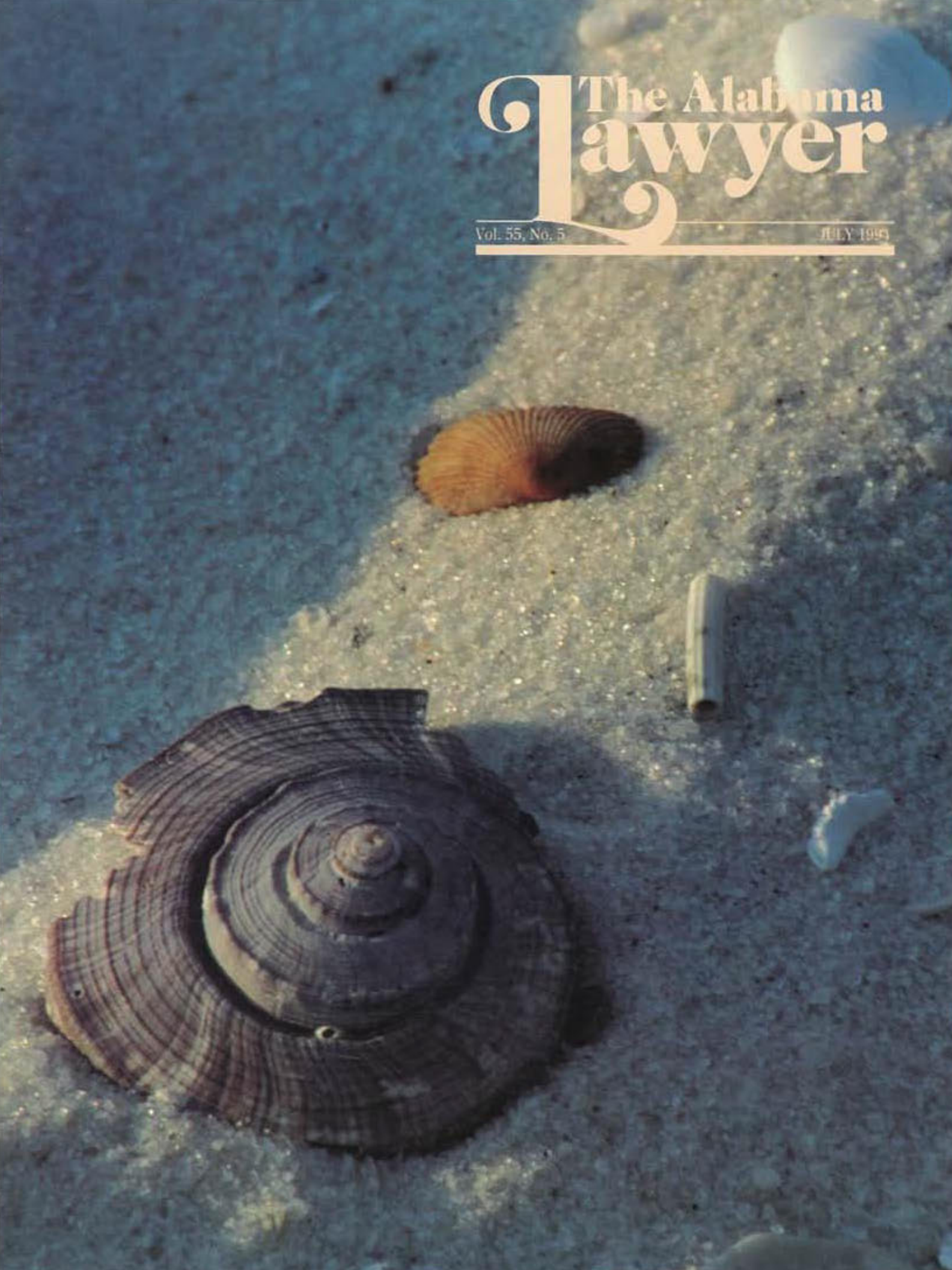
The Alabama
Lawyer
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JULY 1994

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Cumberland School of Law of Samford University Continuing Legal Education Fall, 1994 Seminar Schedule

September 9	**Health Care** - Birmingham
September 16	**Federal Practice: Including Update on the Federal Rules of Civil Procedure** - Birmingham
September 23	**Negotiation: The Lawyer's Essential Skill with Paul M. Lisnek, J.D., Ph.D.,** - Birmingham
September 30	**Annual Bankruptcy Law Seminar** - Birmingham
September 30	**AUBA CLE Conference: Environmental and Business Issues for the General Practitioner** - Auburn [co-sponsored by Cumberland School of Law]
October 7	**Insurance Law** - Birmingham
October 14	**Mediation** - Birmingham
October 20	**New Alabama Rules of Evidence** - Huntsville
October 21	**New Alabama Rules of Evidence** - Birmingham
October 27	**New Alabama Rules of Evidence** - Montgomery
October 28	**New Alabama Rules of Evidence** - Mobile
October 28	**Revised Alabama Business Corporation Act** - Birmingham
November 4	**Annual Workers' Compensation Seminar** - Birmingham
November 11	**ERISA** - Birmingham
November 18	**James W. McElhaney's Master Advocate Series: Proving Your Case *and* Expert Witnesses -- The Art and The Law** - Birmingham
December 2	**Employment Discrimination** - Birmingham
December 9	**Recent Developments for the Civil Litigator** - Mobile
December 16	**Recent Developments for the Civil Litigator** - Birmingham
December 8, 19-22	**Video Replays** - Montgomery and Birmingham

Brochures specifically describing the topics to be addressed and speakers for each of the seminars will be mailed approximately six weeks prior to the seminar. If for any reason you do not receive a brochure for a particular seminar, write Cumberland CLE, 800 Lakeshore Drive, Birmingham, AL 35229-2275, or call 870-2865 or 1-800-888-7454. Additional programs and sites may be added to the schedule.

IN BRIEF

July 1994 Volume 55, Number 5

ON THE COVER:

Seashells spotlight the sparkling white beaches at the Gulf State Park in Gulf Shores, Alabama, just down the road from the site of this year's annual meeting in beautiful Orange Beach at the Perdido Beach Resort, July 18-21. — Photo by James W. Guier, Jr.

INSIDE THIS ISSUE:

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, June (bar directory edition), July, September, 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*. Other subscribers do not receive the directory edition of the *Lawyer* as part of their subscription. Advertising rates will be furnished upon request. Advertising copy is carefully reviewed and must receive approval from the Office of General Counsel, but publication herein does not necessarily imply endorsement of any product or service offered. *The Alabama Lawyer* reserves the right to reject any advertisement.

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PRESIDENT'S PAGE

Thank You!

How time flies when you are having fun! It's hard to believe that my year as your president is nearly over, but on July 21, I will pass the gavel and my best wishes to President-elect Broox Holmes. It has certainly been an eventful year and one I feel we as lawyers can be proud of the manner in which our state bar responded to various matters. I am particularly proud of the way the bar handled the Amtrak wreck, the abolition of Rule IV(D) (five-time bar exam rule), the law school accreditation standards, and the proposed *Hoover White v. Bennett* settlement.

The events of this year have taken an enormous amount of time, but I can honestly say I enjoyed it. More importantly, I can unequivocally say I would do it again, even knowing what I know now.

Spud Seale

At the risk of omitting and offending someone I should thank, I would be remiss if I did not mention some people who have been of tremendous assistance to me this year. First and foremost I give my profound thanks to you, the lawyers of Alabama, for affording me the privilege to serve as president of one of the finest bars in the country. It has been an awarding experience and I am sincerely grateful for the opportunity.

I next thank my family for the unwavering support they have been throughout this year. I am particularly thankful to my own first lady, Nancy Seale, for listening to my frustrations and offering her usual sound and practical advice. Nancy was certainly a help to me and I thank her for it.

I thank the members of my firm, Robison & Belser, for picking up the slack and keeping my practice afloat. Serving as president of the Alabama State Bar takes an enormous amount of time and I could have not done so without the full support of my partners. I am particularly grateful to my partner, Martha Ann Miller, and, most especially, to my wonderful secretary, Wynn McLaney, for the help and assistance they gave me this year.

Having witnessed and participated in the business of the state bar for approximately seven years, I was very cognizant of the importance of a strong Executive Committee and a Supreme Court Liaison Committee for a successful year as president. These two committees are in large part responsible for whatever success I and the bar may have had this year. Both committees dealt with some of the most difficult issues ever to come before the bar and did so in an exemplary fashion. To my Executive Committee, composed of state bar Vice-President Billy Melton, President-elect Broox Holmes, past President Clarence Small, and commissioners Rick Manley, Cathy Wright and John Key, and to the Supreme Court Liaison Committee composed of commissioners Sam Franklin and Johnny Owens and Vice-President and chairman Billy Melton, I say thank you for your support, your advice and for standing tall during tough times and on tough issues.

I also thank the members of the board of bar commissioners for the faith and support they gave me this year. We had some unusually long meetings which tested the patience of people from time to time and we dealt with some extremely sensitive and volatile issues. Most importantly, I believe the positions ultimately taken by the commissioners were correct and positions of which the vast majority of lawyers and citizens in Alabama can be proud.

I thank the committees and task forces for a job well done. I am especially pleased with the work done by several of the task "forces", i.e., Long Range Planning under the leadership of Camille Cook, Judicial Selection under the leadership of Bob Denniston, Minority Participation and Opportunity under the leadership of Walter McGowan, Alternative Methods of Dispute Resolution under the leadership of Marshall Timberlake, and Women in the Profession under the leadership of Celia Collins and Margaret Young. With respect to the Women in the Profession Task Force, I especially thank Commissioner Cathy Wright for her vision in recognizing the necessity for this task force.

Last, but certainly not least of all, I express my never- ending thanks and appreciation to Reggie Hamner, Keith Nor-

man, Bob Norris and the *entire* staff of the Alabama State Bar. I cannot begin to tell you how fortunate we are as a bar to have the dedicated staff we have. I would inadvertently omit someone if I attempt to name names, so it will have to suffice for me to say I relied on everyone and could not have done my job without the help and support of the entire staff. They have my heartfelt thanks.

Reggie and I will sing our swan song together at the annual meeting, but Reggie's comes at the end of 25 years of service. Reggie has seen our bar grow from approximately 2,000 members and four employees to over 10,000 members and 30 employees. He has had a distinguished career as our executive director and the whole bar owes him a tremendous debt of gratitude for his unquestionable contributions to the state bar and its members. Join me in wishing Reggie and Anne success and happiness in their future years.

In the event you have not heard, after a national search and approximately 80 applicants, the Search Committee chaired by past President Bill Scruggs recommended Keith Norman to the board of bar commissioners for the position of executive director effective October 1, 1994. On May 13, the commissioners unanimously approved the recommendation of the Search Committee and selected Keith as Reggie's successor. Additionally, the commissioners elevated Keith to the position of associate executive director of the Alabama State Bar. I publicly congratulate Keith on his being selected. I have had the pleasure of working with Keith for the past seven years and I can assure you the board of bar commissioners made an excellent choice. I encourage those of you who do not know Keith and his lovely wife Teresa to take time to meet them and welcome Keith as our new executive director. They are both tremendous assets to our bar.

In closing, I believe the futures of our bar and our profession are bright. I share the same concern for our future bar leaders that my counterparts throughout the Southern Conference of Bar Presidents have expressed for their successors—namely, that the demands on the time of the volunteer bar leader could become so demanding that circumstances will limit the opportunities to serve our profession to a select few.

As our Long Range Planning Committee pursues its work, I hope it will keep as one of its prime considerations the need to evaluate new programs and activities while keeping in focus the time volunteers will have to contribute to ensure their successful operation and completion.

I again say thanks to all the members of the Alabama State Bar for allowing me to serve as your president. It has been a wonderful year and I truly enjoyed it.

God bless you all. ■

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LETTERS

Letter to the President

April 15, 1994

Dear Spud:

Thank you for sending us the March 22, 1994 letter from Bob Denniston. I join you in your praise for the diligent work that Bob has put into the complex and controversial issues considered by the Judicial Selection Task Force. He has undertaken a difficult subject which in my opinion will require much more study and analysis before being reconsidered by the Bar Commissioners. Here are some but by no means all of the reasons I say this:

1. The voluntary guidelines are flawed and should not be adopted by the Bar Commission because:
   (a) They impose limits that may favor incumbents [see (f) below];
   (b) They unfairly limit lawyers generally and in particular those with litigation pending, to the advantage of other "interest groups" [see Nos. 3 and 4];
   (c) They "tilt" the field from level [see Nos. 2 and 3];
   (d) They gratuitously assume that judges are going to be unduly influenced by campaign contributions [see Nos. 6 and 8];
   (e) They will only exacerbate the "problem" if there is indeed one [see Nos. 2, 3, 4 and 5];
   (f) As quasi legislation, affecting election to an arm of government of major import to minorities, the guidelines would probably require Justice Department preclearance. We do not need, nor should we invite such a conflict [see (a) above].
2. If lawyers are restricted in their campaign giving as suggested by the Task Force Report, then the playing field is tipped to other potential special interests with more numbers (individuals, diverse pacs, sub pacs, etc.) in their corner than lawyers. (It has been my experience that very few lawyers give over $250.00 to any political campaign. Yet, it takes the rest of us to help finance these very expensive races.)
3. If the Task Force is concerned with the perception that judges may be unduly influenced by lawyers, it should also remember that there are many more union members, teachers, state employees, business people, executives, stockholders, and employees of the insurance industry than lawyers. Let's face it, some of these groups are engaged in full scale war on our current judiciary and system.
4. If we believe or fear that judges can be and are influenced by the source and amount of contributions to their campaigns from lawyers, why then would not the same concern apply to those interest groups set out in No. 3 because of their number and diversity? They could out-spend the "limited" lawyers four to one or more even under the Task Force "voluntary guidelines".
5. If we believe judges can be influenced by the source and amount of campaign contributions, then shouldn't we also assume that they may be influenced by social and business contacts they have? We all know that various interest groups have been known to lavishly entertain.
6. I must also ask why we are afraid that the present method of financing judicial campaigns poses any greater threat of corruption than was the case in quieter times? Consider all the side bar and coffee shop talk we have all been exposed to over the years about this or that judge's favoritism of one litigant, lawyer, or whatever. This image problem has been with us from the foundation of the republic. My point, of course, is that, if a judge is corruptible, no amount of campaign finance regulation or apoliticization is going to prevent it — not even the "merit-retention" plan.
7. We in Alabama have for many years had in place a mechanism to deal with corruption in the judiciary. The Judicial Inquiry Commission and Court of the Judiciary have functioned well and could be strengthened to be even more effective.

   If anyone has any evidence that any current judge in this state has violated his or her oath in response to campaign contributions, they should be advised of how to file a complaint with the commission and do it.
8. By the way, I would appreciate it if Bob would name the "three selfish interest groups" referred to in his letter to you dated March 22, 1994. I would be interested to know who he believes is opposed to the voluntary guidelines for selfish reasons.

Would he include consumers and the people of Alabama in that group? It is they who have benefitted most from the

enlightened, progressive, hard-working judiciary that our present system has given us.

I would have to ask, are we really thinking of those people when we try to "fix" the system for the sake of the appearance of propriety or are we engaging in a public relations fiction?

I do not expect you or Bob the share the conclusions I have reached. On the other hand, I trust that you will continue to look at all sides of this enormously complex issue. I assure you that I will do so as well.

As far as Bob's thoughts on the present voting rights cases are concerned, I cannot entirely agree with him, but do feel he may be on to something.

To be sure, the proposed "Balkanization" of the judiciary into single member districts is an unmitigated constitutional and institutional disaster in the making. The bar should encourage an aggressive appellate and even legislative response at the national level.

I do not agree with the merit-retention system. It is oriented to the status quo, yet leaves the incumbent subject to enormous "recall" pressure by a disaffected interest group. (Look at the money spent ten years ago to unseat Chief Justice Byrd of the California Supreme Court.)

While far from perfect and badly handled, the settlement negotiated by the Attorney General makes more sense than any other attainable outcome. It retains at-large election while providing another plank in the floor of equity for minorities. Maybe we should just go one step further and agree that two additional seats on the appellate courts are reserved in perpetuity for minorities, only non-whites could seek those seats, hold elections, and let us all vote.

I appreciate the openness with which this matter is being handled and hope that we will continue to work together on it.

John Percy Oliver, II
Oliver & Sims
Dadeville, Alabama

Letter to the Editor

April 6, 1994

In the January 1994 issue of *The Alabama Lawyer*, I read with interest the article entitled "The Tort of Outrage in Alabama: Emerging Trends in Sexual Harassment." As in-house counsel for BE&K Construction Company, I want to clarify information contained in the article referencing *Potts v. BE&K Construction Company*.

The sequence of events are misstated. The implication is that the company allowed two weeks to pass after the complaint of sexual harassment was made without taking any action, and action was taken only after a subsequent complaint. In reality, the testimony in the record is that there was no information provided at the time of the initial complaint to allow any corroboration of Potts' claim. There was only the allegation made by one employee and a denial by the other. Sanders was, in fact, put on notice as to the company policy of sexual harassment and his obligations to avoid any behavior which would be sexually harassing to another employee. There was not a second complaint of harassment. Two weeks after the initial complaint, Potts provided, for the first time, names of witnesses who could substantiate her allegations. With this information, the investigation was continued and disciplinary action was taken.

The Supreme Court's reversal of the summary judgment order placed the case on the trial docket, and it was tried to a jury in Mobile County Circuit Court. The undisputed testimony at trial was that, following the initial complaint, there were no further instances of harassment, even though two more weeks passed before disciplinary action was justified following completion of the investigation. The steps taken by BE&K were adequate to stop the harassing behavior. The jury agreed and returned a verdict for BE&K Construction Company.

On behalf of BE&K, I request that the whole story be told accurately in order to paint a true picture of what did occur. We would appreciate your running a correction in the next issue.

Carolyn F. Morgan
Corporate Counsel
BE&K Construction Company
Birmingham, Alabama

Notice – Change of Address Information

Effective January 21, 1994, all post offices were directed to cease researching and disclosing addresses of individuals and families except for those requested by government agencies, law enforcement agencies, courts or other special exceptions. According to Marvin Runyon, CEO/Postmaster General, "Recognizing growing concern in society about disclosing new address information on battered individuals, the United States Postal Service is making major changes in its mail forwarding system."

However, lawyers, private investigators and other individuals who are performing as "process servers," (i.e., persons empowered by law to serve or deliver legal documents to others), may be provided with a requested address, upon completing and signing the new "Request for Boxholder or Change of Address Information Needed for Service of Legal Process" form. The form must be on the process server's letterhead.

(Letterhead)

Postmaster

Date: _____

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Please furnish the new address or the name and street address (if a boxholder) for the following:

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NOTE: The name and last known address are required for change of address information. The name, if known, and post office box address are required for boxholder information.

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3. The names of all known parties to the litigation: _____
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5. The docket or other identifying number if one has been issued: _____
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WARNING

The submission of false information to obtain and use change of address information or boxholder information for any purpose other than the service of legal process in connection with actual or prospective litigation could result in criminal penalties including a fine of up to $10,000 or imprisonment or (2) to avoid payment of the fee for change of address information of not more than 5 years, or both (title 18 U.S.C. Section 1001).

I certify that the above information is true and that the address information is needed and will be used solely for service of legal process in connection with actual or prospective litigation.

_____ _____

Signature Address

_____ _____

Printed Name City, State, ZIP Code

FOR POST OFFICE USE ONLY

New Address or Boxholders Information: _____ No change of address order on file

_____

Name & Address

_____ Not known at given address _____ Moved, left no forwarding address _____ No such address

EXECUTIVE DIRECTOR'S REPORT

JUNE 1, 1994

Twenty-five years ago today, I locked the state bar headquarters building as secretary of the Alabama State Bar for the first time. Tonight, June 1, 1994, I have locked it for the last time as secretary. As I turned off the lights, I could not help but laugh to myself as I recalled the difficulty I experienced in performing this simple task for the first time back then.

There are two large round skylights in the middle of the original building. They have always had opaque covers which, to the casual observer, make them appear to be two large round lights with covers flush at the ceiling. The building had only four light switches back then. I tried each one, but none of them seemed to turn off the big round ceiling lights. I left thinking I had run up the electric bill my first day on the job and I would have to call **Judge John Scott** on day number two to ask how to do such a simple task. Fortunately, I felt comfortable in knowing that I *could* call upon him.

Reginald T. Hamner

Never in my wildest imagination, that first day on the job, did I think I would be here 25 years later. Twice I had declined the opportunity to even discuss the job before agreeing to meet with a committee charged with recommending a successor to Judge Scott. Ultimately, I committed to three years in the position, but candidly expressed the view that I could not see staying more than five years.

Five years ago, I made the personal decision that I would like to leave my position this year. I suggested that the Alabama State Bar employ a person who could gain the experience needed to compete in a search for my replacement. The board of bar commissioners concurred in the employment of such an individual and I made what I believed then, and now know, was one of my best decisions. I recruited **Keith Norman** from private practice to join our staff. I had not known Keith personally, but I had observed his work.

Keith had been an outstanding volunteer in bar activities. I saw in him a commitment to making the legal profession in Alabama the best it could be. He possesses many characteristics I have admired in my colleagues who have chosen to be bar executives throughout the country. Absolute integrity, a strong work ethic and an enthusiasm for those professional endeavors through which our bar and its members can have a positive impact on the high calling of the administration of justice are among these traits. I have watched with pride the respect his contributions to the National Association of Bar Executives and the Continuing Legal Education Administrators have earned him.

One cannot invest the majority of one's professional life in a 115-year-old institution without having a strong desire to see the work of its elected leaders and countless other volunteers continue on a positive and progressive course. I care deeply about the person to whom I relinquish my office.

I will leave the office September 30 with the satisfaction of knowing that the best person I could have imagined for this position has been selected and will follow me. I am excited about our bar's future. Upon accepting the recommendation of the search committee, which was composed of some of our best and brightest lawyers, I asked the board to confer on Keith the title of associate executive director.

Keith now will have the benefit of a longer period of orientation than I had. I commit to him, as Judge Scott committed to me, to be available for counsel. However, just as I had to seek Judge Scott's input, Keith will have to ask for mine. I will not volunteer advice. Fortunately, he has gone through the process of building and remodeling the headquarters so that on October 1 he can at least turn off all the lights. Also, he will inherit, as I did, a wonderfully capable staff, though his will be nine times bigger than mine. The bar has similarly grown from 1,200-plus members in 1969 to our present membership of over 10,200.

I wish for Keith a wise counselor like I had in **Robert E. Steiner, III**, who early on shared so candidly with me what our bar was in 1969, how it got to that status, what it could become—and who you could rely on to help. That afternoon I spent during my first week as secretary of the bar sitting on the steps of Bob's caboose in a field on Bell Road has proven over time to be the best bar executive education seminar I could have attended. (Ironically, the first vote I ever cast for a bar president in my first Alabama State Bar meeting after admission in 1965 was for "R.E., III".) I also would hope to be the same friend and confidant to Keith that Judge Scott was to me. Finally, in addition to Bob and Judge Scott, I benefited greatly both personally and professionally from the wisdom and learned counsel of **Justice Pelham Merrill** who gave me my first opportunity at legal employment. Keith will have to find his own Judge Merrill—his likes are rare indeed. ■

About Members, Among Firms

ABOUT MEMBERS

William B. Hardegree announces the relocation of his office to 323 E. 16th Street, Anniston, Alabama 36201. The mailing address is P.O. Box 1453, Anniston 36202. Phone (205) 238-0093.

J.M. Boozer announces the relocation of his office to 502 Church Avenue, S.E., Suite A, Jacksonville, Alabama 36265. Phone (205) 782-2080.

Morris J. Princiotta, Jr. announces the relocation of his offices to 3000 Riverchase Galleria, Suite 490, Birmingham, Alabama 35244. Phone (205) 985-3700.

Richard W. Whittaker, formerly of Pittman, Whittaker & Pittman, announces the opening of his offices at 300 E. Lee Street, Enterprise, Alabama 36330. The mailing address is P.O. Box 170, Enterprise 36331. Phone (205) 393-5146.

Janet P. Cox, formerly of Veigas & Cox, announces the opening of **The Cox Law Firm**, located at 813 Shades Creek Parkway, Suite 200, Birmingham, Alabama 35209. Phone (205) 870-1205.

Jeff T. Brock, formerly of Nix & Brock, announces the opening of his offices at South Court Square, Evergreen, Alabama. The mailing address is P.O. Box 468, Evergreen 36401. Phone (205) 578-9871.

William David Newton, formerly with the City of Huntsville, Finance Department, announces a change of address to the **Alabama Department of Finance**, Budget Office, 237 Alabama State House, Montgomery, Alabama 36130-2610.

AMONG FIRMS

Jones & Waldrop announces a change of address to Southcrest Building, 1025 Montgomery Highway, Suite 212, Vestavia Hills, Alabama 35216. Phone (205) 979-5210.

Stone, Granade, Crosby & Blackburn announces that **Martha Durant Hennessy** has become a member of the firm. The mailing address is P.O. Drawer 1509, Bay Minette, Alabama 36507.

Douglas J. Fees announces the opening of his office and the association of **Jeffrey K. Grimes** and **L. Caroline McGehee**. Offices are located at 401 Madison Street, Huntsville, Alabama and the mailing address is P.O. Box 508, Huntsville 35801. Phone (205) 536-1199.

Hamilton, Butler, Riddick, Tarlton & Sullivan announces that **Steven C. Pearson** has become a member of the firm, and **Leigh L. Austill** and **James W. Tarlton, IV** have become associates. The mailing address is P.O. Box 1743, Mobile, Alabama 36633. Phone (205) 432-7517.

Lamar, Nelson & Miller announces that **David M. Benck** has become associated with the firm. Offices are located at 505 20th Street, North, Suite 1600, Financial Center, Birmingham, Alabama 35203. Phone (205) 326-0000.

Cherry, Givens, Peters, Lockett & Diaz announces that **Carl E. Underwood, III** and **Tracy W. Cary** have become associates of the firm. They will practice in the Dothan office, located at 125 W. Main Street. The mailing address is P.O. Box 927, Dothan 36302. Phone (205) 793-1555. The firm also has offices in Birmingham and Mobile, Alabama and Jackson, Mississippi.

Davidson, Wiggins & Crowder announces that **W. David Ryan** has

become associated with the firm. The mailing address is P.O. Box 1939, Tuscaloosa, Alabama 35403. Phone (205) 759-5771.

Lehr, Middlebrooks & Proctor announces that **Steven M. Stastny** has become an associate. Offices are located at 2021 Third Avenue, North, Suite 300, Birmingham, Alabama 35203.

Chapman, King & Byrholdt announces that **J. Barry Abston** has become associated with the firm. Offices are located at 117 W. Benson Street, Anderson, South Carolina 29624. Phone (803) 225-1411. Abston is a 1990 admittee to the Alabama State Bar.

Powell & Peek announces that **Gary L. Weaver** has joined the firm as a partner and **Abner Riley Powell, IV** has joined as an associate. The firm's new name is **Powell, Peek & Weaver.** Offices are located at 102 N. Cotton Street, Andalusia, Alabama 36420. The mailing address is P.O. Drawer 969, Andalusia 36420. Phone (205) 222-4103.

Loveless, Banks & Lyons announces that **T. Allen Tippy** has become associated with the firm. Offices are located at 28 N. Florida Street, Mobile, Alabama 36607. Phone (205) 476-7857.

Walston, Stabler, Wells, Anderson & Bains announces that **C. Ellis Brazeal, III** and **David B. Walston** have become partners and **Edward J. Ashton,** former senior vice-president and associate general counsel for AmSouth Bank, has become *of counsel*. The firm also announces that **Jeffry B. Gordon, Kimberly Goldfarb Gordon, Randall D. Quarles** and **N. Christian Glenos** have become associated with the firm. Offices are located in the Financial Center, 505 20th Street, North, Suite 500, Birmingham, Alabama 35203. Phone (205) 251-9600.

Johnston, Johnston & Moore announces that **Stuart M. Maples** has joined the firm. Offices are located at Regency Center, 400 Meridian Street, Suite 301, Huntsville, Alabama 35801. Phone (205) 533-5770.

Bryant, Blacksher & Lester announces that it has opened an additional office in Baldwin County, Alabama. The new office is located at 21 S. Section Street, Fairhope, Alabama. Phone (205) 990-8998. The firm also has offices in Mobile, Alabama.

Wainwright & Pope announces that **Joseph M. Ayers** has become an associate with the firm. Offices are located at 100 Union Hill Drive, Suite 100, Birmingham, Alabama 35209. Phone (205) 802-7455.

Wilmer & Shepard announces that **John O. Cates** has joined the firm as a partner. Offices are located at 100 Washington Street, Suite 302, Huntsville, Alabama 35801. Phone (205) 533-0202.

Blalock, Blalock & Oros announces that **James L. Stirling, Jr.** has joined the firm as an associate. Offices are located at 651 Beacon Parkway, West, Suite 214, Birmingham, Alabama 35209. Phone (205) 945-9922.

Michael S. McNair announces that **J. Charles Wilson** has become associated with the firm. Offices are located at 2152 Airport Boulevard, Suite 105, Mobile, Alabama 36606. Phone (205) 450-0111.

McElvy & Ford announces that **David P. Martin, Frank M. Cauthen, Jr., Richard M. Kemmer, Jr.** and **Gregory S. Griggers** have become associated with the firm. Offices are located at 621 Greensboro Avenue, Tuscaloosa, Alabama and Court Square, Centreville, Alabama. Phone (205) 349-2000 or (205) 926-9767.

Edward F. Berry of **Berry & Shelnutt** announces a change of address. His new address is 1024 Second Avenue, P.O. Box 1437, Columbus, Georgia 31902-1437. Berry is a 1990 admittee to the Alabama State Bar.

Gorham, Stewart, Kendrick, Bryant & Battle announces that **Victor Kelley** has become a partner. Offices are located at 2101 6th Avenue, North, Suite 700, Birmingham, Alabama 35203. Phone (205) 254-3216.

James A. Harris, Jr., formerly of Sirote & Permutt, and **Thomas H. Brown** announce the formation of **Harris & Brown.** Offices are located at 2000A SouthBridge Parkway, Suite 520, Birmingham, Alabama. The mailing address is P.O. Box 59329, Birmingham 35209. Phone (205) 879-1200.

Blume & Blume announces that **John W. Stahl** has become an associate with the firm. Offices are located at 2300 University Boulevard, East, Tuscaloosa, Alabama 35404. Phone (205) 556-6712.

Doyce P. Mitchell and **Thomas E. Mitchell** announce the formation of **Mitchell & Mitchell.** Offices are located at 139 W. Main Street, Albertville, Alabama 35950. Phone (205) 878-9441.

Adams & Reese announces that **Lisa Bradford Hansen** has become a partner, and **William E. Pritchard, III** and **Thomas M. O'Hara** have become associates. Offices are located in New Orleans and Baton Rouge, Louisiana; Mobile, Alabama; Houston, Texas; and Washington, D.C.

M. Mort Swaim announces that **Joel F. Dorroh** has become an associate of the firm, and that the firm has opened an additional office. The new office is located at 3600 Watermelon Road, Northport, Alabama 35476. Phone (205) 752-2323. The firm also has an office at 235 W. Laurel Avenue, Foley 36535. Phone (205) 943-3999.

C. Knox McLaney, III announces that **Hendon Blaylock DeBray**, formerly administrator of the Alabama Alcoholic Beverage Control Board, has become a partner and the new name of the firm is **McLaney & DeBray.** The new offices are located at 509 S. Court Street, Montgomery, Alabama 36103. Phone (205) 265-1282.

Webb & Eley announces the relocation of its offices to 166 Commerce Street, Suite 300, Montgomery, Alabama 36104. Phone (205) 262-1850.

Briskman & Binion announces that **Christ N. Coumanis** has become associated with the firm. Offices are located at 205 Church Street, Mobile, Alabama 36602. The mailing address is P.O. Box 43, Mobile 36601. ■

PLEASE NOTE
ALABAMA STATE BAR MEMBERS:
Whenever you are requested to furnish your state bar identification number (pleadings filed with courts, etc.), please refer to your Social Security number, as that is what we keep on record identifying you.

LEGISLATIVE WRAP-UP

By ROBERT L. McCURLEY, JR.

First Special Session 1994

Bills of general interest to lawyers that passed in the May special session are as follows:

S-30 (Act 94-800) **DHR Attorney-Client Relationship** – Any district attorney or attorney appointed by the attorney general initiating legal proceedings at the request of the Department of Human Resources to establish or enforce child support or spousal support represents only DHR. There is no attorney-client relationship between the attorney and applicant or recipient.

S-32 (Act 94-826) **Motor Voter** – This designates the Alabama Secretary of State to implement the National Voter Registration Act of 1993. It further authorizes the Secretary of State to promulgate rules and prescribe forms.

S-38 (Act 94-828) **Alabama Athlete Agent Regulatory Commission** – This amends Ala. Code §8-26-3 *et seq.* to specify the colleges with representatives on the Commission and revise the recordkeeping provisions for agents and the Commission.

S-61 (Act 94-802) **Power of Attorney to Make Gifts** – Any general power of attorney, unless restricted, has the authority to make gifts of the principal's property within the limits of the annual exclusion allowed by IRS.

S-70 (Act 94-820) **Possession of Pistol in Public School** – This amends Ala. Code § 16-28-40 to provide that anyone convicted of the crime of possession of a pistol on school premises loses their driver's license for 180 days. If the person is not old enough to obtain a license one will not be issued until 180 days after they become eligible.

S-71 (Act 94-782) **Local School Board Policy** – This amends Ala. Code §16-18-12 to provide that each local public board of education must adopt a written policy for its standards on school behavior. This policy statement must be received and signed for by the student and parent.

S-72 (Act 94-817) **Possession of Deadly Weapon** – This amends Ala. Code § 13A-11-72 to provide that possession of a deadly weapon on public school premises or school buses is a Class C felony.

S-73 (Act 94-819) **Parents' Liability for Minors** – This amends Ala. Code §6-5-380 to provide that parents are liable for damage caused by the malicious acts of their children up to $1,000.

S-74 (Act 94-783) **Liability for Sale of Controlled Substance** – Any person who unlawfully provides a minor with a controlled substance may be liable for injuries suffered by third persons as a result of the use of the controlled substance by the minor.

S-75 (Act 94-787) **Disciplinary School Programs** – Within each county the school boards must establish at least one disciplinary school program provided the Legislature grants specific funds.

S-77 (Act 94-784) **School Discipline Plan** – This amends Ala. Code §16-1-24.1 to provide for school discipline plans to include policies for drugs, alcohol, weapons and physical harm to a person.

S-78 (Act 94-793) **School Regulations on Behavior and Discipline** – This amends Ala. Code § 16-1-14 to provide that local school board regulations governing the behavior and discipline of pupils must be approved by the State Board of Education.

S-79 (Act 94-794) **Assault on a Teacher** – This amends Ala. Code § 13A-6-21 to provide that physical injury to a teacher or educational employee is a Class C Felony.

It is anticipated that a second special session will be called for July to address education reform and casino gambling.

For further information, contact Bob McCurley, Alabama Law Institute, P.O. Box 1425, Tuscaloosa, Alabama 35486, or call (205) 348-7411, FAX (205) 348-8411. ■

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

BUILDING ALABAMA'S COURTHOUSES

HALE COUNTY COURTHOUSE

By SAMUEL A. RUMORE, JR.

The following continues a history of Alabama's county courthouses—their origins and some of the people who contributed to their growth. ***The Alabama Lawyer*** *plans to run one county's story in each issue of the magazine. If you have any photographs of early or present courthouses, please forward them to: Samuel A. Rumore, Jr., Miglionico & Rumore, 1230 Brown Marx Tower, Birmingham, Alabama 35203.*

Hale County Courthouse

HALE COUNTY

On January 30, 1867, the Alabama Legislature created Hale County from the eastern half of Greene County, and from smaller sections of Marengo, Perry and Tuscaloosa counties. The legislation stated that the county contained 663 square miles and 4,610 white citizens.

Prior to its creation, the history of its territory was closely intertwined with that of Greene County. For instance, the first courthouse of Greene County was located in the area that became Hale; further, the town of Greensboro, which became Hale County's county seat, was named for Greene County's namesake, Nathaniel Greene; and Hale County was named for a prominent attorney and war hero who lived and practiced law in Eutaw, the county seat of Greene County. The counties share a common border, the Warrior River. On a list of Alabama counties, Greene and Hale counties are both alphabetical and numerical neighbors.

The first settler in the territory was Caleb Russell, who came to the frontier in 1816, shortly after the Choctaw Indian land cession. A number of other Russells moved into the area, which, within a radius of four or five miles of Caleb's homestead, became known as the Russell Settlement or Russellville.

Other settlers from Tennessee, Georgia and the Carolinas came into the nearby area. They erected homes and called their settlement Troy or New Troy, probably after the ancient city in Asia Minor. After Alabama became a state, officials concluded that Troy was located in a "sixteenth section" which, according to the Act of Congress creating Alabama, had to be set aside for the benefit of public schools. Therefore, the settlers at Troy moved to Russellville, which in 1823 was renamed Greensboro, in honor of Nathaniel Greene and Greene County.

One of the first ordinances passed in Greensboro outlawed horse racing within the town's corporate limits. Its passage was in reaction to the fact that the town's main street was being used as a race course and its citizens had organized a "Jockey Club." In response, a new race course was built outside the town limits, approximately two miles west of the pres-

ent courthouse site, and was the scene of horse racing for many years.

In the 1830s, 1840s and 1850s, Greene County changed from a frontier area to a prosperous agricultural center. With its newly acquired wealth, it became a cultural and educational hub for Alabama. And Greensboro benefitted from Greene County's advancement. For example, in January 1856, the Methodist Church established Southern University at Greensboro. This school was designed to be an institution of higher learning for the promotion of literature, science, morality and religion. Its cornerstone was laid on June 11, 1857, and the doors of the university opened to students on October 3, 1859. (This school remained a vital part of the Greensboro community until 1918 when it merged with Birmingham College, another Methodist institution, founded in 1898, to become Birmingham-Southern College, located in Birmingham.) When Hale County was created, it had the good fortune to acquire the thriving and prosperous community of Greensboro, at Greene County's expense.

Upon its creation in 1867, Hale County was named for Stephen Fowler Hale. Hale was born in Kentucky on January 31, 1816. His parents had been natives of South Carolina. Hale obtained a law degree from Transylvania University in 1839 and then relocated to Eutaw, in Greene County, to practice law.

In 1843 he was elected to Alabama's Legislature. He volunteered and served two years as a lieutenant in the Mexican War, from 1846 to 1848. In 1853, he ran for Congress but was defeated. Subsequently, he was elected for a second term in the state Legislature. He briefly served the Confederate government as attorney general of Alabama, was appointed commissioner to Kentucky, and spoke before the Kentucky Legislature on secession. In the same year he was elected to the provisional Confederate Congress. While serving in the latter position, he was chosen lieutenant colonel in the 11th Alabama Regiment and left public office to serve in the Confederate army.

At the battle of Gaines Mill outside Richmond, Virginia, Hale was wounded five times. The wounds proved fatal. He lingered for three weeks and then died at Richmond on July 18, 1862, at the age of 46.

Stephen Fowler Hale Home, Eutaw, Alabama

Hale is remembered as an able lawyer and outstanding speaker. He was married to Mary Kirksey, the sister of F.M. Kirksey, who served as sheriff of Greene County. The Kirksey Home, Kirkwood, remains the showcase of Eutaw ante-bellum architecture. The Hale residence, which was constructed in the 1840s, also still stands in use in Eutaw today.

When Hale County was created, the Legislature provided that commissioners would be appointed to organize the county and to determine the site of a county seat. The five commissioners set up election precincts and called for the election of county officials on the first Monday in March 1867. At the same time the voters selected a county seat from among the communities of Greensboro, Bucksnort and Five Mile Church.

The Greensboro community provided an attractive inducement for voters to select it. The town offered to furnish the county the land and building for a courthouse if Greensboro won the election. The offer contained a proviso that the land and building would revert to Greensboro ownership should the county seat ever be removed from the town. The inducement worked: the vote was Greensboro, 570; Bucksnort, 280; and Five Mile Church, 124. Since Greensboro received a majority of the votes, it became the county seat. And Greensboro's selection as county seat has never been challenged.

On December 13, 1867, the officials of Greensboro purchased the Salem Baptist Church from the Alabama Baptist State Convention for $8,000. (The deed of conveyance from the convention was signed by J. L. M. Curry, whose statue stands in Statuary Hall in the nation's capital as one of Alabama's greatest citizens.) On April 5, 1868, the Town of Greensboro conveyed the former church property to Hale County. The Salem Church building was used as the central section of the Hale County Courthouse, wings being added to the sides to provide appropriate office and courtroom space. This structure served as the Hale County Courthouse for almost 40 years.

In November 1905, the citizens of Hale County approved a bond issue for

Samuel A. Rumore, Jr.

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

The old Hale County Courthouse

the purpose of constructing a new courthouse. A contract was let in November 1906, and John A. Straiton served as builder. His bid was $44,767.19. The old courthouse was torn down and construction on the new courthouse began in January 1907. The first court sessions took place in the new courthouse in April 1908, even though the building was officially completed a month later.

The top floor of the courthouse burned March 4, 1935. The fire, of an undetermined cause, started in the attic and was fanned by high winds. Although some records were destroyed, most county documents had been placed in fireproof vaults or removed to other locations. County officials estimated the damage to the building at $30,000. After the fire, courts were held at the old Southern University Campus while restoration of the courthouse was undertaken.

Restoration of the courthouse was handled by the Skinner Contracting Company of Tuscaloosa under a contract let in May 1935. The contract price was $32,000. This price included a Seth Thomas clock for the new belfry. The county also bought the bell which was in the old Southern University bell tower to be used in the courthouse belfry.

As part of the nation's bicentennial celebration in 1976, the Greensboro community sponsored further additions and renovations to the 1908 courthouse. The citizens also conducted a drive which culminated on August 13, 1976, in the creation of the Greensboro Historic District, including the courthouse and 14 blocks along Main Street. The district was added to the National Register of Historic Places.

Today's Hale County Courthouse is a brick structure of Neo-Classical design. It has a pedimented portico with four Ionic columns. The corners of the building are accentuated with quoins. It is topped by a bell tower containing a four-faced clock. ■

Sources: *History of Greensboro Alabama from its Earliest Settlement,* William Edward Wadsworth Yerby, 1908; revised by Mable Yerby Lawson, 1963. The author also thanks Sue W. Seale of Greensboro for her contribution to this article.

OPINIONS OF THE GENERAL COUNSEL

By ROBERT W. NORRIS, general counsel

Question:

In a recent disciplinary complaint, it was alleged that the charging of an attorney's fee equal to 15 percent of the value of real estate involved in a foreclosure sale was a clearly excessive fee and, thus, violated Rule 1.5(a) of the Alabama Rules of Professional Conduct. The scenario presented by the complaint involved an individual who had mortgaged a piece of real estate. The terms of the mortgage provided that, in the event of foreclosure, the mortgagor would pay a reasonable attorney's fee. The mortgage was foreclosed and the lawyer subtracted a 15 percent attorney's fee from the proceeds of the sale.

During the course of investigation, it was learned that it is the practice of some foreclosure lawyers to charge attorney's fees of $400-$500 if the property is purchased at auction by the foreclosing lawyer's client, usually a financial institution. If the property is purchased at auction by someone other than the foreclosing lawyer's client, e.g., the creditor, a member of the creditor's family or some other individual or institution, a percentage fee, sometimes as high as 15 percent, is charged by the lawyer as an attorney's fee.

The question that arises is whether it is proper under Rule 1.5 to charge a percentage fee in a foreclosure sale without relating this percentage to any of the factors for determining a reasonable fee as contained in Rule 1.5(a).

Answer:

It is improper for a lawyer to charge a set percentage fee in a foreclosure sale without regard to the factors for determining a reasonable fee as contained in Rule 1.5 of the Rules of Professional Conduct.

Discussion:

At the outset, it should be understood that this is not a contingent fee matter but rather a percentage fee for the performance of legal services. Percentage fees must not be clearly excessive as determined by the factors set forth in Rule 1.5(a) of the Rules of Professional Conduct. These factors are as follows:

"Rule 1.5 Fees

(a) A lawyer shall not enter into an agreement for, or charge, or collect a clearly excessive fee. In determining whether a fee is excessive the factors to be considered are the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) Whether the fee is fixed or contingent; and

(9) Whether there is a written fee agreement signed by the client."

The above factors are identical to those announced by the Supreme Court of Alabama in *Peebles v. Miley*, 439 So.2d 137 (Ala. 1983) with the exception that Rule 1.5 added an additional factor regarding whether there is a written fee agreement signed by the client. Applying these factors, the court said:

> "As the amount of the recovery increases, the attorney's fee should be prudently reduced. Otherwise, we would have the anomalous situation of a routine collection of a promissory note of $2,000,000 and an attorney's fee of $400,000. The determination of a reasonable attorney's fee should not be done in a wooden, inflexible manner, but should be done so that all factors will be given their proper interplay." *supra* p. 143.

The Supreme Court of Alabama in *State v. Brown*, 565 So.2d 585 (Ala. 1990), in remanding the case back to the circuit court to determine the question of excessive fees, reaffirmed the above factors and directed the court to review the following cases in connection with the determination of an attorney's fee: *Reynolds v. First Alabama Bank of Montgomery, N.A.*, 471 So.2d 1238 (Ala. 1983), *Peebles v. Miley*, 439 So.2d 137 (Ala. 1983), *Mashburn v. National Healthcare, Inc.*, 684 F.Supp. [679] (M.D. Ala. 1988), and *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

Whether or not a 15 percent fee was an excessive fee was considered by the United States Bankruptcy Court for the Middle District of Alabama in *Dadeville Lumber Company d/b/a Still Waters Resort v. Unsecured Creditors Committee*, Case No. 85-00406. In this case, a lawyer foreclosed against Still Waters on behalf of SouthTrust Bank. The property was purchased by the second mortgage holder which was another lending institution. The lawyer deducted a 15 percent attorney's fee from the foreclosure proceeds causing the unsecured creditors to file an objection with the bankruptcy court contending that the attorney's fee was excessive. The court agreed with the unsecured creditors and awarded a fee on an hourly basis. The lawyer appealed this determination to the United States District Court. That court determined that in arriving at a reasonable fee the bankruptcy court should have considered the 12 factors set out in *Johnson v. Georgia Highway Express, Inc., supra*. These *Johnson* factors are essentially identical to the factors adopted by the Supreme Court of Alabama in Rule 1.5(a) and the cases cited above. It should be noted that the *Johnson* case was specifically noted in the Supreme Court of Alabama's remand in *Brown, supra.*

Thus, it seems clear that a fee in a foreclosure sale cannot be determined by application of a standard percentage fee applied in a "wooden, inflexible manner" without regard to the factors enumerated in Rule 1.5 and enunciated in federal and state case law. ■

[RO-94-07]

SPRING 1994 ADMITTEES

NEW ADMITTEES

December 1993 Admittees

Lyn Ann Batastini
Jeffrey Knight Grimes
Lawrence Buford Hammet, II
Mark Douglas Johnson
Denise Williamson Killebrew
Derrick Ward Lefler
Clarence Morris Mullin
Deborah Ann Payne
John Alan Putman
William Duff Quenelle
Mary Boehme Richards
Howard Patrick N. Tagg

Spring 1994 Admittees

David Barton Allen
Patrick Joseph Anderson
Stewart Gorham Austin, Jr.
Stephen Judson Bailey
Regina Michi Lee Barron
Barry Christopher Battles
Gregory Eugene Beard
Joseph Michael Berry
John Neville Bettex
Robert Welton Birmingham
Jerry Michael Blevins
Cynthia Helene Moore Bockaman
Betty Blue Keeler Bond
Vicki Gayle Bradley
Melody Annette Smith Brooks
Stephen Wallace Brooks, Jr.
Dawn Lenia Brown
Gloria Denise Brown
LaSherril Brown
Ouida Yvette Brown
Gregory Thomas Brown-Spencer
Paul Edward Burkett
Stephen Walker Burrow
Bennie Davis Butler, Jr.
Merribeth Abbott Butler
Kim Bywaters
Jon Christopher Capps
George Christopher Carr
James Minton Cash
Deborah Ann Cerminaro
Mae Elizabeth Chesser
Myla Calhoun Choy
Anthony Lee Cicio, Jr.
Mark Allison Cobb
Dorothy Joan Scalf Collier
Anne Gaillard Conner
Larry George Cooper, Jr.
Henry Bain Cornelius, Jr.
Christopher Donald Curry
Theresa Jenkins Daniel
Susan Faust Fort Dawson
David Paul Dorn
Larry Little Doyal
Linda Kay Dukes
Stanley Keith Eady
Rocky Wayne Eaton
Thomas Adam Edenbaum
Melba Faye Hutchinson Edmondson
Michael Leonard Ellison
Ronald Martin Feder
Daniel Lewis Feinstein
Kenneth Donelson Foose
Laura Leigh Francis
Brownell Clifton Franklin
Warren Freeman
Alan Curtis Furr
Mary-Ann Garrison
Paul David Gilbert
William Paul Glass, Jr.
David Lawrence Goodwin
Laura Rebekah Grantham
James Harold Halford, II
Paul Michael Hamrick
Jessee Dean Hash, II
Scott Patrick Hooker
Angie Denise Hubbard Ingram
George Thomas Jackson
Thomas Robert Jenkins
Eric Heath Johnson
Jocelyn Elise Jones
Julie Laura Jones
Brian Kirk Jordan
Stephanie Marshall Keller
Elizabeth I. Trimble
Graham Kelley
Howard Benjamin Kelly
Will Ray Kelly
Edward Perry Kendall
William Burl Key, II
Herman Maddox Kilgore
Phillip Eugene Kinney
Michael Arthur Kirtland
Fred Lawton, III
Daniel Patrick Lehane
William Hitchcock Lindsey
Kathryn Louise Lippert
Donald Blair Little
Michelle Oliver Llewellyn
LuAn Marshall Long
David Michael Loper
Catheron Hardenbrook Mahan
Linda Diane McGee Mann
Kyle Dennis Massengale
Larry Arthur Matthews
Robert Gene McDonald
Sabrina Lee McKinney
Stephen Paul McMunn
John Otto Meier
Michael Philip Milazzo
Randy Jens Moeller
Adam Paul Morel
Dorsey Winborn Morrow, Jr.
Graydon Christopher Newman
Thomas Michael O'Hara
Christy Lynn Campbell Osborne
Phyllis Naomi Turnham Paramore
Clark Maurice Parker
Tammy Watkins Parris
Patrick Patronas
Roderick Burke Perdue
Roxane Danielle Peyser
Sherrie Narelle Reid Phillips
Amardo Wesley Pitters
Abner Riley Powell, IV
Keith Douglas Preston
Alfred Patrick Ray, III
Paul Ellisor Reams
Robert Dudley Reese
Robert Harris Rigsby, Jr.
Clinton Herbert Ritchie, Jr.
Patricia Ann Rives
Catherine Darlene Phillips Roberts
Amy Jeanette Rudd
Timothy David Ryan
Thomas Joseph Saunders
Scott John Schwarz
Christopher Bryan Scott
James Jerome Scroggins
Jackie Ann Sexson
Richard Lee Sharff, Jr.,
Thomas Daniel Simon
Scott Alan Slate
Gerald Raynard Smith, Jr.
Melissa Kessler Smith
Thomas Scott Smith, Jr.
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Christopher Vance Sockwell
Ranah Leigh Stapleton
Steven Michael Stastny
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Terri Willingham Thomas
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Gregory Eugene Tolar
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Matthew Anthony Vega
Kelly Dean Vickers
William Alexander Walker
Brenda Fay Ward
Sandra Kimbrough Watkins
Karen Sue Whatley
Brian Mitchell White
Richard Allen Whitehead
Jay Chambers Wilson
Wendell Wesley Wilson
John Curtis Wright, II
David Bruce Zimmerman

April 1994 Admittees

James Barnes Cox
Jennifer Anne Currie
John Joseph Kubiszyn, Jr.
Jean Carleen Marcantonio

LAWYERS IN THE FAMILY

Sandra Watkins (1994) and Nathan Watkins (1950)
(admittee & father)

LuAn Long (1994) and Jeff Long (1980)
(admittee & brother-in-law)

Tammy Parris (1994) and Paul Parris (1993)
(admittee & husband)

Anthony L. Cicio, Jr. (1994) and Anthony L. Cicio, Sr. (1959) (admittee & father)

Myla Calhoun Choy (1994) and Michael K.K. Choy (1984)
(admittee & husband)

Abner Riley Powell, IV (1994) and Abner Riley Powell, III (1967)
(admittee & father)

Curtis Wright, II (1994) and Curtis Wright (1960)
(admittee & father)

Graydon Christopher Newman (1994) and Graydon Leonard Newman (1965) (admittee & father)

Laura Leigh Francis (1994) and James C. Francis (1964)
(admittee & father)

William Alexander Walker (1994) and James E. Walker, III (1989)
(admittee & brother)

Amy J. Rudd (1994) and Kathryn S. Carver (1986)
(admittee & mother)

Justice Hugh Maddox (1957) and Alan C. Furr (1994)
(cousin & admittee)

Scott C. Hooker (1994) and Peggy C. Hooker (1990)
(admittee & mother)

SPRING 1994 BAR EXAM STATISTICS OF INTEREST

Number sitting for exam 251

Number certified to Alabama Supreme Court 162

Certification rate.....65 percent

Certification percentages:

- University of Alabama—90 percent
- Cumberland School of Law—73 percent
- Birmingham School of Law—55 percent
- Jones School of Law—65 percent
- Miles School of Law—8 percent

ALABAMA STATE BAR

DISABILITIES LAW SECTION

To better serve the needs of Alabama attorneys practicing in the area of disabilities law, the state bar has formed the Disabilities Law Task Force. The mission of the task force is to survey members of the bar to find out if there is sufficient interest to support a new section on disabilities law.

The proposed section would serve attorneys who practice in several areas including:

Social Security	Fair Housing
Medicaid/Medicare	Elder Law
Special Education	Rehabilitation Act
Americans with Disabilities Act	Insurance

The activities of the proposed section would include:

- Development of a network of experienced attorneys to share information and ideas about disabilities law
- Publication of a periodic newsletter dealing with disabilities law
- Presentation of seminars eligible for CLE credit
- Development of a pool of expert consultants on disabilities issues

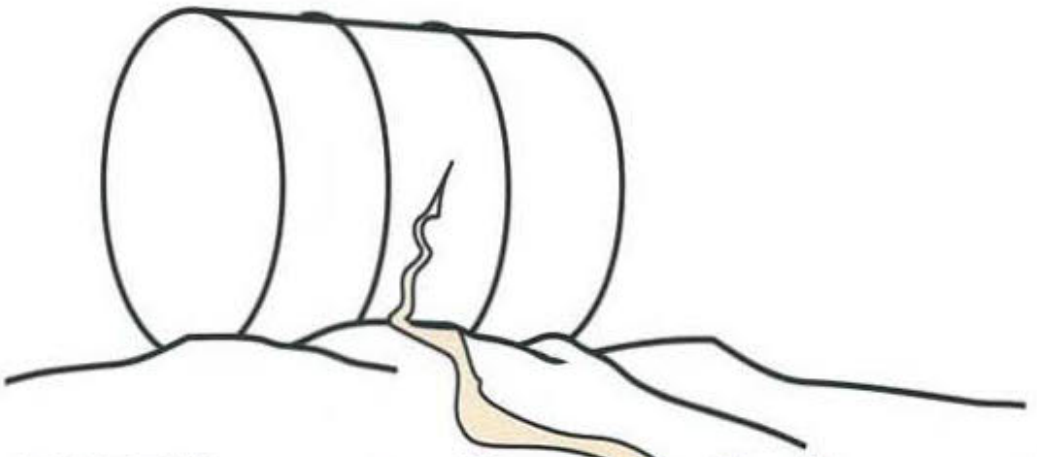
The task force is now attempting to identify all members of the state bar who would be interested in the creation of this section. If you are interested, please return the attached form. This does not commit you to become a member of the section (if formed) nor does it commit you to do any work in creating the section. It simply helps the task force to learn the level of interest in forming this section.

Please mail or fax the attached form **by July 31** to Victoria Farr, Disabilities Law Task Force, University of Alabama, Box 870395, Tuscaloosa, Alabama 35487-0395; FAX: 205-348-3909; Phone: 205-348-4928; TDD: 205-348-9484.

I am interested in the proposed Disabilities Law Section.

Name _____
Firm or Company _____
Mailing Address _____
City _____
State _____ ZIP _____
Phone _____ FAX _____

Return **by July 31** to Victoria Farr, Disabilities Law Task Force, University of Alabama, Box 870395, Tuscaloosa, Alabama 35487-0395; FAX: 205-348-3909; Phone: 205-348-4928; TDD: 205-348-9484.



What is this thing called UST ?

By: James G. Stevens

During the last few months I noticed that I was receiving more than a few telephone calls concerning underground storage tanks (UST). While the topic of discussion was varied, the topic that dominated the discussion was the question of ownership of the UST. This question is extremely important if you happen to be the owner of the property whereupon the UST resides. In order to answer the question of "Who is the owner?" one must determine how the UST got to its "final" resting place.

First and foremost, all USTs must meet "new tank" standards by the year 1998. This means that all steel tanks that are presently in place must be closed or replaced with an "upgraded" system by 1998. (For "new tank" and "upgrade" standards see ADEM Admin. Code R. 335-6-15-.06 and .07) In the event that soil and/or groundwater contamination exists, the property will need to be remedied by someone. The question is "Who?"

An understanding of the retail gasoline business needs to be explored to fully appreciate the magnitude of the impending disaster about to befall the unwary property owner. An unsuspecting property owner in the quest to produce a profit from the land will either start a gasoline business or lease his property to a marketer or oil company. As time goes by the property owner may become dissatisfied with his marketer and take action to change to another marketer. Similarly, the marketer may determine that he cannot make a profit delivering 500 gallons to his customer and decide to stop delivering gasoline to him.

There is another situation that is a potential pitfall for the property owner. The oil company or the marketer approaches the property owner and informs him that they are going out of business and will "sell" the UST to him for "$1.00." In addition, the marketer and/or the oil company may attempt to induce the sale of the UST to the property owner under the guise of increasing the property owner's "profits" on the sale of each gallon of gasoline by decreasing the amount of "rent" to be paid to the marketer.

Listed below are other situations that are most often asked about that the property owner should be aware of:

1. The property owner starts a retail gasoline operation and buys and installs a UST and begins operation:

2. Property owner leases the property to an oil company and the oil company installs the UST with no written agreement as to fate of the UST upon the expiration of the lease;

3. Property owner leases the property to an oil company and the oil company installs the UST with a written agreement as to fate of the UST upon the expiration of the lease;

4. Property owner leases the property to an oil company and the oil company installs the UST with a provision in the lease that all improvements to the property remain with the property at the expiration of the lease;

5. The property owner starts a retail gasoline operation, the local marketer buys and installs the UST, and the local marketer then ceases to do business or the property owner ceases to do business.

These are but several situations that can arise, each requiring an answer to the question of who owns the UST. Except for (3) above, the "owner" of the UST will, in all probability, be the property owner.

A problem arises when the person (other than the property owner) annexing the UST to the real property is nowhere to be found and the property owner is faced with ADEM and the Tank Trust Fund requiring the property owner to either register or close the UST. In addition, ADEM and the Tank Trust Fund are having to become involved in resolving disputes between landlord and tenant and/or tank owner and property owner. Using the analogy above and, unless the property owner and/or the tank owner can produce facts that there is an agreement to the contrary, there is a high probability that the UST has become a "fixture" and thereby becomes the property of the property owner.

In its efforts to regulate the UST universe within Alabama, ADEM and the Tank Trust Fund may be confronted with the difficult situation of becoming involved in a private dispute in their efforts to fulfill the mandate to protect the environment and human health.

Section 22-35-3(5) of the *Code of Alabama* 1975 (1990 Repl. Vol. and 1993 Cum. Supp.) defines an owner of a UST as:

> Owner in the case of an UST system in use on November 8, 1984, or brought into use after that date, or in the case of an AST in use on August 1, 1993, or brought into use after August 1, 1993, any person who owns an UST or AST system used for storage, use, or dispensing of motor fuels; and in the case of any UST system in use before November 8, 1984, but no longer in use on that date, or an AST in use before August 1, 1993, but no longer in use on that date, the present owner of the underground storage tank or aboveground storage tank system and any person who owned such underground storage tank or aboveground storage tank system immediately before the discontinuation of its use. *For the purposes of this chapter, the person who registers the underground storage tank or aboveground storage tank is, and shall be considered the owner.*

From the above definition it is possible to be the actual owner of a UST but not the person who has registered it with ADEM and the Tank Trust Fund.

It is to be hoped that this article will help the regulated community understand the rationale that supports ADEM's and the Tank Trust Fund's position regarding the responsibility that may befall an unsuspecting property owner.

General principles of property ownership imply the right of possession and control of everything attached to the surface and embedded in the soil. In the absence of a better title in someone else, the owner of the soil acquires property to the things deposited thereon or therein; it makes no difference that the possessor is not aware of the existence of the thing.

In judging whether property is personal or real, the manner in which it is affixed to the land and the permanence with which it was designed to remain in place must be considered. Ordinarily, property which by its nature is otherwise personal, when physically attached to the soil becomes part of the realty. For example, a sewage treatment plant that is transported by truck and installed at ground level on a concrete slab is personal property but the sewer main that is buried in property is real property. Similarly, a UST is permanently buried in the land without regard for mobility.

In contrast to the argument that a UST is personal property, there appears to be a stronger argument that a UST is a "fixture." A "fixture" is defined as personal property that was originally personal property, but which, by reason of its affixation

to real property, has become a part of the realty.

The general test for determining whether a particular personal property has become a fixture is usually said to comprise annexation to the realty, adaptation to the use to which the realty is devoted, and intention that the personal property become a permanent accession to the freehold. However, in Alabama, it is the intention of the party making the accession that controls as opposed to the intention that the UST become a permanent accession to the property. (See, *Milford v. Tennessee River Pulp & Paper Co.*, 355 So.2d 687.)

Whether personal property constitutes a fixture depends on the circumstances of the particular case. The relative ease with which personal property, e.g., a UST, may be removed, while not the sole test, is often considered in determining whether personal property has become a fixture. However, the ordinary criteria for determining whether personal property has become a fixture are generally held inapplicable where the property owner and the person claiming the personal property (or who installed the personal property) have made a special agreement respecting its status. Normally, UST's are installed in a permanent manner (i.e., to remain in place) and, although they can be removed, any removal would not be considered easy and would cause some damage to the property.

In Alabama the test of whether or not and when personal property becomes a fixture has been visited by the court on several occasions. However, Alabama has only one case directly involving a UST. *MOCO, Inc. v. Gaines,* 484 So.2d 470 (Ala.Civ.App. 1985) held that a UST was not a fixture and remained personal property. However, the facts in the case were that the USTs were to be removed from the property by a prior oral agreement between the parties. This is in line with the circumstances required to be visited when determining the status of a UST in Alabama and several other states.

In the case of *Milford v. Tenneessee Pulp & Paper Co.*, 355 So.2nd 687 (Sup. Ct 1978) the Supreme Court of Alabama held that only from the examination of the circumstances of each case that doubt as to the status of personal property can be resolved as to whether or not personal property has become a fixture. The court held that the criteria for making such determination were (1) actual annexation to the realty or to something appurtenant thereto; (2) the appropriateness to the use or purposes of that part of the realty with which it is connected; and (3) the intention of the party making the annexation of making permanent attachment to the freehold. The intent of the party making the annexation may be inferred from (a) the nature of the personal property annexed; (b) the relation of the party making the annexation; (c) the structure and mode of the annexation; and (d) the purpose and uses for which the annexation was made. (See, *Langston v. State*, 96 Ala. (1891.)

Contrary to the above general principle that fixtures become part of the realty, "trade fixtures" remain the personal property of the occupant of the land and are generally removable by him at the expiration of the occupancy, i.e., expiration of a lease or sale of the property. Trade fixtures are those items of personal property brought upon the land by the occupant that are necessary to carry on the trade or business to which the land is devoted. Moreover, trade fixtures in the nature of chattels and capable of being detached without material damage to the realty remain personal property. (See, *Walker v. Tillis*, 66 So. 54 (1914).) It is possible to make the argument that a UST is a "trade fixture" but given the intent and nature of the annexation to the realty, and without an agreement to the contrary, the UST most likely will be determined to be a fixture.

As with fixtures, courts will draw a distinction between trade fixtures which are incorporated into the soil and trade fixtures which, though attached to the soil, can easily be removed without any or appreciable damage to the property and in the latter case sustain the right of ownership to the saleer or tenant. From this, one can draw the conclusion that unless the UST can be removed easily without any or appreciable damage, the UST will be determined to be a part of the realty unless there is an agreement to the contrary.

Several state courts have decided property law cases involving USTs. Generally, the courts agree that a UST is a perma-

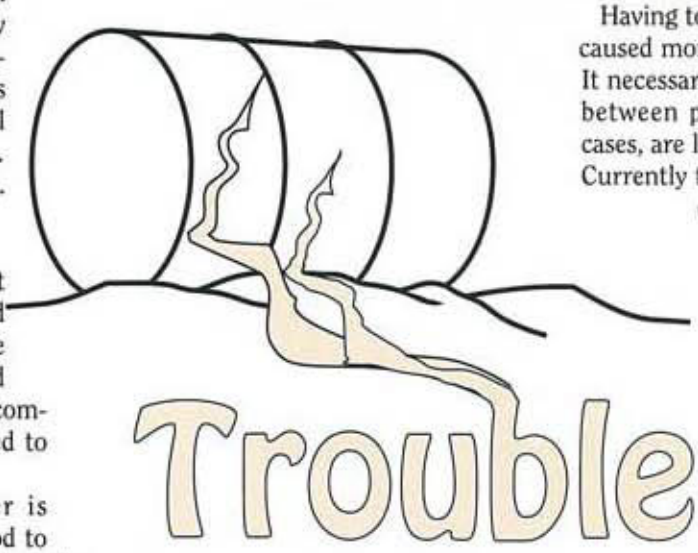
James G. Stevens

James G. Stevens serves as associate general counsel for the Alabama Department of Environmental Management. He is a graduate of the Birmingham School of Law and serves as the chair of the EPA's Region IV Underground Storage Tank Program Attorney's Work Committee.

nent annexation to the real property unless there is an agreement to the contrary. In *Big West Oil Co. v. Willborn Bros. Co.*, 836 S.W.2d 800 (Tex.Ct.App. 1992), the Court of Appeals of Texas held a UST to be an "improvement" and, therefore, part of the real property. The court specifically stated:

> The term "improvement" is defined in case law as having broader signification than "fixture" and constitutes all additions and betterments to the freehold. *Id.* at 802.

In *Wilson v. McLeod Oil Co., Inc.*, 327 N.C. 491, 398 S.E.2d 586 (N.C. 1990), the Supreme Court of North Carolina held that USTs remained personal property because of a written agreement between the property owner and the oil company evincing the intention that the USTs not become a part of the real property. In *Lee-Moore Oil Co. v. Cleary*, 245 S.E.2d 720 (N.C. 1978), the North Carolina Supreme Court held that because of a previous agreement between the property owner and the oil company that installed the UST, the subject UST remained the personal property of the oil company even though it was annexed to the property.



As a general rule, whatever is attached to the land is understood to be a part of the realty but as this depends to some extent, upon the circumstances, the rights involved must always be subject to explanation by evidence. Whether a thing attached to the land be a fixture or personal property depends upon the agreement of the parties, express or implied.

Similarly, in *Ilderton Oil Co. v. Riggs*, 13 N.C.App. 547, 186 S.E.2d 691 (Ct. App. 1972), the North Carolina Court of Appeals held that a UST was a "trade fixture" and, because of an agreement between the property owner, a previous tenant and the fuel supplier who installed the UST stating that the UST remain the property of the fuel supplier. Thus, the UST was determined to be the personal property of the fuel supplier and was allowed to be removed.

In contrast, in *Stephens v. Carter*, 246 N.C. 318, 98 S.E.2d 311 (1957), the North Carolina Supreme Court held that a UST was a part of the realty and could only be conveyed by written agreement. In *Tyler v. Hayward*, 235 Mich. 674, 209 N.W. 801 (Mich. 1926), the Michigan Supreme Court held those USTs installed by the property owner are annexed to the land and thereafter become part of the realty. The court stated that where an owner affixes a UST to property, "the presumption follows that he intended they should become realty."

Given the state of the law on fixtures in Alabama, it appears that at the installation of a UST it becomes a fixture unless there is an agreement to the contrary. This presents ADEM with a regulatory problem in the event that no one is willing to take the responsibility for the UST.

Having to deal with this problem daily has caused more than great concern for ADEM. It necessarily involves ADEM in the dispute between private parties and they, in all cases, are looking to ADEM for the answers. Currently the answer is that unless there is evidence to the contrary, ADEM views the UST as a fixture and therefore it becomes the responsibility of the property owner to comply with all of the UST technical and financial responsibility requirements as set out in ADEM Administrative Code R. 335-6-15 and 16.

The property owner who is successful in his attempts to rid himself of the responsibility of the UST may find that looming on the horizon is the Alabama Water Pollution (AWPCA) (*Code of Alabama* 1975 §§ 22-22-1 et. seq.). In the event there exists groundwater contamination, the property owner is faced with prospects of being required to remediate the property. The AWPCA has conferred upon ADEM the authority to require any person who is violating, or is about to violate, any provision of the AWPCA or any rule or regulation or any order or permit of ADEM, issued pursuant to the AWPCA, to take such action as is required to control any harm or potential harm to the environment or human health.

In the end, this thing called UST is really called "TROUBLE". ■

C·L·E OPPORTUNITIES

The following programs have been approved by the Alabama Mandatory Continuing Legal Education Commission for CLE credit. For information regarding other available approved programs, contact Diane Weldon, administrative assistant for programs, at (205) 269-1515, and a complete CLE calendar will be mailed to you.

JULY

12 Tuesday
DEFENDING WRONGFUL DISCHARGE CLAIMS UNDER ALABAMA LAW
Birmingham, Holiday Inn Redmont
National Business Institute, Inc.
Credits: 6.0 Cost: $138
(715) 835-8525

12-15
SUMMER CONFERENCE
Orange Beach, Perdido Beach Resort
Alabama District Attorneys Association
(205) 242-4191

13 Wednesday
DEFENDING WRONGFUL DISCHARGE CLAIMS UNDER ALABAMA LAW
Huntsville, Marriott
National Business Institute, Inc.
Credits: 6.0 Cost: $138
(715) 835-8525

13-15
CLERKS AND REGISTERS ANNUAL CONFERENCE
Point Clear, Grand Hotel
Alabama Judicial College
Credits: 3.3
(205) 242-0300

18-21
ANNUAL MEETING
Orange Beach, Perdido Beach Resort
Alabama State Bar
Credits: 10.5 maximum Cost: $125
(205) 269-1515

19 Tuesday
RECENT DEVELOPMENTS IN INSURANCE LAW
Birmingham
Lorman Business Center, Inc.
Credits: 6.0 Cost: $149
(715) 833-3940

20 Wednesday
HOW TO GET RESULTS IN COLLECTION OF DELINQUENT DEBTS IN ALABAMA
Birmingham, Ramada Inn Airport
National Business Institute, Inc.
Credits: 6.0 Cost: $138
(715) 835-8525

AUGUST

1 Monday
HEALTH LAW UPDATE
Destin, Sandestin Beach Resort
Center for Health Services Continuing Education
Credits: 6.0 Cost: $325
(205) 934-1672

2 Tuesday
ALABAMA PROBATE: BEYOND THE BASICS
Mobile, Ramada Resort & Conference Center
National Business Institute, Inc.
Credits: 6.5 Cost: $138
(715) 835-8525

3 Wednesday
ALABAMA PROBATE: BEYOND THE BASICS
Montgomery, Governor's House Hotel
National Business Institute, Inc.
Credits: 6.5 Cost: $138
(715) 835-8525

4-10
ANNUAL MEETING
New Orleans
American Bar Association
(312) 988-5870

10 Wednesday
DEFENDING WRONGFUL DISCHARGE CLAIMS UNDER ALABAMA LAW
Mobile, Ramada Resort & Conference Center
National Business Institute, Inc.
Credits: 6.0 Cost: $138
(715) 835-8525

11 Thursday
DEFENDING WRONGFUL DISCHARGE CLAIMS UNDER ALABAMA LAW
Montgomery, Governor's House Hotel
National Business Institute, Inc.
Credits: 6.0 Cost: $138
(715) 835-8525

11-13
MEDIATOR TRAINING
Nashville
American Arbitration Association
Credits: 20.0 Cost: $550
(404) 325-0101

16 Tuesday
FRAUD LITIGATION IN ALABAMA
Mobile, Admiral Semmes Hotel
National Business Institute, Inc.
Credits: 6.0 Cost: $138
(715) 835-8525

18-20
SUMMER SEMINAR
Orange Beach, Perdido Beach Resort
Alabama Trial Lawyers Association
(205) 262-4974

19 Friday
LAW IN THE WORKPLACE
Orange Beach, Island House Hotel
Lorman Business Center, Inc.
Credits: 6.0 Cost: $135
(715) 833-3940

POST–JUDGMENT REMEDIES
Birmingham
Birmingham Bar Association
Credits: 1.0
(205) 251-8006

23 Tuesday
TAKING EFFECTIVE DEPOSITIONS
Birmingham
Lorman Business Center, Inc.
Credits: 4.0 Cost: $135
(715) 833-3940

24 Wednesday
AVOIDING OSHA CITATIONS AND LIABILITY
Birmingham
Lorman Business Center, Inc.
Credits: 6.0 Cost: $135
(715) 833-3940

26 Friday
BASICS OF BANKRUPTCY
Birmingham
Birmingham Bar Association
Credits: 3.0
(205) 251-8006

SEPTEMBER

9 Friday
HEALTH CARE
Birmingham
Cumberland Institute for CLE
Credits: 6.0
(800) 888-7454

16 Friday
FEDERAL PRACTICE UPDATE: RULES OF CIVIL PROCEDURE
Birmingham, Civic Center
Cumberland Institute for CLE
(800) 888-7454

16-17
FAMILY LAW RETREAT
Orange Beach, Perdido Beach Resort
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

22 Thursday
REAL ESTATE
Montgomery, Civic Center
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

23 Friday
REAL ESTATE
Birmingham
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

NEGOTIATION: THE LAWYER'S ESSENTIAL SKILL
Birmingham, Sheraton Civic Center Hotel
Cumberland Institute for CLE
Credits: 6.0
(800) 888-7454

30 Friday
DEPOSITIONS
Birmingham, Civic Center
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

BANKRUPTCY LAW
Birmingham, Pickwick Center
Cumberland Institute for CLE
Credits: 6.0
(800) 888-7454

LIABILITY OF PROFESSIONALS for Negligent Certification

By: William H. Hardie

CERTIFIED

Early in 1994, the Supreme Court of Alabama issued an opinion in *Boykin v. Arthur Andersen & Co.*[1] which substantially expands the rights of minority shareholders to sue for their individual loss at the hands of those in control of the corporation. The decision also expands the category of plaintiffs who may sue certified public accountants for misrepresentations made in financial statements. This aspect of the case may be more important because of its potential application to lawyers, engineers, and other professionals who issue opinions and certifications to their own clients with the understanding that third parties may rely on their work.

In *Boykin v. Arthur Andersen & Co.* the Supreme Court of Alabama abandoned the rule adopted more than 75 years ago by the Court of Appeals of New York and embraced a more liberal rule promulgated in the *Restatement (Second) of Torts.*[2] The leading case in this field is *Glanzer v. Shepard*[3] written by Judge Benjamin N. Cardozo in 1922. In *Glanzer* a public weigher, at the request of the seller, provided the buyer with a certificate of the weight of 905 bags of beans. On resale, the buyer learned that the weight was overstated and sued the weigher for negligent misrepresentation. Judge Cardozo's opinion for the New York Court of Appeals held that the weigher's duty of care extended to the buyer because the buyer's use of the certificate was "the end and aim of the transaction."[4] The legal theory applied by Judge Cardozo was tort, not contract: "We do not need to state the duty in terms of contract or privity."[5] It also added:

"We state the defendants' obligation, therefore, in terms, not of contract merely, but of duty."[6]

Although the *Glanzer* decision involved a public weigher, and not an accountant, the rule was obviously applicable when the issue arose in connection with a certified public accountant in *Ultramares Corp. v. Touche*,[7] an opinion also authored by Judge Cardozo. In *Ultramares* the plaintiff relied on financial statements prepared by the defendants and made a loan to Stern Company. When Stern Company filed for bankruptcy and failed to repay its loans, the plaintiff suffered a loss. The plaintiff's suit presented legal theories of negligent and fraudulent misrepresentation. The Court of Appeals of New

York found evidence to support the verdict of negligence, but the court held that the defendant accountants did not owe the plaintiff a duty of care to prepare the financial statements without negligence. To hold otherwise would expose accountants "to a liability in an indeterminate amount for an indeterminate time to an indeterminate class."[8] The court explained further that Stern Company's financial statements were only "incidentally and collaterally for the use of those to whom Stern and his associates might exhibit it thereafter. Foresight of these possibilities may charge with liability for fraud. The conclusion does not follow that it will charge liability for negligence."[9]

Fifty years later the issue was again presented to the Court of Appeals of New York in *Credit Alliance Corp. v. Arthur Andersen & Co.*[10] when a creditor relied to its detriment on financial statements negligently audited by the defendant. The court reviewed in detail the opinions in *Glanzer* and *Ultramares* and confirmed its rule that "a relationship 'so close as to approach that of privity' ... remains valid as the predicate for imposing liability upon accountants to non-contractual parties for the negligent preparation of financial reports."[11] The court expressly rejected foreseeability as the test of the plaintiff's standing,[12] but it did not explain why its rule was preferable to the foreseeability rule adopted by other courts.

During the years between the *Ultramares* and *Credit Alliance* decisions, other states had adopted more expansive tests such as the "foreseeability rule" adopted in 1983 by the Supreme Court of New Jersey in *H. Rosenblum, Inc. v. Adler.*[13] The defendant Adler was a partner in the firm of Touche, Ross & Co. who had audited the financial statements of Giant Stores. The plaintiffs relied on those statements when they accepted Giant Stores' stock as consideration for the sale of their business to Giant. One of the Touche partners was present at the negotiations and knew that the statements had been given to the plaintiffs. Giant had manipulated its books by recording assets it did not own and by omitting substantial amounts of accounts payable thereby making the financial statements incorrect. When the fraud was discovered, Giant Stores filed bankruptcy proceedings, and the plaintiffs sought recovery from the accountants.

The *Rosenblum* court began its analysis with the premise that a cause of action for negligent misrepresentation is a legally sound theory if asserted by the direct recipient of the information. The court also approvingly noted that recovery of economic loss due to negligent misrepresentation had long been available.[14] Inasmuch as privity had been abandoned as a prerequisite to recovery of economic loss in products liability cases,[15] the court asked rhetorically why the privity prerequisite should remain in other cases sounding in tort.[16] The court replied that the only objection to expanded liability was a fear of boundless actions and an "undue burden on the declarants, when balanced against the functions they performed."[17] Relying on public interest and fairness, the court reasoned that "[t]he auditor's function has expanded from that of watchdog for management to an independent evaluator of the adequacy and fairness of financial statements issued by management to stockholders, creditors, and others."[18] Accordingly, the court concluded that the accountant's liability for negligently prepared financial statements should extend to any foreseeable user, a rule which might force accountants to "engage in more thorough reviews."[19]

In 1976 the American Law Institute adopted and promulgated a standard of liability which falls between the restrictive rule of *Ultramares/Credit Alliance* and the expansive rule of *Rosenblum.* Section 552 of the *Restatement (Second) of Torts* extended liability for negligent misrepresentation to a "limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it."[20] This rule expands liability beyond the "near privity" standard adopted by the Court of Appeals of New York. The Restatement expressly disclaims liability to "the much larger class who might reasonably be expected sooner or later to have access to the information and foreseeably to take some action in reliance upon it."[21]

When the Supreme Court of Mississippi confronted the issue in 1987, it

found four alternative expressions of the rule: the New York rule of *Ultramares* and *Credit Alliance*, the New Jersey rule of *Rosenblum*, the Restatement rule and a decision from California in which the court balanced various factors.[22] The court analyzed these four rules as involving only three levels of foreseeability: A known third party (*Credit Alliance*), a third party who has actually been foreseen (*Restatement*), and a reasonably foreseeable third party (*Rosenblum*). The court held that "an independent auditor is liable to reasonably foreseeable users of the audit, who request and receive a financial statement from the audited entity for a proper business purpose, and who then detrimentally rely on the financial statement, suffering a loss, proximately caused by the auditor's negligence."[23] Among such reasonably foreseeable users, according to the Court, are investors, creditors, vendors, and insurers who regularly rely on audits.[24]

This was the context in which the Supreme Court of Alabama first confronted the issue in 1989 in *Colonial Bank v. Ridley & Schweigert*.[25] Colonial Bank was a creditor of Leady Mortgage Company whose annual financial statements were audited by Ridley & Schweigert. In the course of auditing the financial statements the accountants asked Colonial Bank to respond to standard bank confirmation inquiries, and Leady furnished Colonial Bank with a copy of each of the annual audits. Leady filed for bankruptcy and defaulted on its indebtedness to Colonial Bank. The trial court granted summary judgment in favor of the accountants and the Supreme Court of Alabama affirmed because the relationship between the accountants and the bank did not reach the level of near privity required under the *Credit Alliance* rule. The Alabama court adopted the New York rule by relying on the persuasive authority of the *Credit Alliance* decision.[26] The court cited with approval Judge Cardozo's *Ultramares* opinion which expressed reluctance to impose a rule which "may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class."[27]

The *Colonial Bank* decision also affirmed summary judgment on the fraud claim against the accountants,[28] but that was not consistent with the principles set out by Judge Cardozo in the *Ultramares* case. Cardozo had distinguished between the people to whom the auditor owed a duty of care and the people to whom it owed a duty to make its certificate without fraud:

> Fraud includes the pretense of knowledge when knowledge there is none. To creditors and investors to whom the employer exhibited the certificate, the defendants owed a like duty to make it without fraud, since there was notice in the circumstances of its making that the employer did not intend to keep it to himself.[29]

Judge Cardozo also explained:

> Even an opinion, especially an opinion by an expert, may be found to be fraudulent if the grounds supporting it are so flimsy as to lead to the conclusion that there was no genuine belief back of it.[30]

Based on the evidence before it, the *Ultramares* court concluded that the evidence of negligence was sufficient to sustain an inference of fraud, that is, "without information leading to a sincere and genuine belief when they certified to an opinion that the balance sheet faithfully reflected the condition of the business."[31] Since the duty to make the certificate without fraud extended to creditors and investors to whom the certificate had been exhibited, the *Ultramares* court reversed the trial court's dismissal of the fraud claim and reinstated it for a new trial.[32] Thus, the Supreme Court of Alabama had been more restrictive in *Colonial Bank* than Judge Cardozo had been in *Ultramares*.

In *Boykin* the Supreme Court of Alabama adopted a rule that "limits accountants' liability to specifically foreseen and limited groups of third parties for whose benefit and guidance the accounting firm supplied the financial information and who used it as the accounting firm intended it to be used."[33] Boykin and the other plaintiffs were shareholders in Secor Bank, and they alleged that the accountant, acting in concert with the officers and directors of the company, refused to disclose material liabilities and failed to disclose three years of losses although it allegedly knew the true financial condition of the Bank. The trial court granted a motion to dismiss under Rule 12(b)(6) on the ground that the plaintiffs were not in "near privity" with the accountants. In adopting the new rule, the *Boykin* court invoked Section 552 of the Restatement and explained that it was "time that Alabama move forward."[34]

Policy considerations, rather than legal logic, seem to motivate the adoption of these various rules. The Court of Appeals of New York seemed more concerned in preserving accountants and other professionals from immeasurable potential liability. Conversely, the Supreme Court of New Jersey rejected that concern in order to force accountants to "engage in more thorough reviews."[35] The Restatement, on the other hand, explained that its rule limited the right of recovery to those who have a reasonable commercial expectation that the maker of the certificate will be responsible to them. None of these policy reasons appear to be supported by any evidence or other rational conclusions. The boundless liability which so affected the Court of Appeals of New York is unsupported by any empirical evidence. On the other side, the New Jersey Court's belief that boundless liability would force accountants to engage in more thorough reviews was supported only by the opinion of student commentators.[36]

The *Boykin* decision will certainly have important implications beyond the accounting profession. A public weigher began the line of cases, and as Cardozo pointed out in *Ultramares*, liability for negligent misrepresentation "will extend to many callings other than an auditor's."[37] Cardozo's examples were lawyers and title companies. Indeed, lia-

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bility has been sought with varying success not only against lawyers[38] and title abstractors,[39] but also engineers,[40] termite inspectors,[41] and architects.[42] The Restatement rule applies by its own terms to anyone who supplies information in a commercial setting, so the class of defendants is limited only by the plaintiff's imagination.

With so many categories of potential defendants, this cause of action deserves more careful scrutiny.

Who can recover? The Restatement limits recovery to:

> the person or one of a limited group of persons for whose benefit and guidance [the defendant] intends to supply the information or knows that the recipient intends to supply.[43]

Obviously, the defendant can be liable to anyone the defendant intends to rely. But what does it mean to say that the provider of information is liable to a person or one of a limited group to whom he "knows" that the recipient intends to supply the information? In *Boykin* the Court found that the client's stockholders constituted a group to which Arthur Andersen "knew and understood" its opinion was directed.[44] According to the *Boykin* Court:

> There must simply be some conduct on the part of the [defendants] that evidences [the defendants'] understanding that their opinion will be relied upon by a reasonably foreseeable and limited class of persons.[45]

Despite its invocation of the Restatement rule, the Court's addition of "foreseeability" to its formulation significantly expands the persons entitled to recover. The Restatement requires that the defendant "know" the limited group to whom the recipient intends to supply the information. Yet the *Boykin* Court also states:

> The Restatement rule limits accounts' liability to a specifically foreseen and limited groups of third parties for whose benefit and guidance the accounting firm supplied the financial information and who used it as the accounting firm intended it to be used.[46]

Contrary to this assertion by the *Boykin* Court, the Restatement expressly rejects foreseeability.[47] Why then did the Court slip "foreseeability" into its discussion? Perhaps it meant to equate "specifically foreseen" with a known limited group.[48] If so, the Court has needlessly confused the clarity of the Restatement.[49] More likely, the Court is simply expanding the Restatement for the benefit of future plaintiffs.[50]

Another aspect of this cause of action is the temporal requirement of the defendant's knowledge (or foresight as the case may be) of the plaintiff. The present tense of the Restatement suggests that the knowledge must exist when the defendant supplies the information to his recipient.[51] It is at this time that the supplier must choose his compensation, and it would be unfair to permit the recipient to expand the supplier's potential liability by subsequently informing the supplier of a wider dissemination of the information. Evidence should be limited to the supplier's knowledge at the time the information was delivered.

In *First National Bank of Commerce v. Monco Agency, Inc.*,[52] the client received its 1980 audit from Arthur Young, and three months later the client delivered the audit to a bank in support of an application for a loan. At the time it delivered the audit, Arthur Young was unaware of the loan application. The Court's discussion of the evidence does not emphasize the timing of the events which it considered, but the Court stated:

> Liability is fixed by the accountants' particular knowledge at the moment the audit is published ....[53]

Reliance is another element of the Restatement rule, and the plaintiff's reliance must relate to a transaction that the supplier

> intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.[54]

The issue is simple if the information relates to a transaction that the defendant intended to influence. The prob-

lem arises when the plaintiff merely contends that the defendant knew that the recipient intended the information to influence a specific transaction or a substantially similar transaction. In *Boykin* the complaint alleged that the auditors failed to disclose material liabilities and losses. The *Boykin* court never discussed the nature of the transactions in which the corporation's stockholders relied on the audited financial statements, nor did the court discuss any action that the plaintiffs took, or forbore, in reliance on the audited financial statements. According to the opinion, the plaintiffs merely "asserted that they relied to their detriment on inaccurate financial reports" certified by the defendant.[55]

In *Touche Ross v. Commercial Union Insurance Co.*[56] an insurance company relied on certified financial statements when it issued a fidelity bond to the subject of the audit. The court approved an instruction to the jury which allowed recovery against the auditor if the jury found that the auditor should have reasonably foreseen that an entity such as the insurance company might rely on the audit. It does not mention the nature of the transaction among the requirements for recovery.

The Restatement imposes liability for pecuniary loss caused by justifiable reliance upon the information supplied by the defendant; otherwise, the Restatement does not cover issues of causation. For example, if a lender relies upon a negligently prepared audit in making a loan, will the auditor always be liable to the lender if the borrower defaults? Must the inaccuracy relate to the reason for the default? In securities fraud cases, courts distinguish between misrepresentations which merely induce the plaintiff to enter into the transaction and misrepresentations which relate to the plaintiff's loss.[57]

For example, if a termite inspector negligently certifies the insect-free status of a dwelling, should the buyer be permitted to tender the property and recover the full purchase price or merely recover the difference in value or cost of repair? The *Boykin* decision was based on the pleadings, so there is no guidance on these questions of causation.

Can the information provider limit its liability? Could, say, the auditor restrict its liability by simply stating that its certification is intended for the benefit solely of its client and no one else? The *Ultramares/Credit Alliance* decision suggests that this question need not be asked because the only eligible plaintiff is somebody who, for all practical purposes, was the intended recipient of the information. Under the Restatement, however, such a limitation might be important evidence of the defendant's intention or knowledge. The Restatement is silent, however, whether such a limitation would be binding. Of course the supplier of information could simply refuse to give the information if he were informed that the recipient intended to pass it on to someone else. Under the "foreseeability" rule of *Rosenblum* the ability to limit liability is more important, and the New Jersey court clearly stated that the information supplier can limit its liability.[58]

Logic also suggests that the information supplier should be permitted to limit its liability. The duty to act with care arises in a contractual context. Therefore, the contract is a suitable medium for defining the duty. A third party should have no higher capacity for recovery than the contracting party.

Finally, it is fair to ask whether the *Boykin* decision is really an expansion of existing Alabama law. The answer is, probably not. The Restatement rule requires a negligent misrepresentation. In Alabama it has long been the rule that a misrepresentation of a material fact made by mistake and innocently and acted upon by the opposite party constitutes legal fraud.[59] Thus, under Alabama law, it is not even necessary to prove negligence in order to recover for

a misrepresentation.

The real issue in the cases which began with *Glanzer* is whether a third party can recover for the misrepresentation. The Supreme Court of Alabama has recently answered, yes, to this question in connection with innocent fraud. In *Thomas v. Halstead*[60] a patient attempted to recover for a misrepresentation made by his dentist to his medical insurance company. The trial court granted the dentist's motion for summary judgment, evidently because the misrepresentations were not made to the plaintiff. Relying on the statutory right of action for innocent fraud, the court stated:

> In Alabama, it is not always necessary to prove that a misrepresentation was made directly to the person who claims to have been injured.[61]

Unfortunately, the court does not analyze the circumstances under which a third person may recover for an innocent misrepresentation, and no mention is made of any of the alternative standards considered in the *Boykin* decision. If innocent misrepresentations can be the subject of a cause of action by a third person, then logic suggests that the right of recovery should be restricted to substantially the same type of recipients as provided in the Restatement.

All professionals who issue opinions and certifications must be aware that their work product can be the source of liability beyond their own clients unless they take an active role to limit the dissemination of their opinions or certifications. More important, the decision in *Thomas v. Halstead* suggests that such liability may soon be expanded to innocent, rather than negligent, misrepresentations. Otherwise, an unresolved distinction exists between these two areas of liability for misrepresentation. Until such time as the Supreme Court of Alabama resolves these questions, professionals will labor under a measure of uncertainty as to the scope of their potential liability. ■

Endnotes

1. 1994 WL 54923 (Ala. February 25, 1994).
2. Restatement (Second) of Torts § 552 states:

   (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

   (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

   (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

   (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

   (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.
3. 135 N.E. 275 (N.Y. 1922).
4. *Id.*
5. *Id.* at 276.
6. *Id.* at 277.
7. 174 N.E. 441 (N.Y. 1931).
8. *Id.* at 443.
9. *Id.* at 446.
10. 483 N.E.2d 110 (N.Y. 1985).
11. *Id.* at 115 (quoting *Ultramares*, 174 N.E. at 446).
12. *Id.* A single telephone call from the lender to the auditor was insufficient to create the necessary privity in *Security Pacific Business Credit, Inc. v. Peat Marwick Main & Co.*, 597 N.E.2d 1080 (N.Y. 1992).
13. 461 A.2d 138 (N.J. 1983).
14. *Id.* at 142-43.
15. *Santor v. A & M Karagheusian, Inc.*, 207 A.2d 305 (N.J. 1965).
16. *Rosenblum*, 461 A.2d at 147.
17. *Id.* at 145.
18. *Id.* at 149.
19. *Id.* at 149.
20. See note 2, *supra*.
21. Restatement (Second) of Torts § 552 cmt. h (1977).
22. *Touche Ross & Co. v. Commercial Union Ins. Co.*, 514 So.2d 315, 321-23 (Miss. 1987).
23. *Id.* at 322.
24. *Id.*
25. 551 So.2d 390, 395 (Ala. 1989).
26. *Id.* at 395.
27. *Id.* at 394 (citing *Ultramares*, 174 N.E. at 441).
28. *Colonial Bank*, 551 So.2d at 396.
29. *Ultramares*, 174 N.E. at 444.
30. *Id.* at 447.
31. *Id.* at 449-50.
32. *Id.* at 450.
33. *Boykin*, 1994 WL 54923 at p. 4.
34. Id. at 5.
35. *Rosenblum*, 461 A.2d at 152.
36. *Id.* at 152 (citing D. D. Hallett & T. R. Collins, Comment *Auditors' Responsibility for Misrepresentation: Inadequate Protections for Users of Financial Statements*, 44 Wash.L.Rev. 139 (1968).
37. *Ultramares*, 174 N.E. at 448.
38. One New Jersey lower court relying on *Rosenblum* has held that lack of privity is no longer a bar to an action for legal malpractice. *See Zendell v. Newport Oil Corp.*, 544 A.2d 878 (N.J. Super. 1988). Relying on a statute which abolishes privity as a requirement for recovery, the Supreme Court of Mississippi has also declared that privity is not required to recover from an attorney for malpractice. *Century 21 Deep South Properties, Ltd. v. Courson*, 612 So.2d 359, 373 (Miss. 1992).
39. *First American Title Ins. Co. v. First Title Service Co.*, 457 So.2d 467, 472 (Fla. 1984).
40. *Pensacola Executive House Condominium Association v. Baskerville-Donovan Engineers, Inc.*, 566 So.2d 850, 852 (Fla. Dist. Ct. App. 1990).
41. *Barrie v. V.P. Exterminators, Inc.*, 625 So.2d 1007, 1014 (La. 1993).
42. *McElvy, Jenneweine, Stefany, Howard, Inc. v. Arlington Electric, Inc.*, 582 So.2d 47, 49 (Fla. Dist. Ct. App. 1991).
43. Restatement (Second) of Torts § 552(2)(a) (1977).
44. *Boykin*, 1994 WL 54923 at p. 3.
45. *Id.* at p. 4.
46. *Id.* The Supreme Court of Mississippi says that "know" in § 552(2)(a) is equivalent to "knows or reasonably should know." *Hosford v. McKissack*, 589 So.2d 108, 111 (Miss. 1991) (termite inspection report). The *Hosford* interpretation of § 552(2)(a) does violence to the notion of constructive knowledge because there is no duty under which the supplier "should" know or try to learn who may receive the information.
47. Restatement (Second) of Torts § 552 cmt. h (1977).
48. The Supreme Court of New Jersey introduced the concept of "particular foreseeability" in a case involving economic loss for negligent interference with a contractual right, but the New Jersey court admitted that the test really did not resolve all questions concerning allowable plaintiffs. *People Express Airlines, Inc. v. Consolidated Rail Corp.*, 495 A.2d. 107, 118 (N.J. 1985).
49. *See* W. H. Hardie, *Foreseeability: A Murky Crystal Ball for Predicting Liability*, 23 Cumb.L.Rev. 349, 394 (1993) (arguing that as a result of the uncertainty of its meaning, foreseeability is unsuitable as a test for any element of liability).
50. According to Mr. Justice Maddox's dissent, the *Boykin* court adopted the Restatement test in response to a request from the plaintiffs' bar. *Boykin*, 1994 WL 54923, p. 7, n. 3.
51. *Restatement*, § 552(2)(a).
52. 911 F.2d 1053 (5th Cir. 1990).
53. *Id.* at 1059. The *Bank of Commerce* case was cited with approval in *Boykin*, 1994 WL 54923 at p. 5.
54. *Restatement*, § 522(2)(b).
55. *Boykin*, 1994 WL 54923 at p. 2.
56. 514 So.2d 315 (Miss. 1987).
57. This is the distinction between "transaction cause" which induces the plaintiff to enter into the transaction and "loss cause" which causes the reduction in value of the security purchased in the transaction. *See e.g., Bastian v. Petren Resources Corp.*, 892 F.2d 680, 683-86 (7th Cir.), *cert. denied*, 496 U.S. 906 (1990); *Bruschi v. Brown*, 876 F.2d 1526, 1530-31 (11th Cir. 1989); *Huddleston v. Herman & MacLean*, 640 F.2d 534, 549 (5th Cir. 1981), *aff'd in part, rev'd in part on other grounds*, 459 U.S. 375 (1983).
58. *Rosenblum*, 461 A.2d at 152.
59. See § 6-5-101 Code of Ala. (1975).
60. 605 So.2d 1181 (1992).
61. *Id.* at 1184.

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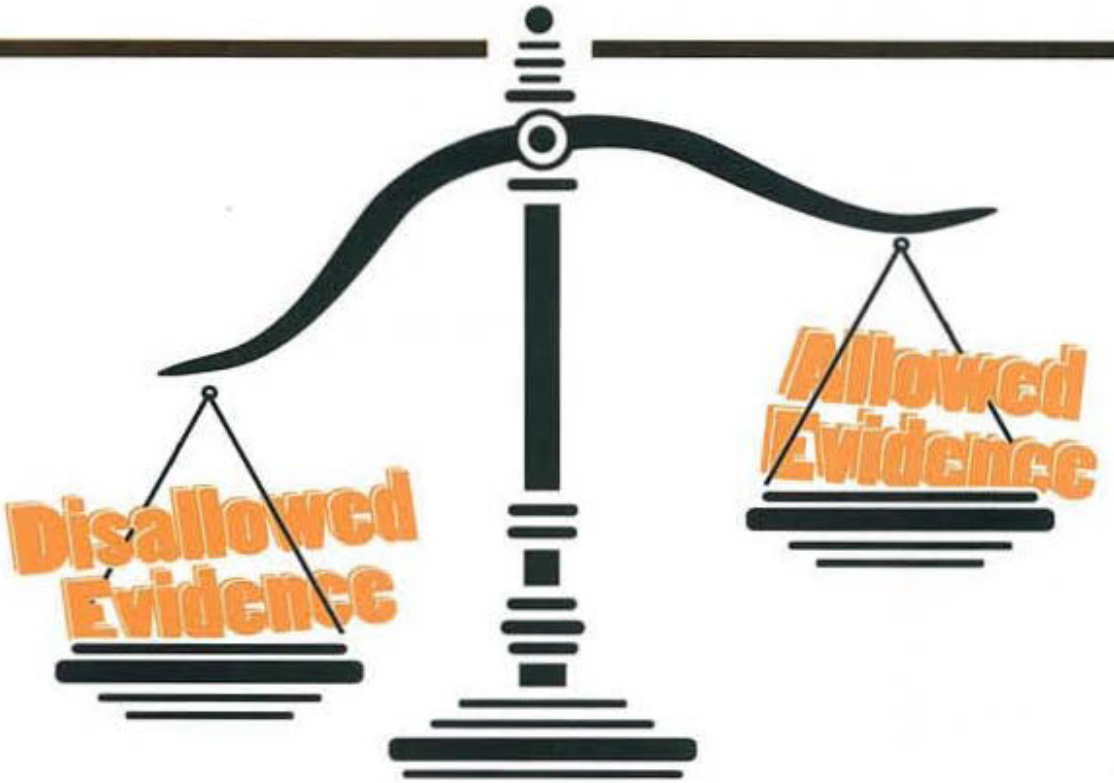

PATTERN AND PRACTICE: DISCOVERY AND USE OF EVIDENCE-

A Defendant's Perspective

By: Charles D. Stewart, Edward M. Weed and Philip G. Piggott

Because of the complex foundation which is used to try to introduce evidence of collateral acts of misconduct in a trial for fraud, many practitioners shortcut their analysis of the traditional rules regarding this type of evidence. As a result, some confusion exists in the cases, and far too much attention at trial goes toward trying to decipher what the current law is with regard to the admissibility of such evidence. This article is written in an attempt to review some of the basic principles regarding the admissibility of other acts. Hopefully, this article will provide lawyers and judges some basic guidelines to use in dealing with evidence of collateral misconduct.

As with any area of the law, the best starting point for analysis is the general rule of law which everyone agrees upon:

> One of the cardinal principles of the common law is that a person's character, good or bad, offered for the purpose of showing his conduct on a specified occasion, is not provable by evidence of his specific acts or course of conduct. The policy behind this rule is that the reception of such evidence would result in an intolerable confusion of the issues.

* * * * *

The present principle is one that has been termed the 'general exclusionary rule of character.' Collateral acts of a litigant are generally inadmissible when

> offered to prove that the litigant was of a particular character and acted consistent therewith on the occasion in question.

Gamble, *McElroy's Alabama Evidence*, 4th ed. 1991 § 26.01(1).

While there are exceptions to this general rule (discussed below), the "intolerable confusion" which results from the jury's reception of collateral acts of misconduct provides a sound reason by itself for excluding reception of such evidence. More importantly, however, the general exclusionary rule is probably based upon the policy that it is fundamentally unfair to convict, or hold liable, someone for a particular act when the only evidence that they did the act is that they have done other bad acts. Few would disagree with this basic premise.

In the past, under certain exceptions to the general exclusionary rule normally applicable to collateral acts of misconduct by a party, the courts have allowed evidence of collateral misconduct. One such exception is for collateral acts of fraud in an action for fraud. Two clear requirements for admissibility, however, under the fraud exception which has remained steadfast for 100 years in Alabama is that such acts must be *similar* and must be *proven. Nelms v. Steiner Bros.*, 113 Ala. 562, 22 So. 435 (1896) (citing *Johnston v. Br. Bank Montgomery*, 7 Ala. 379 (1845)); *Cartwright v. Braly*, 218 Ala. 49, 117 So. 477 (1928); *Great American Ins. Co. v. Dover*, 221 Ala. 612, 130 So. 335 (1930); *Shelby Mutual Ins. Co. of Shelby, Ohio v. Ralston*, 369 So. 2d 285 (Ala. Civ. App. 1979) (in addition to similarity, *proof* of collateral acts of fraud is required); *Dorcal, Inc. v. Xerox Corp.*, 398 So. 2d 665 (Ala. 1981) (court did not err in excluding evidence of collateral acts based upon doctrine of res inter alios acta and questions of materiality, relevancy and remoteness as determined by trial judge); *Ex parte State Farm Mut. Ins. Co.*, 452 So. 2d 861 (Ala. 1984); *Robinson v. Kierce*, 513 So. 2d 1005 (Ala. 1987) ("The idea that a complaint filed in one action can be introduced in another action to establish the truthfulness of the allegations in the complaint transcend our established rules of evidence."); *Kabel v. Brady*, 519 So. 2d 912 (Ala. 1987); *Potomac Leasing Co. v. Bulger*, 531 So. 2d 307 (Ala. 1988); *Ex parte Georgia Casualty and Surety Co.*, 531 So. 2d 838 (Ala. 1988); *Massachusetts Mutual Life Ins. v. Collins*, 575 So. 2d 1005 *cert. den.* 499 U.S. 918, 111 S.Ct. 1306, 113 L. Ed. 2d 240 (1991) ("In order to admit other, false representations in a fraud case, the other representations must be similar in nature to those alleged in the complaint, . . . and the transaction must be of substantially the same character."); *Harris v. M & S Toyota, Inc.*, 575 So. 2d 74 (Ala. 1991) (prejudicial effect of evidence admitted concerning earlier different settlement of fraud claim held to have outweighed its probative value, entitling defendants to new trial); *Associates Financial Services Co. of Ala., Inc. v. Barbour*, 592 So. 2d 191 (Ala. 1991).

As stated, evidence of a party's past acts cannot be generally offered to show that party acted in conformity with such acts on the occasion in question; however, as noted, the Alabama Supreme Court has stated that there are certain situations where prior acts may be admitted into evidence. The exceptions, it should be remembered, are exactly that – exceptions; and the exceptions should not be allowed to eat up the general rule.

Like any other form of evidence, in order for the court to permit evidence of similar representations to others in the past, such representations must be *relevant* to the issues being litigated. *Cartwright v. Braly*, 218 Ala. 49, 117 So. 477 (Ala. 1928). It would also seem to go without saying that the actions of a person whose conduct is not on trial cannot be material or relevant in the trial of one whose conduct is being analyzed at trial, e.g. what one employee did on one occasion would seem to be immaterial in determining whether a second employee mentally formulated the intent to do a similar act on another occasion without any knowledge of the first employee's actions. There is good authority that, absent an allegation of fraud, evidence of collateral misconduct is not even discoverable, much less admissible. *Ex parte, Mobile Fixture and Equip. Co., Inc.*, 630 So. 2d 358 (Ala. 1993). Thus materiality and relevancy are always considerations. If in fact fraud allegations do exist and prior representations are permitted as evidence, the trial judge should caution the jury as to the purpose and legitimate bearing of the testimony regarding those prior representations. *Cartwright*, 117 So. at 480. This type of evidence can be handled through two-part jury instructions. *Cups Coal v. Tenn River Pulp & Paper*, 519 So. 2d 932 (Ala. 1988)(advocating instructions regarding limited purpose admissibility).

It is evident that prior acts may be admitted into evidence if such evidence falls within the broadly defined interpretation of "similarity of character." At the present time, however, there appears to be no set standard for the courts to use in determining the meaning of similarity of character and thus there are some disparate holdings in the case law. As trial judges have wide discretion in their authority to permit, or exclude evidence, the cases are difficult, if not impossible, to reconcile.

In Newman v. Bankers Fidelity Life Ins. Co., 628 So. 2d 439 (Ala. 1993) the court reviewed the issue of whether the trial judge erred when he disallowed evidence regarding the sale of a life insurance policy to a third party. The evidence was purportedly offered to show pattern and practice in a fraud action. The Supreme Court of Alabama held that such evidentiary matters were fully within the discretion of the trial judge and refused to overturn the trial judge's ruling. In refusing to find that the trial judge abused his discretion the court stated that, "in order to admit other false representations in a fraud case, the other representations must be similar in nature to those alleged in the complaint, and the transaction must be of substantially the same character." *Newman*, at 442. Apparently, the appellate court left the determination of similarity entirely with the judge at trial. The trial judge, therefore, appears to have a wide area within his discretion to determine whether prior acts by the defendant are of a similar character.

In addition to determinations of similarity, the trial court must make other determinations with regard to evidence of collateral misconduct. In some instances, these determinations may also lead to the exclusion of evidence of collateral misconduct. In *Harris v. M & S Toyota, Inc.*, 575 So. 2d 74 (Ala. 1991), the court upheld the order granting a new trial after evidence was introduced of past settlements reached by an automobile dealership. Disallowing such evidence to prove a 'pattern' by the defendant, the court held that the prejudicial effect of testimony concerning the automobile dealer's settlement of prior fraud claims, outweighed the probative value of the testimony. The court also recognized the general policy of encouraging settlement. Denying the admission of the prior settlements in evidence the court held:

> It is the general rule that evidence of an offer to compromise or settle a claim will not be received as an admission of the party making the offer. An offer of agreement to pay, or even payment, in the way of compromise, is not an admission of indebtedness nor of any fact from which indebtedness may be inferred.
>
> *Harris*, 575 So. 2d at 79.

If, in fact, a decision is made to let in evidence of collateral misconduct, it should be borne in mind that these other acts must meet the same requirements of any piece of evidence. That is, hearsay, the best evidence rule and attorney/client privilege for example, may also be roadblocks to getting these collateral acts into evidence. In short, in order to admit proof of similar acts, such evidence must be proven by admissible evidence.

In *Courtesy Ford Sales, Inc. v. Clark*, 425 So. 2d 1075 (Ala. 1983), the court refused to admit into evidence prior acts by the dealership when there was no evidence as to whether the vehicles sold in the past were in fact sold as new or used. The court stated that, "[w]hen a claim is made for punitive damages, proof of similar misrepresentations may be offered to show intent to deceive. The other fraudulent transactions, however, must be established by admissible evidence; mere rumor of fraud on the part of the party is not admissible evidence and cannot serve as a basis for finding fraud in a later transaction." *Clark*, 425 So. 2d at 1078. *See also Shelby Mut. Ins. Co. of Shelby, Ohio v. Ralston*, 369 So. 2d 285 (Ala. Civ. App. 1979).

Similarly, unproven allegations of misconduct were not admitted to prove intent in the case of *Robinson v. Kierce*, 513 So. 2d 1005 (Ala. 1987). In *Kierce*, the plaintiff sought to introduce evidence of a prior lawsuit by a third party against the defendant to prove a pattern of fraudulent behavior. In disallowing evidence of the prior lawsuit, the court stated that, "[t]he idea that a complaint filed in one action can be introduced in another action to establish the truthfulness of the allegations in the complaint transcends our established rules of evidence." *Kierce*, 513 So. 2d at 1007.

Several trial court decisions, however, have been upheld on the basis that the trial judge did not abuse his/her discretion in permitting evidence of collateral acts in order to prove a common plan or scheme. In *Shoals Ford, Inc. v. McKinney*, 605 So. 2d 1197 (Ala. 1992), the court permitted testimony of witnesses to be introduced into evidence in regard to the fact that false representations had also been made to them as to the physical condition to the vehicles they purchased. The purchases by the witnesses had occurred within a period extending from approximately five months before the plaintiff's transaction to approximately nine months after the plaintiff's transaction. In upholding the evidentiary ruling of the trial judge, the court held that "[e]vidence of similar fraudulent acts is admissible to show a fraudulent intent, plan, or scheme, provided that the acts sought to be proven meet the requirement of similarity in nature and proximity in time." *McKinney*, 605 So. 2d at 1200. It would appear form the holding in *McKinney*, that the trial judge considered prior acts as well as those occurring after the incident in question to be considered when reviewing the evidence for the requirement of proximity of time. Such would appear inconsistent with some cases that hold *only prior* acts are admissible evidence in such situations. *See e.g. Kabel v. Brady*, 519 So. 2d 912 (Ala. 1987) (Although past dealings of a party with a nonparty are normally excluded as irrelevant, this prior conduct becomes competent when the intent of the party is in issue).

In *Valentine v. World Omni Leasing, Inc.*, 601 So. 2d 1006 (Ala. Civ. App. 1992), fraud was alleged against both the principal company and its agent. The lessee of the automobile brought a fraud in the inducement claim against the lessor of the automobile. The trial court excluded evidence of other similar misrepresentations that were made by different salesman not named in the suit. The Court of Civil Appeals, however, held that the evidence should have been admitted. The court stated that, "while evidence of past dealings of a party with non-parties is generally irrelevant, when the intent of the party is at issue, that party's prior conduct and acts on other occasions which have a bearing on that parties intent in a sub-

sequent action is competent evidence." *Valentine*, 601 So. 2d at 1009.

The court in *Valentine*, appears to have exceeded the traditional 'similar in nature' rule and allowed not only evidence of the parties' prior acts to prove conformity therewith, but also third parties' acts to prove the defendant acted in conformity with other parties' actions.

Another case which appears to have stretched the common law to beyond its limit is *Davis v. Davis*, 474 So. 2d 654 (Ala. 1985). In *Davis*, the court held that the trial judge did not abuse his discretion by admitting into evidence testimony of a similar representations made by the defendant to a third person ten years after the alleged misrepresentation was made to the plaintiff. The court held that the actions of the defendant over the ten year period were "continuing in nature." In dealing with the issue of 'proximity of time' the court stated that "whether or not the offer of evidence will be denied on the ground of remoteness is a question to be decided by the trial court in the exercise of sound discretion, and such ruling by trial court will not be reversed on appeal unless it is plain that error was committed. *Davis*, 474 So. 2d at 655. Because of the "continuing in nature" type fraud, however, the situation is *Davis* appears distinguishable from most cases.

Thus, as is evident, some trial judges in Alabama, supported by the Alabama Supreme Court's wide discretion allowed to trial judges, appear to have broadened the common law in regards to the 'similarity in nature' in allowing evidence of collateral acts beyond its intended realms. This broadening of the common law may have also allowed, in some instances, the exception to become the rule. One problem with this is that it overlooks the basic reasons why these rules were established. In particular, it overlooks the fact that

The general law, with regard to similar acts of defendants, as stated in C.J.S. is as follows:

> Evidence of similar acts or transactions is inadmissible when irrelevant to the issues in the case. Thus, the law will not consider evidence that a person has, or has not, done a certain act at a particular time as probative of a contention that he has, or has not, done a similar act at another time. One vise or moral dereliction cannot be proved as a circumstance to show the existence of another not necessarily or vitally connected with it as cause or effect. It is clear that a person cannot be shown to have done an act by evidence that another person has done a similar act, although both persons are under the control of a single management.
>
> 32 C.J.S. Evidence § 579 (1964).

The common law does allow the exception of admitting evidence of collateral acts where such acts are pertinent to the issue in question:

> Evidence of a course of conduct or dealing may be admitted where pertinent to an issue in the case.
>
> 32 C.J.S. Evidence § 581 (1964).

Although,

> Evidence of similar facts, conditions, or occurrences is inadmissible where not pertinent to the issues in the case. Thus, in the absence of a showing that the essential conditions were the same , an issue as to the existence or occurrence of a particular fact, condition, or event cannot be proved by evidence as to the existence or occurrence of other facts, conditions, or events, although they are, in some respects, similar.
>
> 32 C.J.S. Evidence § 583 (1964).

Therefore, the burden is on the plaintiff to prove, in order for evidence of prior acts to be admissible, that the events sought to be admitted are not merely similar, but that the essential elements are the same.

The plaintiff must not only prove that the elements were the same but the plaintiff must also prove that the representation made to him in the underlying action was in fact false. In McElroy's Alabama Evidence § 70.03(1) (4th Ed. 1991), it states:

> It appears quite clear that the plaintiff may not prove that similar false representations were made to others in the absence of evidence that the representation to the plaintiff was indeed false. Another way of stating this rule is

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that prior acts of the defendant, standing alone, cannot form the basis of a judgment that he acted fraudulently in the present transaction. Once there is evidence that the representation to the plaintiff was false, the plaintiff may then offer evidence of similar representations to others about the same time for the purpose of bolstering the conclusion that the representation to him was false. Such is admissible even though there is no evidence warranting a finding that the misrepresentations were a part of a common plan or scheme.
Gamble § 70.03.

From the defendant's perspective, the initial opposition to the introduction of collateral evidence should be that the plaintiff has failed to prove that the representations allegedly made to him were false. If such can be shown, it would automatically follow that no evidence of other similar acts would be admissible to prove that the representations made to the plaintiff in the present action were false.

A defendant's first line of defense is to oppose broad, general discovery requests concerning other claims decisions, complaints, and lawsuits, etc. Unlike the federal rules, Alabama Rule 26(b) does not contain specific language limiting the discovery on matters which the court deems unduly burdensome. *See* Ala. R. Civ. P. 26(b), Fed. R. Civ. P. 26(b). Nevertheless, Alabama courts have recognized "...that the right to discovery is not unlimited, and the trial court has broad powers to control the use of the process to prevent its abuse by any party". *Ex Parte McTier*, 414 So. 2d 460, 462 (Ala. 1982). Citing *Campbell v. Eastland*, 307 F.2d 478 *cert. den., Eastland v. Campbell*, 371 U.S. 995, 83 S.Ct. 502, 9 L. Ed. 2d 502 (1963) and *Delong Corp. v. Lucas*, 138 F. Supp. 805 (S.D.N.Y. 1956). In limiting unduly burdensome and overly broad discovery requests, Alabama courts have insisted that the information sought be limited to both a reasonable time and a reasonable geographical area. *Ex Parte State Farm*, 452 So. 2d 861, 863-864 (Ala. 1984).

In *State Farm*, the plaintiff alleged that the insurer's retention of invalid policy provisions, without notifying its insureds of the invalidity of the provisions, constituted a fraudulent nationwide scheme. *Id.* at 862. The provisions dealt with uninsured motorist benefits, and purported to prohibit stacking, in contravention of the law of Alabama and a host of other jurisdictions. *Id.* Despite the fact that the policies were issued nationwide, and the retained provisions were invalid in many other jurisdictions, the Alabama Supreme Court held that the plaintiff's geographical scope of discovery would be limited to Alabama. *State Farm* at 864. The court further limited discovery to a reasonable time frame (approximately ten years) which it felt was sufficient to establish the plaintiff's claim. *Id.*

In *State Farm*, the court cited *National States Insurance Co. v. Jones*, 393 So. 2d 1361 (Ala. 1980) in support of its decision to limit the scope of plaintiff's discovery. One of the earliest cases to deal with this particular area of discovery, *Jones* limited discovery of insurance company information to a five year period. *Jones* at 1364.

Prior to the court's decision in *State Farm*, the court faced nearly identical issues in *Ex Parte Allstate Insurance Co.*, 401 So. 2d 749 (Ala. 1981). In *Allstate*, the court held that plaintiff's motion to compel had been properly granted where the plaintiff limited his discovery to similar claims within the state of Alabama and within the last two years. *Id.* at 750, 751.

Another case decided prior to *State Farm* was *Ex Parte McTier II*, 414 So. 2d 460 (Ala. 1982). Unlike *Allstate*, and *State Farm*, *McTier II* was decided in noninsurance context. *McTier II* involved the allegedly fraudulent sale of a burglary protection system. *Id.* at 461. In stark contrast to the insurance cases, the court denied a discovery request concerning similar allegedly fraudulent sales where such request was limited to sales within one county over a two year period. *Id.* at 461, 462. Thus, it would appear that each case is clearly decided on its own circumstances.

Since *State Farm* in 1984, the court has continued along the same lines it established in that case. *See e.g. Ex Parte Georgia Casualty and Surety Company*, 531 So. 2d 838 (Ala. 1988). In its most recent discussion in the area, *Ex Parte Asher*, 569 So. 2d 733 (Ala. 1990), the court was afforded the opportunity to discuss the case law

developments subsequent to *State Farm.*

It must be pointed out initially, that though the *Asher* court ordered production of documents over defendant's objections that such production was unduly burdensome, the burden in *Asher* was substantially less than in the cases decided previously: "especially when compared to the numbers of files the court ordered produced in *Ex Parte State Farm* and *Ex Parte Allstate*". *Asher* at 738. All in all, the *Asher* discovery dispute involved approximately fifty (50) files. *Id.*

In *Asher,* insureds who had placed their insurance through an agency brought suit against the agency when the insurer chosen by the agency ran into difficulties. *Id.* at 734. When the plaintiffs, alleging fraud in their complaint, sought discovery of similar sales by the agency, the agency objected on grounds of unduly burdensome. *Id.* Unlike the *State Farm* and *Allstate* cases, the *Asher* allegations involved only the local actions of one agency. *Asher* dealt only with discovery requests regarding local transactions and local insureds. Therefore, even though the discovery permitted in *Asher* may appear broad, the limitations set by the court severely confined the scope of discovery.

Therefore, the defendant must first object, if appropriate, to plaintiff's discovery requests of information which exceeds the parameters of those cases cited above on the basis that it is overly broad and unduly burdensome. The defendant must demonstrate that the right to discovery is not unlimited and that the court does have powers to control and prevent abuse by either party.

Defendant's next line of defense is a pretrial motion in limine. A defendant should always file a pretrial motion in limine directed at collateral act evidence. Presumably a pretrial conference and order (this is a must) will have directed plaintiff to disclose all witnesses. Through discovery and/or investigation defendant should be able to fully determine the substance of plaintiff's collateral act evidence and whether or not it meets the similarity tests in accordance with Alabama case law. At the hearing on the motion in limine defendant must be able to demonstrate the pertinent facts of the case at hand and the detailed, specific facts of each collateral act witnesses' testimony and transaction. This should be presented to the court through deposition summary and claim file documents/summaries if appropriate. Most courts will consider the motion if the evidence before the court is sufficient and the court has had an opportunity to study the motion before the hearing.

Defendant's last line of defense is to oppose the introduction of the collateral acts offered as evidence at trial. If the court did not rule on the defendant's motion in limine (or even if the court denied it, in whole or part) defendant must be prepared to object to the evidence at trial when presented. The previous denial of the motion in limine does not alleviate the need for an objection to the admissibility to the collateral evidence

at trial. *Bush v. Ala. Farm Bur. Mut. Cas. Ins.*, 576 So. 2d 175 (Ala. 1991).

Because of the nature of such evidence and its potentially harmful effect on the defendant, the defendant should request, before such evidence be placed before the jury, a voir dire examination of the witness to enable the court to ascertain whether the evidence meets the similarity test of admissibility. Judges usually are receptive to such a request. This procedure is valid even though there has been an extensive evaluation of such evidence before trial because the trial court is in a much better position to evaluate the evidence and its admissibility when it is coming from the witness stand and is subject to cross examination.

One final note, there seems to be some sort of Lazarus like attempt to use the term "pattern and practice". This phrase is dead and has no meaning other than to confuse the issue even more. Because the Alabama Supreme Court Struck down the Cap on Punitive damages, evidence is no longer admissible on the grounds that it is need to show a "pattern and practice" of conduct entitling plaintiff to damages in excess of the statutory cap.

One of the plaintiff's most frequent arguments for allowing collateral acts into evidence was that such evidence was necessary to circumvent the statutory cap on punitive damages enacted under tort reform. In *Henderson v. Alabama Power Co.*, the Alabama Supreme Court struck down the cap on punitive damages set forth in Alabama Code § 6-11-21 (1975, as amended 1987). Prior to the statute being declared unconstitutional, the only way to get around the cap was by showing that certain types of conduct had occurred. One of these types of conduct involved a "pattern or practice" of intentional wrongful conduct. If it were demonstrated at trial that the defendant had engaged in a pattern or practice, the plaintiff could be entitled to damages in excess of the cap. Based on the need for this type of evidence, the plaintiff's bar argued, *see, e.g.*, David Marsh, "The Tort of Bad Faith and the $250,000 Punitive Damages Cap" *The Alabama Lawyer*, March 1990, the plaintiff was entitled to almost carte blanche admissibility for collateral acts of misconduct in fraud and bad faith actions.

While the extent of the validity of this argument was never finally decided, *Henderson* makes the argument moot since pattern and practice evidence is no longer necessary to avoid a punitive damage cap. *Gober v. Khalaf*, 628 So. 2d 416 (Ala. 1993).

CONCLUSION

A defendant, in an action for fraud, faced with a situation where the plaintiff's attorney is more than likely to raise the issue of "pattern and practice" should clearly set forth grounds under which the court should grant its Motion in Limine precluding testimony as to any prior acts.

The present case law is fairly clear, with only a few exceptions, as to the parameters which prove plan, intent and/or scheme. It is clear that these parameters must be met in order for evidence of collateral acts to be admitted and that the plaintiff must first *prove* that there was a misrepresentation made. After which plaintiff then has the burden to prove that the evidence sought to admitted is proven, similar in nature and occurred in clear proximity of time to the occurrence in issue. ■

DISCIPLINARY REPORT

Disability Inactive Status

• **William Eason Mitchell**, an Alabaster attorney, petitioned the Disciplinary Board of the Alabama State Bar to be placed on disability inactive status pursuant to Rule 27 of the Rules of Disciplinary Procedure (Interim) contending that he was disabled from the practice of law due to substance abuse. The Disciplinary Board, on March 18, 1994, approved Mitchell's petition and ordered that he be transferred to disability inactive status and prohibited from the practice of law in the state of Alabama and shall not resume active status until ordered reinstated by the Disciplinary Board upon a showing by clear and convincing evidence that his disability has been removed and that he is fit to resume the practice of law. The Supreme Court of Alabama, on April 5, 1994, transferred Mitchell to disability inactive status, effective March 18, 1994. [Rule 27(c), Pet. No. 94-02]

Reinstatement

• **Jack Edward Swinford**, a Talladega lawyer, was reinstated to the practice of law by order of the Supreme Court of Alabama effective April 8, 1994. [Pet. No. 94-01]

Notice

Mark M. Hull, attorney at law, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of July 15, 1994 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 93-382 before the Disciplinary Board of the Alabama State Bar. [ASB No. 93-382]

Suspensions

• On May 26, 1994 Birmingham lawyer **C. Michael Crenshaw** was suspended from the practice of law for a period of 90 days by order of the Disciplinary Board of the Alabama State Bar. Crenshaw was employed to probate an estate and misappropriated and converted to his own use a portion of the proceeds of the estate. Crenshaw replaced the money in the estate before the discrepancy was discovered but his misappropriation delayed the closing of the estate. The Disciplinary Board found that Crenshaw's conduct constituted a violation of DR 102-D4 which provided that a lawyer shall not misappropriate the funds of his client by appropriating to his own use funds entrusted to his keeping. [ASB No. 93-122]

• By order of the Supreme Court of Alabama, Birmingham attorney **Dwight Lee Driskill** was suspended from the practice of law in the State of Alabama for a period of two years, effective April 5, 1994. Driskill was further ordered to make restitution in each of the three cases involved. Driskill failed to respond to the formal charges filed by the bar and failed to attend his duly noticed disciplinary hearing.

In one case, Driskill was hired to help place a parolee in a drug rehabilitation program. Even though paid to render legal service, Driskill failed to do so. Driskill's failure caused the parolee to be transferred directly to prison. Driskill failed to refund the fee and failed to cooperate with the investigation of the bar complaint. Rules violated were: DR 6-101(A) and A.R.P.C. 1.3, (willful neglect); A.R.P.C. 1.16(d), (failure to refund unearned fee); A.R.P.C. 1.4(a), (failure to keep client reasonably informed); A.R.P.C. 8.1(b), (failure to respond to disciplinary authority); A.R.P.C. 8.4(c), (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); and A.R.P.C. 8.4(g) (engaging in conduct adversely reflecting on fitness to practice law).

In the second matter, Driskill accepted a retainer to represent a client in a domestic relations matter. Driskill failed to take any action on behalf of the client, failed to keep her informed, failed to return her telephone calls, and failed to return the unearned fee. Driskill also failed to respond to repeated written and telephonic requests of the grievance committee investigating the complaint. Rules violated were: DR 6-101(A) and A.R.P.C. 1.3; A.R.P.C. 1116(d), 1.4(a), 8.1(b), 8.4(c), and 8.4(g).

In the third case, Driskill was referred a criminal matter by another lawyer with the understanding that Driskill, the client and the referring lawyer would agree upon the fee Driskill would receive. However, unbeknownst to the referring lawyer, Driskill set a fee of $1,500 which eventually escalated to $9,000. Some $5,000 of the amount paid by the client to Driskill was for restitution to be made by the client in the criminal matter.

Driskill failed to make said restitution, failed to perform the agreed-upon legal services for the client, and failed to make

any refund of the misappropriated funds. Driskill also failed to respond to the bar grievance. Rules violated were: DR 6-101(A) and A.R.P.C. 1.3; A.R.P.C. 1.16(d), 1.4(a), 8.1(b), 8.4(c), 8.4(g), 1.15(a) and (b) (safekeeping property of a client), and 8.4(d) (engaging in conduct prejudicial to the administration of justice). [ASB Nos. 92-02, 92-178 and 92-202]

• On April 5, 1994, the Supreme Court of Alabama suspended Gadsden attorney **John Edward Cunningham** for a period of 45 days, effective from that date. Cunningham was suspended for willfully neglecting a probate matter he was handling and for failing to keep his client reasonably informed. He also failed to respond to lawful demands for information from a disciplinary authority. A default judgment was entered against him. Cunningham failed to appear at the hearing to determine discipline before the Disciplinary Board of the Alabama State Bar. [ASB No. 13-126]

• By order of the Supreme Court of Alabama Centre attorney **Gary Edwin Davis** was suspended from the practice of law in the State of Alabama for a period of 60 days, effective April 19, 1994. Davis' suspension was based upon the following cases:

In ASB No. 92-279, Davis represented the executrix of an estate. He failed to enter into and maintain a clear fee agreement, and further failed to keep his client informed. Davis failed to comply with the discovery mandates of the court and in so doing caused his client to be removed as executrix on two separate occasions. The Disciplinary Board found that Davis' conduct was in violation of the following rules: DR 1-102(A)(6), (misconduct); A.R.P.C. 1.3, (diligence); A.R.P.C. 1.4(a) & (b), (communication); A.R.P.C. 1.5 (b) and (c), (fees); A.R.P.C. 3.2, (expediting litigation); A.R.P.C. 8.1(a), (bar admission and disciplinary matters); and A.R.P.C. 8.4(g), (misconduct).

In ASB No. 92-280, Davis was hired to represent clients in a civil suit. When the clients questioned Davis about the filing of the suit with concern about the statute of limitations running out, Davis misrepresented to the clients that the suit had already been filed. In addition, Davis falsely indicated to the clients that the case had to be refiled due to certain allegations that could not be proved. Davis further failed to communicate with his clients about the status of their case after it was filed. The Disciplinary Board found that Davis' conduct was in violation of the following rules: A.R.P.C. 1.3, A.R.P.C. 1.4(a), A.R.P.C. 3.2, and A.R.P.C. 8.4(g).

In ASB No. 92-380, Davis represented clients in a contested guardianship proceeding and subsequent appeal. In the appeal, the opposing party filed an erroneous summary of the testimony taken in the lower court. Davis failed to note or object to the discrepancies in the summary, and further failed to file an appellate brief on behalf of his clients. The Disciplinary Board found that Davis' conduct was in violation of the following rules: A.R.P.C. 1.3, A.R.P.C. 3.2, and A.R.P.C. 8.4(a), (d) and (g).

In ASB No. 92-436, Davis was retained to represent clients in their attempt to recover property which had been mistakenly transferred. Davis failed to take action on behalf of his clients, causing them to lose any ability to recover the property. Davis further failed to keep his clients informed as to the status of their case. Davis failed to respond to requests of the Disciplinary Commission for information regarding this complaint. The Disciplinary Board found that Davis' conduct was in violation of the following rules: A.R.P.C. 1.3, A.R.P.C. 1.4(a), A.R.P.C. 3.1, (meritorious claims and contentions); A.R.P.C. 8.1(b), and A.R.P.C. 8.4(a), (b), (c), (d) and (g).

In ASB No. 92-464, Davis was to represent a client in a suit for patent infringement. Davis never filed such suit on behalf of his client and further falsely represented the status of the fictitious case to the client. The Disciplinary Board found that Davis' conduct was in violation of the following rules: A.R.P.C. 1.1, (competence); A.R.P.C. 1.3, A.R.P.C. 1.4(b), A.R.P.C. 3.2 and A.R.P.C. 8.4(c) and (g). [ASB Nos. 92-279, 92-280, 92-380, 92-436 and 92-464]

Public Reprimands

• On April 15, 1994, Mobile attorney **Richard R. Williams** pled guilty to a public reprimand with general publication for having violated the Rules of Professional Conduct of the Alabama State Bar. In 1991, Williams represented William Dees, Sr. on appeal for his conviction of possession and distribution of a controlled substance. Pursuant to the conviction, the FBI had seized a motor home and a shrimp boat which belonged to the defendant. Williams contacted Mr. and Mrs. Albert Dees, the brother and sister-in-law of the defendant and asked them to post bond in the amount of $4,500 to redeem the motor home

and shrimp boat. Williams did not use the money to post bond and allowed the deadline for posting bond to run. Thereafter, Williams attempted to keep the $4,500 as an attorney's fee, despite the fact that the brother and sister-in-law had never agreed, either verbally or in writing, that the money could be used to pay his attorney's fee or for any purpose other than posting bond. Williams took the $4,500 out of his trust account and misappropriated it to his own use. Williams kept the money for approximately a year and a half and only returned it as part of the settlement of a civil action filed in the Circuit Court of Mobile County.

The Disciplinary Board accepted Williams' plea of guilty to a violation of Rule 1.15(b) which requires a lawyer to promptly deliver to a third person any funds or other property that a third person is entitled to receive and promptly render a full accounting regarding such property. The Disciplinary Board also required that Williams make restitution to Mr. and Mrs. Dees for legal expenses incurred by them as a result of Williams' actions. [ASB No. 93-029]

• On March 18, 1994, Birmingham attorney **Donald T. Trawick** was given a public reprimand with general publication for having violated the Rules of Professional Conduct and the Rules of Disciplinary Procedure of the Alabama State Bar.

In July 1992, Trawick was employed by Richard Pirtle and Robert Boffa to file a motion for a temporary restraining order and suit for damages for breach of a non-complete provision of a sales contract. The motion for the temporary restraining order and the suit were to be filed immediately. Thereafter, Pirtle and Boffa made several attempts to contact Trawick concerning the status of their case, but Trawick refused or failed to communicate with them.

In October 1992, when Pirtle was finally able to contact Trawick, Trawick falsely represented to him that the suit had been filed and was set for trial. Thereafter, Pirtle contacted the court and found that no suit had been filed. Subsequently, Trawick falsely represented to his clients that he had lost or misplaced their file. When the file was later located, Trawick again misrepresented to his clients that suit had been filed. Thereafter, Pirtle and Boffa filed a complaint with the Alabama State Bar and Trawick failed or refused to respond to the complaint. The Disciplinary Board determined that Trawick's conduct constituted a violation of Rule 1.1 of the Rules of Professional Conduct which requires a lawyer to provide competent representation to a client; Rule 1.3 which provides that a lawyer shall not willfully neglect a legal matter entrusted to him; Rule 1.4(a) which states a lawyer shall keep a client reasonably informed about the status of the matter and promptly comply with reasonable requests for information; Rule 1.5(c) which requires contingent fees to be in writing; Rule 8.4(g) which prohibits a lawyer from engaging in conduct that adversely reflects on his fitness to practice law; and Rule 2(e) of the Rules of Disciplinary Procedure which provides that discipline may be imposed for failure to respond to a request for information from a local grievance committee or the Office of General Counsel. [ASB No. 92-533]

• On March 18, 1994, Hayneville attorney **Harold L. Wilson** was given a public reprimand with general publication for having violated the Rules of Professional Conduct of the Alabama State Bar. In 1993, Wilson was appointed by the Circuit Court of Lowndes County to represent two separate indigent criminal cases on appeal. Despite being given two extensions by the court of criminal appeals, Wilson failed to file either brief on a timely basis. The briefs Wilson filed late were rejected by the court and other counsel was appointed to represent his clients. Wilson provided the court with no explanation of his failure to file the required briefs on a timely basis.

The Disciplinary Commission of the Alabama State Bar determined that Wilson's conduct as described above constituted a violation of Rule 1.1 of the Rules of Professional Conduct, which provides that an attorney shall provide competent representation to a client, and Rule 1.3, which provides that a lawyer shall not willfully neglect a legal matter entrusted to him. [ASB No. 93-475]

• On March 18, 1994, Moulton attorney **Rod M. Alexander** received a public reprimand with general publication for having violated the Rules of Professional Conduct of the Alabama State Bar.

In January 1987, Alexander was employed to represent Roy D. Oliver in connection with a workers compensation claim. Alexander lost or misplaced Oliver's medical records and failed to depose Oliver's treating physician until five years after the accident, when the doctor's recollection was clouded and some of the records were unavailable for review. Alexander was late for the deposition of a critical medical witness for the defendant and missed the opportunity to cross-examine the witness and impeach his testimony with records. Throughout the course of the representation, Alexander failed or refused to return Oliver's telephone calls, respond to his letters or otherwise communicate with him concerning the status of his case. When Oliver filed a complaint against Alexander, he failed to respond until requested to do so the third time by the Office of General Counsel.

The Disciplinary Commission determined that Alexander's actions violated Rule 1.1 of the Rules of Professional Conduct which provides that a lawyer shall provide competent representation to a client; Rule 1.3 which provides that a lawyer shall not willfully neglect a legal matter entrusted to him; and Rule 1.4 which provides that a lawyer shall keep a client reasonably informed about the status of the matter and promptly comply with all reasonable requests for information. [ASB No. 93-179]

• On May 13, 1994, Mobile attorney **W. Gary Hooks** pled guilty to a public reprimand without general publication in response to four separate charges of professional misconduct. In complaint one, ASB No. 93-172, Hooks was retained by Robert B. Neese, Jr. on July 28, 1992 to file a Chapter 7 bankruptcy. Hooks did not file the petition until December 1992 and then requested an extension of the first hearing, which was granted. When the hearing was reset, Hooks did not appear at the scheduled time for the hearing and the bankruptcy petition was dismissed due to his failure to timely file the required schedules. Neese attempted to contact Hooks and learned that his telephone was disconnected. Hooks indicated that he would repay Neese the $450 retainer but did not do so until after a complaint was filed with the Alabama State Bar.

In complaint two, ASB No. 93-174, Hooks was retained by Jamie W. Sullivan to prepare a Chapter 7 bankruptcy for which he paid Hooks the sum of $400. Hooks took no action on behalf of Sullivan, and after approximately two years, Sullivan filed a complaint with the bar. Hooks admitted that he failed to prepare the bankruptcy petition and agreed to refund $350 to Sullivan but failed to refund the entire amount.

In complaint three, ASB No. 93-249, Hooks was paid a $1,000 retainer by Robert M. Wheeler to recover three dogs from a kennel, which was holding the dogs as payment for boarding fees. Hooks did not pursue the matter after sending the kennel's attorney a proposed complaint, and, thus, the three dogs were auctioned by the kennel. Hooks then amended the complaint to include damages for the fraudulent sale of the dogs but did nothing further. Hooks agreed to refund Wheeler's retainer fee, but failed to refund the entire amount.

In complaint four, ASB No. 93-288, Donna Eatmon paid Hooks $700 to represent her in a child support matter, $300 of which was to cover blood testing fees. The court refused to allow the blood tests and Hooks agreed to refund $300 to Eatmon. Hooks was to also prepare a divorce for Eatmon but failed to do so until after a complaint was filed with the state bar.

The Disciplinary Board accepted Hooks' plea of guilty to a violation of Rule 1.3 which provides that an attorney shall not willfully neglect a legal matter entrusted to him, and to Rule 1.16(d) which requires an attorney whose representation is terminated to refund any unearned portion of the fee paid in advance. The Disciplinary Board further determined that Hooks should make restitution in each case. [ASB Nos. 93-172, 94-174, 93-249 and 93-288]

• On May 13, 1994, Mobile attorney **James C. Powell** pled guilty to a public reprimand without general publication for having violated the Rules of Professional Conduct of the Alabama State Bar. In 1987, Powell was retained by W. Todd Pipkin to represent him in a fraud and breach of warranty suit over his purchase of a mobile home. After being employed by Pipkin, Powell failed or refused to return telephone calls or otherwise communicate with his client concerning the status of the case. When the case finally came to trial in November 1991, a settlement was reached. However, the defendant only partially performed according to the terms of the settlement agreement. In April 1992, Powell filed a motion to set aside the original settlement agreement and try the case before a jury. Subsequent to the filing of this motion, Powell again failed or refused to return Pipkin's telephone calls or otherwise communicate with him concerning the status of the motion. Finally, in March 1993, after repeated unsuccessful attempts, Pipkin was able to contact Powell by telephone and was informed that the motion to set aside the settlement was automatically denied if not ruled on within 90 days. Powell did not convey this information to Pipkin until after the time to appeal the denial of the motion had run. Thereafter, Pipkin attempted repeatedly, without success, to obtain his file from Powell and finally filed a complaint with the state bar. Despite three written requests for a response, Powell failed or refused to respond to the state bar concerning Pipkin's complaint. The Disciplinary Board accepted Powell's plea of guilty to a violation of Rule 1.3 which provides that a lawyer shall not willfully neglect a legal matter entrusted to him, and to a violation of Rule 8.1(b), which provides that a lawyer shall not, in connection with a disciplinary matter, knowingly fail to respond to a lawful demand for information from a disciplinary authority. Powell was also placed on probation for a period of two years under terms prescribed by the Office of General Counsel of the Alabama State Bar. [ASB No. 93-114]

• On May 13, 1994, Anniston attorney **Mark M. Hull** was given a public reprimand with general publication for having violated the Rules of Professional Conduct of the Alabama State Bar. In the first case, Hull was appointed in 1992 by the presiding judge of the Circuit Court of Calhoun County to represent James Wilburn Hughes on appeal to the court of crimi-

nal appeals from his conviction in the Calhoun County Circuit Court in case number CC 91-979. After being so appointed, Hull failed to file a brief on behalf of his client, or to apply for or obtain an extension from the court. On February 12, 1993, the court of criminal appeals issued an order which found that Hull's failure to file a brief on behalf of his client constituted ineffective assistance of counsel. The court further ordered that Hull be removed from the case and that the circuit court appoint a new attorney to represent Hughes on appeal.

The Disciplinary Commission of the Alabama State Bar determined that Hull's conduct as described above constituted a violation of Rule 1.1 of the Rules of Professional Conduct, which provides that an attorney shall provide competent representation to a client; Rule 1.3, which provides that a lawyer shall not willfully neglect a legal matter entrusted to him; and Rule 8.4(g), which provides that a lawyer shall not engage in conduct which adversely reflects on his fitness to practice law. [ASB No. 93-046]

In September 1992, Hull was appointed by the presiding judge of the Circuit Court of Calhoun County to represent Howard E. Hughes on appeal from his conviction in Calhoun County Circuit Court to the court of criminal appeals. After being appointed, Hull failed to communicate with his client, failed to keep appointments with his client, failed to comply with the appeal procedures of the court of criminal appeals and failed to file a brief on behalf of his client with the court. The court of criminal appeals sent Hull two notices advising him that he had failed to timely comply with the appellant procedures and allowing Hull a total of three additional months to comply. Hull failed or refused to respond to either of these notices. Thereafter, the court of criminal appeals dismissed Hughes' appeal because of Hull's failure to file a docketing statement and the court reporter's transcript order.

The Disciplinary Commission of the Alabama State Bar determined that Hull's conduct as described above constituted a violation of Rule 1.1 of the Rules of Professional Conduct, which provides that an attorney shall provide competent representation to a client; Rule 1.3, which provides that a lawyer shall not willfully neglect a legal matter entrusted to him; and Rule 8.4(g), which provides that a lawyer shall not engage in conduct which adversely reflects on his fitness to practice law. [ASB No. 93-051]

In 1992, Hull was appointed by the Circuit Court of Calhoun County to represent Jerome Harris on appeal to the court of criminal appeals from his criminal convictions in three different cases in Calhoun County Circuit Court. After being appointed, Hull failed to provide Harris with a copy of the record on appeal after having been ordered to do so by the court of criminal appeals by order of March 11, 1993. Thereafter, Hull was given seven days to respond to Harris' allegations that Hull failed to provide him with a copy of the record on appeal as ordered by the court of criminal appeals. Hull failed to respond as directed by the court. On May 6, 1993, the court of criminal appeals removed Hull from Harris' case and ordered the Circuit Court of Calhoun County to appoint new counsel to represent Harris.

The Disciplinary Commission of the Alabama State Bar determined that Hull's conduct as described above constituted a violation of Rule 1.1 of the Rules of Professional Conduct, which provide that an attorney shall provide competent representation to a client; Rule 1.3, which provides that a lawyer shall not willfully neglect a legal matter entrusted to him; and Rule 8.4(g), which provides that a lawyer shall not engage in conduct which adversely reflects on his fitness to practice law. [ASB No. 93-168]

• On September 17, 1993, the Disciplinary Commission voted to impose a public reprimand without general publication on Birmingham attorney **Gary Stephen Tetrick**. In December 1989, Tetrick was employed with the Legal Counsel for Senior Citizens. A client paid Tetrick a fee to handle a dispute over poor workmanship on a home roofing job. After hearing nothing from Tetrick for a period of time, the client learned that Tetrick had been terminated from the agency. No file could be located and all of the documents the client had provided were missing. Tetrick has since left Alabama and is apparently living somewhere in New Jersey. [ASB No. 91-341]

• On January 28, 1994, Phenix City attorney **Gregory Kelly** received a public reprimand without general publication. Kelly was appointed by the district court to represent a minor in a juvenile proceeding. The minor was receiving Social Security Administration benefits which, by agreement with the minor's next of kin, were retained by Kelly. During the time these funds were in Kelly's possession, he misappropriated and converted to his own use approximately $5,496. Kelly also failed to communicate with the minor or the minor's next of kin or to comply with a request for an accounting of the money in his possession. Kelly repaid the misappropriated money in full, after a complaint was filed against him with the Alabama State Bar by the minor's next of kin. The Disciplinary Board of the Alabama State Bar determined that Kelly should receive a public reprimand without general publication and should remain on probation for a period of two years. [ASB No. 92-88] ■

YOUNG LAWYERS' SECTION

By Les Hayes III, president

SANDESTIN SEMINAR

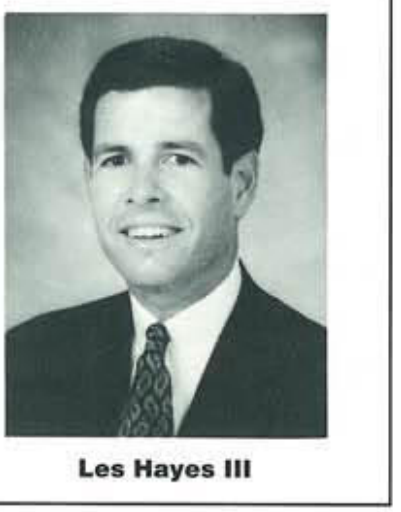
Our Sandestin seminar in May was a huge success. Almost 300 attorneys attended the sessions, and on behalf of the Alabama Young Lawyers' Section, I thank those law firms and businesses who graciously agreed to sponsor the leisure activities at the seminar. I also thank our seminar speakers for providing us with excellent presentations and useful materials. Many thanks also go to **Hal West** (Birmingham), **Frank Woodson** (Mobile) and **Robert Hedge** (Mobile), members of the YLS Executive Committee, who were in charge of organizing the seminar.

Minority High School Pre-Law Conference

On May 6, the Alabama YLS sponsored the first annual Minority High School Pre-Law Conference held at Alabama State University in Montgomery. Approximately 75 high school students from around the state attended the conference. Alabama Supreme Court Justice Ralph D. Cook was the speaker. Attendees were provided with useful information about law schools and matters concerning the practice of law were also discussed. **Fred Gray, Jr.** (Tuskegee), a member of the YLS Executive Committee who organized the conference, is to be congratulated for his good work.

Disaster relief aid

Everyone is certainly aware of the tragic situation that occurred in north Alabama when tornadoes recently struck the area. Several years ago, in order to better deal with the aftermath of such natural disasters, the ABA Young Lawyers' Division established a national network of disaster relief committees composed of young lawyers from every state. Each state's committee formulates a statewide network of young lawyers who provide volunteer services and assistance to victims of natural disasters. Previously, these committees have sprung into action in Florida after hurricanes struck and in the midwest after the devastating floods. **Candis McGowan** (Birmingham) is the chair of **Alabama's Disaster Relief Committee**, and after being notified that President Clinton had declared north Alabama a national disaster, she utilized the network previously established. Candis and several other young lawyers spent several days in north Alabama providing assistance to victims of the tornadoes, and she and those who unselfishly participated in this program are to be commended.



Les Hayes III

Bar admissions ceremony

On May 24, the YLS helped sponsor and coordinate the bar admissions ceremony for our newest members. The ceremony was held at the Civic Center in Montgomery and approximately 162 new lawyers were admitted to practice. Montgomery attorney Jere Beasley was the guest speaker. Young Lawyers' Executive Committee member **Andy Birchfield** (Montgomery) was in charge of the ceremony and did an excellent job.

State bar annual meeting

The Alabama State Bar will hold its annual meeting at the Perdido Beach Hilton in Orange Beach July 18-21. The YLS meeting will be during the afternoon of Tuesday, July 19. At the meeting, Hal West will become our new president and elections for the positions of president-elect, secretary and treasurer will be held.

"Year of the Child"

The incoming chair of the ABA Young Lawyers' Division, Mike Bedke, has determined that his administration will focus on matters dealing with children and children's rights. Certainly this is a topic which deserves the attention of all lawyers, particularly young lawyers. Better ways in which to deal with gang violence, children who are the product of divorce, and the problems of healthcare and education for young people will be emphasized and discussed at upcoming ABA YLD assembly meetings.

I have used this column as an opportunity to address the dilemma that many young lawyers face in trying to balance time between a career and raising children. Each of us, as parents, must make sacrifices and spend quality time with our children. We should also be aware, however, that the environment in which our children are living is not the same one in which we were raised. Opportunities for children are becoming more limited and the complicated decisions and increased dangers they face have multiplied over the years. To be a better parent it is essential for us to stay in touch with the issues affecting children and the problems they face; we cannot effectively deal with them unless we are aware of them.

As attorneys, we can make a difference for children in our society. We cannot expect others to do the work for us. It is

up to us to see that our children are given every opportunity to better themselves. Certainly, we can help children through our involvement in the legal process. We can shape legislation, counsel parents and children involved in divorces, and volunteer for work in numerous children's organizations; the opportunities are there waiting for us to seize them. Just as important as our participation in the above matters, however, is our involvement with our own children, that "one-on-one" relationship. Before we can get things in order for children in the world around us, we should make sure that our relationships with the children in our homes are solidly established. Take the time, *make* the time, to spend with your child. Find out about his or her school, visit with the teacher, take your child to church. Do everything you can to develop a strong bond between you and your child. Learn more about the problems he or she faces and the decisions he or she will have to make in the future. As attorneys, we are trained to be advocates. Be an advocate for your children. Spend time with them and learn about their environment with the same determination and enthusiasm that you have for an important case or client. Any recognition or accolades you have received for the work you have done as an attorney won't come close to the satisfaction you will get from helping children and spending time with them. Any lawyer in your firm who has children or who has worked with children in any capacity, whether it be as a coach, teacher or volunteer, will tell you that there is no better feeling than when a child looks up at you and says "thank you" or "I love you" or simply gives you a hug.

Thank you

I thank everyone who has made this year an enjoyable and worthwhile one for me. The staff at the state bar headquarters has been tremendous. I particularly thank Keith Norman for all of his help. Congratulations also go to Keith on his becoming the new executive director of the state bar when Reggie Hamner retires. We are very fortunate to have a person of Keith's integrity and knowledge to serve. Lastly, I thank the members of the YLS Executive Committee who have participated in the many projects about which I have reported to you in this column throughout the year. I look forward to seeing you at the annual meeting in Orange Beach July 18-21. ■

LEGAL SPECIALIZATION

By Keith B. Norman, *associate executive director*

The Alabama State Bar Board of Legal Specialization has certified the following three organizations as certifying agencies for Alabama attorneys. Included below are the organizations, as well as the speciality areas for which they have been approved to certify Alabama attorneys.

American Bankruptcy Board of Certification
510 C Street, NE
Washington, D.C. 20002
(202) 546-1200
Contact Person: Scott Williamson
Speciality Areas: Business Bankruptcy and Consumer Bankruptcy

Commercial Law League of America
150 N. Michigan, Suite 600
Chicago, Illinois 60601
(312) 781-2000
Speciality Areas: Creditors Bankruptcy and Business Bankruptcy

National Board of Trial Advocacy
18 Tremont Street, 4th Floor, Suite 403
Boston, Massachusetts 02108
(617) 720-2032
Speciality Areas: Civil Trial Advocacy and Criminal Trial Advocacy

The members of the Board of Legal Specialization are:

Will Lawrence, Talladega, chair

Gregg Everett, Montgomery

Charlie Beavers, Birmingham

Richard Cater, Anniston

Jacob Walker, Jr., Opelika

Bill Coleman, Montgomery

Clay Alspaugh, Birmingham

Herndon Inge, Mobile

Steve Ford, Tuscaloosa

Claude Hundley, Huntsville

Judy McMillin, Mobile

Sam Franklin, Birmingham

If you have any questions concerning specialization, please contact Keith B. Norman at (205) 269-1515 or 1-800-354-6154.

RECENT DECISIONS

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

UNITED STATES SUPREME COURT

Beyond a reasonable doubt and to a moral certainty

Victor v. Nebraska, Case No. 92-8894 and *Sandoval v. California,* Case No. 92-9049, (March 21, 1994). Are jury instructions that include the phrase "moral certainty" in defining what is needed to find a criminal defendant guilty beyond a reasonable doubt constitutional? The Supreme Court said yes by a seven-to-two vote.

Justice Sandra Day O'Connor, writing for the majority, stated:

> "Though...we do not countenance its use, the inclusion of the moral certainty phrase did not render the instruction given ...unconstitutional."

Sandoval contended that the meaning of the term "moral certainty" had changed since Chief Justice Shaw's time, to the point that a modern jury would understand it to allow conviction on proof that does not meet the beyond-a-reasonable doubt standard. The Court disagreed, holding that the instruction given in Sandoval's case was constitutional. However, the Court recognized Sandoval's contention that "moral certainty" standing alone might not be recognized by modern jurors as a synonym for "proof beyond a reasonable doubt", and cautioned that a conviction based on such a misunderstanding would violate due process. In so concluding, the Court reasoned that:

> A juror might be convinced to a moral certainty that the defendant is guilty even though the government has failed to prove his guilt beyond a reasonable doubt. A definition of moral certainty in a widely used modern dictionary lends support to this argument ("based on strong likelihood or firm conviction, rather than on the actual evidence") and we do not gainsay its force. As we have noted, "[the] constitutional standard recognized in the *Winship* case was expressly phrased as one that protects an accused against a conviction except on proof beyond a reasonable doubt."

Finally, Justice O'Connor noted that while jurors might not understand the moral certainty phrase, the full instructions given to the jurors in the two cases made it clear that they must "reach a subjective state of near certitude of the guilt of the accused." Thus, taken as a whole, the instructions in question correctly conveyed the concept of reasonable doubt, and no reasonable likelihood existed that the jurors understood the instructions to allow convictions based on proof insufficient to meet the *Winship* standards.

Restoration of civil rights by state does not avoid federal firearms statutes

Beecham v. United States, Jones v. United States, Case No. 93-445 (May 16, 1994). Eighteen U.S.C. §922(g) provides in pertinent part as follows:

> It shall be unlawful for any person who has been convicted...[of] a crime punishable by imprisonment for a term exceeding one year...[to possess] any firearm....

The Federal Firearm Statute also provides that what constitutes a conviction should be determined in accordance with the law of the jurisdiction in which the proceedings were held. 18 U.S.C. §921(a)(20) (the choice-of-law clause). The third provision of the statute under scrutiny, i.e., the exemption clause, provided that where "any conviction which

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has been expunged or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction...." The question before the Supreme Court was which jurisdiction's law is to be considered in determining whether a felon "has had civil rights restored for a prior federal conviction."

Each of the petitioners was convicted of violating §922(g). Both Jones and Beecham had their civil rights restored by the states of Tennessee and West Virginia. The question presented was whether these restorations of civil rights by states could remove the disabilities imposed as result of Beecham's and Jones' federal rights.

Justice O'Connor delivered the opinion of the Court. In a tightly worded opinion, Justice O'Connor and the majority held:

> We therefore conclude that petitioners can take advantage of §921(a)(20) only if they have had their civil rights restored under federal law, and accordingly affirm the judgment of the Court of Appeals.

This case presents a red flag for the criminal practitioner who must advise his client previously convicted of a felony offense that the restoration of his civil rights by a state does not exempt him from the reach of the federal gun control laws. The protection under §921(a)(20) is afforded only to those persons who have their civil rights restored under federal law.

Structuring violation requires proof of knowledge

Ratzlaf v. United States, Case No. 92-1196 (January 10, 1994). Must prosecutors prove that someone, charged with evading a federal law requiring all banking transactions involving $10,000 or more in cash be reported, knew the conduct was illegal? The Supreme Court answered yes by a five-to-four vote.

The 1986 Money Laundering Control Act makes it a crime to "willfully" structure cash transactions to evade the requirement. The majority, led by Justice Ruth Bader Ginsburg, said, "The willfulness requirement means the government must prove a defendant acted with knowledge that the conduct was illegal. It is not enough to prove a defendant's purpose was to circumvent a bank's reporting obligation." Justice Harry A. Blackmun wrote a dissenting opinion in which he suggested that the Court had ignored the traditional rule that states, "Ignorance of the law is no excuse."

SUPREME COURT OF ALABAMA

When is an indigent defendant not entitled to free transcript?

Powell v. State of Alabama, 28 ABR 1854 (March 11, 1994). Powell, a criminal defendant, petitioned the Alabama Supreme Court for writ of mandamus directed to the Circuit Court of Mobile County, to grant him a free copy of the transcript of his sentencing hearings. It is important to note that Powell did not appeal from his conviction and sentences originally. Powell claimed that the transcripts were necessary to adequately prepare and present his Rule 32 petition for post-conviction relief as to his sentence.

In an opinion authored by Chief Justice Hornsby, the court, at the outset, noted that the type of post-conviction relief provided by the writs of habeas corpus or error coram nobis, now encompassed in a Rule 32 petition, is separate and distinct from the convicted defendant's right of appeal. A direct appeal is the remedy favored by the law and a Rule 32 petitioner will not be granted relief if the grounds on which he seeks relief either were raised or could have been raised on appeal. *See* Rule 32.2, A.R.Crim.P.

Moreover, it is clear that in Alabama, where the law provides for a direct appeal of a criminal conviction or the ruling on a post-conviction motion, a transcript of the proceeding appealed from must be provided without cost to an indigent defendant whenever the proceeding is transcribed. §§12-22-190 and 12-22-191, Code of Alabama (1975). The Alabama Code requirement is based upon the supreme court's decision in *Griffin v. Illinois*, 351 U.S. 12 (1956). After reviewing §§12-22-190 and 12-22-191, Chief Justice Hornsby critically focused the issue as follows:

> Thus, Alabama law recognizes that when an indigent defendant appeals a conviction or the trial court's ruling in a post-conviction proceeding, such as a hearing on a Rule 32 petition, a transcript of the proceeding must be made available to the defendant without cost. The critical word in the above statutes is *appeal*.

Ultimately, the supreme court held that an indigent defendant has no constitutional right to a free transcript of his trial or some other proceeding once that defendant has foregone the privilege of appealing from the judgment based on the trial or other proceeding. See also *Mayola v. State*, 344 So.2d 818, 820 (Ala.Crim.App. 1977), *cert. denied*, 344 So.2d 822 (Ala. 1977). The court concluded that Powell's Rule 32 provided no basis for right to a free transcript of his sentencing hearing because he had failed to appeal from his earlier conviction and sentence.

Specific objections and weak links

Ex parte Danny Harlan Works, 28 ABR 1458 (February 4, 1994). Works was convicted of murder and sentenced to life imprisonment. The court of criminal appeals affirmed. Works petitioned the supreme court for certiorari on the

issue of whether the trial court had committed error when it admitted the knife allegedly used by Works in the murder. Works argued that it was prejudicial error to admit the knife into evidence, over objection, without establishing an unbroken chain of custody. The State argued that Works failed to preserve the issue for appeal by failing to state specific grounds for his objection, and alternatively, that any error in admitting the knife was harmless under the circumstances.

The Supreme Court of Alabama, however, through Justice Shores, affirmed under a harmless error analysis. Pictures of the knife and testimony about the knife had been admitted without objection. Justice Shores' opinion serves as an important reminder to Alabama criminal practitioners. First, specific objections or motions are generally necessary before the ruling of a trial court is subject to review, unless the ground is so obvious that the trial court's failure to act constitutes prejudicial error. An objection without specifying a single ground, such as "I object," "objection," or "we object" is not sufficient to place the trial court in error for overruling the objection.

The purpose of requiring a specific objection to preserve an issue for appellate review is to put the trial judge on notice of the alleged error, giving an opportunity to correct it before the case is submitted to the jury. However, as Judge Taylor stated in his dissent from the memorandum affirmance in this case, "Defense counsel should not have to direct his opponent's mind to the correct law the way one would thrust a beagle's nose on a rabbit trail."

In this case, Works' objection was sufficiently specific to put the court on notice of the alleged error in the chain of custody by saying:

> Judge, we would object to the introduction. There has not been chain of custody proven where the knife has been [sic].

Justice Shores' opinion also reaffirms the teaching of the supreme court in *Ex parte Holton*, 590 So.2d 918 (Ala. 1991), which originally explained the court's chain of custody analysis, as follows:

> The chain of custody is composed of 'links'. A 'link' is anyone who handled the item. The State must identify each link from the time the item was seized. In order to show a proper chain of custody, the record must show each link and also the following with regard to each link's possession of the item: (1) [the] receipt of the item; (2) [the] ultimate disposition of the item, i.e., transfer, destruction, or retention; and (3) [the] safeguarding and handling of the item between receipt and disposition.
>
> If the State, or any other proponent of demonstrative evidence, fails to identify a link or fails to show for the record any one of the three criteria as to each link, the result is a 'missing' link, and the item is inadmissible. If, however, the State has shown each link and has shown all three criteria as to each link, but has done so with circumstantial evidence, as opposed to the direct testimony of the 'link', as to one or more [of the] criteria or as to one or more links, the result is a 'weak' link. When the link is 'weak', a question of credibility and weight is presented, not one of admissibility.

In this case, the State did not identify the person who received the knife in the Department of Forensic Sciences; identify the person in the Department of Forensic Sciences who ultimately disposed of the knife; or show the safeguarding and handling of the knife while it was in the custody of the Department of Forensic Sciences. Thus, there was a missing link in the chain of custody of the knife and the knife, therefore, was inadmissible. However, the Court determined that, based on the specific facts of this case, admission of the knife into evidence did not prejudice a substantial right of Works and upheld his murder conviction.

Other acts evidence—an expansion under guise of motive evidence

Hatcher v. State of Alabama, 28 ABR 1677 (February 25, 1994). Hatcher was convicted of sexual abuse of his wife's ten-year-old sister, who was living with the defendant and his wife. The court of criminal appeals reversed the defendant's conviction on the ground that the trial court had erred in allowing the State to present evidence that the defendant had committed another sex crime *after the date of the offense for which he was charged in this case.*

The court of criminal appeals' reversal was based on the introduction of the evidence regarding Hatcher's sex crime against CM, TM's sister, introduced in order to prove that Hatcher was guilty of the offense as to CM.

The supreme court granted the State's petition for writ of certiorari to review the holding of the court of criminal appeals that the law established by previous decisions, i.e., *Bowden v. State*, 538 So.2d 1226 (Ala. 1988), was not applicable because the motive exception was available only in cases involving incest.

The supreme court, through Justice Maddox, reversed the intermediate appellate court and affirmed the conviction. Justice Maddox reasoned that the holding in *Bowden v. State* was not so restrictive as to make the evidence of the collateral sex crime inadmissible in this case simply because the State had failed to charge incest. Justice Maddox went on to reason that:

> It is unnatural, as well as illegal, for an adult male to seek to gratify his sexual desires by exploiting a child; therefore, CM's testimony was relevant and admissible as proof of Hatcher's motive for committing the act for which he was being tried.
>
> Based on our analysis of the circumstances of this case, we hold that the trial judge did not err in admitting the evidence and that 'probative value [of the evidence outweighed] its prejudicial effect....' The evidence of the collateral act against CM was relevant in this case to prove what the prosecution contended was Hatcher's motive, to gratify sexual desires by having sex with young girls living in his household.

Therefore, the supreme court concluded that it was not unduly prejudicial for the trial court to permit CM to give testimony.

Bankruptcy Decisions

Dischargeability complaint in Chapter 11 case dismissed as untimely

In re Joe H. Williamson, 15 F.3d 1037 (11th Cir. 1994). Northern District of

Alabama Bankruptcy Judge James S. Sledge dismissed a dischargeability complaint on the ground of untimeliness. District Judge Sam C. Pointer, Jr. affirmed, and on appeal, the Eleventh Circuit adopted Judge Pointer's opinion. The dischargeability complaint had been filed 16 days after the expiration of the 60-day period provided in Bankruptcy Rule 4007(c) (the opinion in two places refers to the deadline in 11 U.S.C. §523(c) which was probably a typographical error.) The opinion is correct when it refers to the motion to dismiss being based upon Rule 4007 which contains the 60-day rule. (Section 523(c) does not contain any reference to time.) In response to the debtor's motion to dismiss, the plaintiff contended (1) that the initial bankruptcy notice had stated that the filing deadline was "to be set", (2) there had been no 30-day notice as required under Bankruptcy Rule 4007(c), (3) the lack of the 30-day notice from the clerk of the court violated the due process clause of the Fifth Amendment of the U.S. Constitution, and (4) equitable principles required a hearing on the merits. The court was not impressed; it stated that the defective notice does not relieve the observance of Bankruptcy Rule 4007, citing *In re Alton*, 837 F.2d 457 (11th Cir. 1988) which in turn had based its opinion on the Fifth Circuit case of *Neeley v. Murchison*, 815 F.2d 345 (1987). *Neeley* had ruled that the clerk's failure to provide notice did not suspend the running of the fixed limitation period. Here, the court stated that the plaintiff had notice of the bankruptcy, there was no incorrect date given in the notice, and that plaintiff should have determined deadlines under the Code and the Rules. As to the "due process" argument, it was held not to be a violation, as the Fifth Amendment does not require any additional notice, and this same reasoning applies to the argument that equity requires notice.

Comment: A lesson to be learned from this case is that a lawyer should not rely on the court for notices required by the Rules. The Rules are to be followed. Inaccurate notices may be of aid in not meeting a deadline, but insufficient notice or lack of notice is not beneficial provided that the party has had actual notice of the proceeding.

Chapter 11 debtor has no liability for contingent environmental contribution claims

In re Picher Industries, Inc., 164 B.R. 265, 25 B.C.D. 520 (S.D. Ohio, Feb. 16, 1994). Prior to filing the Chapter 11 petition, EPA sent notices to debtor and two claimants as to being potentially responsible for cleanup of certain sites. Later the EPA issued notices of liability, demanding reimbursement for past and future response costs. One of the two claimants consented to a decree and the other to an administrative order with EPA as to cleaning up the sites. The debtor was not a party to either. After debtor filed its Chapter 11, the two claimants filed proofs of claim which included a contribution for past and future response costs. The court, under Code §502(e)(1)(B) which provides for disallowance of claims for reimbursement or contribution which are contingent as of the time of allowance or disallowance, denied the claims. The court said all of the parties were coliable to EPA for costs in the future, but that the claims were contingent until payment had been made on the underlying claim; further, that disallowing the claims would not defeat the policy of CERCLA, because it required those who seek contribution to incur the expense before stating the claim. The district court, upon appeal, stated that to allow the claims could create double liability as the EPA was free to also pursue the debtor for remediation costs. Claimant contended that it would be impossible for them to liquidate the claims at the present time because of the immense cost and length of time required, that CERCLA's policy is violated, and, therefore, the debtor's share of future cleanup costs should be placed in a trust with proceeds to be disbursed to parties who perform the cleanup. The district judge quoted from the Eleventh Circuit case of *In re Charta*, 862 F.2d 1500 (1989) to the effect that the main purpose of CERCLA is to promote expeditious cleanup by authorizing private parties to assume financial responsibility to seek contribution from other responsible parties before a determination is made as to the party responsible, and the allowance does not conflict with this but rather fosters the policy by requiring expenses to be incurred before an allowable claim can be stated.

Comment: Some parties may consider the holding in this case as rather tenuous, and perhaps faulty. Certainly, the holding is an aid to reorganization as contingent claims for environmental cleanup can be enormous. Perhaps this case is headed for the U.S. Supreme Court.

Ninth Circuit rules that discharged employee's claim for post-petition back pay not administrative claim entitled to priority

In re Palau Corporation, 18 F.3d 746, 25 B.C.D. 547, (9th Cir. March 8, 1994). The employee was discharged one month prior to the filing of a Chapter 11 bankruptcy petition. Post-petition, the NLRB ordered reinstatement and back wages, further claiming that the amount was entitled to first priority as an administrative expense of the bankruptcy estate. The claim actually was divided into pre-petition net back pay and post-petition net back pay, together with fringe benefit contributions. The bankruptcy court allowed the post-petition back pay claim only as a general unsecured claim, and the NLRB appeal ultimately reached the Ninth Circuit. NLRB insisted that the NLRA controlled rather than the Bankruptcy Code because the claim was the result of an unfair labor practice charge and federal law governs the terms and conditions of

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David B. Byrne, Jr.

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

Wilbur G. Silberman

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

payment. The Ninth Circuit ruled that the Bankruptcy Code prevails as bankruptcy law determines the priority and liability of all claims in a bankruptcy proceeding; although the Labor Act determines the validity of a claim for compensation resulting from unlawful discharge, the Bankruptcy Code determines priority. It then stated that administrative expenses "must be the actual and necessary cost of preserving the estate for the benefit of its creditors", and as no services were performed post-petition by the employee, to allow the claim as administrative would ignore the very purpose of bankruptcy, which is to allow a debtor a fresh start while fairly apportioning losses among creditors.

Question: Suppose the unlawful discharge had been post-petition. Would the holding of the court relative to post-petition back pay have been any different?

Paralegal compensation and more—first ruling by any court of appeals

In re Busy Beaver Building Centers, Inc., ____F.3d____, 25 B.C.D. 603 (3rd Cir. (Pa.), March 11, 1994). The bankruptcy court *sua sponte* characterizing as purely clerical work, disallowed certain items of service of debtor's counsel's paralegals. Upon request for reconsideration, evidence was taken upon which the court again denied fees for the clerical services or functions. After affirmance in the district court, the Third Circuit undertook to consider the question, first commenting that it had never been ruled upon by any circuit court of appeals. The activities in question were filing motions at the bankruptcy court; preparing, organizing and tabbing motions, pleadings and document binders for hearings; distributing documents and other materials to creditors; and drafting transmittal letters. The National Federation of Paralegal Association, Inc. as *amicus*, participated in the hearing. There was extensive testimony concerning paralegal functions, including testimony that in non-bankruptcy cases, such services are billed to the client.

The Third Circuit first stated that the bankruptcy court not only has the power to *sua sponte* review fee petitions, but that it has this duty. It also held that should the bankruptcy court believe the written application defective in delineating detail, the applicant attorney should be allowed an evidentiary hearing. In turning to the question of paralegal compensation, the court stated that to comply with the 1978 Code requirements, it must rely upon the market; the Code does not bar clerical services, but that the five factors set out in Section 330(a) must be followed. It related the history of legal practice and the emergence of the paralegal, the sometime requirement of a paralegal's expertise over that of a legal secretary in performance of clerical work, and the custom with non-bankruptcy clients. Finally, the court, in opining on bankruptcy fees in the entirety, declared that just as in non-bankruptcy matters, certain non-productive or redundant work should be absorbed or written off without charge, with the result of a blended rate.

Comment: This case is not applicable only to paralegals but to the entire scope of attorney fees in bankruptcy. Undoubtedly, it will be controversial, but it is well-documented, including an appendix of endnotes of considerable length.

Two attorney's fee cases give pause (and not the one that refreshes)

In the Matter of Jeanette Pierce, ____B.R.____, 25 B.C.D. 629, (Bankr. W.D. Pa., March 23, 1994). This was a case in which an attorney successfully defended an involuntary bankruptcy petition based upon Bankruptcy Code §303(i), which in the event of a successful defense, provides for payment of a reasonable attorney's fee to the debtor's attorney. Such attorney sought $12,000 based upon more than 120 hours of time. The parties stipulated that 32.1 hours were compensable. The bankruptcy judge held that in a fee-shifting case, the prevailing party must exclude unnecessary or redundant hours in exercising billing judgment. In such cases, burden is greater than in seeking payment from one's own client; if the defense is against frivolous pleading, there is a duty under Rule 11 to mitigate fee expenses by quick and efficient resolution. The bankruptcy judge furnished numerous citations of appellate courts, including the U.S. Supreme Court. Precedent was furnished to show that multiplying hours by rates is a starting point only—the worth of the services, the party being billed, and the appropriateness of the bill which has been shifted to the adversary are all factors to be considered. Finally, the court said that if the amount sought is excessive or if no effort was made to mitigate the damages, the entire amount claimed may be denied. In this instance, the court did not deny compensation but only allowed an additional ten hours to the 32.1 hours agreed upon. Additionally, the erstwhile successful attorney received something of a tongue-lashing in the opinion.

In re Ryan's Subs, Inc., ____B.R.____, 25 B.C.D. (Bankr. W.D. Mo., March 22, 1994). Debtors had defaulted under a franchise and sublease agreement. The franchiser and sublessor, under the contention that damages are due on assumption of an executory contract for any pecuniary loss (see §365(b)(1)(B)), requested payment of attorneys fees claiming that these were part of the pecuniary loss. However, the court held that attorneys fees were collectible only if provided for in the written agreement between the parties, and here the agreement provided for attorneys fees only on collection matters, but not for the matter before the court.

Comment: Although the above two

cases are from the trial level, the courts in each instance cited sufficient precedent to substantiate the opinions. The *Jeannette Pierce* case specifically should be noted as a possible trend in the award of fees. According to information obtained regarding the Eleventh Circuit Judicial Conference in Miami held in May of this year, the judges were rather severe in their attitude toward excessive attorneys fees.

Third Circuit says debtor's trustee cannot employ generally a professional when it is not disinterested, even if in interest of all to do so

U.S. Trustee v. Price Waterhouse, ____F.3d____, 25 B.C.D. 618, (3rd Cir. (Pa.), March 16, 1994). With concurrence of the creditors committee, the Chapter 11 debtor sought to employ the Price Waterhouse accounting firm which held an $875,000 claim. Price Waterhouse promised that it would not vote the claim, or participate in the case. The bankruptcy and district courts approved the employment. The Third Circuit adopted the strict constructionalist's view, stating that Section 327(a) prohibited the employment, that the permissive language in 327(c) pertained only to disallowance of fees in the event of improper employment or if post-petition matters cause the professional to lose "disinterest". It said the bankruptcy court, although a court of equity, cannot use equitable principles in contravention of "unambiguous statutory language" quoting *In re Middleton*, 934 F.2d at 725 (6th Cir.).

Comment: This is still an unsettled matter. Preferably Congress should rewrite the law to allow representation in such instances. Is there a real difference in the professional being a pre-petition creditor, than in becoming a post-petition creditor? Is it worthwhile from the standpoint of economy and efficiency to allow employment of the professional who is owed pre-petition services?

Everything you wanted to know about equitable tolling (but were afraid to ask)

In re United Insurance Management, Inc., 14 F.3d 1380, (9th Cir., Dec. 13, 1993). Accountants appealed district court partial summary judgment order which remanded the case back to the bankruptcy court to decide whether "equitable tolling" would allow an avoidance action against Ernst & Young (EY), even though the statute of limitations had expired. EY contended that equitable tolling was not applicable to bankruptcy statutes, but even should it be applicable, it was not so to the facts of the instance case. In this case, (Brown) had originally sued EY for breach of its duty, and when not successful bought the potential claim of the debtor from the trustee. Thus, Brown was the one actually attempting to sue EY by standing in the shoes of the trustee of the debtor.

The court of appeals first held that a partial summary judgment does constitute a final order in the bankruptcy sense when it is a final disposition of all asserted claims, but when a case is remanded for factual findings, the order ordinarily is not final. However, here jurisdiction was granted on the ground that the appellate court could possibly dispose of the case or resolve issues to aid the bankruptcy court in a final disposition—to wit: a decision on the applicability of equitable tolling. The court then held that equitable tolling does apply to avoidance actions except when as a matter of law, the trustee's lack of diligence in not proceeding against the accounting firm earlier now prevents the invocation of the doctrine. For equitable tolling to apply, the invoking party must, without fault, be ignorant of the alleged wrong, even though there has been no effort by the alleged offending party to conceal the circumstances. In bankruptcy a trustee has a statutory duty to investigate the financial affairs of the debtor and for equitable tolling to apply, the trustee should examine the debtor's books and records, including an investigation as to potential lawsuits. The trustee did not do so, the trustee was not diligent, Brown stands in the shoes of the trustee who would not have been able to invoke the doctrine and, thus, Brown was not allowed to do so.

Comment: There may be a good deal more in the opinion than has been mentioned above even though my analysis has been more detailed than usual. I have done so because we do not often see the equitable tolling doctrine invoked. ■

• M·E·M·O·R·I·A·L·S •

Ben A. Engel

Be it resolved by the Executive Committee of the Birmingham Bar Association, that:

Whereas, Ben A. Engel was an active member of the Birmingham Bar Association and the Alabama State Bar at the time of his death on Friday, December 31, 1993; and

Whereas, Ben A. Engel was a practicing attorney and member of the Birmingham Bar Association for over 50 years; and

Whereas, Ben A. Engel was a graduate of the University of Alabama School of Law and was a member of the Alabama State Bar and the Birmingham Bar Association; and

Whereas, Ben A. Engel was recognized and highly regarded by the bench and bar as a keen and diligent lawyer who fairly, but fearlessly, pursued the causes of his clients and the causes of justice while providing an example of all that is good and right in our profession; and

Whereas, Ben A. Engel was a member of the Temple Emanu-El; and

Whereas, Ben A. Engel gave freely of his time, actively serving his community, his God and his family; and

Whereas, we wish to express our deep regard for Ben A. Engel and our profound sense of loss in the passing of our distinguished colleague who served our profession well.

Now, therefore, it is hereby resolved, by the Executive Committee of the Birmingham Bar Association, that this resolution be spread upon the minutes of this committee and that copies thereof be sent to Mrs. Frankie F. Engel, his wife; Mrs. Jane Engel Purcel, his daughter; Ms. Ellen Sabel, his daughter; Mrs. Lillie E. Buchstone, his sister; Mrs. Willine Mitnick, his sister; Mr. Joseph H. Engel, his brother; and Dr. Robert Engel, his brother.

—William N. Clark
President
Birmingham Bar Association

Connie Walter Parson

Whereas, Connie Walter Parson was an active member of the Birmingham Bar Association from 1984 to the time of his death on Friday, December 31, 1993; and,

Whereas, Connie Walter Parson was a member of the American Bar Association, the Alabama State Bar, the Birmingham Bar Association, the Magic City Bar Association, the Supreme Grand Lodge of the International Free and Accepted Modern Masons, and numerous other organizations throughout Jefferson County and the State of Alabama; and

Whereas, Connie Walter Parson served faithfully as executive vice-president of the Greater Birmingham Criminal Defense Lawyers Association; and,

Whereas, Connie Walter Parson was in fraternal kinship with the law fraternity of Delta Theta Phi and with Omega Psi Phi; and,

Whereas, Connie Walter Parson was graduated from Miles School of Law and the University of Alabama, Birmingham; and,

Whereas, Connie Walter Parson was a member of the A.M.E. Zion Church; and,

Whereas, Connie Walter Parson is survived by his wife, Linda Robinson Parson; a daughter, Miss Nyya Connyse Parson; also by a sister, Corinne Lockett, and three brothers, John Spain and Matthew and Leon Parson; and,

Whereas, Connie Walter Parson was active in the defense of the reputation, liberty and life of Alabama citizens against all charges, slanders and accusation; and was renown as a defender of the rights of all citizens under the Alabama Constitution and the Constitution of the United States; and was esteemed as a dedicated, vigorous and tenacious advocate on behalf of citizens enlisting his representation; and,

Whereas, we express our deep regret and sense of loss at the passing of our colleague from our honorable profession, from the world of business and from the congress of society.

—William N. Clark
President
Birmingham Bar Association

Norman W. Harris, Jr.

Be it resolved by the Morgan County Bar Association duly assembled at its annual meeting as follows:

We are gathered to remember our brother, Norman W. Harris, Jr. and to express our deep sorrow at his tragic and untimely death. A third-generation lawyer of his family to actively practice in Morgan County, Norman was endowed both with special gifts and abilities, and with a work ethic rivaled by few. He was a lawyer's lawyer who cared deeply about the profession and about his clients and friends. A consummate professional, he was available and generous with his time and immense talent. More than a few of our number have been the beneficiary of his wise counsel. His commitment to excellence was ever a beacon light through the fog of mediocrity so prevalent today.

We now express our thanks for the life of our friend. His example will challenge us and those who follow us. We extend our condolence and deep regret to both family and friends. Except for a few among us, we can only imagine the pain of the loss of a son, or the loss of a husband. Our thoughts and prayers are especially with Norman, Sr., and Norman's beloved Katie. Truly, in the words of King David, "A prince has fallen."

—Jerry R. Knight
Immediate past president
Morgan County Bar Association

• M·E·M·O·R·I·A·L·S •

Joe A. Macon, Jr.

Recently, the Elmore County Bar Association met for its annual meeting. While the event drew one of the largest crowds in memory, the noted absence of one member, Joe A. Macon, Jr., was felt by all.

On November 17, 1993, Joe died of complications associated with bone marrow transplant surgery. This 1974 graduate of the University of Alabama Law School passed away while at the peak of his career at the age of 44. His untimely and tragic death caused the whole Elmore County Bar to suffer a great sense of loss and grief, along with hundreds of Joe's friends and family.

Joe was survived by his wife, Jo Puryear Macon, and two sons, Jobo and John, along with both parents and all his siblings. His father, Judge Joe Macon, Sr., and his mother, Helen N. Macon, were driving influences in Joe's life. As a family, the Macons have long been devoted to improving the quality of life for all people in Alabama.

Joe A. Macon, Jr. was a charismatic individual whose presence was always felt when he entered a room. His vivacious attitude toward life was contagious to all. Throughout Joe's life, he was well known for his friendly and outgoing personality; he never met a stranger. These qualities served him well in building a law practice in Elmore County and in providing leadership in many civic and political endeavors.

Joe was chairman of the Elmore County Democratic Executive Committee, immediate past president of Quail Walk Country Club, and an active member of the Lion's Club. In the past, Joe served as president of the Elmore County Bar Association and was active in the Alabama Trial Lawyers Association, as well as the Alabama State Bar.

Joe was an effective leader in the legal community of Elmore County and will always be known for his encouragement of collegiality between members of the bar. He counselled against the ever-increasing hostile, adversarial environment which has become prevalent in the practice of law and he also advocated the Golden Rule among attorneys.

Throughout his career, Joe believed in the highest qualities of the legal profession. He felt it was an honor and a privilege to be an attorney and to serve the public in such capacity. It pleased Joe to be able to help people in their difficulties. His practice afforded him many opportunities to be more than just a zealous advocate for his clients, it gave him the chance to be a compassionate counselor to those in need. Joe strongly believed that attorneys should strive to promote the best interests of their clients and help their clients to rationally and calmly see that interest.

In the memories of the Elmore County Bar Association, Joe A. Macon, Jr.'s influence will be felt for a long time. He had that kind of effect on the people who knew him.

Joe A. Macon, Jr. will remain an eternal member of the Elmore County Bar Association.

—Thomas R. Edwards
President
Elmore County Bar Association

Claude E. Bankester

Whereas, Claude E. Bankester, a distinguished member of the bar, passed away on September 5, 1993; and

Whereas, the Baldwin County Bar Association desires to remember his name and recognize his contributions to our profession.

Now, therefore, be it resolved, that Claude E. Bankester was born on November 25, 1928, Robertsdale, Alabama, and attended school in Robertsdale, and graduated from Robertsdale High School. He attended college at the University of Alabama and obtained a bachelor of science degree in commerce and business administration. After graduating he continued his education at the University of Alabama School of Law. While in law school he was inducted into the Farrah Order of Juris Prudence and also served as comments editor of the *Alabama Law Review*. He graduated from law school in August 1953 and was admitted to the Alabama State Bar in September 1953.

After law school he joined the United States Army where he held the rank of first lieutenant and served with the Judge Advocate General's Corp. He attended the University of Virginia Law School where he performed graduate work in taxation. In 1958 he became a member of the faculty at Cumberland School of Law in Lebanon, Tennessee, where he taught until 1961. He then moved to Washington, D.C. where he worked for the House of Representatives Committee on Taxation. In 1963, he returned to Cumberland School of Law in Birmingham, Alabama and taught until 1975. While a professor at Cumberland, he helped found the *Cumberland Law Review* and served as its first faculty advisor. He was also selected "Most Outstanding Professor" by the students at Cumberland School of Law.

He was an active member of the Alabama State Bar and served on the board of bar examiners for many years. In 1975, he moved to Bay Minette where he went into private practice with the law firm now known as Wilkins, Bankester, Biles & Wynne. In 1979, the firm opened an office in his native Robertsdale, Alabama where he practiced until his death. He was an active member in the First Christian Church of Robertsdale, Alabama as well as the Baldwin County Bar Association, serving as president. In 1992, he was selected "Boss of the Year" by the Baldwin County Legal Secretaries Association.

Claude is remembered not only for his ability in the practice of law, but also for his friendliness and willingness to help his fellow lawyers in all walks of life.

—W. Donald Bolton
President
Baldwin County Bar Association

• M·E·M·O·R·I·A·L·S •

Roscoe B. Hogan

Windblown on the salty currents
Rives the boat, its rudder stored
Adrift she floats above the rocks
Then slope, then sand, then finally shored

•

None aboard to tend the tiller
None comes forth to drop the sail
Once there was its knight to steer her
Now the course does not avail

•

Aboard behind the mast and mizzen
Starboard of the captain's chair
Burns a candle next the casket
Its flame unyielding to breezes there

•

'Bove the shore, green and glistening
Rising through the clouds toward day
A range of mountains sways its branches
Whispering down as if to say:

•

Roscoe Hogan we salute you
Champion of those who hurt and fear
Back from wars for weak and weary
Welcome now to sojourn here

•

You were there for future oceans
You stood tall for stream and tree
Indian spirit with heart of knighthood
We've a place for such as thee.

—R. Ben Hogan, III
Birmingham, Alabama

Morris K. Sirote

Whereas, Morris K. Sirote, a practicing attorney in Birmingham for more than 60 years, died at the age of 84 on February 18, 1994; and,

Whereas, Morris Sirote attended Phillips High School, studied pre-law at the University of Alabama and received his law degree in 1932 from the Birmingham School of Law; and,

Whereas, Morris Sirote became a founding partner in 1942 of the firm of Sirote & Permutt; and,

Whereas, shortly after the founding of this firm, Sirote left the practice to serve as a Judge Advocate Officer in the United States Army Air Corps during World War II, resuming his practice following his discharge as a captain in 1946; and,

Whereas, Morris Sirote was well-known for his contributions to various cultural and communal organizations and institutions in Birmingham, among them being the Performing Arts Center of the University of Alabama in Birmingham, where the main theater of the Center, now under construction, has been named the "Morris K. Sirote Theater," in recognition of his love and support for the arts; and,

Whereas, Morris Sirote had a passion for the law generally and a burning zeal for legal research, remaining an indefatigable and tireless advocate for his clients, who was active in the practice of law until a few weeks prior to his death; and,

Whereas, we express our enduring regard and respect for our distinguished colleague who served our profession, our State and our country in such a notable manner.

—William N. Clark
President
Birmingham Bar Association

Milton Guy Garrett

Be it resolved by the Executive Committee of the Birmingham Bar Association, that:

Whereas, Milton Guy Garrett, a member of the Birmingham Bar Association since 1967 and a practicing attorney in Birmingham for more than 27 years, died at the age of 65 on March 28, 1994; and

Whereas, Milton Garrett attended Woodlawn High School and distinguished himself as a champion athlete; and

Whereas, Milton Garrett served in the United States Armed Forces with distinction; and

Whereas, Milton Garrett was a former deacon of the Woodlawn Baptist Church. He walked with the truth and a friendly heart and found faith and hope awaiting there. He created the impression to others that he possessed the spirit of understanding, with a cherished wholesome daily walk with his fellow man—and was a friend to all; and

Whereas, Milton Garrett was a Mason and a Shriner and The Golden Rule fertilized his spirit as he translated intrinsic commitments and abiding love for his fellows into a portrait of a satisfying channel of worthy service; and

Whereas, Milton Garrett had a passion for the law generally and a desire for others to share such passion which resulted in his teaching and instructing as a professor at the Birmingham School of Law for many years; and

Whereas, Milton Garrett participated in and donated much of his time and talent to the Parent Advocate/ Down Syndrome (PADS); and

Whereas, Milton Garrett was deeply respected and loved by members of the bar and bench and the community at large; and

Whereas, we express our enduring regard and respect for our distinguished colleague who served our profession, our state and our country in such a notable manner.

It is therefore hereby resolved by the Executive Committee of the Birmingham Bar Association that this resolution be spread upon the minutes of this committee and copies thereof be sent to his wife, Shirley Martin Garrett; his daughters, Lauren Wallace and Julie Sloan; his son, Steven D. Garrett; and his grandchildren, Daniel Wallace, Casey Sloan and Savannah Wallace.

—William N. Clark
President
Birmingham Bar Association

• M·E·M·O·R·I·A·L·S •

Samuel Earle Greene Hobbs

Whereas, after a hard fought struggle, death claimed our brother, Samuel Earle Greene Hobbs, on January 4, 1994; and,

Whereas, Sam Earle was born to prominent families on April 23, 1917, the son of Samuel Frances and Sarah Ellen Greene Hobbs; and,

Whereas, on the paternal side of Sam Earle's family his father was born in 1887 at Selma, Alabama to Samuel Freeman Hobbs and his wife, Frances Jeffries John, the former a native of York County, Maine, who moved to Dallas County, Alabama in 1856 and served in the Confederate service; the said Samuel Frances Hobbs was educated in public schools in Selma and attended Professor Calloway's school and Marion Military Academy and Vanderbilt University and the University of Alabama School of Law, engaged in the practice of law in Dallas County, Alabama, served as judge of the circuit court and as Representative in the Congress of the United States; and,

Whereas, on the maternal side of Sam Earle's family, his mother, Sarah Ellen, was born in 1891 to Judge Samuel Earle Greene and his wife, Rosa Miller, and the latter, a daughter of Judge George Knox Miller and his wife, Celeste McCann; and,

Whereas, Sam Earle attended Selma public schools, and received an A.B. degree from the University of North Carolina at Chapel Hill in 1939, earned an M.A. degree from George Washington University in 1940, an LL.B. degree from the University of Alabama School of Law in 1948, an LL.M. degree from Yale University Law School in 1940, and an honorary LL.D. degree from the University of Alabama in 1987; and,

Whereas, Sam Earle served as a special agent in the Federal Bureau of Investigation from 1940 to 1944, served in rank from ensign to lieutenant in the United States Military Reserves (1944 to 1946) with service in the Pacific theater, served at the University of Alabama as instructor of political science from 1946-1948 and as assistant professor of law from 1949-1952, was admitted to the Alabama State Bar in 1948, engaged in the practice of law with the firms of Hobbs, Hobbs & Hobbs, Craig, Hobbs & Hain, and Hobbs & Hain, served as judge of the Dallas County Court from 1952-1958, served as a member of the Board of Bar Examiners from 1967-1969, and served as a member of the Selma School Board from 1952-1963, and as its chairman from 1961-1963; and,

Whereas, Sam Earle was active in community and civic organizations, was one of the three founders and served as a member of and as chairman of the Board of Directors of Citizens Bank & Trust Company (and after its merger with SouthTrust Bank, as a member of the local board of directors), served as a trustee-director and chairman of the board of the New Vaughan Memorial Hospital, Inc., as director of the Vaughan Memorial Foundation; as president of the United Community Services and of the Sturdivant Museum Association, member of the board of directors of the Young Men's Christian Association, and president of the Selma Dallas County Chamber of Commerce; and,

Whereas, Sam Earle served as a member of the board of trustees of the University of Alabama from 1964-1987, serving as chairman of the board from 1981-1984, returning in 1989 to serve as interim chancellor of the University System; and,

Whereas, Sam Earle was raised in the Presbyterian Church, joined and served as a faithful member of St. Paul's Episcopal Church, serving as a member of the vestry and as senior warden and serving the Diocese of Alabama as president of the Episcopal Churchmen of Alabama; and,

Whereas, on June 10, 1941 Sam Earle married Emily Nicolson, and to such union were born Ralph Nicolson Hobbs, Samuel Frances Hobbs, II and Ellen Earle Hobbs; and,

Whereas, Sam Earle and Emily suffered the loss of their son, Sam, in 1971 and in 1989, Sam Earle suffered the loss of his wife, Emily; and,

Whereas, Sam Earle married Mary Drue Berrey Jones in 1992 and obtained an extended family of lifelong acquaintances; and,

Whereas, the law practice of Sam Earle Greene Hobbs was active and extensive, succeeding to a wide and influential clientele of his father, and in association with William B. Craig, B.V. Hain and his son, Ralph N. Hobbs, and later associating with two young attorneys, Barry R. Bennett and James B. McNeill, Jr., and providing quality legal service and counsel to an extensive clientele of individuals, corporate and governmental bodies; and,

Whereas, Sam Earle was possessed of the finest character and integrity and exhibited faithful and dedicated service through the contribution of his time and capable mind and effort to his community, to his church, to education, both in his hometown and at his university; to his profession and the association of the state bar; and,

Whereas, our brother, Sam Earle, in making such contributions and providing his family, friends, community and state by his example a life worthy of the best of mankind, continued a tradition of family character, service, leadership and distinction among the most prominent in the history of our state and nation; and,

Whereas, Sam Earle was a man possessed of a fine intellect and dry wit; and,

Whereas, Sam Earle leaves surviving him in this life his wife, Mary Drue Berrey (Jones) Hobbs; his son, our brother, Ralph N. Hobbs; his daughter, Ellen Earle Hobbs Wilkes; his grandchildren, Aimee Louise Hobbs, Hugh Nicholson Hobbs, Emily Nicolson Wilkes and Samuel Kenneth Wilkes; his sister, Rosa Miller Hobbs Joyce; and his brother, Judge Truman M. Hobbs; and,

Whereas, Sam Earle was a true Christian gentleman in the mold and character of the late Robert E. Lee; and,

Whereas, the passing from this life of our brother, Sam Earle Greene Hobbs, marks a tremendous loss to the state bar, to our state and nation, to his family and many friends, to his church, and to educational, civic and charitable organizations far too numerous to mention.

Now, therefore, be it resolved by the Dallas County Bar Association that we do hereby assemble and take official notice of the passing from this life of Sam Earle Greene Hobbs and of his exemplary character, and the many significant and varied contributions of our said brother.

—Robert R. Blair
President
Dallas County Bar Association

• M·E·M·O·R·I·A·L·S •

Grady Jackson Long

Whereas, Grady Jackson Long passed this life on October 13, 1993; and

Whereas, Grady Jackson Long was born on October 17, 1904 in Lawrence County, Alabama, was a graduate and lifelong supporter of Alabama Polytechnic Institute, now Auburn University, where he lettered in football in 1928 and 1929, and later coached at Wetumpka High School before moving to Hartselle, Alabama, where he ended his coaching career at Morgan County High School and won the Tennessee Valley Championship in 1939; and

Whereas, Grady Jackson Long was admitted to the Alabama State Bar in 1939; and

Whereas, Grady Jackson Long was a devout Christian, being a member of the First Baptist Church where he served as deacon and Sunday School superintendent and as treasurer of the Morgan County Baptist Association; and

Whereas, Grady Jackson Long served his country in World War II as a lieutenant colonel in the United States Army; and

Whereas, Grady Jackson Long served his community as mayor of Hartselle from 1960 to 1964, and as a Civitan; and

Whereas, Grady Jackson Long served honorably, patiently and diligently as a member of the Morgan County and Alabama State Bar associations for 55 years and continually exhibited diligence, patience, courtesy, dependability, community interest and service, devotion and service to his family, his God, his country and his community, and it is the desire of the Morgan County Bar Association, assembled on this date, to honor the memory of Grady Jackson Long.

Now, therefore, be it resolved that the Morgan County Bar Association mourns the death of Grady Jackson Long and commends his many years of honorable, patient and unselfish service to the Morgan County and Alabama State Bar associations, his family, his church, his community, and his country.

—Jerry R. Knight
Immediate past president
Morgan County Bar Association

Horace E. Garth, III

Whereas, the Huntsville-Madison County Bar Association comes together to pay tribute to Horace E. Garth, III, who passed away March 17, 1994; and

Whereas, Horace E. Garth, III was born in Madison County, Alabama and attended the public schools of Huntsville and the University of Alabama, in Tuscaloosa, graduating with an L.L.B. degree, and was admitted to the Alabama State Bar and practiced at this bar for over 40 years; and

Whereas, Horace E. Garth was prosecutor for the City of Huntsville, from 1958 to 1959, and as city judge from 1959 to 1962, and

Whereas, Horace E. Garth distinguished himself as a fighter pilot in World War II and the Korean Conflict; and

Whereas, Horace E. Garth's reputation as a man of integrity and dignity distinguished him in all aspects of community life and he had the respect of his fellow lawyers and all who knew him; and

Whereas, Horace E. Garth is survived by his wife, Sylvia S. Garth; two sons, Horace E. Garth, IV and Samuel G. Garth; a sister, Caroline Monroe; and a niece and a nephew; and

Whereas, Horace E. Garth was a valued and respected friend and was a distinguished citizen of this community, and it is in grateful memory and appreciation of his contributions to his fellow man, to his profession and to this association, that this Resolution is adopted.

—John D. Snodgrass
President
Huntsville-Madison County Bar Association

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

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• M·E·M·O·R·I·A·L·S •

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Birmingham
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Dothan
Admitted: 1931
Died: March 31, 1994

Winston F. Groom
Magnolia Springs
Admitted: 1934
Died: February 15, 1994

Robert Lawrence Gunn, Jr.
Huntsville
Admitted: 1954
Died: February 5, 1994

Roscoe Benjamin Hogan
Birmingham
Admitted: 1950
Died: May 6, 1994

Gilbert Egloff Johnston
Birmingham
Admitted: 1941
Died: May 17, 1994

Harold P. Knight
Birmingham
Admitted: 1950
Died: March 20, 1994

John Hill Peach, Jr.
Fort Walton Beach, FL
Admitted: 1937
Died: April 30, 1994

Daniel Adolphus Pike
Mobile
Admitted: 1971
Died: May 12, 1994

Joseph C. Sullivan
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Died: May 5, 1994

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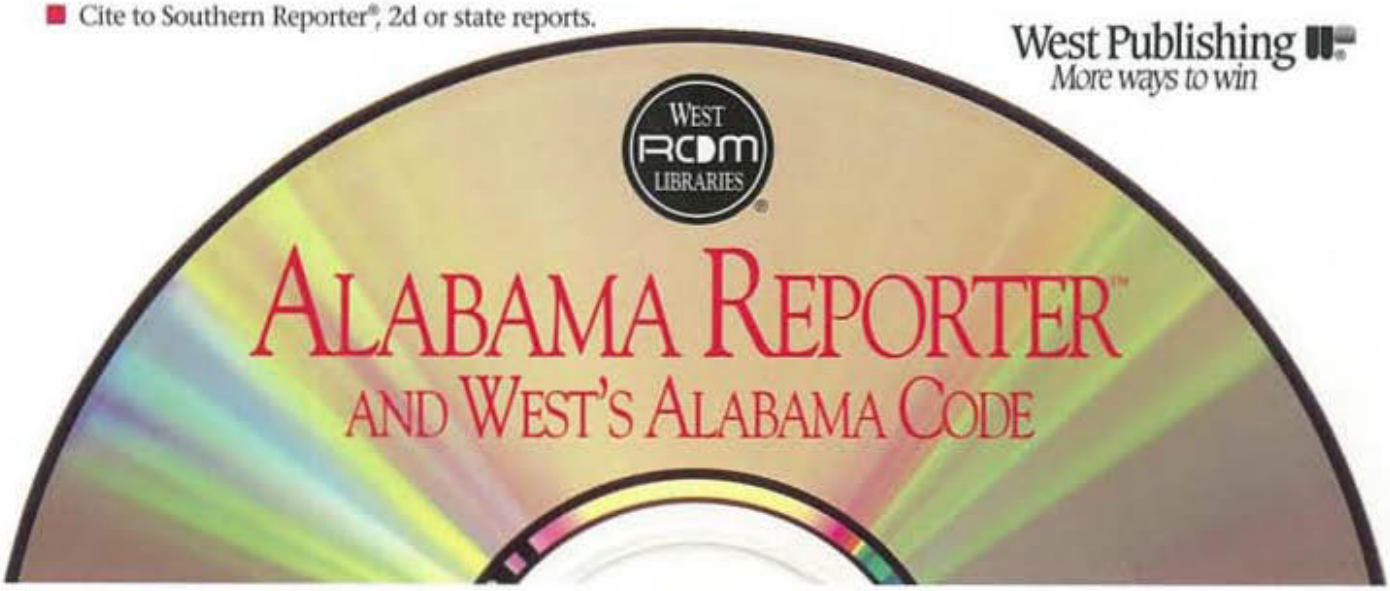

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