lienors (see *Priorities* section below).

By contrast, an "unpaid balance" lien, which is the only lien available where the time has lapsed for giving advance notice and where the lienor has no direct contract with the owner, "shall extend only to the amount of any unpaid balance due the contractor by the owner or proprietor . . . ." §35-11-210. Thus, where there is no unpaid balance due the contractor, no lien may be established. *See Abell-Howe Co. v. Industrial Development Bd. of Irondale*, 392 So.2d 221 (Ala. Civ. App. 1980).

C. Steps to perfection

All potential lienors, with the exception of an "original contractor," must fulfill three basic prerequisite steps to perfecting his lien: provide statutory notice to the owner, file a verified statement of lien in the probate office of the county where the improvement is located and file suit to enforce the lien.[1] *Harper v. J & C Trucking & Excavating Co.*, 374 So.2d 886 (Ala. Civ. App. 1978), *cert. dismissed*, 374 So.2d 893 (Ala. 1979). An "original contractor," who is absolved only from the notice requirement (see §35-11-218), is one with a direct contract with the owner and may even be a materialman. *See, e.g., Wahouma Drug Co. v. Kirkpatrick Sand & Cement Co.*, 187 Ala. 318, 65 So. 825 (1914). The lien will be lost if each of the three steps is not carefully and properly taken. *See, e.g., Security Transportations, Inc. v. Nelson Excavating and Paving Co.*, 55 Ala. App. 223, 314 So.2d 297, *cert. denied*, 294 Ala. 768, 314 So.2d 304 (1975); *Lily Flagg Bldg. Supply, Co. v. J.M. Medlin & Co.*, 285 Ala. 402, 232 So.2d 643 (1970); *Home Fed. Sav. & Loan Ass'n. v. Williams*, 276 Ala. 37, 158 So.2d 678 (1963).

1. Notice

a. Full price lien

Section 35-11-210 sets out the notice requirements for a full price lien. By its terms, this section requires written notice to the owner that "such certain, *specified material* will be furnished by him [the materialman] to the contractor or subcontractor for use in the building or improvements on the land of the owner or proprietor at certain *specified prices* . . . ." [emphasis added]. Nevertheless, at the end of this section, it is provided that "such notice may be given in the following form, which shall be sufficient":

> To _____ owner or proprietor: Take Notice that the undersigned is about to furnish _____, your contractor or subcontractor, certain material for the construction, or for the repairing, altering or beautifying of a building or buildings, or improvements, on the following described property:
>
> _____
>
> _____ and there will become due to the undersigned on account thereof the price of said material, for the payment of which the undersigned will claim a lien.

Ala. Code §35-11-210 (1975).

As is apparent, the statutory form does not set forth "specified material" at "specified prices." The discrepancy has

been noted by the Alabama Supreme Court. *Avondale Lumber Co. v. Hudson*, 214 Ala. 128, 106 So. 803, 804 (1926). Unfortunately, in the rare instances where the Alabama Supreme Court has analyzed and applied the advance notice requirement, it has not resolved the discrepancy.[2]

Section 35-11-210 does not specify how much advance notice is required to establish a "full price" lien. Presumably, sufficient notice must be given to provide the owner reasonable opportunity to object "before the material is used." The owner should be wary of such advance notices and, upon receipt of such a notice, immediately should notify the furnisher in writing before the materials are used "that he will not be responsible for the price thereof." §35-11-210. Failure to do so will create a contract between the furnisher and owner by implication, which not only increases the potential amount of the encumbrance but allows the lienor to take a judgment *in personam* against the owner. *See Buettner Bros. v. Goodhope Missionary Baptist Church*, 245 Ala. 553, 18 So.2d 75 (1944); *Avondale Lumber Co. v. Hudson*, 214 Ala. 128, 106 So. 803, 804 (1926); *Morris v. Bessemer Lumber Co.*, 217 Ala. 441, 116 So. 528 (1928).

b. Unpaid balance lien

As a practical matter, "full price" lien notices are seldom given. At the beginning of a project, materialmen are not attuned to collection difficulties and, even if they were, are reluctant to alienate the contractor or the owner with legalistic notices. Even though the time may have passed to provide the advance notice of a "full price" lien, the potential lienor may provide written notice to establish an "unpaid balance" lien as provided in §35-11-218. The only timing provision for such notice is that it be given before the filing of a verified statement of lien, the second step for lien perfection as discussed below. Once the notice is given, any unpaid balance in the hands of the owner is held subject to such a lien. §35-11-218. With this notice in hand, the owner then can take appropriate action in the disbursement of remaining contract monies to the general contractor to insure that the potential lienors are satisfied and the property is not encumbered.

2. Verified statement of lien

a. Form

A statutory form for a verified statement of lien, which has been deemed sufficient, is set forth in section 35-11-213, *Alabama Code*. Special attention should be paid to the property description required in the statement. Generally, the statute requires that the description be "in such a manner that same [the property] may be located or identified . . . ." *Id.* With regard to any particular situation, the practitioner is advised to consult §35-11-213 and the interpreting case law closely to determine what is sufficient.[3] As discussed below, the extent of the property encumbered is affected by the location or nature of the property.[4]

i. City or town

When the building or improvement on which the lien is claimed is located in a city or town, the lien extends to all of the right, title and interest of the owner to the building or improvement and the land on which it is situated *and* "to the extent in area of the entire lot or

parcel of land in a city or town . . . ." §35-11-210. Where multiple buildings and/or lots or parcels are involved, the lien may attach to all of the improvements together with the lands upon which they are situated. *Ala. Code* §35-11-217 (1975). While older Alabama cases appeared to require the materialman to segregate the materials according to the building before he filed his statement of lien, *(see, e.g., Richardson Lumber Co. v. Howell,* 219 Ala. 328, 122 So. 343 [1929]), current authority allows a statement merely to claim a lien "separately, severally, and jointly" as to the specified parcels of land and the specified buildings and improvements. *O'Grady v. Bird,* 411 So.2d 97 (Ala. 1981). The proper allocation for each improvement would be determined later by the court. *Id.*

ii. Not in city or town

Where the lienor seeks to attach property not located in a city or town, the lien extends not only to the building or improvements and the land on which such is situated, but also to "one acre in addition to the land upon which the building or improvement is situated . . . ." *Ala. Code* §35-11-210 (1975). Section 35-11-217 requires the additional one acre to be selected from "land surrounding the said building or improvement and contiguous thereto." The selection must be made prior to the filing of the verified statement of lien. *Id.* Where the claimant does not have and cannot reasonably obtain an accurate description of the one acre, his verified statement of lien may describe the building and then claim "one acre of land surrounding and contiguous" to the building. *O'Grady v. Bird,* 411 So.2d 97 (Ala. 1981). (apparently overruling a more constrictive reading of the statutory description requirements in *Fowler v. Mackentepe,* 233 Ala. 458, 172 So. 266 [1937]). In the ensuing action to enforce the lien, the court should be petitioned to order a surveyor to determine an accurate description of the one acre. *Id.*

b. Where to file

The verified statement of lien must be filed in the office of the judge of probate of the county where the subject property is located. *Ala. Code* §35-11-213 (1975). When the property is located in more than one county, the statement must be filed in each county where so located.

c. When to file

Different time periods are prescribed by statute for the filing of the verified statement of lien, depending upon the status of the potential lienor. *Ala. Code* §35-11-215 (1975). Laborers must file the statement within 30 days, original contractors must file within six months and every other claimant must file within four months after the last item of work or material has been performed or furnished. *Id.* A "full-price" lienor is considered an original contractor within this section and, thus, has six months to file his verified statement of lien. *Southern Sash of Huntsville, Inc. v. Jean,* 285 Ala. 705, 235 So.2d 842 (1970).

3. Suit to enforce lien

a. Where to file

The third and final step is to file suit in the circuit court (or district court when the amount is $50 or less) of the county where the property is located. *Ala. Code,* § 35-11-220 (1975). If the subject property is located in two or more counties, separate actions must be brought in each of the involved counties. *United Supply Co. v. Hinton Construction and Development, Inc.,* 396 So.2d 1047 (Ala. 1981).

b. When to file

The action must be commenced "within six months after the maturity of the entire indebtedness secured" by the lien. *Ala. Code,* §35-11-221 (1975). This has been construed to mean the point in time when the debt is contractually due and payable to the lienor. *Home Fed. Sav. & Loan Ass'n. v. Williams,* 276 Ala. 37, 158 So.2d 678 (1963). Express contract provisions specifying such a due date will control. *Sherrod v. Crane Co.,* 236 Ala. 344, 182 So. 48 (1938). If no express contractual provisions are available, other evidence such as invoice dates, statements and correspondence will be considered. It appears the courts will assume that the indebtedness matured on the date of the last labor performed or last materials furnished unless it is shown that an agreement existed for the debt to mature at a different time. *See Yeager v. Coastal Millwork, Inc.,* 510 So.2d 188 (Ala. 1987); *Garrison v. Hawkins Lumber Co.,* 111 Ala. 308, 20 So. 427 (1896).

c. Necessary parties

Section 35-11-223, *Alabama Code,* provides that, in actions to enforce a lien, "all persons interested in the matter in controversy, or in the property charged with the lien, may be made parties; but such as are not made parties shall not be bound by the judgment or proceedings therein." In other words, if the lien claimant intends to establish a priority over another party interested in the property, such as a mortgagee, then that other person should be made a party to bind it to the judgment. *See Starek v. TKW, Inc.,* 410 So.2d 35 (Ala. 1982); *Lily Flagg Bldg. Supply Co. v. J.M. Medlin & Co.,* 285 Ala. 402, 232 So.2d 643 (1970). The owner or proprietor of the subject property is a necessary party to a suit to foreclose on the property in satisfaction of the lien.[5] *See Starek; Lily Flag.* Furthermore, where the lien claimant seeks to establish an "unpaid balance" lien, the general contractor is a necessary party. *See Williams v. Pyramid Development Co.,* 289 Ala. 473, 268 So.2d 752 (1972).

d. Waiver or release defense

To establish waiver or release of a lien claim, the defending party must show that the lien claimant "knowingly surrendered or waived" its right to the lien. *Noland Co. v. Southern Development Co.,* 445 So.2d 266, 270 (Ala. 1984). Further, "an agreement by a person entitled to a lien that he will look exclusively to the contractor or some person other than the owner for the payment of this claim may be a waiver of his right to a lien." *Id.* A provision in a contract between the owner and the general contractor waiving all liens is not binding on the laborers and materialmen of the general contractor unless they have actual notice thereof when they furnish labor or material. *Baker Sand & Gravel Co. v. Rogers Plumbing & Heating Co.,* 228 Ala. 612, 154 So. 591 (1934). By statute, the general contractor may forfeit his right to a lien by failing to provide the owner certain information or lists as to materialmen and laborers on the project or failing to pay such parties "in accordance with any special contract made with the owner . . . ." *Ala. Code* §35-11-291 (1975).

III. Priorities

A. Prior or subsequent mortgages

A mechanic's lien attaches, for purposes of establishing priority over other liens, mortgages or encumbrances, at the time of "the commencement of work on the building or improvement . . . ." *Ala. Code* §35-11-211 (1975). "Commence-

ment of the work" has been interpreted to mean the time that the material for which a lien is sought is incorporated into the building or improvement or at least furnished therefor at the construction site. *Gambles, Inc. v. Kansas City Title Insurance Co.*, 283 Ala. 409, 217 So.2d 923 (1969). By statute, it is provided that, "[s]uch lien as to the land and buildings or improvements thereon, shall have priority over all other liens, mortgages, or incumbrances [sic] *created subsequent* to the commencement of work on the building or improvement . . . ." *Ala. Code* §35-11-211 (1975). [emphasis added]. Consequently, careful construction lenders should insure that no materials are furnished and no work is performed prior to the execution of the construction loan mortgage. It is the prior execution of the mortgage, and not its recording, which establishes the priority of the mortgage over mechanics' liens. *Kilgore Hardware & Bldg. Supply, Inc. v. Mullins*, 387 So.2d 834 (Ala. 1980). *Ala. Code* §35-11-211 (1975). If a potential construction lender determines that work has already commenced before it can obtain execution of the mortgage, it typically requires written subordination of all lien rights signed by all who have furnished labor or materials up to that point. Failure to obtain such subordination agreements will result in those mechanics and materialmen obtaining a lien with priority over the mortgage.

Prior to 1933, with regard only to the building or improvement, a mechanic's lien maintained priority categorically over prior mortgages and other encumbrances. Consequently, there was little the construction lender could do to protect its security interest in the improvement. However, a 1933 amendment to the mechanic's lien law (embodied in section 35-11-211, *Alabama Code*), as first construed in *Empire Home Loans, Inc. v. W.C. Bradley, Co.*, 286 Ala. 449, 241 So.2d 317 (1970), essentially reversed this state of affairs to the benefit of construction lenders and other mortgagees. The relevant language of the amendment provides:

> " . . . and as to liens, mortgages, or encumbrances created prior to the commencement of the work, the lien for such work shall have priority only against the building or improvement, *the product of such work which is an entirety, separable from the land, building or improvement* subject of the prior lien, mortgage, or encumbrance, and *which can be removed therefrom without impairing the value or security of any prior lien, mortgage, or encumbrance* . . . ."

Ala. Code §35-11-211. [emphasis added]. This language was construed by the *Empire* court as a qualification of limitation of the priority of mechanics' liens over prior, existing mortgages. Specifically, the priority exists only where the improvement is "separable" from the building and where it can be removed "without impairing the value of security" of the prior mortgage. As noted in *Empire*, "While under the 1933 amendment the materialmen's and mechanics' lien is yet given priority on the building, such priority may indeed be evanescent if the building cannot be separated from the land without impairing the value or security of the prior mortgage, for in such situations the mortgage retains its priority." *Id.* at 321. Typically, construction lenders obtain mortgages based upon a large percentage of the value of the construction when completed; therefore, removal and sale of the improvement indeed would impair the total value of the mortgage. *See Overhead Door Co. v. First Nat. Bank of Tuskaloosa*, 365 So.2d 70 (Ala. Civ. App.) *cert. denied*, 365 So.2d 70 (Ala. 1978). (Removal of doors would impair security of the bank's prior mortgage, even though the value of the property with doors removed would be $462,000, the balance due on debt to bank was $393,740 and doors could have been replaced for only $12,800.)

Clearly, a cautious construction lender has the upper hand under the current law, leaving the mechanic's lienor, in most cases, holding a lien of questionable value.

B. Subsequent purchasers

A mechanic's lien has no priority over a purchaser of the subject property if it is purchased without notice, actual or constructive. *See Ex parte Douthit*, 480 So.2d 547, 552 (Ala. 1985). (Interestingly, in this case a mortgagee tried to "piggyback" on the rights of its mortgagor, an innocent purchaser for value without notice of the lien, but was rejected by the court on the basis of the mortgage priority provision of Section 35-11-211.) A purchaser obtains clear and free title to the property if the purchase is made without actual or constructive knowledge of an outstanding debt to the lienor and prior to the filing of the lien. However, this general rule only applies to existing buildings. An exception has been carved out for purchasers of new buildings. *See Starek v. TKW, Inc.*, 410 So.2d 35 (Ala. 1982). For *new buildings*, a mechanic's lien properly filed within the prescribed statutory six-month period has priority over a purchaser *even though the lien had not been filed prior to the purchase.* In short, the "[p]urchaser of a new building is charged with constructive notice during the statutory period and takes subject to a mechanic's lien filed on the property during this period." *Ex parte Douthit*, 480 So.2d at 552. *See also, Collateral Investment Co. v. Pilgrim*, 421 So.2d 1274 (Ala. Civ. App. 1982) (a mortgage company is also on constructive notice of the potential for filing of liens on a new home during the statutory six-month period).

C. Competing mechanics' and materialmen's liens

With the exception of the "original contractor," all claimants under the mechanic's lien law "stand on an equal footing" regardless of who filed their verified statement of lien first (*LeGrand v. Hubbard*, 216 Ala. 164, 112 So. 826 [1927]), of who gave notice first to the owner (*Rayborn v. Housing Authority*, 176 Ala. 498, 164 So.2d 494 [1964]) or of who began supplying materials first to the project (*O'Grady v. Bird*, 411 So.2d 97, 105 [Ala. 1981] [original decision corrected on this point]). *Ala. Code* §35-11-228 (1975). Consequently, if funds from the sale of the improved property (together with the unpaid balance due the original contractor) are insufficient to satisfy all of the liens in full, then they are distributed pro rata among each of the mechanics and materialmen who obtain a judgment establishing his lien. *Id; Knox v. Jones, 268 Ala.* 389, 108 So.2d 369 (1959).

The unpaid general contractor who has established a lien nevertheless is subordinated to all of the claims of his subcontractors, materialmen, laborers, etc., taking only the unpaid balance due from the owner after full satisfaction of the other lienors. *Bakers Sand & Gravel Co. v. Rodgers Plumbing & Heating Co.*, 228 Ala. 612, 154 So. 591 (1934). On the other hand, another type of "original

contractor" (as commensurate with a materialman having a direct contract with the owner of the "full price" lienor discussed above) appears to stand on a different and more favorable footing than other mechanic's lienors, but the law is less than clear on this point. *See Id.* at 594, 596.

D. Tax liens

Priority between mechanics' liens and general federal tax liens is established by the "first-to-file" rule. A mechanic's lien statement filed in the probate office before the filing of such a tax lien in that office creates a priority in the mechanics' lien. 26 U.S.C. §6323(a), (f) (1967); *see United States v. Albert Holman Lumber Co.*, 206 F.2d 685 (5th Cir. 1953.)

IV. Transferring liens to substitute security

A 1980 amendment to Alabama's mechanic's lien law provides a procedure for freeing real property of a mechanic's lien and transferring the lien to other security. *Ala. Code* §35-11-233(b)(1975). Under this procedure, any person with an interest in the real property concerned (such as the title holder or a mortgagee of the property) or with an interest in the contract under which the lien is claimed (such as a general contractor) may file "with the court in which the action is brought" a copy of the lien and deposit therein a sufficient sum of money or a sufficient bond executed by an acceptable surety. The statute defines what is sufficient security and should be closely followed.

Upon receipt of the security, the court is required to "make and record a certificate showing the transfer of the lien from the real property to the security and mail a copy thereof by registered or certified mail to the lienor . . . " §35-11-233(b). The lienor has ten days from the receipt of the certificate to move or petition the court for a hearing on the sufficiency of the security. If he does not, "the real property shall thereupon be released from the lien claimed and such lien shall be transferred to said security." If the lienor does timely move or petition for such a hearing, the real property shall be released from the lien and transferred to the security only upon a determination by the court that the security filed is sufficient and in compliance with the statute. *Id.*

Although the Alabama appellate courts have not explored the effect of this lien transfer procedure, other jurisdictions with similar statutes have. Generally, a proper transfer of lien from the real property allows the dismissal of the owner and any claim to foreclose on the property from the lawsuit; the interest of the owner and the property are simply no longer at stake in the case. *See, e.g., Linco Construction Co. v. Tri-City Concrete*, 288 S.E.2d 125 (Ga. App. 1982); *Deltona Corp. v. Indian Palms, Inc.*, 323 So.2d 282 (Fla. App. 1975); *Morse Brothers Contractors, Inc. v. CJH Construction Co.*, 675 P.2d 1122 (Or. App. 1984).

One aspect of the amendment needs clarification by the Legislature. From a reading of subsection (b) of the statute, it appears that it contemplates filing the substitute security in a circuit court where "an action" is pending to enforce a mechanic's lien. On the other hand, subsection (e) of the statute contemplates a transfer of lien prior to the commencement of an action to enforce the lien in circuit court, thereby implying that the transfer could be effected in probate court where the lien is filed. It would serve everyone's convenience if liens could be transferred to substitute security in the probate court without the necessity of first filing a suit in circuit court. The writer is aware that, in some counties, the probate court adopts the view that it does have the authority to transfer liens to substitute securities under the statute, and regularly does so. However, it is also the regular practice in other counties to initiate an action in circuit court to effect the transfer if a lien enforcement action is not already pending.

V. Conclusion

Alabama's mechanic's and materialman's lien law is a maze of inconsistent and unclear legislation. Although valiantly striving to fill the gaps and smooth the tangles, the courts simply are not able to discern the legislative intent or enunciate a clear course of public policy. The practitioner is advised to tread carefully until the Legislature addresses this confusion with a new, up-to-date and comprehensive law. ■

FOOTNOTES

[1]If and when the lien is fully paid, certain statutory procedures must be followed to acknowledge satisfaction of the lien. *Ala. Code* §35-11-23 (1975).

[2]In *Baker Sand & Gravel Co. v. Rogers Plumbing & Heating Co.*, 228 Ala. 612, 154 So. 591, 596 (1934), while noting that the statutory form of notice does not meet several requirements contained in the body of the statute, the court concluded, "We do not feel authorized to further deplete this important statute by approving a notice which does not give at least the information contained in the prescribed form of notice." It appears the court applied the statutory form as a minimum standard. However, in a more recent decision, the court made no mention of the statutory form in its holding that the purported advance notice did not meet statutory requirements. *Kilgore v. First Assembly of God Church, Inc.*, 477 So.2d 300, 302 (Ala. 1985). In fact, in *Kilgore*, the court found the notice insufficient, among other reasons, because it failed to list "certain specified prices" as required by the terms of §35-11-210. *Id.* No explanation is given by the court for this apparent shift in standard.

[3]For instance, with regard to property located in a city or town, "a description by house number, name of street and name of city or town" is sufficient under the statue. *Ala. Code* §35-11-213 (1975).

[4]The extent of condominium property encumbered by a lien is specially handled in *Ala. Code* §35-8-16 (1975).

[5]Although the Alabama appellate courts have not addressed whether an owner may be dismissed from the suit where the lien has been transferred to substitute security under statutory procedure, other jurisdictions with similar statutory schemes have so held. *See, e.g., Deltona Corp. v. Indian Palms, Inc.*, 323 So.2d 282 (Fla. App. 1975); *Vector Co. v. Star Enterprises*, 206 S.E.3d 636 (Ga. App. 1974).

Honor Roll of Attorneys Participating in IOLTA

(as of May 24, 1988)

The Alabama Law Foundation, Inc. announces that the following attorneys and law firms have been added to the list of those participating in the IOLTA program. The foundation thanks those participating for their support.

BALDWIN
Armstrong, Vaughn & Floyd
Ferrell, Kathryn D.
Fleming, Tim W.
Floyd, J. Langford
Wilkins, Bankester & Biles
BARBOUR
Jackson, Lynn Robertson
BULLOCK
Rutland, Louis C.
CALHOUN
Burnham, Klinefelter, Halsey, Jones & Cater
Ghee & Associates
Long & LaBudde
Wilson, Pumroy, Rice & Adams
CHAMBERS
Reynolds, Jr., Charles G.
CHILTON
Bowers & Bowers
Latham, William D.
Moore, Jr., C. Richard
Rogers, III, Joel S.
COFFEE
McLean, D. Bruce
COLBERT
Hewlett & Black
CONECUH
Chapman, II, William T.
COVINGTON
Laird, Wesley L.
CULLMAN
Smith & Smith
DALE
Kennington, Ray T.
DALLAS
Williamson & Williamson
DEKALB
Millican, Carol J.
Watson & Watson
ETOWAH
Floyd, Keener, Cusimano & Roberts
Garmon, Leon
Willard, William R.
HOUSTON
Hardwick, Hause & Segrest
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Parkman & Adams
JACKSON
Proctor, John
White, J. William
JEFFERSON
Bains & Terry
Bradley, Arant, Rose & White
Burr & Forman
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Eubank, Robert B.
Gorham, Waldrep, Stewart, Kendrick & Bryant
Griffin, Allison & May
Johnston, A. Eric
Johnston, Conwell & Hughes
Jones, Clyde E.
King & King
Lee & Sullivan
Morris & Vann
Newman, Miller, Leo & O'Neal
Ovson, David F.
Porterfield, Scholl, Bainbridge, Mims & Harper
Resha, Jr., Salem N.
Satterwhite, Wayne R.
Schoel, Ogle, Benton, Gentle & Centeno
Shores, James L.
Smith, W. Wheeler
Spain, Gillon, Tate, Grooms & Blan
Stockham, III, Richard J.
Thompson, Griffis & Hooper
Thompson, Ronald F.
Tingle, Sexton, Murvin, Watson & Bates
Tipton, Guy L.
Turberville & Maxwell
Wade, Jeannie
Watterson, Singer & DiVito
Wiginton, Don F.
Wininger & Wininger
LAUDERDALE
Colebeck, Yates & Mitchell
Harris, Jr., John C.
Hill, Young & Boone
Odem, Dennis N.
Schuessler & Sandlin
Smith, Robert F.
Wilson, Marvin A.
LEE
Legal Services Corporation of Alabama
LIMESTONE
Croomes, E. Stephen
Raley, Landy
MADISON
Barclay, Jerry Sanford
Cleary, Lee, Morris, Smith, Evans & Rowe
Harrison, John Wyly
Humphrey, Currun C.
Patterson, Robert E.
Wilson, Stephen M.
MARENGO
Coplin, Jr., William T.
MARSHALL
Gullahorn & Hare
Walker, James D.
MOBILE
Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves
Briskman & Binion
Bryant, Jr., Thomas E.
Cabaniss, Johnston, Gardner, Dumas & O'Neal
Collins, Galloway & Smith
Doyle, Paul & Smith
Harrison, Thomas
Jackson, III, Sidney W.
Johnstone, Adams, Bailey, Gordon & Harris
Madden, III, Arthur J.
McFadden, Willoughby & Rouse
McKnight, Charles N.
Pate, Richard F.
Perry, Linda S.
Posey, Melissa A.
Ratcliffe, David L.
Sintz, Campbell, Duke, Taylor & Cunningham
Turner, Onderdonk & Kimbrough
Vickers, Riis, Murray & Curran
Watson, Slade
York, Jay A.
MONTGOMERY
Carroll, Marcel E.
Livingston, Edwin K.
Powers & Willis
Stiller, Micki B.
Wakefield, Jr., George H.

MORGAN
Chenault, Hammond, Buck & Hall
PIKE
Pelfrey, V. Lee
RUSSELL
Legal Services Corporation of Alabama
SHELBY
Jackson, Ronald E.
Shuleva, Richard C.
Swatek, William E.
Walden & Walden

TUSCALOOSA
Barton & Maddox
Burns, Ellis, Copeland & Lisenby
Cartee, Michael J.
Cockrell & Cockrell
Donald, Randall, Donald & Hamner
Lee, Barrett, Mullins, Smith & Smithart
Legal Services Corporation of Alabama
Rosen, Harwood, Cook & Sledge
Whitehurst & Whitehurst
Williams & Pradat

WILCOX
Bonner, Jr., W.J.

WINSTON
Richardson, Ann R. ■

Honor Roll of Financial Institutions

(as of May 24, 1988)

The Alabama Law Foundation, Inc. announces that the following financial institutions are participating in the IOLTA program. The foundation thanks these institutions for their participation.

Alabama Federal Savings & Loan Association
Altus Bank
AmSouth Bank*
Bank Independent, Florence
Bank of Albertville
Bank of Dadeville
Bank of Mobile
Camden National Bank
Central Bank of the South*
Citizen's Federal Savings Bank
Citizen's National Bank of Shawmut
Colonial Bank*
Commercial Bank of Ozark
Covington County Bank
Farmers & Merchants Bank, Ariton
Farmers & Merchants Bank, LaFayette
Farmers & Merchants Bank of Russell County
First Alabama Bank*
First American Bank, Decatur
First American Bank of Pelham
First American Federal Savings & Loan, Huntsville
First Bank & Trust, Grove Hill
First Bank of Baldwin County
First Commercial Bank, Birmingham
First Community Bank, Chatom
First Federal Savings & Loan, Gadsden
First Federal Savings & Loan of Bessemer
First Federal Savings & Loan of Florence
First Federal Savings & Loan of Russell County
First Federal Savings Bank, Decatur
First Montgomery Bank
First National Bank, Ashland
First National Bank, Brewton
First National Bank, Opelika
First National Bank of Atmore
First National Bank of Columbiana
First National Bank of Florence
First National Bank of Hamilton
First National Bank of Jasper
First National Bank of Tuskaloosa
First National Bank of Union Springs
First State Bank of Bibb County
First State Bank of Tuscaloosa
Jacobs Bank, Scottsboro
National Bank of Commerce, Birmingham
Peoples Bank & Trust, Selma
Pike County Bank
Robertson Banking Company, Demopolis
Southland Bank, Clayton
Southland Bank of Dothan
SouthTrust Bank, Auburn
SouthTrust Bank of Alabama
SouthTrust Bank of Andalusia
SouthTrust Bank of Baldwin County
SouthTrust Bank of Calhoun County
SouthTrust Bank of Cullman
SouthTrust Bank of Dothan
SouthTrust Bank of Etowah County
SouthTrust Bank of Huntsville
SouthTrust Bank of Mobile
SouthTrust Bank of Montgomery
SouthTrust Bank of Ozark
SouthTrust Bank of the Quad Cities
SouthTrust Bank of Tuscaloosa County
Sweet Water State Bank
The American Bank, Geneva
The Bank of Tallassee
The Choctaw Bank of Butler
The Citizens Bank, Enterprise
The Citizens Bank of Valley Head
The Peoples Bank, East Tallassee
The Peoples Bank & Trust, Greenville
The Peoples Savings Bank, Clanton
The Perry County Bank
Tuskegee Federal Savings & Loan Association
Union Bank & Trust Company
United Security Bank, Butler ■

**financial institutions participating statewide*

IOLTA Participation Deadline Nears

The Alabama Interest on Lawyers' Trust Accounts (IOLTA) program has gotten off to a very successful start. The support of bar members has been overwhelming, with 22 percent of those eligible to participate doing so. As of May 25, 358 trust accounts representing 1,162 attorneys were converted to IOLTA accounts. Receipts to date total approximately $36,000.

IOLTA is a program allowing attorneys to convert their commingled client trust accounts to NOW accounts. The interest from these accounts is forwarded, at least quarterly, by financial institutions to the Alabama Law Foundation, Inc., which oversees the disbursement of IOLTA funds. A committee of the foundation currently is devising forms and procedures to use in making grants with IOLTA funds. The Supreme Court of Alabama's order authorizing IOLTA listed several acceptable uses of IOLTA interest which are: "to provide legal aid to the poor; to provide law student loans; to provide for the administration of justice; to provide law-related educational programs to the public; to help maintain public law libraries; to help maintain a client security fund; to help maintain an inquiry tribunal; and for such other programs for the benefit of the public as are specifically approved by the Supreme Court of Alabama from time to time." Based on the experiences of other jurisdictions the vast majority of grant applications the foundation receives are expected to be from organizations.

All attorneys admitted to practice in Alabama must make a decision by September 1, 1988, concerning their participation in IOLTA. Forms to be used when converting trust accounts may be obtained from Tracy Daniel at state bar headquarters. In order to convert their trust accounts attorneys simply complete a conversion form and send one copy to their bank, send a second copy to the foundation and keep a third copy for their records. Financial institutions throughout the state have been most cooperative in efforts to implement the program. Their adjustment to the procedures required by IOLTA has gone remarkably well.

Those attorneys not wishing to participate in the IOLTA program must notify the executive director of the Alabama State Bar by September 1, 1988, of their election not to participate. This election may be made in the form of a letter and must be done by September 1 of each year.

As the deadline approaches, support of IOLTA in both the legal and banking communities continues to grow. Alabama's program is well on the way to matching the success of other IOLTA programs. Participation in IOLTA requires very little effort on the attorney's part and can enhance the image of the legal profession while benefitting the general public. If you have not already converted your trust account please consider doing so; your support will be truly appreciated.

—Tracy Daniel

■

Correcting the Record on Appeal: A Primer

by G. Houston Howard, II

I. Introduction

Appellate review ordinarily is limited to an examination of rulings made by the trial court as disclosed by a document known as the *record on appeal*.[1] The record on appeal is the official chronicle of the litigation. It contains the papers filed in the clerk's office and the transcript of the evidence and argument presented in open court.[2]

Nevertheless, just like any other chronicle, it often contains errors and omissions. The jury instructions delivered to the judge may have found their way into some other file. The eloquent but objectionable oratory may have made no impression whatsoever on the court reporter. And finally, typographical errors weave their way through even the best edited chronicles, usually in the most misleading places.

Yet, with all of its imperfections, the record on appeal remains the sole account of the litigation that the appellate court will consider. If things occurred in the trial court that are not accurately reflected in that chronicle, then it must be corrected. Rule 10(f) of the Alabama Rules of Appellate Procedure provides the mechanism for doing this. This article provides a working guide to that rule.

II. The Scope of rule 10(f)

Rule 10(f) of the Alabama Rules of Appellate Procedure is as follows:

> If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the trial court either before or after the record is transmitted to the appellate court, or the appellate court, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the appellate court.

The rule is not designed to allow a party to offer on appeal additional evidence that he should have offered at trial,[3] nor is it designed to allow a trial court to conduct substantive proceedings that it should have conducted before entering judgment.[4]

It is, however, designed to allow the appellate court to review the trial court's actions based on the same information that was before the trial court. In determining whether material may be included in the record, the test is whether the material was before the trial court.[5]

Of course, material is formally placed before the court by filing it in the clerk's office or offering it during a hearing. Yet, motions and arguments often are presented informally in hallways and chambers. The informality with which material is presented is not a basis for refusing to memorialize the event in the record *as it occurred*.[6] The issue of whether *what occurred creates any reviewable issue* is a separate question that should be of no consequence to the trial court.

The court's task when ruling on a motion to correct the record is to make the chronicle as accurate as is possible. To this end, a motion under rule 10(f) may be used to correct a host of errors that occur in the preservation, transcription, transmission and designation of court records and proceedings.

A. Errors in preservation—Rule 10(f) finds its widest and perhaps most important application as a device for creating a record of events that were not memorialized in court records. Although rule 10(d) creates a procedure for creating a record of unrecorded proceedings,[7] often one does not discover that events were not memorialized until after the time limit set by that rule has elapsed. Rule 10(f) then is an available remedy.

Information that may be included in the record under rule 10(f) is not limited to proceedings that were originally recorded by the court reporter or to documents that were actually filed in the clerk's office. Requests made to the judge in chambers, in the court halls and in unrecorded bench conferences may be included in the record under rule 10(f).[8] Rule 10(f) has been used in conjunction with rule 10(d) to amend the appellate record to include unrecorded conferences,[9] motions,[10] opening statements,[11] closing arguments,[12] objections to jury charges[13] and agreements between counsel.[14]

Similarly, court records from other cases may be included in the record on appeal if the trial court considered them in rendering its decision.[15] For example, in *White v. State*, 378 So.2d 247 (Ala. Crim. App. 1979), the defendant contended that his acquittal in a related case barred the present prosecution. The trial judge had heard the earlier case, and having personal knowledge of the issues in the action, he had overruled the plea of double jeopardy. The court of criminal appeals, however, remanded the case to the trial court to make findings of fact about the issues in the prior action. A transcript of the prior action was prepared and certified to the court of criminal appeals.

Some *physical actions* that occur during a trial, such as the separation of the jury, the absence of the judge or a gesture made by a witness, ordinarily do not appear in the record. Yet, such information may be relevant to an issue raised on appeal, and when it is, rule 10(f) may be used to include it in the record.[16]

B. Errors in transcription—Rule 10(f) also provides a mechanism for correcting routine typographical errors in transcripts and related documents.[17] Of course, the corrections that may be made are limited to those that are necessary to make the record truly reflect what occurred in the circuit court. That is, if the documents filed in the circuit court contained errors,

then those errors may not be corrected on appeal;[19] the appellate record must truly disclose the documents that were before the trial court.

Snider v. State, 406 So.2d 1008 (Ala. Crim. App. 1981), illustrates this use of rule 10(f). Although the transcript in *Snider* reflected that the defendant had been convicted of selling marijuana, the formal judgment entry adjudged him guilty of "*possession* and sale of marijuana." The court held that this was a clerical error correctable by a motion under rule 10(f).19

C. Errors in designation—In civil cases the appellant is required to designate, within seven days after filing notice of appeal, the portions of the clerk's record and reporter's transcript that he desires included in the record. If the appellee wants to include additional items in the record, then he must designate those additional items within seven days after receiving the appellant's designation of the record.[20]

When one discovers that he needs a portion of record not timely designated, rule 10(f) affords a remedy. In *Ex parte Edwards*, 450 So.2d 464, 466 (Ala. 1984), the supreme court held that "[r]ule 10(f) acts as a safety valve to allow a party who has, by reason of 'error or accident,' failed to designate a material portion of the record to request the trial court or this Court to permit additional portions of the record to be included."

D. Errors in transmission—Similarly, rule 10(f) is also the proper remedy when the clerk has omitted documents from the record on appeal. The court of criminal appeals has relied on rule 10(f) in directing trial clerks to certify to it affidavits, search warrants and tape recordings that had been omitted from the record on appeal.[21]

E. Other applications—Rule 10(f) has been liberally applied in criminal cases to permit the appellate courts to resolve constitutional issues.[22] In some of these cases, information included in the record under rule 10(f) had never previously been presented to the trial court.

For example, in *Peal v. State*, 491 So.2d 991 (Ala. Crim. App. 1985), the court of criminal appeals directed the trial court to conduct a hearing to determine whether the state had breached a discovery agreement with the defendant. The trial court held a hearing at which witnesses testified about the agreement. Upon return to remand, the court of criminal appeals found that the state had breached the agreement, and it reversed the defendant's conviction.

Since the matters included in the record after remand had never previously been presented to the trial court, *Peal* represents a questionable use of rule 10(f).23 The remand in *Peal* would have been more properly justified as an exercise of the court's inherent power to direct further proceedings in the interests of justice.

III. Procedure under rule 10(f)

A. Time for filing motion—Although rule 10(f) provides that a motion to correct the record may be filed "before or after the record is transmitted to the appellate court . . .," it sets no time limit for filing the motion. Prudence dictates that one file such a motion as soon as possible; yet, court decisions establish that a party may, as of right, correct the record on appeal even *after the appellate court issues its opinion.*[24]

Ex parte Sawyer, 456 So.2d 112 (Ala. 1983), is illustrative. Although the appellant in *Sawyer* had entered a plea of guilty, she sought appellate review of the trial court's action in denying her motion to suppress. The court of criminal appeals refused to review the issue, holding that she had waived it.

After the court issued its opinion, the defendant filed an application for rehearing and a supplemental record reflecting that she had expressly reserved her right to present the search and seizure question on appeal. The court of criminal appeals overruled the application. The Alabama Supreme Court granted certiorari and directed the court of criminal appeals to reconsider the case based on the supplemental record.

When some document or transcript is omitted from the record, the court frequently refers to this omission in its opinion and to the availability of rule 10(f) as a remedy.[25] This is an invitation for the loser to present the omitted material to the court with an application for rehearing.[26]

B. Place for filing motion—The trial court, not the appellate court, is the proper forum for resolving disputes about the factual accuracy of the record on appeal. Rule 10(f) expressly provides that "[i]f any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court . . . " Consequently, one should ordinarily file a motion to correct the record in the trial court.[27]

Although the trial court alone may determine *what occurred* before it, the appellate court may direct the trial court to prepare a supplemental record of what occurred or include omitted documents in the record.[28] If one anticipates difficulty in timely obtaining a supplemental record, one may file a motion to remand in the appellate court asking it to direct the trial court to prepare a supplemental record.[29]

C. Content of motion—A motion to correct the record should state the specific defect in the record and the specific correction sought.[30] If a transcript of part of the proceedings is not available, the movant's statement of the evidence under rule 10(d) should be attached to the motion.[31] Similarly, if one desires to include

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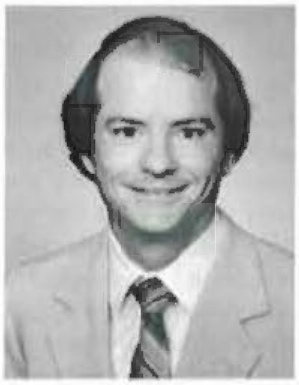

some omitted document in the record, one should attach that document to the motion. A sample motion appears at the end of this article.

D. Proceedings on motion—Unless the parties reach a stipulation about what the record should contain, the court should give all parties an opportunity to be heard on the motion.[32] Witnesses may testify about *what occurred* on the original trial. If motions or objections were presented to the judge in chambers, in bench conferences or in the hallways, then witnesses may testify to these occurrences.[33]

Although the court has held that one may not use rule 10(f) to offer new, substantive evidence concerning the merits of the case,[34] in *Rogers v. State*, 491 So.2d 987 (Ala. Crim. App. 1986), the court permitted a witness whose testimony had not originally been recorded to testify again. The court then considered this new testimony in reviewing the trial court's judgment. Although the procedure used in *Rogers* seems improper under rule 10(f), apparently no one objected to it.

The testimony offered at the hearing should be transcribed and certified to the appellate court. Additionally, the trial court should enter an order settling the dispute about the contents of the record,[35] even if the parties reach a stipulation.[36]

IV. Review of trial court

One must distinguish factual issue about *what occurred* in the trial court from related legal issue about the *significance to appellate review* of those occurrences. The trial court alone has the authority to resolve *factual issues* about *what occurred* before it; absent a showing that it intentionally falsified its records, its determination is conclusive.[37]

Yet, once the trial court resolves the factual issues, the appellate court is the final authority for determining whether those occurrences should be considered on appeal, and if so, their legal effect on the issues raised. The trial court has no authority to include in the record things that admittedly were not originally before it, nor does it have any authority to exclude from the record things that admittedly were originally before it.[38]

To challenge the composition of the record in the appellate court, one first must challenge the composition of the record in the trial court. This is ordinarily done by filing a motion to correct the record in the trial court.

If the trial court improperly permits documents to be included in the record, the aggrieved party may file a motion to strike the documents in the appellate court,[39] or he may file an independent action for a writ of mandamus in the appellate court.[40] No Alabama decision explicitly sets forth the procedure for obtaining review of the trial court's refusal to include things in the record. In *Finch v. State*, 479 So.2d 1314 (Ala. Crim. App. 1985), the court of criminal appeals reversed the trial court for refusing to supplement the record, noting that it was "[a]pplying Rule 10(f) . . . upon suggestion of appellant . . ."

V. Effect of corrected record

A. In general—The corrected record replaces the original record for all purposes. The court "must decide any reviewable question by what the record on appeal now shows, not by what it previously showed."[41] Similarly, when "no record is made of the evidence taken at a trial and the trial court approves a statement of the evidence . . . [the appellate court] must accept that statement of the evidence as being true."[42]

B. Incomplete record: (1) Civil Cases—In civil cases the burden rests on the appellant to present a record showing the error committed by the trial court. If the record does not contain sufficient detail or clarity to show the trial court's error, then the appellate court will affirm the judgment.[43]

Unfortunately, when a transcript of the testimony is not available, it sometimes is impossible to obtain a *complete* statement of the evidence under rule 10(d). When the record shows on its face that it is incomplete, the appellate court *assumes* that the missing evidence supports the trial court's judgment; this assumption prevents a reversal based on the insufficiency of the evidence.[44]

Seidler v. Phillips, 496 So.2d 714 (Ala. 1986), a boundary line dispute, represents a harsh application of this principle. The court reporter lost the transcript notes, and the appellants prepared a statement of the evidence under rule 10(d). The appellee apparently filed additions and corrections. Unable to remember specific testimony, the trial court entered an order noting that "it is difficult to say that the statement of facts presented by either party is inaccurate."

Although the Alabama Supreme Court questioned the sufficiency of the evidence, it affirmed based on the insufficiency of the record. The court noted, "Although there is no clear evidence in the record to support the trial court's finding of adverse possession . . . we must assume that the missing evidence is sufficient to support the judgment . . ."

In *Seidler* the appellants were precluded from appellate review of the sufficiency of the evidence because the court reporter had lost the transcript notes. Certainly this is a harsh remedy for one who was without fault; a more appropriate remedy would have been remandment for retrial. Yet, the Alabama courts have held that the court reporter's loss of notes is not a sufficient basis for awarding the appellant a new trial in a civil case.[45]

(2) Criminal cases—In criminal cases the state is required to provide a court reporter at trial without a request from the defendant.[46] Further, when a transcript of the evidence is unavailable, a statement of the evidence prepared under rule 10(d) is not always sufficient to satisfy the defendant's right to due process of law.

In *Ex parte Steen*, 431 So.2d 1385 (Ala. 1983), the court set forth the normal procedure when difficulties arise in obtaining a transcript:

> "Customarily, where a transcript has not been timely filed in the appellate court, it remands the case to the trial court to determine whether the appellant was at fault in failing to file. The trial court, if it determines that the appellant was without fault, then directs the preparation of the transcript or a succinct statement of the evidence in lieu of a transcript. If preparation is not feasible, the trial court is then required to grant a new trial."[47]

VI. Conclusion

Rule 10(f) provides a simple and efficient remedy for most of the common problems that arise in presenting an accurate and complete chronicle of litigation to an appellate court. If used wisely, it allows one to maintain that paper trail from the circuit court to the appellate court that is necessary for effective appellate review. ■

IN THE CIRCUIT COURT OF
_____ COUNTY

_____
Plaintiff
V.

_____
Defendant

Civil Action No. _____

MOTION TO CORRECT RECORD ON APPEAL

1. The defendant filed notice of appeal to the Alabama Supreme Court on (date), and the court reporter's transcript was filed with the circuit clerk on (date).

2. The transcript does not truly disclose what occurred in this court because it does not contain a record of the defendant's objections to the jury charge and the court's ruling on those objections.

3. Attached hereto and made a part hereof as exhibit one is the defendant's statement pursuant to rule 10(d) of the Alabama Rules of Appellate Procedure summarizing the unrecorded proceedings.

Wherefore, the defendant moves the court, pursuant to rules 10(d) and 10(f) of the Alabama Rules of Appellate Procedure, to correct the record on appeal to include the defendant's objections to the court's jury charge and the court's ruling thereon, as shown on exhibit one.
(Attorney's Signature)

STATE OF ALABAMA
COUNTY OF _____

AFFIDAVIT OF (ATTORNEY)

Before the undersigned Notary Public for the State of Alabama at Large personally appeared (attorney), who says on oath as follows:

1. My name is (Name), and I was the trial attorney for the defendant in this action.

2. The trial of this case was held on (date). Immediately after the judge instructed the jury and before the jury retired to consider its verdict, the judge motioned for the plaintiff's attorney and me to approach the side of his bench. We walked to the side of the bench, outside of the hearing of the court reporter, and the judge asked us if we had any exceptions to his charge. The plaintiff's attorney stated that he had no exceptions, and I stated in substance,

> Yes, your Honor, we object to the court's instructing the jury that it may award damages for mental anguish in this case. This is an action for breach of contract, and damages for mental anguish are not recoverable. This case does not come within any exception to the rule against awarding damages for mental anguish.

The judge thereafter stated, "Overruled. I will send the jury out." The judge thereafter directed the jury to begin deliberating.

Dated this the _____ day of _____198____.

_____

Sworn to and subscribed before me on this the _____ day _____198____.

_____
Notary Public

FOOTNOTES

[1] *Jones v. Jones*, 464 So.2d 125, 127 (Ala. Civ. App. 1985).
[2] Ala. R. App. P. 10(b).
[3] *See, e.g., Williams v. Ford*, 402 So.2d 903, 904 N.1 (Ala. 1981); *American Beneficial Life Ins. Co. v. Ussery*, 373 So.2d 824, 827 (Ala. 1979)); *Bledsoe v. State*, 409 So.2d 924, 925-926 (Ala. Crim. App. 1981); *Tatum v. State*, 405 So.2d 951, 952 (Ala. Crim. App. 1981).
[4] *See Luke v. State*, 484 So.2d 531 (Ala. Crim. App. 1985).
[5] *See Sheetz, Aiken, & Aiken, Inc. v. Louverdrape, Inc.*, 514 So.2d 797 (Ala. 1987).
[6] *See Weaver v. State*, 401 So.2d 344 (Ala. Crim. App. 1981).
[7] *See Todd v. United Steelworkers of America*, 441 So.2d 889 (Ala. 1983). Examples of statements of the evidence under rule 10(d) are contained in *Gullatt v. City of Hoover*, 459 So.2d 1006 (Ala. Crim. App. 1984), and *Todd v. Slim's Auto*, 496 So.2d 92 (Ala. Civ. App. 1986).
[8] *See Weaver v. State*, 401 So.2d 344 (Ala. Crim. App. 1981).
[9] *Reid v. Southeastern Materials, Inc.*, 396 So.2d 667 (Ala. 1981).
[10] *Weaver v. State*, 401 So.2d 344 (Ala. Crim. App. 1981) (motion for continuance).
[11] *Mathews v. Tuscaloosa County*, 421 So.2d 98, 99 (Ala. 1982).
[12] *Christian v. State*, 351 So.2d 623, 625 (Ala. 1977).
[13] *Cook v. State*, 437 So.2d 1378 (Ala. Crim. App. 1983).
[14] *Peal v. State*, 491 So.2d 991 (Ala. Crim. App. 1985) (unrecorded discovery agreement between the state and the district attorney).
[15] *See Waldrep v. Goodwin*, 348 So.2d 491 (Ala. 1977); but see *Bledsoe v. State*, 409 So.2d 924 (Ala. Crim. App. 1981), *cert. denied*, 409 So.2d 924 (Ala. 1982).
[16] *See Cockrell v. Ferries*, 375 F.2d 889 (5th Cir. 1967); *Satterwhite v. State*, 359 So.2d 819 (Ala. 1977) (extent of attorney's participation in prosecution).
[17] *Pendleton v. State*, 295 Ala. 325, 329 So.2d 142 (1976) (error in indictment); *Howard v. State*, 390 So.2d 1070, 1076 (Ala. Crim. App.) (error in transcription of jury charge), *cert. denied*, 390 So.2d 1077 (Ala. 1980).
[18] *See Finch v. State*, 479 So.2d 1314 (Ala. Crim. App. 1985).
[19] *Accord, Floyd v. State*, 486 So.2d 1314 (Ala. Crim. App. 1985).
[20] Ala. R. App. P. 10(b).
[21] *Peal v. State*, 491 So.2d 991 (Ala. Crim. App. 1985); *Finch v. State*, 479 So.2d 1314 (Ala. Crim. App. 1985); *Smith v. State*, 470 So.2d 1365, 1367 (Ala. Crim. App. 1985).
[22] *Satterwhite v. State*, 359 So.2d 819 (Ala. 1977) (remand to determine whether prosecutor had conflict of interest); *White v. State*, 378 So.2d 239, 246 (Ala. Crim. App.) (remand to determine whether prosecution barred by double jeopardy), *cert. denied*, 378 So.2d 247 (Ala. 1979).
[23] *See Richburg v. Cromwell*, 428 So.2d 621, 622 (Ala. 1983) ("This rule was never intended to allow matter to be included in the record on appeal that was not before the trial court.").
[24] *See Ex parte Sawyer*, 456 So.2d 112 (Ala. 1983) (reversing court of criminal appeals for refusal to permit correction; after certiorari granted by supreme court); *Pendleton v. State*, 295 Ala. 325, 329 So. 2d 142 (1976) (reversing court of criminal appeals for refusal to permit correction); *Robinson v. State*, 441 So.2d 982 (Ala. Crim. App. 1983); but see *Walker v. Eubanks*, 424 So.2d 631, 634 (Ala. Civ. App. 1982) "[I]t is in our discretion to 'allow' it or not.").
[25] *See, e.g., Fuller v. State*, 472 So.2d 452, 454 (Ala. Crim. App. 1985); *Welch v. State*, 455 so.2d 299 (Ala. Crim. App. 1984); *Morton v. State*, 409 So.2d 968 (Ala. Crim. App. 1981).
[26] *See Ex parte Sawyer*, 456 So.2d 112 (Ala. 1983); *Howard v. State*, 390 So.2d 1070 (Ala. Crim. App.), *cert. denied*, 390 So.2d 1077 (Ala. 1980).
[27] 9 *Moore's Federal Practice* paragraph 210.08[2], at 10-58 (2d ed. 1978).
[28] *Sheetz, Aiken & Aiken, Inc. v. Louverdrape, Inc.*, 514 So.2d 797 (Ala. 1987); *Satterwhite v. State*, 359 So.2d 819, 820 (Ala. 1977).
[29] *See Howard v. State*, 390 So.2d 1070, 1076 (Ala. Crim. App.), *cert. denied*, 390 So.2d 1077 (Ala. 1980).
[30] Ala. R. App. P. 27.
[31] 9 *Moore's Federal Practice* paragraph 210.08[3], at 10-63.
[32] *Id.*
[33] *See Weaver v. State*, 401 So.2d 344 (Ala. Crim. App. 1981).
[34] *See* cases cited note 3 *supra*.
[35] *See Watson v. State*, 398 So.2d 320, 331 (Ala. Crim. App. 1980), *cert. denied*, 398 So.2d 332 (Ala. 1981).
[36] *See Liberty Nat'l Life Ins. Co. v. Patterson*, 278 Ala. 43, 48, 175 So.2d 737 (1965).
[37] *See* 9 *Moore's Federal Practice* paragraph 210.08[1], at 10-48; *Johnson v. Bryars*, 264 Ala. 243, 247, 86 So.2d 371 (1956); *In re: Gunn*, 467 So.2d 963, 964 (Ala. Civ. App. 1985); *Nesbitt v. State*, 343 So.2d 1240 (Ala. Crim. App.), *cert. denied*, 343 So.2d 1243 (Ala. 1977).
[38] *See Mathews v. Tuscaloosa County*, 421 So.2d 98 (Ala. 1982); *Finch v. State*, 479 So.2d 1314 (Ala. Crim. App. 1985); *Weaver v. State*, 401 So.2d 344 (Ala. Crim. App. 1981); 9 *Moore's Federal Practice* paragraph 210.08[1], at 10-48 to 10-52.
[39] *See Tatum v. State*, 405 So.2d 951 (Ala. Crim. App. 1981); *Summerlin v. Bowden*, 353 So.2d 1175 (Ala. Civ. App. 1978).
[40] *See Ex parte Edwards*, 450 So.2d 464 (Ala. 1984).
[41] *Ballou v. State*, 365 So.2d 352, 354 (Ala. Crim. App. 1978).
[42] *Abel v. Hadder*, 404 So.2d 64, 67 (Ala. Civ. App. 1981).
[43] *Sam's v. Equitable Life Assurance Society*, 402 So.2d 999, 1002 (Ala. Civ. App. 1981).
[44] *Brumbeloe v. Brumbeloe*, 429 So.2d 1063, 1065 (Ala. Civ. App. 1983); *Nadreau v. Nadreau*, 395 So.2d 1017, 1019 (Ala. Civ. App. 1981).
[45] *Snider v. Alabama Power Co.*, 346 So.2d 946, 950 (Ala. 1977); *Perkins v. Perkins*, 465 So.2d 414 (Ala. Civ. App. 1984), *cert. denied*, 465 So.2d 414 (Ala. 1985).
[46] *Ex parte White*, 403 So.2d 292 (Ala. 1981); *but see Mosley v. State*, 461 So.2d 34 (Ala. Crim. App. 1984) (rule did not apply to sentencing hearing when rule 10(d) had not been used); *Marquis v. State*, 439 So.2d 197 (Ala. Crim. App. 1983) (defendant entitled to court reporter upon request in probation revocation hearing).
[47] 431 So.2d at 1388.

cle opportunities

july

11-13

TRIAL EVIDENCE, CIVIL PRACTICE, EFFECTIVE LITIGATION
Snowmass Village, Snowmass, Colorado
American Law Institute-American Bar Association
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14-15

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Practising Law Institute
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14-16

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American Law Institute-American Bar Association
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19 tuesday

RECENT DEVELOPMENTS IN THE EMINENT DOMAIN LAW
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Montgomery County Bar Association
Credits: 1.0 Cost: $15 nonmembers
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21-23

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

28 thursday

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Montgomery County Bar Association
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29 friday

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29-2

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Quebec
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30-31

LITIGATING PSYCHOLOGICAL INJURIES
Hyatt Islandia Hotel, San Diego
The Medi-Legal Institute
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august

2 tuesday

BASIC DRAFTING OF WILLS AND TRUSTS IN ALABAMA
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National Business Institute, Inc.
Credits: 6.0 Cost: $98
(715) 835-8525

3 wednesday

BASIC DRAFTING OF WILLS AND TRUSTS IN ALABAMA
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National Business Institute, Inc.
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4 thursday

BASIC DRAFTING OF WILLS AND TRUSTS IN ALABAMA
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National Business Institute, Inc.
Credits: 6.0 Cost: $98
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4-6

ACQUISITIONS AND MERGERS
The Stanford Court, San Francisco
Practising Law Institute
Credits: 13.3 Cost: $475
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6-7

AIDS—CURRENT MEDICAL AND LEGAL ASPECTS
Hotel Intercontinental, New York
The Medi-Legal Institute
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11 thursday

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Montgomery County Bar Association
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11-12

NORTHEAST REGIONAL TRIAL ADVOCACY COURSE
Hofstra University, Hempstead, New York
National Institute for Trial Advocacy
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16 tuesday

WORKER'S COMPENSATION
Birmingham
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17 wednesay

WORKER'S COMPENSATION
Huntsville
National Business Institute, Inc.
Credits: 6.0 Cost: $98
(715) 835-8525

18 thursday

WORKER'S COMPENSATION
Mobile
National Business Institute, Inc.
Credits: 6.0 Cost: $98
(715) 835-8525

CORPORATE ADVICE
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Montgomery County Bar Association
Credits: 1.0 Cost: $15 nonmembers
(205) 265-4793

19 friday

WORKER'S COMPENSATION
Montgomery
National Business Institute, Inc.
Credits: 6.0 Cost: $98
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25 thursday

ALABAMA SECURITIES ACT
County Courthouse, Montgomery
Montgomery County Bar Association
Credits: 1.0 Cost: $15 nonmembers
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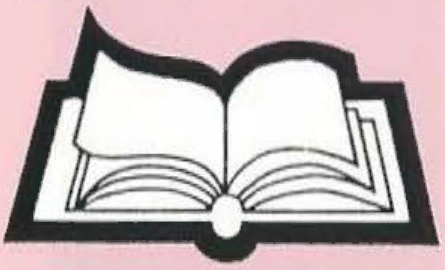

september

9 friday

CIVIL PROCEDURE
Harbert Center, Birmingham
Alabama Bar Institute for CLE
(205) 348-6230

15 thursday

FAMILY LAW
Civic Center, Montgomery
Alabama Bar Institute for CLE
(205) 348-6230

16 friday

FAMILY LAW
Civic Center, Birmingham
Alabama Bar Institute for CLE
(205) 348-6230

19-20

LITIGATION RISK ANALYSIS
Four Seasons Clift Hotel, San Francisco
Litigation Risk Analysis, Inc.
Credits: 10.8 Cost: $800
(415) 854-1104

22 thursday

REAL ESTATE
Civic Center, Montgomery
Alabama Bar Institute for CLE
(205) 348-6230

23 friday

REAL ESTATE
Civic Center, Birmingham
Alabama Bar Institute for CLE
(205) 348-6230

29 thursday

TRIAL SKILLS
Von Braun Civic Center, Huntsville
Alabama Bar Institute for CLE
(205) 348-6230

30 friday

TRIAL SKILLS
Civic Center, Birmingham
Alabama Bar Institute for CLE
(205) 348-6230

Consultant's Corner

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

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

Why don't they tell it like it is?

Many vendors today have developed a remarkable version of double-speak. They have a litany of "knee-jerk" responses that cover any situation, be it an innocent request for information to a nasty reaction to the latest glitch. Herewith, a sampling of the more egregious ones:

Q. When will the version you promised me be available?

A. We are working on it right now and it should be in beta testing this month.
Translation...We have not even begun to work on it yet. We are not going to waste our money on your dumb scheme until we get paid to do so.

Q. Is this thing of yours compatible with that thing of their's?

A. Absolutely.
Translation...I do not have the vaguest idea. I just hope you do not pin me down too hard before we close the deal.

Q. What about obsolescence?

A. This is obsolescence-proof. It will last forever.
Translation...I hope it will last until I get out of your office and collect my commission.

Bornstein

Q. We cannot seem to get the Framis program to work.

A. I am sure it is just a minor matter.
Translation...Why did you have to bring up this chestnut just as I qualify for the trip to Acapulco?

Q. What if our requirements change?

A. No problem, we are as close as the phone.
Translation...What do you want? Be grateful the lights go blink, blink, blink.

Q. Are you active in legal research?

A. Are we active?...You must be kidding!
Translation...How did this nerd find out we are going in the tank next week?

Q. Where do you expect to be in ten years?

A. Right on top of the legal market.
Translation...Uruguay. I understand they do not have extradition treaties with the United States.

Q. If we do business with you, will you guarantee the results?

A. Absolutely!
Translation...When were you born? This is the '80s!

On a more serious note

Watch out for the glib purveyors of "what you want to hear." Most of them have (at most) a very shallow concept of your needs. Your long-term interests lie with established vendors, those with more to lose than a lawsuit, filed with an agent of record who lives in a post office box. ■

Justice Hugo Black and the First A

Hugo L. Black
1886-1971

by Hollinger F. Barnard

The First Amendment views of Justice Hugo Black are so well-known that they require no citation or explanation. He was a literalist and an absolutist. He carried a copy of the United States Constitution in his vest pocket at all times. He knew what the Constitution said, and he believed it meant what it said.[1]

The First Amendment to the Constitution reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." That is an unequivocal and unconditional statement, and Justice Black read it as such. He repeatedly wrote, often in dissent or special concurrence,[2] that the First Amendment of the United States Constitution meant that in this country, government[3] simply cannot censor speech.

As early as his fourth term on the Court, the justice began to express his commitment to the First Amendment rights. He wrote for the Court in *Bridges v. California*[4] that "it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions."[5] Black's earlier, unpublished, draft dissent in that case stated his position more emphatically.

> "First in the catalogue of human liberties essential to the life and growth of a government of, for, and by the people are those liberties written into the First Amendment to our Constitution. They are the pillars upon which popular government rests and without which a government of free men cannot survive."[6]

In the same term as the *Bridges* decision, Justice Black went public with the passion of his position, this time writing in dissent, in *Milkwagon Drivers Union v. Meadowmoor Dairies*.[7]

mendment: an Alabama Connection

> "... I view the guarantee of the First Amendment as the foundation upon which our governmental structure rests and without which it could not continue to endure as conceived and planned. Freedom to speak and write about public questions is as important to the life of our government as is the heart of the human body. In fact, this privilege is the heart of our government. If that heart be weakened, the result is debilitation; if it be stilled, the result is death."[8]

The First Amendment, of course, expresses not one right, but a group of related rights: freedom of speech and of the press, freedom of religion and of association and assembly, and the right to petition government for redress of grievances. One Hugo Black scholar has suggested that "[t]o isolate representative opinions of Justice Black in the field of free speech, free assembly, free press, and censorship is, in a way, to pull apart a fabric whose threads are carefully interwoven."[9] With due recognition that we "pull apart a fabric whose threads are carefully interwoven," this article focuses on three of the justice's First Amendment opinions to suggest an Alabama connection to each of those opinions.

To suggest an Alabama connection to Hugo Black's judicial philosophy and to his published opinions is not exactly a radical proposal. Hugo Black was, after all, born and reared in Alabama, educated in Alabama and engaged in the practice of law in Alabama.[10] He was also vilified in this state and is now honored in this state.[11] Where his name was once anathema to perhaps the majority of the citizens of this state for his consistent support of the rights of black people from the nation's highest bench, his name now is engraved on the new federal courthouse in Birmingham, Alabama, in tribute to his courageous advocacy of civil rights for all people in this nation.

When Hugo Black was appointed to the Supreme Court in 1937, he assumed permanent residence in Washington, D.C., and never again lived in Alabama, although he visited occasionally.[12] For ten years prior to the Court appointment, he had served as United States Senator from Alabama and maintained residences (as was and is the practice for United States Senators) in both Birmingham and Washington and divided his time between the two places. Despite his absence from the state, however, Hugo Black continued to have contact with Alabama. While on the Court, his law clerks often were Alabamians.[13] His son, Hugo Black, Jr., moved to Birmingham to practice law after graduation from Yale Law School.[14] And the justice's sister-in-law, Virginia Foster Durr, returned to Alabama with her husband, Clifford Durr, in 1951. All of this family and extended family[15] kept the justice in touch with his native state.

It is Justice Black's relationship and correspondence with his wife's sister, Virginia Durr, that suggests an Alabama connection with at least three of the justice's published opinions: his dissenting opinion in *Barenblatt v. United States* in 1959, his concurring opinion in *New York Times Co. v. Sullivan* in 1964, and his dissenting opinion in *Tinker v. Des Moines School District* in 1969.

Free association and expression: *Barenblatt v. United States*

In *Barenblatt v. United States*,[16] a teacher at Vassar College had been held in contempt for refusing to answer questions of the House Committee on Un-American Activities (popularly known as HUAC). The questions dealt with the teacher's alleged associations with Communists. The events that prompted the case occurred during the height of the "red-scare" in this country. Not surprisingly, "[T]he Court balanced Congress' need to investigate against the individual interest of the instructor in privacy of belief and held that the governmental interest must prevail."[17] Justice Black was opposed to such judicial balancing, especially when First Amendment rights were at stake. He particularly protested the majority's balancing in this case because the Court had failed to consider Barenblatt's own individual rights and interests in the balance:

> "... the real interest in Barenblatt's silence, the interest of the people as a whole in being able to join organizations, advocate causes and make political "mistakes" without later being subjected to governmental penalties for having dared to think for themselves. It is this right, to err politically, which keeps us strong as a Nation.
>
> • • •
>
> "Ultimately all the questions in this case really boil down to one—whether we as a people will try fearfully and futilely to preserve democracy by adopting totalitarian methods, or whether in accordance

Hollinger F. Barnard is a graduate of Birmingham-Southern College and the University of Alabama School of Law. She is a member of the Birmingham firm of Johnston, Barton, Proctor, Swedlaw & Naff. She is editor of Outside the Magic Circle: The Autobiography of Virginia Foster Durr, *which was published by the University of Alabama Press in 1985 and republished in paperback by Simon & Schuster, Inc., 1987.*

with our traditions and our Constitution we will have the confidence and courage to be free."[18]

Throughout the 1950s, the Supreme Court consistently affirmed the government's right to require loyalty oaths and impose restrictions and penalties on those who espoused communist beliefs. Justice Black just as consistently dissented; he believed that these loyalty-security measures infringed upon freedom of belief and expression and thus violated the First Amendment.[19] He understood that the Court's decisions were prompted at least in part by the red-scare atmosphere of the time, but he had hoped that "in calmer times when present pressures, passions, and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society."[20]

. . . in this dissent, he seems to be on the "wrong" side of the First Amendment issue.

By the time Justice Black penned his dissent in *Barenblatt* he had more than a theoretical knowledge of the harm done by the red-scare atmosphere and the government's loyalty-security measures: in March 1954, his wife's sister, Virginia Durr, was called to testify before the Senate Internal Security Subcommittee (the Senate's equivalent of HUAC). The committee did not accuse Durr of being a Communist, but she was asked to identify certain named people as Communists. She announced instead that she was standing mute and refused to answer any of the Committee's questions.[21] Virginia's husband, Cliff, represented Aubrey Williams, who also was called to testify. The committee permitted Cliff Durr to cross-examine the Justice Department informant, Paul Crouch, who was to be the government's star witness at the hearing. When pressed on cross-examination, Crouch accused Cliff Durr of attending top-echelon meetings of the Communist Party in New York.[22] Durr effectively exposed Crouch's testimony as nothing more than self-aggrandizing fantasy, but he was so incensed by Crouch's accusations that he attempted to attack Crouch, was restrained by federal marshals and suffered a mild heart attack.[23]

Justice Black was close to both Virginia and Clifford Durr, by kinship, by friendship and by certain shared beliefs in the rights that form the basis for a free and democratic society.[24] He knew that the Durrs were not Communists but that they were not afraid to talk to people of various political persuasions.[25] Virginia Durr has said:

> "I think Hugo thought I was very foolish to take up with strange foreigners in Washington, but he never said anything to me about it or to Cliff either. As the cold war heated up, many people became as frightened of the red-scare movement in this country as the anti-Communists were frightened of Russia, but Hugo never criticized me or Cliff for associating with foreigners."[26]

Hugo Black did berate Virginia Durr for supporting Henry Wallace and the Progressive Party in the presidential election of 1948, but not because of the fact that the Wallace campaign attracted Communist sympathizers. Black simply "thought [Virginia] was a total idiot to leave the Democratic party and vote for Henry Wallace. Hugo was a yellow-dog Democrat. He thought you had to stick by the party . . . ."[27] But, as the justice had insisted in his *Barenblatt* dissent, the First Amendment protects an individual's right to "make political 'mistakes' without later being subjected to governmental penalties for having dared to think for themselves."[28]

Freedom of the press: *New York Times v. Sullivan*

In March 1960, a full-page advertisement entitled "Heed Their Rising Voices" was published in the *New York Times*.[29] The ad was sponsored by the Committee to Defend Martin Luther King and the Struggle for Freedom in the South.[30] The text of the ad accused the Montgomery, Alabama, police of ringing the campus of a local all-black college (Alabama State University) after students from the college gathered on the state capital steps to sing "My Country 'Tis of Thee," of padlocking the college dining hall and of arresting Dr. King seven times. Montgomery Police Commissioner Sullivan sued the *Times* for libel, and a Montgomery coutny jury awarded him $500,000 in damages, the full amount claimed.[31]

The Alabama Supreme Court affirmed the jury's verdict,[32] but the United States Supreme Court reversed. The nation's highest court quoted Judge Learned Hand's ringing declaration that the first amendment "'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.'"[33] The Court concluded that Alabama's libel law "is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct and the Court fashioned:

> " . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[35]

The Court expressly considered the *Sullivan* case "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attack on government and public officials."[36] The "actual malice" test that the Court devised was necessary to give the freedoms of expression the breathing space those freedoms need to survive.[37]

Despite the Court's ringing words, Justice Black chose to write separately in concurrence (joined by Justice Douglas, the other First-Amendment absolutist on the Court at the time).[38] Black agreed that the Alabama jury verdict should be reversed, but on absolutist grounds.

> "I base my vote to reverse on the belief that the First and Fourteenth Amendments not merely 'delimit' a State's power to award damages to 'public officials against critics of their official conduct' but completely prohibit a State from exercising such power . . . . Unlike the Court, therefore, I vote to reverse exclusively on the ground that the *Times* and the individual defendants had an absolute, unconditional right to publish in the *Times* advertisement their criticisms of the Montgomery agencies and officials."[39]

Such a position was not new for Black; he long had espoused an unconditional interpretation of the free press clause of the first amendment.[40] He believed "[a]n unconditional right to say what one pleases about public affairs . . . to be the minimum guarantee of the First Amendment."[41]

What is noticeable about Black's concurrence in *Sullivan* is its emphasis on the "factual background of this case."[42] Justice Black describes the atmosphere in Montgomery in some detail, and with some familiarity.

> "Montgomery is one of the localities in which widespread hostility to desegregation has been manifested. This hostility has sometimes extended itself to persons who favor desegregation, particularly to so-called 'outside agitators,' a term which can be made to fit papers like the *Times*, which is published in New York. The scarcity of testimony to show that Commissioner Sullivan suffered any actual damages at all suggests that these feelings of hostility had at least as much to do with rendition of this half-million-dollar verdict as did an appraisal of damages. Viewed realistically, this record lends support to an inference that instead of being damaged Commissioner Sullivan's political, social, and financial prestige has likely been enhanced by the *Times*' publication."[43]

Although Justice Black expressly tied his remarks about the factual background of the *Sullivan* case to the record before the Court on appeal, we know that Justice Black had information about the racial atmosphere in Montgomery from sources other than the record on appeal in *Sullivan*.

Virginia Durr, a lifelong devoted correspondent with family and friends, wrote to her brother-in-law fairly frequently after Virginia and Cliff moved back to Alabama.[44] Virginia's letters sometimes were long and anguished descriptions of the tension and overt violence that enveloped the Montgomery community as it came to terms with the *Brown* decision, the bus boycott and the freedom riders.[45] Hugo Black's letters back to Virginia were brief and discreet expressions of family affection and snippets of family news.[46] The justice was much too circumspect to respond to his sister-in-law's comments on racial strife in Montgomery, but his response leaves no doubt that he received and read Virginia's letters and that from those letters he knew quite a bit about the atmosphere of hostility in Montgomery at the time of the *Sullivan* decision.

Freedom of speech: *Tinker v. Des Moines School District*

In *Tinker v. Des Moines School District*,[47] as in *Barenblatt v. United States*, Hugo Black wrote in dissent. But in this dissent, he seems to be on the "wrong" side of the First Amendment issue. As in *Barenblatt* and *Sullivan*, Justice Black's Alabama connection with Cliff and Virginia Durr provides a clue to Black's position in the *Tinker* dissent.

In *Tinker*, a small group of students (three children) wore black armbands to their respective schools "to publicize their objections to the hostilities in Vietnam and their support for a truce."[48] Learning of the armband plan beforehand, the Des Moines school principals

"adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband."[49] The three children wore their armbands to school, refused to remove them and were suspended. When the children, through their fathers, filed a complaint in federal district court asking for an injunction to restrain the schools from disciplining the children, the district court dismissed the complaint.[50] When the Eighth Circuit Court of Appeals considered the case *en banc*, that court split equally, leaving the district court ruling intact.[51]

The United States Supreme Court found that the children's wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. "[Although a type of symbolic speech], [i]t was closely akin to 'pure speech' which . . . is entitled to comprehensive protection under the First Amendment."[52] The Supreme Court reversed the lower court, holding that "the prohibition of expression of one particular opinion [here, opposition to the nation's involvement in Vietnam], at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible."[53]

Justice Black dissented, in surprisingly passionate language.[54] He objected primarily to the Court's becoming the arbiter of discipline in the nation's schools. He held fast to his belief that the content of speech never must be subject to censor, but he reminded the majority that the Court has clearly, and properly, retained the right to limit speech as to time and place when appropriate.

> "While I have always believed that under the First and Fourteenth Amendments neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations *where* he pleases and *when* he pleases."[55]

Justice Black found the children's wearing of armbands to have been diverting, although not disruptive, and he disapproved of the diversion.[56] The language of the dissent reveals the justice's strong disagreement with the Court's decision:

> "[I]f the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary age of permissiveness in this country fostered by the judiciary.
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> "In my view, teachers, in state-controlled public schools are hired to teach there . . . .Nor are public school students sent to the schools at public expense to broadcast political or any other views to educate and inform the public . . . .It may be that the Nation has outworn that old-fashioned slogan that 'children are to be seen not heard,' but one may, I hope, be permitted to harbor the thought that taxpayers send children to school on the premise that at their age they need to learn, not teach.
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> "School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens.
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> "One does not need to be a prophet or the son of a prophet to know that after the Court's holding today some students in Iowa schools and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders. This is the more unfortunate for the schools since groups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins and smash-ins. Many of these student groups, as is all too familiar to all who read the newspapers and watch the television news programs, have already engaged in rioting, property seizures, and destruction.
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> "Turned loose with lawsuits for damages and injunctions against their teachers as they are here, it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils. This case, therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students. I, for one, am not fully persuaded that school pupils are wise enough, even with this Court's expert help from Washington, to run the 23,390 public school systems in our 50 states. I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender

control of the American public school system to public school students. I dissent."[57]

Again, Virginia Durr's relationship with the justice provides a clue to the vehemence of Hugo Black's dissent in *Tinker*. By all accounts, Hugo Black was a controlled and disciplined person who believed in the obedience of children and the orderly conduct of the nation's citizenry.[58] He declared in *Tinker* that, "[U]ncontrolled and uncontrollable liberty is an enemy to domestic peace."[59] What that statement fails to acknowledge, however, is that the tension between peace and liberty is chronic and unresolvable, as John Stuart Mill has exhaustively written.[60] A nation can have absolute peace only by foregoing liberty, and absolute liberty only by foregoing peace.

In the *Tinker* dissent, Justice Black reveals his fear of uncontrolled liberty, as he had earlier revealed that fear to Virginia Durr regarding the civil disobedience crusade led by Dr. Martin Luther King. Virginia visited her brother-in-law "during the time of all the rioting and sit-ins and marches. Hugo was opposed to the marches. He thought they were terrible . . . [that they] create a lot of trouble and may cause rioting."[61] When the right of free expression too closely threatened orderly peace, Justice Black drew back from his absolutist position on free speech to permit time and place limitations to that right so that the liberty of free expression would not destroy the nation's orderly peace.

Barenblatt, Sullivan, Tinker: an Alabama connection?

No claim is made here that Hugo Black borrowed his First Amendment beliefs from his Alabama friends and relatives Cliff and Virginia Durr. It is clear that Black's views on the First Amendment were molded early, within his own keen mind, informed by his perceptive reading of Jefferson, Blackstone, Mill and others.[62] The justice's earliest Supreme Court writings show him to be a passionate advocate of both a literalist reading of the First Amendment and an absolutist application of the amendment.[63]

Nor is any claim made here that Hugo Black's friendship and kinship with fellow Alabamians Cliff and Virginia Durr improperly influenced the justice's decision on any case in any way. As Virginia herself has made clear, the justice forbid any mention or discussion of any issue in a case pending before the Court.

> "I never could have any power through Hugo because the last thing Supreme Court justices' relatives can do is speak to them about a case. They recuse themselves immediately if that happens. If you were ever known to speak to Hugo about a case, that would be the worst thing that could happen. In fact, Hugo and Sister's dinner parties were pretty dull because nobody could talk about anything very much. They were always so afraid it would come up before the Supreme Court. We usually talked about roses and tennis. And sometimes Bill Douglas would sing hymns. He was raised very strictly in the church and he knew the most marvelous array of hymns."[64]

Notwithstanding those caveats, it is indisputable that Supreme Court justices, like all human beings, neither create nor apply theories in a vacuum. Justice Hugo Black's self-education through his extensive reading provided part of the material background against which the justice wrote his opinions. His relationship and communication with fellow Alabamians Clifford and Virginia Durr, and others, also contributed to the background material for those opinions. ■

FOOTNOTES

[1]Strickland (ed.), *Hugo Black and the Supreme Court*, Dillard "The Individual and the Bill of Absolute Rights," (1967) at 98.
[2]Lewis, Anthony, "Justice Black and the First Amendment," 38 Ala.L. Rev. 289, 303-4 (1987).
[3]Justice Black applied the Bill of Rights guarantees to the states through the Fourteenth Amendment by the incorporation theory. The Supreme Court eventually adopted some, but not all, of Black's incorporation theory. *See Adamson v. California*, 332 U.S. 46, 68 (1947)(Black, J., dissenting).
[4]314 U.S. 252 (1941); *see also Lewis*, 38 Ala.L.Rev. at 289-99.
[5]Bridges, 314 U.S. at 270 (footnote omitted).
[6]Quoted in *Lewis*, 38 Ala.L.Rev. at 295 and n.34.
[7]312 U.S. 287, 289 (1941)(Black, J., dissenting).
[8]*Id.* at 302.
[9]Dilliard in *Hugo Black and the Supreme Court* at 118-19.
[10]*See generally* Hamilton, V., *Hugo Black: The Alabama Years* (1972).
[11]See, e.g., Black, Jr., H., *My Father* (1975) at 211-12.
[12]Barnard (ed.), *Outside the Magic Circle: The Autobiography of Virginia Foster Durr* (1985) at 307.
[13] Black, *My Father* at 121. Among those who clerked for Justice Black are the following Alabama lawyers and judges: Judge Melford Cleveland; Jerome A. Cooper; Judge Truman M. Hobbs; Drayton Nabers, Jr.; James L. North; J. Vernon Patrick, Jr.; and David J. Vann.
[14]*Id.* at 206.
[15]*Id.* at 122.
[16]360 U.S. 109, 134 (1959)(Black, J., dissenting).
[17]Lewis, 38 Ala.L.Rev at 305.
[18]*Barenblatt, 360 U.S. at 144, 162.*
[19]*Barnes, C., Men of the Supreme Court: Profiles of the Justices* (1978) at 26.
[20]*Dennis v. United States*, 341 U.S. 494, 579, 581 (Black, J., dissenting); Dilliard in *Hugo Black and the Supreme Court* at 111.
[21]Barnard (ed.), *Outside the Magic Circle* at 254-60.
[22]*Id.* at 261-62.
[23]*Id.* at 263-65.
[24]*See, e.g., id.* at 218.
[25]*Id.* at 194.
[26]*Id.* at 208-9.
[27]*Id.* at 196.
[28]*Barenblatt*, 360 U.S. at 144.
[29]*New York Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964).
[30]*Id.* at Appendix.
[31]*Id.* at 258, 256.
[32]*New York Times Co. v. Sullivan*, 144 So.2d 25 (1962).
[33]*Sullivan*, 376 U.S. at 270 (quoting *United States v. Associated Press*, 52 F.Supp. 362, 372 (D.C.N.Y. 1943)).
[34]*Sullivan*, 376 U.S. at 264-65.
[35]*Id.* at 279-80.
[36]*Id.* at 270.
[37]*Id.* at 271-72.
[38]*Id.* at 293, (Black, J., dissenting).
[39]*Id.* at 293.
[40]Dilliard in *Hugo Black and the Supreme Court* at 118-22.
[41]*Sullivan*, 376 U.S. at 297 (emphasis added).
[42]*Id.* at 294.
[43]*Id.*
[44]Correspondence of Virginia Foster Durr, copies of which are in possession of the author. Originals on deposit in the Schlesinger Library at Radcliffe College.
[45]*Id.*
[46]*Id.*
[47]393 U.S. 503 (1969).
[48]*Id.* at 504.
[49]*Id.*
[50]*Id.*
[51]*Id.* at 505.
[52]*Id.* at 505-6.
[53]*Id.* at 510-11.
[54]*Id.* at 515 (Black, J., dissenting).
[55]*Id.* at 517 (emphasis added).
[56]*Id.* at 518.
[57]*Id.* at 518, 522, 524, 525, 526.
[58]*See generally* Black, *My Father*.
[59]393 U.S. at 524.
[60]*See generally* Mill, *On Liberty*.
[61]Barnard (ed.), *Outside the Magic Circle* at 293.
[62]See, e.g., White, G. Edward, *The American Judicial Tradition* (1976) at 332.
[63]*See generally* Lewis, 38 Ala.L.Rev. 289.
[64]Barnard (ed.), *Outside the Magic Circle* at 163.

Building Alabama's Courthouses

by Samuel A. Rumore, Jr.

The following continues a history of Alabama's county courthouses—their origins and some of the people who contributed to their growth. *The Alabama Lawyer* plans to run one county's story in each issue of the magazine. If you have any photographs of early or present courthouses, please forward them to:

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Clay County

In 1850 Alabama was divided into 52 counties. No new counties were established until the Reconstruction period. Between 1866 and 1868 the Legislature created 13 counties and among those was Clay County, which was formally established December 7, 1866.

The county was named for Senator Henry Clay of Kentucky, the famous statesman and political leader. The county seat is Ashland, which was named in honor of Clay's plantation home near Lexington, Kentucky.

Since Clay County was established in 1866, the county itself had no part in the early history of Alabama. The county is located between Randolph County on the east and Talladega County on the west and was formed from territory taken from these two counties.

The act establishing Clay County called for an election to be held the first Monday in March 1867 to select officers for the county and choose a county seat site. Until a county seat was selected, courts were held in Lineville. At that time this community was located on the existing line between Clay and Randolph counties. Subsequent territorial changes have pushed the line farther east, and Lineville today is well within the Clay County boundary.

In the 1867 election, voters had to choose between Lineville and the geographic center of the country for their permanent county seat. The center received the greater number of votes; however, because a certain Hollingsworth Watts donated to the county 40 acres of land two miles east of the actual geographic center, the county seat was established at its present location. (And, as previously noted, the town was called Ashland.)

In 1867, construction began on a one-story frame courthouse in Ashland. Pending its completion courts were held in the old Lineville Baptist Church. The first

Clay County Courthouse

courthouse in Ashland served the county until December 18, 1875, when a fire destroyed the building and virtually all of the county records.

The county commissioners levied a tax in 1876 for the construction of the second Clay County Courthouse. This building was formally accepted by the commission May 6, 1878. It was a two-story brick structure that had an external stairway leading to the upstairs courtroom. This building served the county for almost 30 years.

The cornerstone for the present Clay County Courthouse was dedicated August 10, 1906. Charles W. Carlton was the architect and also designed the neighboring Cleburne County Courthouse whose cornerstone was laid in 1907. Harper and Barnes were the contractors for the Clay County Courthouse.

The building is very impressive for a small county seat town. Its external materials are yellow brick and concrete, and its exterior dimensions are 105 feet by 69 feet. The structure is three stories tall, and each corner of the building has a minor dome. In the center is a large elevated dome with a clock facing in each direction; this silver dome is topped by a bell tower. The unique feature of the courthouse, a symbolic statue of "Blind Justice" holding her scales, is mounted on the tower.

The Clay County Courthouse contains elements of a number of architectural styles. Each of the four sides contains three arched entranceways. Over these entranceways are two simple Doric columns; above the columns are triangular pediments.

The most famous native of Clay County must be the late U.S. Supreme Court Justice Hugo Black. Justice Black was born in rural Clay County, but his family moved to Ashland in December 1889, before he turned four. It has been recounted by one biographer that Hugo Black was a frequent spectator at trials in Clay County from the age of six, observing and playing the role of lawyer as a boy.

After graduating from the University of Alabama School of Law in 1906, Hugo Black returned home to hang out his shingle at the age of 20. Although he was considered a bright fellow, most of the citizens of Ashland took their legal cases to older lawyers.

Black spent over $1,500 setting up his law office. This represented a large portion of the inheritance he received from his parents. His office was located on the second floor of a building adjoining the courthouse square. The brand new courthouse of 1906, which remains the present Clay Count Courthouse, was the one which greeted the fledgling lawyer in his first cases.

Unfortunately, a fire in February 1907 destroyed Black's office and law library. Since he could not afford insurance, the loss was complete. At the age of 21, Black left his hometown to seek his fortune in the booming city of Birmingham. That fire in Ashland changed the course of Hugo Black's life, and the rest of his life's story was played out away from the Clay County Courthouse. ■

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Opinions of the General Counsel

QUESTION:

Attorney 'X' represented the City of 'H' as its city attorney for a period in excess of 20 years. During the time of Attorney 'X's' service as a city attorney, it became the custom and practice of Attorney 'X' to retain the originals of all deeds, contracts, writings, bond documents, etc. in his law office files. On several occasions prior to City Attorney 'X's' being discharged as city attorney, the City Council of City of 'H' requested that he turn over to the city clerk the original of all deeds, contracts, bond documents, etc. in his possession to which the city was a party or to which the city was obligated or had rights or privileges arising therefrom. The documents were not turned over to the city clerk. Attorney 'X' was discharged as city attorney. At the time of discharge, Attorney 'X' retained pending and open files which were at that time being handled by Attorney 'X's' office and all closed files which had been accumulated by Attorney 'X's' office during his years of service as city attorney for City of 'H'.

The city council has requested that Attorney 'X' turn over to the new city attorney all pending legal files and matters which were being handled by Attorney 'X's' office at the time of his discharge as well as the original documents accumulated by Attorney 'X' during the years of his representation as city attorney. The City has instructed that Attorney 'X' is to take no further action in the representation of the City of 'H' in any past, present or future matters. Assume that Attorney 'X' has been paid in full for all legal representation relation to all closed files in his possession. Assume further that Attorney 'X' has been paid in full for a portion of the open and pending files in his possession at the time of his discharge and has submitted statements for services rendered for the remaining portion of the open and pending files in his possession which have not been fully satisfied by the City. Based on the hereinabove assumed facts, this letter will serve as a formal request that your office issue opinions as to the following inquiries:

1. What rights of possession or interest does the City of 'H' have in and to the contents of all closed files which have been accumulated by Attorney 'X' during the time of representation of the City of 'H' as their City Attorney, assuming that Attorney 'X' has been fully compensated for all legal services rendered relating to such closed files?

2. What rights of possession or interest does the City of 'H' have in and to all original deeds, contracts, bond documents or other writing to which the City is a party, is obligated or has any rights or privileges arising therefrom which have been retained by Attorney 'X' in his law office files, assuming Attorney 'X' has been fully compensated for all legal services rendered as relates to such files?

3. What rights or privileges does the City of 'H' have to examine or make copies of the contents of all files retained by Attorney 'X'?

4. Who should bear the cost of duplicating the contents of any files obtained by Attorney 'X' for which Attorney 'X' has been fully paid for all professional services rendered in relationship to such open, closed or pending files?

5. Based on the facts set out above, does Attorney 'X' have a right to an attorney's lien on any of the files retained by his office? If the answer is in the affirmative please state to which files the attorney lien would attach and what rights or obligations are awarded to Attorney 'X' upon the attachment of such lien?"

ANSWER:

Subject to the attorney's lien provided for in *Code of Alabama* (1975), § 34-3-61, the attorney must provide copies of a client's complete file to the client upon request if it is material delivered to the lawyer by the client or if it consists of an original document prepared by the lawyer for the client. A lawyer is not required to provide copies of legal analyses to the client unless he has specifically agreed to do so previously, and he is not required to furnish notes, research and inter-office memoranda which went toward the compilation of the final product unless he has previously agreed to do so. This is so whether the attorney (1) voluntarily withdraws from representation under DR 2-111, (2) is discharged by his client, (3) continues to handle the active matter or (4) concludes the matter and closes the file. Should the attorney choose to maintain a copy of these materials for his records, he must pay for the photocopying expense. Where the attorney has received full compensation for his services rendered in connection with a given file, he must surrender these materials to the client upon the client's request.

DISCUSSION:

All of the above questions can be boiled down to one: To whom do a client's files belong, the client or the attorney? If the files belong to the client, they must be turned over to the client upon request. If they belong to the attorney, then it is fair to make the client pay for a copy of the file. If the files belong to the client, it should be immaterial whether the files are closed or pending. Curiously, we have been able to find almost no guidance on the subject. There are no Alabama cases which directly address the issue, nor has the Disciplinary Commission issued ethics opinions on point. The *Code of Professional Responsibility* contains no provisions addressing this issue, nor are we able to locate any pertinent opinions issued by the ABA.

DR 2-111(A)(2) provides that:

(A) In General

* * *

(2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules. (emphasis added)

Thus, whether the attorney's employment is terminated by his voluntary withdrawal under DR 2-111(C), or whether he is fired by his client under DR 2-111(B)(2), our *Code of Professional Responsibility* requires that the attorney relinquish to his client " . . . all papers and property to which the client is entitled." The *Code* is silent as to whether an attorney must turn over the client's "papers and property" in other circumstances, as where the attorney remains in the case until its conclusion or where the attorney retires or dies.

Further, DR 2-111(A)(2) begs the question by requiring the attorney to deliver to the client papers and property " . . . to which the client is entitled." In order to determine the client's entitlement, we must refer to *Code of Alabama* (1975), 34-3-61, which provides that:

Attorneys-at-law shall have a lien on all papers and money of their clients in their possession for services rendered to them, in reference thereto, and may retain such papers until said claims are satisfied, and may apply such money to the satisfaction of said claims.

This statute, of course, creates the so-called "attorney's lien" authorizing an attorney to retain his client's papers until his claim against the client for services rendered is satisfied. When the claim is satisfied, the statutory authorization for retention of the files is terminated. It follows then that the files must be surrendered to the client upon request and therefore constitute the client's property. There would be no need to create a statutory lien on the attorney's behalf if the files in fact belonged to the attorney.

The statute further begs the question, however, in applying the lien to " . . . all papers and money of their client in their possession . . . " Neither this statute nor any case interpreting it defines which papers belong to the client. Does this refer merely to original documents which the client has provided the attorney in the course of representation, as some state bars have held? Does it refer additionally to court pleadings and other documents of public record? Or does it apply to the entire file developed by the attorney?

The sole guidance that we have been able to locate is an order of the Supreme Court of Alabama dated October 1, 1984, which provides that a trial transcript purchased by the state for use of indigent defendants in criminal appeals is the property of the criminal defendant and must be returned to the defendant upon his request. By extension we hereby hold that the client is entitled not only to documents which were furnished by the client to the lawyer in connection with the representation, but also to any materials in the file furnished to the attorney on the client's behalf. In addition, and by extension, the client is also entitled to original documents prepared by the lawyer for the client, such as deeds, wills, pleadings and the like, and to other documents of public record.

Provided that the attorney has been compensated by the client for services rendered, the materials in the file that are furnished by or for the client are therefore the client's property and must be surrendered to the client upon request. It follows that if the attorney chooses to keep a copy of the materials, it must be at his own expense.

The "Opinion of the General Counsel" published in the May issue of the *Lawyer* erroneously indicated that John A. Yung, IV, and Alex W. Jackson were the authors. Former acting Assistant General Counsel Holly L. Wiseman issued that particular opinion.

Where the attorney has not been fully compensated, the client's possessory rights to the file are subject to the attorney's lien statutory created by § 34-3-61. The interpretation of that statute is a matter of law rather than of ethics and is not one which we are empowered to address. ■

Young Lawyers' Section

Charles R. Mixon, Jr.
YLS President

During the past bar year, I have had the privilege of working with many young attorneys dedicated to the betterment of their profession. I express my appreciation to each young lawyer throughout Alabama for the privilege of serving as president of this young lawyers' section. At the annual meeting in Birmingham this month, my official involvement with YLS ends, but I leave the office with many fond memories. The achievements of this section during the past year were made possible by the hard work of many persons, most notably the officers and executive committee members who are Gunter Guy, Montgomery, president-elect; James Anderson, Montgomery, secretary; Percy Badham, Birmingham, treasurer; Claire Black, Tuscaloosa, immediate past president; Robert Baugh, Birmingham, grants; Preston Bolt, Mobile, annual Seminar-on-the-Gulf, social arrangements; Laura Crum, Montgomery, bar admissions; Taylor Flowers, Dothan, local bar liaison-south; Pat Harris, Montgomery, child advocacy; Tom Heflin, Tuscumbia, local bar liaison-north; Sid Jackson, Mobile, annual Seminar-on-the-Gulf, speaker and program; Rick Kuykendall, Birmingham, ABA/YLS Liaison; Warren Laird, Jasper, issues; Terry McElheny, Birmingham, meeting arrangements; Keith Norman, Montgomery, Youth Judicial Program; John Plunk, Athens, by-laws; James Rea, Birmingham, alternate dispute resolution; Steve Rowe, Birmingham, CLE; James Sasser, Montgomery, senior bar administrative liaison; Steve Shaw, Birmingham, Law Week; Rebecca Shows-Bryan, Montgomery, publications; Amy Slayden, Huntsville, Constitution bicentennial; and Duane Wilson, Tuscaloosa, disaster legal assistance.

I extend thanks to State Bar President Ben Harris and President-elect Gary Huckaby for their encouragement of YLS activities and to the board of our commissioners and the staff of the Alabama State Bar for their continuing support. I take this opportunity to mention several highlights of the past year.

Youth Judicial Program

This project continued to flourish under the leadership of Keith Norman. This year, over 600 high school students and approximately 80 attorneys were involved in the program. Forty-eight teams from 13 different high schools in Montgomery, Birmingham, Auburn, Wetumpka, Dothan, Prattville and Opelika participated in the mock trial competition. The program utilized the YLS videotape for recruitment and preparation, and we congratulate all participants in the program, especially the first place plaintiff's team from Woodlawn High School in Birmingham and the first place defense team from Dothan's Northview High School. The Woodlawn students were assisted by the trial advocacy program of Cumberland Law School, and the Northview students were led by Lexa Dowling of Dothan.

Bar admissions

The YLS again sponsored two bar admissions ceremonies in Montgomery. Laura Crum once again did an outstanding job in coordinating these events. In October, Robert Potts, counsel to The University of Alabama System and a former president of the YLS, spoke at the luncheon following the induction. In May, we were honored that Major General Robert Norris, soon to be general counsel of the Alabama State Bar, served as the speaker.

Annual Seminar-on-the-Gulf

With the leadership of speaker and program chair Sid Jackson and social arrangements chair Preston Bolt, this May seminar at the Sandestin Beach Resort was again well attended. With the cooperation of the Alabama Bar Institute for Continuing Legal Education, the seminar presented six hours of CLE credit. In addition, Commonwealth Land Title Insurance Company sponsored the annual golf tournament. We were provided with cock-

tail receptions by the Birmingham firms of Pittman, Hooks, Marsh, Dutton & Hollis and Emond & Vines. The court reporting firm of Foshee & Turner of Birmingham sponsored a Saturday afternoon beach party. A traditional highlight of the seminar is the Friday evening party with music provided by "The Soul Practitioners" of Birmingham, composed of Bob Norman, Vaughn Blalock, Jim Burford, John Chiles, Charlie Beavers, John Hall and Mike Wright. This party was sponsored by the Birmingham firm of Heninger, Burge & Vargo. Our thanks to all attendees and, particularly, to our very generous sponsors.

Continuing legal education

Through the hard work of chairman Steve Rowe of Birmingham, the Young Lawyers' Section again sponsored the Bridge-the-Gap seminar in March. The section is also sponsoring the "Update '88: Recent Developments in the Law" seminar at the annual meeting in Birmingham this month. This event, expected to draw a very large crowd, will include legislature update, sports law, recent decisions of the Alabama Supreme Court, federal sentencing guidelines, deceptive trade practices act and Model Rules of Professional Conduct.

Other convention highlights

In addition to the Update '88 Seminar, the YLS will hold its annual business meeting Thursday afternoon of the annual meeting. We encourage the attendance and participation of all young lawyers.

Thursday evening, the YLS, in conjunction with the Birmingham Young Lawyers' Section, will host a party beginning at 9 p.m. at the Birmingham Botanical Gardens. The cost is $7.50 per person, and the entertainment will be provided by "The Soul Practitioners."

My involvement in the YLS has been one of the highlights of my legal career. I strongly urge each young lawyer to become more active in your profession. I invite you to contact Gunter Guy, the new president of YLS, to volunteer your time and energy to your profession. ■

Legislative Wrap-up

by Robert L. McCurley, Jr.

The 1988 regular session of the Alabama Legislature ended without passing the general fund or special education trust fund. Consequently, there will be at least one, and probably more, special sessions this year.

During the regular session 690 Senate bills and 1,061 House bills were introduced. Only 387 of these bills became law. Of these, 320 (83 percent) were local acts or limited in application. The following is a review of some of the remaining 67 bills which have statewide concern.

Redemption of real property (act 88-441)

This act, drafted by the Alabama Law Institute, revised the law with respect to who may redeem property that has been foreclosed and in what priority. It further provided for what are allowable charges. It leaves intact the present one-year right of redemption. This act became effective January 1, 1988.

Legal malpractice (act 88-262)

This act revises the "Legal Service Liability" law by establishing standards of care and requiring the plaintiff to prove the lawyer violated the applicable standard. Also, under the terms of the act, a two-year statute of limitation is established. In the event that an act or omission could not have been discovered within the two-year period, the plaintiff must file the action within six months from the date of discovery of facts indicating an act or omission by the attorney. However, in no event may an action be commenced more than four years after the act or omission occurred. The bill further provides for settlements of disputes between a person and an attorney by voluntary arbitration and sets out the procedure for the arbitration.

Others of general interest

The Legislature removed the interest limit on credit cards (act 88-80). They also provided that mortgages which are placed on property are valid, and title will not divest from the mortgagee until all secured obligations are paid out and there is no commitment or agreement by the mortgagee to make advances, incur obligations or otherwise give value under any agreement (act 88-87).

Ala. Code § 5-19-15 regarding garnishments has been revised to provide that garnishments under the "mini-code" will be the same as that provided other garnishments. Previously a garnishee was guaranteed a minimum take-home pay of 50 times minimum pay ($167.50). This has been revised to 30 times minimum pay ($100.50). Also, personal property exemptions found in *Ala. Code* § 6-10-6 and 6-10-37 have been revised (act 88-294).

The Legislature further provided for interpreters to be provided during judicial proceedings for persons defective in speech or hearing (act 88-538).

Fiduciaries may make certain elections to divide or keep separate a trust or estate in light of the generation-skipping transfer tax with respect to transfers in trust and decedents dying on and after January 1, 1987 (act 88-340).

Anyone who intentionally and without authority diverts utility services may be civilly liable for three times the loss of revenue plus the cost of repairs and attorney's fees. This act also provides that anyone convicted under *Ala. Code* § 13-A-8-10 shall "conclusively" be liable under this act (act 88-542).

In the criminal law area several bills were passed. The judge may sentence a convicted defendant to "boot camp" operated by the Department of Corrections (act 88-163). Before a criminal defendant who has been tried and found not guilty by reason of insanity and committed to the custody of Mental Health may be released, the department must apprise the court that the defendant no longer is mentally ill and the court must set a hearing before release (act 88-581). The Legislature amended *Ala. Code* § 13A-3-1

Robert L. McCurley, Jr., is the director of the Alabama Law Institute at the University of Alabama. He received his undergraduate and law degrees from the University.

to redefine the defense of insanity to "...the defendant, as a result of severe mental disease or defect, was unable to appreciate the nature and quality of his acts . . . . " (act 88-654).

The Institute also proposed to the Legislature a revision of the "power of sale" law. This bill passed the Legislature only to receive an executive amendment which effectively vetoed the bill since it was returned to the Legislature with only one day remaining and the Senate locked in a filibuster. Also introduced was a trade name law which passed the Senate, but time ran out before it could be considered in the House of Representatives.

We are very appreciative of the law firms that loaned a lawyer to work with certain legislative committees. Special thanks this year go to Balch & Bingham for the loan of Keith Norman who worked with the Senate Judiciary; Rushton, Stakely, Johnston & Garrett for the loan of Holley Knowles who was counsel to the House Ways and Means Committee; and to Jackson Hospital for the loan of Gregg Everett who assisted the House of Representatives Judiciary.

Annual meeting of the Institute

The annual meeting of the Alabama Law Institute will be held Thursday, July 21, 1988, at 4 p.m. in the Avon room of the Wynfrey Hotel during the state bar annual meeting in Birmingham.

WE WANT *YOU* TO JOIN OUR SPEAKERS BUREAU!

The Committee on Lawyer Public Relations, Information and Media Relations is instituting a statewide speaker's bureau to provide speakers for civic organizations, schools, churches and other interested groups. The committee will compile a list of all lawyers in the state who are interested in serving on the speaker's bureau and will endeavor to provide speakers from the same community or general area from which a request for a speaker is received. All requests will be handled through the Alabama State Bar Headquarters. If you are interested in serving as a member of the speaker's bureau please fill out the following form and return it to the Alabama State Bar, P.O. Box 4156, Montgomery, Alabama 36101.

SPEAKER'S BUREAU APPLICATION

Name _____

Firm Name (if applicable) _____

Address _____

City _____ **State** _____ **Zip** _____

Telephone _____

Please list subjects on which you are willing to speak:

1) _____

2) _____

3) _____

Committee News

Insurance Committee

AIM is organized

A board of directors has been established and officers elected for the bar's captive insurance company, known as AIM—Attorneys' Insurance Mutual of Alabama, Inc. The first meeting of the board was held May 19, 1988, at the bar headquarters. The directors present were: Claire A. Black; Reginald T. Hamner; Ben H. Harris, Jr.; P. Richard Hartley; Henry T. Henzel; L. Tennent Lee, III; Charles H. Moses, III; William D. Scruggs, Jr.; Jere C. Segrest; Harold L. Speake; Norborne C. Stone, Jr.; and Cathy S. Wright. The board ratified articles of incorporation and approved bylaws for the new corporation. In addition, the following officers were elected: Ben H. Harris, Jr., chairman of the board; Henry T. Henzel, president and vice chairman; Cathy S. Wright, vice president; Charles H. Moses, III, secretary; Reginald T. Hamner, treasurer.

Jack Stevenson and Eric Carlton of the Burr and Forman firm were retained as legal counsel to handle AIM's incorporation and obtain the Alabama Department of Insurance's and the Alabama Securities Commission's approval for AIM's proposed operation and capitalization. McNeary Insurance Consulting Services of Charlotte, North Carolina, which has advised several other bar associations in the startup of their captives, has been involved in the initial organization of AIM and will continue to serve as consultant throughout its early operation. The present timetable calls for AIM to seek approval from the Department of Insurance and the Securities Commission in time for a July 23 presentation to bar members at this year's annual meeting. ■

KBN

NOTICE

Effective May 13, 1988, legislative act 88-660 transfers the responsibilities previously delegated to the State Board of Health, by section 32-5A-194 of the *Code of Alabama*, to the Department of Forensic Sciences.

All inquiries regarding the program (chemical tests; admissible as evidence; procedure for valid chemical analyses; permits for individuals performing analyses; persons qualified to withdraw blood; presumptions based on percent of alcohol in blood; refusal to submit; no liability for technician) should be directed to: *Dr. James Buttram, Department of Forensic Sciences, P.O. Box 231, Auburn, Alabama 36830. Phone (205) 887-7001.*

—Robert B. Finley,
staff assistant to State Health Officer

NOTICE

To Lawyers Negotiating Settlements of Cases Submitted to the Alabama Supreme Court

It is the court's current policy that if the parties are negotiating a settlement of the case after submission, they should notify the clerk in writing and request that the submission be suspended, pending said negotiations. If one of the parties notifies the clerk that a settlement cannot be reached, the case will be resubmitted. Also, if a party objects to the suspension of submission, the case will remain under submission. No appeal will be dismissed after circulation of a proposed opinion.

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MCLE News

by Keith B. Norman
Director of Programs

As director of programs for the Alabama State Bar, one of my duties will be to oversee the operation of our bar's mandatory CLE program. My use of the word "oversee" is intentional: the mandatory CLE program is essentially self-operating thanks to a very fine commission and administrative assistant Diane Weldon. Also much praise is due to Mary Lyn Pike who guided mandatory CLE from its inception through its implementation and who is largely responsible for its success. Indeed, we are fortunate to have a program that is admired and respected by bar associations across the country. To Mary Lyn, Diane and present and former members of the Mandatory CLE Commission, I express my sincerest appreciation for their work in developing and improving this program over the last six years. Their sense of responsibility and diligence has made my job easier and no doubt more enjoyable.

At its meeting in Montgomery April 1, 1988, the Mandatory CLE Commission:

(1) Recognized the issuance of 1,061 certificates to members earning 25 or more credit hours during the calendar year 1987;

(2) Declined to waive the late filing fee of two attorneys for CLE reports received after Monday, February 1, 1988;

(3) Approved an amended deficiency plan which allowed for the earning of credits after the March 1 deadline on the basis that the requesting attorney was unable to earn the credits listed in his original deficiency plan because of sickness;

(4) Granted a request for late amendment to the 1987 reporting form on a *one-time* basis;

(5) Denied a request for a refund of the late filing fee for a report received after Monday, February 1, 1988;

(6) Denied approval for a seminar on AIDS because the program was not designed primarily for attorneys and did not focus on substantive law;

(7) Approved a seminar in Albuquerque, New Mexico, for 6.0 hours' credit, specifically for those topics taught by attorneys;

(8) Declined to approve an approved sponsor's seminar on legal services marketing because it did not focus on substantive legal issues;

(9) Approved for 4.0 hours' credit a seminar on financial planning and the practitioner, sponsored by the University of North Alabama Office of Continuing Education;

(10) Approved, retroactively, a 1987 program, for which the approval deadline had passed March 1, 1988;

(11) Voted to amend Regulation 5.1 to read as follows:

Any report sent by *certified, registered or express mail of the United States Postal Service and postmarked January 31, or the next business day if January 31 is a Saturday or Sunday,* will be considered timely filed. All others must be accompanied by the $50 late filing fee in the form of a check made payable to the Alabama State Bar. Reports not so accompanied will be returned to the attorneys filing them, and those attorneys will be deemed not in compliance until the fee is paid.

(12) Declined a request for waiver of 1.2 hours of CLE credit.

At its May 20, 1988, meeting in Montgomery, the MCLE Commission:

(1) Approved three comparative law programs, one submitted by the University of Mississippi School of Law and two by the American Bar Association;

(2) Tabled a request by two attorneys for credit for presentations made at a program not designed primarily for attorneys, pending receipt of an evaluation summary;

(3) Tabled a request by an attorney for attendance of a mixed audience seminar not designed primarily for attorneys, pending receipt of an evaluation summary;

(4) Denied approved sponsor status to an organization which markets its legal-oriented programs primarily to non-lawyers. ■

Recent Decisions

by John M. Milling, Jr., and David B. Byrne, Jr.

Recent Decisions of the Alabama Court of Criminal Appeals

Proof of bias

Jones v. State, 1 Div. 539 (April 12, 1988)—The Alabama Court of Criminal Appeals, in a unanimous opinion, reversed the conviction of Jones because of the trial court's failure to allow defense counsel to prove bias through prior inconsistent statements of the witness. Judge Taylor critically noted:

> "... Great latitude is to be allowed an accused in an effort to show the bias of an important witness as to contested issues in a criminal case." *St. John v. State*, 358 So.2d 812, 816 (Ala.Crim.App. 1978). "The trial court has very little, if any, discretionary right to exclude from evidence an important fact showing the bias of a witness." *Proctor v. State*, 331 So.2d 828, 830 (Ala.Crim. App. 1976).

Ordinarily, the way to show bias on the part of a witness is to directly ask him his feelings regarding the accused. If the witness denies bias, then trial defense counsel is entitled to prove facts to show such bias. *Page v. State*, 487 So.2d 999, 1003 (Ala.Crim. App.1986); *See also* C. Gamble, *McElroy's Alabama Evidence*, §149.01(1) (3d ed. 1977).

In *Jones*, the trial court refused to allow the defendant the opportunity to independently prove facts tending to show bias on the part of the state's witness on the ground that the defense witness's testimony would be "rank hearsay."

The law is to the contrary; the general rule is that:

> Prior inconsistent statements of a witness made out of court are admissible in evidence for the purpose of showing that the witness is not worthy of belief—that is, for impeachment purposes. *Such evidence is not classed as hearsay.* (emphasis added)

Expansion of automobile exception to warrant requirement

Stanfield v. State, 6 Div. 300 (April 26, 1988)—The Alabama Court of Criminal Appeals, through Presiding Judge Bowen, affirmed the conviction of the defendant for trafficking in cocaine and other controlled substances.

The defendant argued on appeal that the warrantless search of his person and his automobile were illegal and in violation of his Fourth Amendment rights. Judge Bowen's opinion gives an excellent analysis of the expansion of the automobile exception to the warrant requirement since *Carroll v. United States*, 267 U.S. 132 (1925).

In the opinion, the court observed that the post-1982 supreme court decisions involving the automobile exception have sent a clear and unmistakable signal: "No warrant is needed

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

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

even absent true exigent circumstances . . . Probable cause is sufficient in all instances to justify a warrantless search of a vehicle . . . ."

The cases of *United States v. Ross*, 456 U.S. 798 (1982), and *United States v. Johns*, 469 U.S. 478 (1985), are "grounded primarily on a 'lesser expectation of privacy' theory and . . . abandon[ed] even the pretense of exigent circumstances attributable to the continued mobility of the vehicle."

The court of criminal appeals, based upon that authority, held as follows:

> ". . . Generally, a vehicle may be searched on probable cause without a warrant and without a demonstration of any exigent circumstances other than its own inherent or ready mobility. The exception to this general rule applies when the vehicle is located on premises where the defendant has a legitimate expectation of privacy."

Illegal detention will not support conviction of escape from custody

Vickers v. State, 4 Div. 944 (April 26, 1988)—Vickers was convicted of escape in the third degree in violation of § 13-A-10-10-33, *Code of Alabama* (1975). On appeal, the defendant argued that he was improperly detained for the act of speeding with a "suspicion of DUI" and, therefore, was improperly convicted of escape in the third degree. Escape in the third degree is committed where a person "escapes or attempts to escape from custody." In reversing the conviction, the court of criminal appeals relied on its decision in *Hays v. City of Jacksonville*, 518 So.2d 892 (Ala.Crim.App. 1987).

Judge McMillan reasoned that "the police have no authority to take a motorist into custody and then require him to go to the local station house when that motorist has committed a misdemeanor traffic violation but is willing to sign the summons to court." *See also Morton v. State*, 452 So.2d 1361, 1364 (Ala.Crim. App. 1984). Vickers was under arrest only for speeding (a misdemeanor traffic violation) when he ran from the car; thus, he was not properly in custody and could not be convicted of escape from the custody of a police officer. *See also Ex parte Talley*, 479 So.2d 1305 (Ala. 1985).

Right of defendant to have 'sample' for independent testing and analysis

Moton v. State, 3 Div. 785 (April 12, 1988)—The Alabama Court of Criminal Appeals, in a unanimous decision authored by Judge Taylor, reversed the conviction of Moton for promoting prison contraband in the second degree. On appeal, Moton contended that the trial court erred in denying his motion to obtain a sample of the controlled substance and have it independently analyzed at state expense. The court of criminal appeals reversed for the failure to permit examination of the controlled substance in accordance with Alabama Rules of Criminal Procedure Temp. 18.1(c). *See also Ware v. State*, 472 So.2d 447 (Ala.Crim. App. 1985).

The law is clear in Alabama that a defendant is entitled to have a sample of the alleged contraband for testing. The words of the Supreme Court of Alabama in *Warren v. State*, 288 So.2d 826 (Ala. 1973) are as follows:

> "We think that to deny him this right is to deny him due process, especially where his motion to produce was made well in advance of the trial so that it could have been ruled on by the court without causing any undue delay in the trial."

More recently, Rule 18.1(c) of the Alabama Temporary Rules of Criminal Procedure provides specifically as follows:

"Documents and Tangible Objects. Upon motion of the defendant, the court shall order the district attorney to permit the defendant to analyze, inspect, and copy or photograph books, papers, documents, photographs, tangible objects, *controlled substances*, buildings or places, or portions of any of these things, which are within the possession, custody or control of the state . . . ."

Recent Decisions of the Supreme Court of Alabama—Civil

Attorney/client . . .

Alabama *Code of Professional Responsibility* does not create private cause of action

Terry Cove North, Inc. v. Marr & Friedlander, P.C., 22 ABR 985 (February 5, 1988). The plaintiff incorporated to develop land in south Alabama and retained the defendants as its attorneys. While representing the plaintiff, the defendants negotiated with third parties for the purchase of sewer line connections. The negotiations fell through, and the defendants formed a sewer authority and agreed to provide the needed services for the plaintiff. The defendants disclosed Disciplinary Rule 5-104(A) to the plaintiff and advised the plaintiff a conflict of interest could arise and that it could seek independent counsel. The plaintiff later became dissatisfied with the defendants and filed suit alleging breach of rule 5-104 and fraud. The plaintiff alleged that rule 5-104 establishes a duty owed by an attorney, the breach of which will support a private cause of action. The defendants maintained that there is no private cause of action for an alleged violation of a disciplinary rule and filed a motion for summary judgment. The motion was granted, and the plaintiff appealed. The supreme court affirmed.

The supreme court recognized that Alabama has never decided this issue; however, courts in other jurisdictions have held that an alleged violation of a disciplinary rule does not create a private cause of action. The court noted that the *Code of Professional Responsibility* was designed to be disciplinary in nature. Indeed, rule 3 establishes six types of "discipline": (1) disbarment; (2) suspension for a fixed period of time; (3) temporary suspension; (4) public censure; (5) private reprimand; and (6) private informal admonition. It does not create a private cause of action. The sole remedy is the imposition of these disciplinary measures.

Civil procedure . . .

pending discovery owed by moving party does not always defeat summary judgment

Reeves, etc. v. Porter, et al., 22 ABR 1118 (February 19, 1988)—Reeves filed an action alleging fraud and suppression of material facts concerning the sale of a used dwelling. Reeves also filed requests for production of documents and interrogatories. The defendants did not answer the discovery and filed a motion for summary judgment. Reeves filed a response stating that there were issues of disputed material facts. Reeves did not move the court to compel discovery or request a continuance. The court granted defendants' motion and Reeves' appeals contending that the summary judgment is not proper where the plaintiff has pending discovery requests. The supreme court disagreed.

The court stated that the mere pendency of discovery does not bar summary judgment. If the non-moving party believes that pending discovery contains matters crucial to the motion for summary judgment, the non-moving party should file a rule 56(f) motion with appropriate supporting affidavits. The burden is upon the non-moving party to comply with rule 56(f), Ala.R.Civ.P., or to prove that the matter sought by discovery is or may be crucial to the non-moving party's case. If the trial court from evidence before it, or the appellate court from the record, can ascertain that the matter subject to discovery was crucial to the non-moving party's case, then and only then is it error for the trial court to grant summary judgment before pending discovery is completed.

Property . . .

leasehold interest in real property considered personal property

Ex parte: Nottingham v. C.H. & B., Inc., etc., 22 ABR 1541 (March 18, 1988). In a case of first impression in Alabama, the supreme court was asked whether a leasehold interest in real property is real or personal for the purpose of determining the proper venue of an action. Respondent, a domestic corporation doing business in Dale and Coffee counties, leased space in a motel in Coffee County from the petitioner, a resident of Dale

County. The petitioner filed suit in Dale County alleging breach of the lease. The respondent filed a similar suit in Coffee County and filed a rule 82(d), Ala.R. Civ.P., motion in Dale County on the grounds that both suits involved real property located in Coffee County, and, therefore, Coffee County was the correct venue. The trial court granted the motion, and the petitioner filed this petition for writ of mandamus.

The court noted that at common law, estates for years were classified as chattels real and regarded as personal property. The court also noted that section 1-3-1, *Ala. Code* 1975, provides that the common law continues unless altered by the Constitution or the legislature. The court looked to other jurisdictions and authorities and noted that a person who only has the right to the use or occupancy of a building is not commonly regarded as its owner, and his interest is merely contractual. Since the lease sued upon is personal property, the action is *in personam*. Since respondent is a domestic corporation doing business in Dale and Coffee counties, and petitioner is a resident of Dale County, venue is proper in either county. Therefore, the plaintiff may elect the county, and when this election is made venue will not be disturbed.

Torts . . .

malicious prosecution premature until appeal process is over

Barrett Mobile Home Transport, Inc. v. McGugin, et al., 22 ABR 1067 (February 12, 1988). McGugin sued Barrett for damages arising from a move of their mobile home. Barrett counterclaimed seeking a deficiency judgment on a note. The jury ruled in favor of McGugin on its suit and in favor of McGugin on Barrett's counterclaim. Barrett filed post-judgment motions and later appealed. While these motions were pending, McGugin filed this malicious prosecution action. Ultimately, Barrett lost his appeal. Thereafter, McGugin proceeded with this malicious prosecution action, and Barrett moved to strike, arguing that the action was premature in that there had been no final determination in McGugin's favor when it was filed. The trial court denied the motion to strike, and, therefore, the supreme court was faced with two issues of first impression: first, whether a claim for malicious prosecution accrues at the time the trial court renders its judgment in the underlying proceeding, notwithstanding a later appeal from that judgment, and, second, whether an action for malicious prosecution may be based on a counterclaim filed in the underlying action.

The court recognized that although there is a split of authority on the first issue, the weight of authority supports the rule that the pendency of an appeal procludes a malicious prosecution action. *Restatement (Second) of Torts*, §674. One of the elements of the tort is a judicial determination in favor of the person against whom the underlying action is brought. The courts also have stated that it would be a waste of judicial resources to allow the plaintiff to prosecute his malicious prosecution action only to have it rendered meaningless if later the appeal of the underlying action is decided against him.

Another element of the tort includes "initiation or continuation of an original judicial proceeding . . . by or at the instance of the defendant." Barrett argues that a counterclaim does not supply the element. The court disagreed and noted that it generally has been recognized that "an action for malicious prosecution may be based upon the interposition of a malicious cross-claim or counterclaim . . . since interposing such a cross-action is the equivalent of the institution of an independent action."

Worker's compensation . . .

***McLain v. G.A.F., Corporation* overruled**

Ex parte: Tuscaloosa County, Alabama, (In Re: Tuscaloosa County v. INA/Aetna Insurance Company), 22 ABR 1050 (February 12, 1988). The injured employee and the insurer entered into a settlement agreement but the agreement was not court approved nor incorporated into a judicial decree and no claim for medical expenses was filed within one year following the last payment of compensation benefits. Consequently, on authority of *McLain v. C.A.F. Corporation*, 424 So.2d 1329 (Ala.Civ.App. 1982), the court granted the insurer's motion for summary judgment. Although the legislature did not expressly provide a limitation for the filing of a claim for medical expenses, *McLain* held that an employee's claim for medical expenses is subject to the limitation set forth in section 25-5-80, *Ala. Code* 1975, for compensation benefits. The court of civil appeals reasoned that the court had held that the statute of limitations bars the "right itself," which includes both compensation and medical expenses.

On certiorari, the court reversed *McLain* and held that an employee's right to sue for accrued medical expenses is totally dependent of his or her right to sue for compensation benefits and not subject to the statute of limitations. However, the court also noted that the employee still must prove that the employee received "notice" of the "accident," the accident occurred within the line and scope of the employment and the injuries and medical expenses are proximately related.

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Worker's compensation . . . section 14's omission from 25-5-80 does not affect validity

Ex parte: Rheem Manufacturing (in re: Hodges v. Rheem Manufacturing), 22 ABR 1472 (March 11, 1988). Hodges was injured October 4, 1984, while acting within the line and scope of her employment. At that time, section 25-5-80, *Ala. Code* 1975, provided that she had one year from that date to settle the case or file suit. Effective February 1, 1985, section 25-5-80, *supra*, was amended to give the injured employee two years from the date of the accident to file suit. Hodges filed suit October 3, 1986, i.e., within the two-year amended statute of limitations. Rheem moved for a summary judgment based on the previous one-year statute of limitations and the language contained in section 14 of the act. Section 14 provides that the amendment does not affect a cause of action which arose or accrued or applies to an accident which occurred prior to February 1, 1985. The trial court found that section 14 controlled and ruled that the amendment did not apply because the cause of action accrued prior to February 1, 1985. The court of civil appeals reversed, reasoning that since section 14 of the act had not been codified in section 25-5-80, *supra*, and since section 25-5-80, *supra*, as codified becomes the prevailing law, section 14 is rendered ineffective.

On certoriari, the court reversed the court of civil appeals and held that the failure of Michie Company to incorporate section 14 into the *Code* did not affect its validity. The court reasoned that section 14 belongs in a category of provisions that customarily are not codified but yet remain viable. In such cases, Michie, which is Alabama's designated *"Code* commissioner," customarily refers to the omitted sections in a code note. Other such omitted provisions, whose validity is unaffected, include local laws, severability clauses and repealer clauses.

Recent Decisions of the Supreme Court of Alabama—Criminal

What kind of investigatory "stop" triggers the Fourth Amendment?

State v. Betterton, 22 ABR 1476 (March 18, 1988)—Betterton was indicted for possession of cocaine. The testimony at the suppression hearing showed that the defendant and two others were in the front seat of an automobile, parked in a park at 1:40 a.m. Two Gadsden police officers on patrol spotted the car and, according to one of the officers, "we just got out to check and see . . . if we could help them with anything." The testimony indicated that the park was a place where one could take his girlfriend or go and drink a beer in the privacy of their car. The officers, with their bright lights on, walked up to the occupied car and knocked on the driver's window. The window was opened, and the officer smelled marijuana smoke. The occupants were removed from the car and searched. Betterton had a small glass container containing cocaine.

The trial court granted the defendant's pretrial motion to suppress the evidence as having been seized without probable cause. The court of criminal appeals reversed and the Supreme Court of Alabama, through Chief Justice Torbert, affirmed.

The *Betterton* case turns on the issue of whether a "stop" or "seizure" occurred prior to the point at which the police officers directed the defendant and his companions to get out of the car in which they were sitting. The defendant maintained that the officers' conduct was a sufficient show of authority or implied restraint to constitute a stop or seizure within the Fourth Amendment.

In the law of search and seizure, the term "stop" refers to a type of temporary detention for investigation. In the landmark case of *Terry v. Ohio*, 392 U.S. 1 (1968), the United States Supreme Court rejected the suggestions that referring to a temporary detention as a "stop" takes such police action out of the purview of the Fourth Amendment. The supreme court wrote in *Terry*: "It is quite plain that the Fourth Amendment governs' seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime—'arrests' in traditional terminology."

The court acknowledged that a "*Terry* stop"—a temporary detention of the person—is a "seizure" of that person under the protections of the Fourth Amendment. What makes a police encounter a "seizure" for the purposes of the Fourth Amendment? The court, in *Terry*, stated that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person." The law is clear that the Fourth Amendment applies to seizures of the persons including brief investigatory stops.

"Although a temporary seizure of the person does not require the probable cause necessary to justify a seizure amounting to an arrest, an investigatory stop must be justified *by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.*" *United States v. Cortez*, 449 U.S. 411, 417 (1981).

Chief Justice Torbert approved the language found in LaFave's treatise on search and seizure as follows: "The mere approach and questioning of persons seated within parked vehicles does not constitute a seizure."

In the case *sub judice*, the officers merely approached a car parked in a public place. The court agreed with the

court of criminal appeals that that action alone did not amount to such a show of authority or implied restraint as to amount to a seizure of the petitioner. It followed that the subsequent seizure of the cocaine from Betterton was proper.

What price a confession?

McCary v. State, 22 ABR 824 (January 15, 1988)—Henderson, an investigator with the Chilton County Sheriff's Department, and Chief Deputy Mims travelled to Flagstaff, Arizona, and questioned McCary about a robbery. At the time McCary was questioned by the deputies, he was in custody and charged only with escaping from the Chilton County Jail. McCary was advised of his *Miranda* rights before questioning began. He admitted he had escaped from the Chilton County Jail but denied any knowledge of the robbery. The evidence at the suppression hearing indicated that after the defendant had been questioned "for some time," Mims asked the defendant, "What if I told you that we have Thibodeaux (a person involved in the robbery) and he was found with a bullet between his eyes; what would you say if I told you that he was found?"

At the time the question was asked, the deputies knew that Thibodeaux was not dead. Investigator Henderson testified that the petitioner's reaction was immediate; the defendant swallowed hard and said, "Look, let me tell you something, that I didn't kill the man. I did not pull that trigger; Rubyn Smith did that." After the question was asked, he signed a statement confessing to the robbery; then the defendant was informed that Thibodeaux was, in fact, alive.

McCary contended that the trial court erred in denying his motion to suppress the confession. He argued that the confession was the product of coercive police conduct and, thus, was not made voluntarily, knowingly and intelligently. The Supreme Court of Alabama agreed and reversed.

The law with regard to the admissibility of a confession is set forth in *Eakes v. State*, 387 So.2d 855 (Ala.Crim.App. 1978):

> "A confession is presumed to be involuntary. Before its admission into evidence there must be evidence addressed to the trial judge sufficient to rebut that presumption and a showing that the confession was made without influence of either hope or of fear, unless the attending circumstances affirmatively disclose the voluntariness of the confession."

The true test of determining whether extrajudicial confessions are voluntary is whether the defendant's will was overborne at the time he confessed and therefore not the product of a rational intellect and free will. *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).

The supreme court, in a unanimous opinion, reversed with the following statement:

> "We view the statement of Chief Deputy Mims as being an affirmative misrepresentation to the petitioner that he (the petitioner) was suspected of killing Paul Thibodeaux. At the time the statement was made to the petitioner, both Henderson and Mims were well aware that Thibodeaux was not dead. The petitioner, clearly taken aback, denied the killing, but apparently confessed at some point during the interrogation after the misrepresentation had been made. It is apparent to us that the interrogating officers in this case were trying to get the petitioner to confess to the robbery at Martin's Mercantile by suggesting to him that Thibodeaux had been killed, the implication being that the petitioner might avoid prosecution for the murder of Thibodeaux if he confessed to the robbery. The state failed to introduce evidence sufficient to show that the petitioner's will was not overborne at the time he confessed. The conclusory testimony of Investigator Henderson to the effect that the petitioner's confession was voluntarily made is simply not sufficient, under the undisputed facts in this case, to show that the petitioner's confession was voluntarily made. We hold, therefore, that the petitioner's confession must be deemed not voluntary, but coerced. Consequently, the trial court committed reversible error in allowing it into evidence."

Confession by deception

Johnson v. State, 22 ABR 812 (March 23, 1988)—Johnson and Classco were incarcerated together and escaped from the Lincoln County Jail in Tennessee. The pair travelled in a stolen automobile into neighboring Madison County, Alabama. The vehicle was ultimately involved in a wreck subsequent to which the defendants were captured.

A Tennessee Highway Patrol Trooper went to the Lincoln County Jail to interview Johnson and Glassco concerning the wreck. Prior to questioning Johnson, the trooper advised him of his constitutional right to remain silent and his right to appointed legal counsel. Johnson testified, however, that he consented to answer the questions only on Trooper Horan's assurance that his responses were for use in completion of the traffic accident report in Tennessee and that those responses would not be used against him in any criminal proceeding in Tennessee and Alabama. The statements given by Johnson were ultimately used in his Alabama criminal prosecution. Earlier, Johnson refused to answer questions and asked for counsel.

A unanimous Supreme Court of Alabama reversed, holding that Johnson's statement to Trooper Horan was the product of deception and, thus, should have been suppressed by the trial court. The supreme court found ample evidence that Johnson's statement was deceptively induced because Johnson was told that the interview was "strictly" for the purpose of investigation of a traffic accident.

The law in Alabama is clear that "in order to be admissible a confession must

be free and voluntary and cannot be the result of any direct or implied promises, however slight." *Eakes v. State*, 387 So.2d 855, 859 (Ala.Crim.App. 1978). The court also noted that the conduct of the trooper violated the teachings of *Edwards v. Arizona*, 451 U.S. 477 (1981), and the Eleventh Circuit decision in U.S. Bosby, 675 F.2d 1174, 1181 (11th Cir. 1982), because:

> "Upon assertion of his right to counsel, law enforcement officials cannot subject the defendant to further questioning until an attorney has been appointed for him and he has been accorded the opportunity to consult . . . ."

Test for challenges for cause—not mechanical application of "Magic Question"

Rutledge v. State, 22 ABR 1107 (February 19, 1988)—The Supreme Court of Alabama granted Rutledge's petition for writ of certiorari to review whether the trial court abused its discretion in denying the defendant's challenge for cause against a prospective juror.

Prior to trial, the defendant, through counsel, filed a *voir dire* motion *in limine* requesting that the court prohibit the district attorney from asking the prospective jurors about the Southern Poverty Law Center. Defense counsel argued that the types of cases handled by the Southern Poverty Law Center made it unpopular with a large segment of the population and that those venire persons holding an unfavorable opinion of the center would be potentially prejudiced toward the defendant.

On voir dire, eight prospective jurors responded that they had heard of the SPLC. One juror further stated that he was prejudiced toward organizations such as the SPLC and that this personal prejudice possibly would affect his ability to act as a fair and impartial juror. The next day that juror was interviewed outside the hearing of the other members of the venire.

The trial defense counsel asked the prospective juror, "Okay. But you feel that you would be prejudiced against lawyers from that kind of organization [referring to the Southern Poverty Law Center]?" The juror responded, "It's possible."

The court, in an effort to save the day, asked the juror, "Could you sit on the trial of this case, and regardless of who represented who[sic], could you still listen to the evidence in the case and base your verdict in the case solely on the evidence, regardless of who the lawyers were?" The juror responded, "I would guess I would. I just don't know." Without response, the trial court denied the challenge for cause and committed reversible error. In reversing, the Supreme Court of Alabama cited with approval its holding in *Ex parte Beam*, 512 So.2d 723 (Ala. 1987), wherein the court held:

> "No right of a felon is more basic than the right to strike a petit jury from a panel of fair-minded, impartial prospective jurors." *Beam*, at 512 So.2d 724.

Applying the principles in *Beam* to the answers given by the juror, the supreme court held that the court proceedings not only must *be* fair, but also must *appear* to be fair. Accordingly, the court held that the trial court abused its discretion in not granting the defendant's challenge for cause.

Recent Decisions of the Supreme Court of the United States

404(b)—"other acts" evidence

Huddleston v. United States, 56 USLW 4363 (May 3, 1988)—Must the district court make a preliminary finding that the government has proved the "other act" by a preponderance of the evidence before it submits 404(b) evidence to the jury? The Supreme Court said no.

Federal Rule of Evidence 404(b) prohibits the admission of similar acts evidence to show a defendant's bad character, but lists several proper purposes for which such evidence may be admitted. In *Huddleston*, the defendant claimed that he did not know that the videotapes he sold were stolen. To show that the defendant did, in fact, have the requisite knowledge, the government introduced evidence that the defendant also had sold stolen television sets and appliances. The district court admitted the evidence over objection.

Chief Justice Rehnquist, writing for the majority, held that the district court need not itself make a preliminary finding that the government had proven the "other act" by a preponderance of the evidence before it submits "similar acts" and other rule 404(b) evidence to the jury. The Supreme Court reasoned that the requirement of such a preliminary finding would be inconsistent with the Federal Rules of Evidence, which allow the admission of relevant evidence for a proper purpose subject only to general strictures, with rule 404(b)'s plain language and the legislative history behind that rule. The Court concluded that "similar acts" evidence should be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act.

However, the Court acknowledged the potential prejudice of "other acts" evidence, but noted that the rules provide several ways in which to guard against abuse: first, rule 404(b)'s requirement that the evidence be offered for a proper purpose; rule 402's provision for balancing the probative value against unfair prejudice; and rule 105's provision for requesting a limited evidence instruction. ■

Memorials

John Edmund Adams—Grove Hill
Admitted: 1919
Died: September 9, 1987

Clopper Almon—Sheffield
Admitted: 1920
Died: April 10, 1988

Judith Long Banks—Mobile
Admitted: 1987
Died: May 22, 1988

Joseph Thomas Conwell, Sr.—Huntsville
Admitted: 1940
Died: March 29, 1988

Walter McQueen Cook, Sr.—Mobile
Admitted: 1948
Died: February 18, 1988

Harry Young Dempsey, III—Spanish Fort
Admitted: 1975
Died: May 21, 1988

Wilfred Galbraith—Anniston
Admitted: 1941
Died: April 28, 1988

Maxwell Grabove—Huntsville
Admitted: 1969
Died: January 15, 1988

Benjamin Heustis Kilborn, Sr.—Mobile
Admitted: 1954
Died: February 28, 1988

Hobdy Greer Rains—Gadsden
Admitted: 1945
Died: April 18, 1988

JOHN EDMUND ADAMS

John Edmund Adams was born in Pine Apple, Alabama, December 26, 1896, and died September 9, 1987, after living in Clarke County, Alabama, for more than 90 years.

Adams was a graduate of the University of Alabama, receiving an bachelor's degree in 1917, master's degree in 1919 and LL.B. degree in 1919, and was a member of Phi Beta Kappa honorary fraternity and Sigma Chi social fraternity. He was a distinguished member of the Alabama State Bar, serving as a member of the Grievance Committee, on the board of bar commissioners, as vice president and as president of the state bar in 1946.

Adams was a member of the First Judicial Circuit Bar Association and the Clarke County Bar Association and served as president of the Clark County Bar Association from 1965 until 1987. He was further distinguished by being admitted to practice before the United States Supreme Court in 1945.

He was an outstanding business and civic leader in Clarke County, having served as a director and secretary of the First Bank of Grove Hill, 1965-1984; first mayor of the Town of Grove Hill; president of the Civic Club; deacon and trustee of Grove Hill Baptist Church, and taught men's bible classes for many years; member of the Democratic Executive Committee 1923-1941; an attorney for the Clark County Commission for 57 years, attorney for the City of Jackson for 64 years and coordinator of civil defense for Clarke County in the 1950s; and a member of board of directors of the Alabama Law School Foundation 1964-1966. In 1974 he was recognized by the Association of County Commissioners of Alabama for distinguished service to county government in Alabama, and in 1978 was selected as Boss of the Year by the Clarke County Legal Secretaries Association.

Adams was a man of extreme modesty and unselfishness who endeavored to avoid the attention which his abilities and accomplishments merited. He was an able and learned lawyer, a man of integrity, a gentleman and a friend to all, and for 68 years, was one of the most highly esteemed, respected and beloved members of the bar of Clarke County, Alabama.

JOSEPH T. CONWELL

Joseph T. Conwell, Sr., affectionately known to his many friends as Joe, was born in Oakman, Alabama, and died March 29, 1988. Joe graduated from Walker County High School and the University of Alabama School of Law; he served his country honorably in the United States Army during World War II. He practiced law in Jasper, Alabama, and later in Huntsville, Alabama, beginning in 1955 and, in more recent years, was privileged to practice law with his son, Joseph T. Conwell, Jr., in Huntsville.

Throughout his adult life, Joe took an active interest in politics and the democratic system. He was a faithful member of Episcopal Church of the Nativity and formerly a member of St. Stephens Episcopal Church in Huntsville; he loved the outdoors, including fishing and hunting.

Joe was an advocate for his clients' position in the many causes in which he participated during his lifetime but was, at the same time, a fair and compassionate man; he gained the respect of the members of the Huntsville-Madison County Bar Association during the time he practiced law in this community and gained many friends in this life through his active participation in his church, political and professional endeavors. Joe had a warm and friendly personality which endeared him to those who were privileged to know him.

Left surviving him are his son, Joseph T. Conwell, Jr.; two brothers, William W. Conwell of Birmingham and Dr. Donald T. Conwell of Massachusetts; his mother, Mrs. Joe D. Conwell of Birmingham, Alabama; and two grandchildren.

WALTER McQUEEN COOK

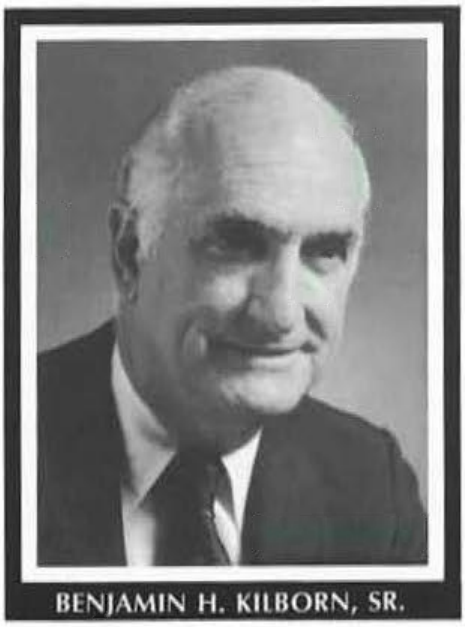
Walter McQueen Cook died in Mobile, Alabama, February 18, 1988.

After attendance at Spring Hill College in Mobile, he obtained a bachelor's degree from the University of Alabama, an LL.B. from George Washington School of Law in 1947 and an LL.M. in 1948. That same year he was admitted to the District of Columbia and the Alabama State bars.

In 1951 he became associated with the firm of Lyons & Pipes, the name of which was later changed to Lyons, Pipes & Cook. Cook was a member of the American, Alabama and Mobile bar associations; the Defense Research Institute; the Federation of Insurance Council and the Alabama Defense Lawyers Association.

While being a successful lawyer, he also found time to set a good example of living for others. He served as president of the Mobile County Wildlife and Conservation Association and the Alabama Wildlife Federation, and served on the board of trustees of both organizations; received the Water Conservationist of the Year award; was one of the founders of the Alabama Wildlife Endowment, Inc., a non-profit fund for the education of youth in conservation; was one of the founders of America's Junior Miss Pageant and president of its board of trustees; for many years was legal counsel to the board of trustees of the pageant; was a member of the board of trustees of the Julius T. Wright School for Girls; and was president of the Mobile Azalea Trail.

He was an able lawyer possessed of a dignity, integrity and ability that were outstanding. He was a Christian gentleman, a devoted husband and father who will be greatly missed by his widow, Norma Rogers Cook; his children, Norma McQueen Cook, Julia Melson, Walter M. Cook, Jr., and Katharyn Satchfield; by other relatives; and by his many friends.



BENJAMIN H. KILBORN, SR.

Benjamin H. Kilborn, Sr., a distinguished member of the Mobile and the Alabama State bar associations, died February 28, 1988.

Kilborn was born in Mobile, Alabama, October 9, 1929. He attended Catholic parochial schools in Mobile and was graduated from McGill Institute. He graduated from Spring Hill College with an bachelor's degree and from Georgetown University in Washington, D.C., with the LL.B. degree.

Kilborn commenced the practice of law over 30 years ago; he was a member of the Mobile County Bar Association, the Alabama State Bar, the American Trial Lawyers Association and the Alabama Trial Lawyers Association. He served as president of the Mobile County Bar Association in 1985 and, at the time of his death, was a senior partner in the firm of Kilborn, Redditt and Griggs.

During the three decades of his legal career he served as a member of many leading civic and conservation associations, including the Board of Zoning Adjustment of the City of Mobile. He was a president of the Mobile County Wildlife and Conservation Association and of the Alabama Wildlife Federation and was a dedicated member of Mobile United.

Kilborn was a veteran of the United States Army. He was married to the former Lynn Edwards of Mobile. They have three children: Nora Lynn Kilborn, Benjamin H. Kilborn, Jr., and Wayne Kilborn. ■

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Disciplinary Report

Disbarment

● The Supreme Court of Alabama entered an order March 21, 1988, disbarring Birmingham lawyer **Charles M. Purvis,** effective March 26, 1988, based upon the "Consent to Disbarment" that Purvis filed March 3, 1988, under Rule 15, Rules of Disciplinary Enforcement. [ASB No. 86-342]

Suspension

● On May 5, 1988, the supreme court ordered that Huntsville attorney **Lawrence A. Anderson** be suspended from the practice of law for a period of six months, commencing June 16, 1988, without automatic reinstatement to the practice of law. Anderson previously had been found guilty by a panel of the Disciplinary Board of all charges arising from five separate complaints brought against him. He was found guilty of neglecting his clients' legal matters, of failing to carry out contracts for the delivery of legal services, of failing to seek the lawful objectives of his clients, of engaging in conduct that adversely reflected on his fitness to practice law and of failing to properly withdraw from those cases. [ASB Nos. 84-646, 85-495, 86-228, 86-652 and 87-156]

Private Reprimands

●On April 1, 1988, a lawyer was privately reprimanded for willful neglect of a legal matter entrusted to him and intentional failure to seek the lawful objectives of a client. The lawyer failed, for a full year, to file any response to discovery requests that had been filed by the defendants in a lawsuit initiated by the lawyer for a client. The failure to respond in any way to the discovery requests resulted in the client's lawsuit being dismissed. [ASB No. 87-143]

● On April 1, 1988, a lawyer was privately reprimanded for willful misconduct, willful neglect, intentional failure to carry out a contract of employment and knowingly making a false statement of fact. In April 1986, the lawyer agreed to obtain for a client an extension of time for the filing of the client's 1985 federal and state tax returns, and the lawyer further agreed to prepare and file those returns for the client. He was paid a specified attorney's fee in the matter, and subsequently informed the client that he had filed both tax returns, and that the client would be receiving refund checks, when, in fact, the lawyer had not filed the tax returns. For six or seven months thereafter, the lawyer failed to return repeated telephone calls to him from the client. Appropriate tax returns were ultimately filed, and the client suffered no financial loss, as he did not owe any additional taxes for 1985. [ASB No. 87-179]

● On April 1, 1988, a lawyer was privately reprimanded for having engaged in conduct that adversely reflected on his fitness to practice law. He filed a suit for a client, growing out of a motor vehicle accident, but subsequently failed to appear at a docket call, resulting in the client's suit being dismissed. [ASB No. 87-36]

● On May 20, 1988, a lawyer was privately reprimanded for having violated DR-1-102(A)(6) and DR-9-102(A). In the course of representing a client in connection with motor vehicle accident injuries, the lawyer signed a written agreement obligating himself to withhold from any settlement proceeds sufficient funds to pay the client's indebtedness to the treating physician. Thereafter, the lawyer received funds in settlement of the client's claim, but deposited the settlement proceeds to a general operating bank account, rather than to a trust account. The lawyer then deducted his fee and disbursed the balance of the funds to the client, failing to withhold the amount due to the physician. [ASB No. 87-483]

● On May 20, 1988, a lawyer was privately reprimanded for having violated DR 2-111(A)(2), by failing to comply with a client's request that he withdraw from her case and return to her the papers that she left in his possession. The lawyer did not return the papers to the client until he had been served by the sheriff with a copy of the complaint that she filed against him with the bar. [ASB No. 87-759]

● On May 20, 1988, a lawyer was privately reprimanded for withdrawing from employment without taking reasonable steps to avoid foreseeable prejudice to the rights of his client, for representing a party to a cause or his successor after having previously represented an adverse party or interest in connection therewith, for willfully neglecting a legal matter entrusted to him and for failing to carry out a contract of employment entered into with a client for professional services. The lawyer, after having been paid to represent the client, allowed a default judgment to be entered against the client in a divorce modification counterclaim filed by the client's former wife. The attorney then informed the client that he no longer could represent the client because he had represented the client's former wife in the original divorce proceedings. [ASB No. 87-520]

■

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THE UAW LEGAL SERVICES PLAN, a national prepaid legal services organization with offices in 19 states, seeks a supervising attorney for its Huntsville area offices to serve the civil legal needs of employees of Chrysler and General Motors. Applicants must be admitted to the Alabama State Bar, have at least five years' civil practice experience and management experience. Salary: $41,000, with liberal fringe benefits. **Send résumé to Jane Mullican, Office Manager, UAW Legal Services Plan, P.O. Box 2416, Decatur, Alabama 35602-2416.**

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Classified Notices

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EXPERT WITNESS ASSISTANCE and case evaluations in Medical Oncology (cancer) and Hematology (diseases of blood). Fast service. Able to travel. Medical school assistant professor. **Richard J. Lanham, M.D., Inc. 42 Forer Road, Dayton, Ohio 45419. (513) 294-3165 anytime.**

UROLOGIST, FORENSIC—experienced, boards, professor, M.D., J.D., **(314) 362-7340.**

REAL ESTATE SALE and loan closing statements (H.U.D. form) with disbursement and amortization schedules. Same day service. Nominal cost. Free trial. **Kloz and Co., Box 76140, Birmingham, Alabama 35253. (205) 870-5858.**

POLICE/PRIVATE SECURITY LITIGATION—Former senior police official Florida and Michigan and college instructor experienced in law enforcement/private security standards and practices. Over 35 years' experience with federal, state, county, municipal and private security systems. NAPS and CPP certified. **W.J. Lougheed, P.O. Box 414, DeLand, Florida 32721. (904) 734-6758.**

CERTIFIED BUSINESS APPRAISALS/EVALUATIONS—You and your client both benefit by using our contacts, training and experience. Compliance with IRS Revenue Ruling 59-60. We help in discovery proceedings, interrogatories and critiquing other appraisals. Economical rate includes facility visit and interview. Listed with both TASA and the National Forensic Center as an expert in business valuation matters. **Donald Richards, CBA., RA Financial Services, P.O. Box 7016, Greenville, South Carolina 29606. (803) 292-1450.**

MEDICAL ECONOMICS-EXAMINATION and establishment of "reasonableness" medical bills. We have hands-on experience in the health insurance industry for a total of 25 combined years with vast technical knowledge of the methodology of establishing and substantiating reasonable fees for hospital, physician and other medical services and supplies. Consultation and expert testimony available if needed. **Contact: Medical Economics c/o Richard W. Vickers, JD, P.O. Box 36604, Birmingham, Alabama 35236. (205) 933-7661, ext. 302 or (205) 678-8908.**

MISCELLANEOUS

MISSING WILL—If any person has information concerning a will which may have been prepared for Virginia Carol Blevins (a/k/a Carol B. Duchac), who was a resident of Shelby County at the time of her death October 19, 1987, please contact Paul O. Woodall, 3000 SouthTrust Tower, Birmingham, Alabama. **(205) 251-3000.**

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