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Vol. 56, No. 5 JULY 1995

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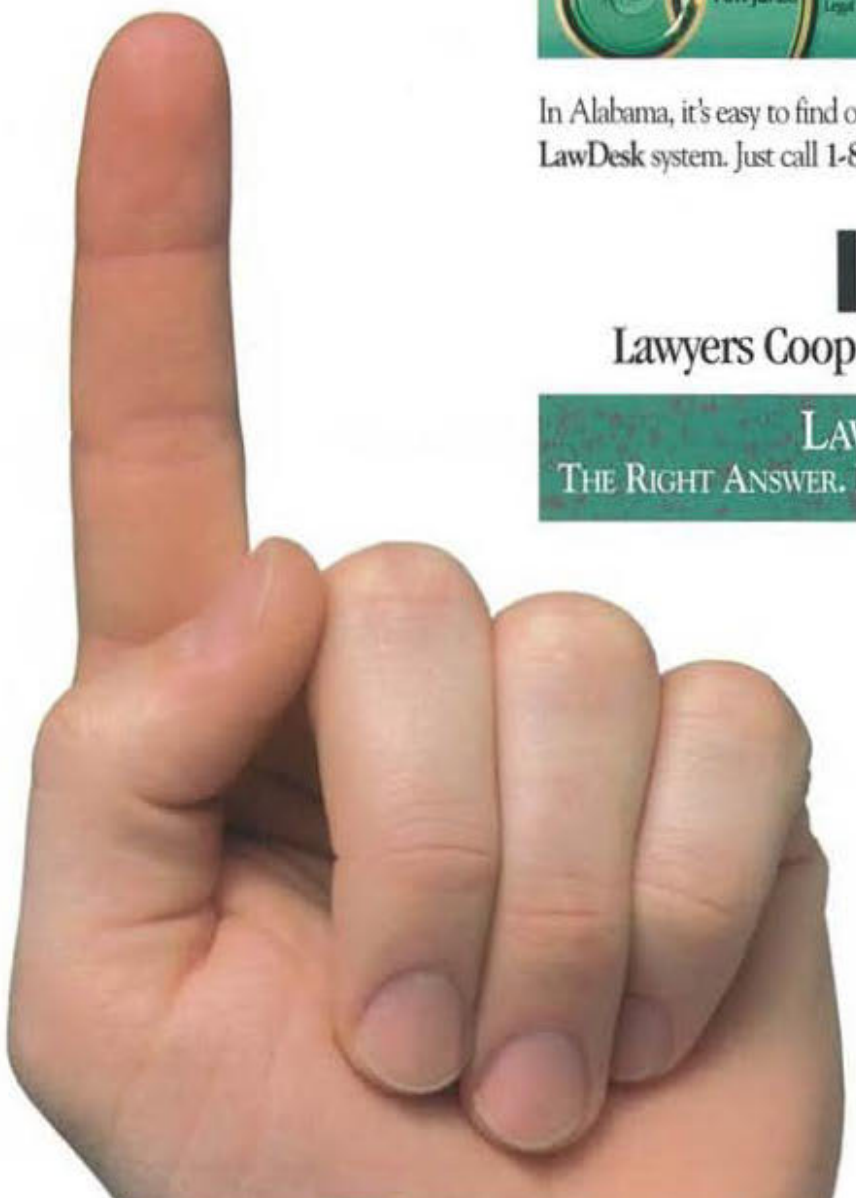

IN BRIEF

July 1995 Volume 56, Number 5

ON THE COVER:

Here is a look at your Alabama State Bar staff, the people who make the bar work, and some of the exciting programs that are being developed to bring together all aspects of the bar, from the solo practitioners to the many-member statewide firms.

When the renovations and additions to the state bar building were completed in April 1993, the staff had room to expand. In May 1985, there were 15 staff members; that number has almost doubled. To know "who's who" and what they do, see page 221.

Photo by Paul Robertson, Jr.

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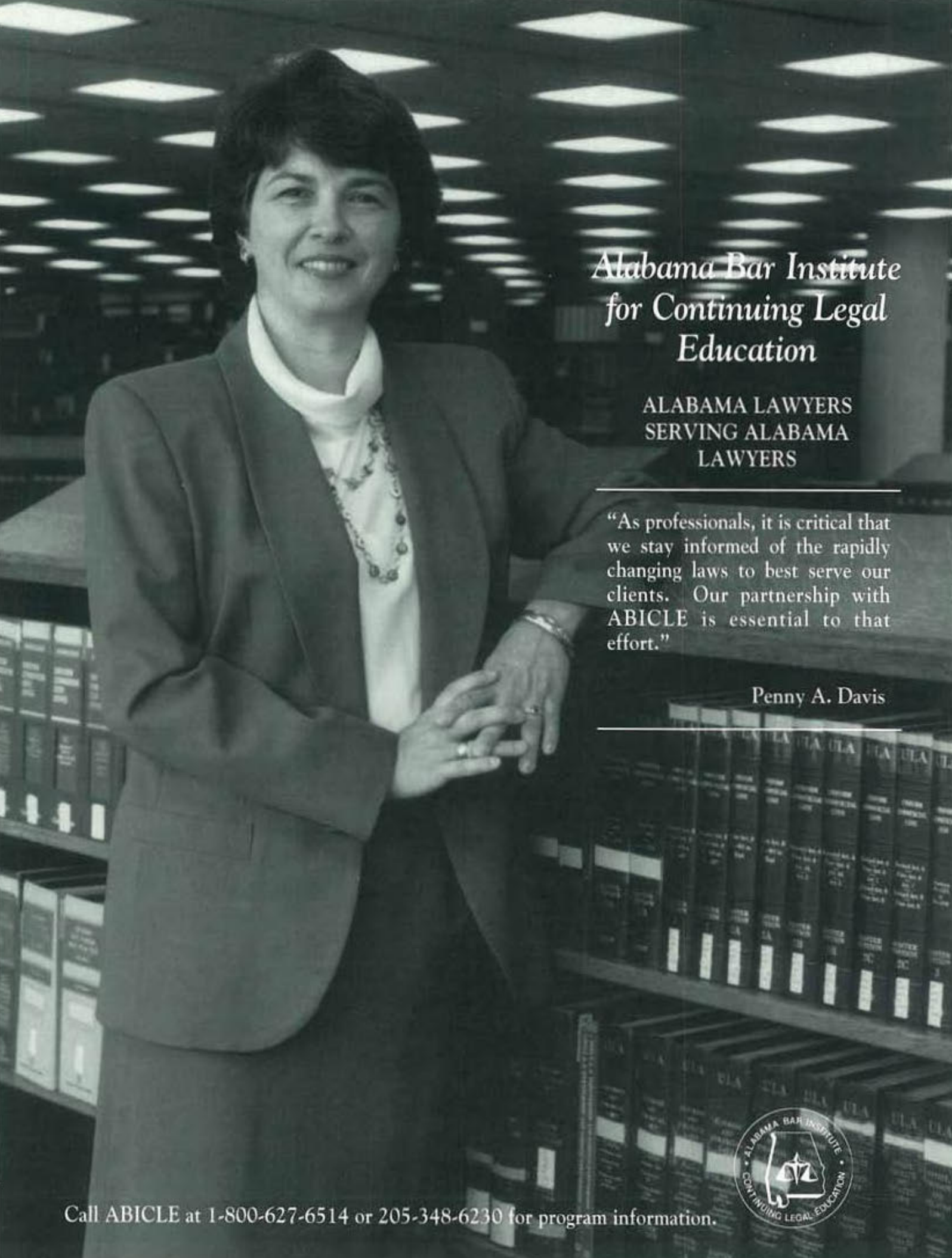
The Alabama Lawyer

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

The Alabama Lawyer is published seven times a year for $20 per year in the United States and $25 per year outside the United States by the Alabama State Bar, 415 Dexter Avenue, Montgomery, Alabama 36104. Single issues are $5.00, for the journal and $25/$40 for the directory. Second-class postage paid at Montgomery, Alabama.

Postmaster: Send address changes to *The Alabama Lawyer*, P.O. Box 4156, Montgomery, AL 36101-4156.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SIGNS OF A SUCCESSFUL YEAR

It hardly seems possible that another year in the long history of the Alabama State bar is drawing to an end. Traditionally, this is the time to recount some of the accomplishments of the year and the outgoing president's hopes for the future. Due to *Alabama Lawyer* deadlines, I write this column in mid-May. But even at this point, thanks to the help of so many, this has all the signs of a successful year for our bar and I believe we will bring to fruition other initiatives between now and the July annual meeting, which marks the end of my term.

The Alabama State Bar committees, task forces and sections have again performed great service for this bar, our profession and the citizens of Alabama. I will not give an account of the committee and task force work as those reports have been set out in the May *Alabama Lawyer* and other pages here. It is important to reiterate, however, that almost all of our 42 committees and task forces met on one or more occasions indicating very active participation by hundreds of Alabama lawyers who dedicated their valuable time to the work of the bar.

Broox G. Holmes

I thank all of the chairpersons and committee members for again demonstrating the volunteer service so typical in our bar. The volunteer spirit to serve among our members remains very high.

I hesitate to single out specific committees; however, I think we should take note of a few. In August 1994, the Alternative Dispute Resolution committee, chaired by Bill Coleman, opened the Alabama Center for Dispute Resolution—an ADR management coordination, research and development office—under the supervision of the newly created Alabama Supreme Court Commission on Dispute Resolution. The committee has drafted a proposed code of ethics for mediators to be submitted to the commission for approval. The committee is also focusing on the qualifications and training for court appointed mediators. The fine work of this committee was recognized nationwide when the National Conference of Bar Presidents selected the Alabama Center for Dispute Resolution as one of its "Best Bar Projects in 1994."

The Task Force on Bench and Bar Relations, chaired by Judge Joe Phelps, and the Task Force on Women in the Profession, chaired by Celia Collins, have been particularly active in encouraging unity of purpose to accomplish the goals of the bar. The Bench and Bar Conference in March sponsored by the bar and Judge Phelps' task force was very productive in our consensus-building effort. That meeting, I believe, is a model of what we should do every year in bringing about unity in our unified bar.

Bob Denniston's Task Force on Judicial Selection did not take off the rest of the year after the Third Citizens' Conference on Alabama Courts was convened pursuant to your bar commissioners' December resolution. The task force has continued to meet and suppy additional research and recommendations on judicial selection measures to the board and the Citizens' Conference leadership and members. This information has been very useful to conference leaders Governor Brewer and Justice Adams and in the deliberations of the conference in its two day-long conferences held thus far.

It is hoped that the Citizens' Conference will reach some concrete recommendations for improvement of the judicial selection system in Alabama on both the trial and appellate levels before our annual meeting. As I have mentioned in prior columns, there is very broad support among lawyers, judges and lay people for improvement in the judicial selection process in Alabama. We must not let this opportunity for improvement pass us by.

I acknowledge and thank Keith Norman and each member of the bar headquarters staff for their dedicated work this year. I know there was some concern when our good friend Reggie Hamner retired last year, but I can tell you that Keith is already performing like a veteran executive secretary. Keith's counsel and knowledge of the bar have been most valuable to me.

Last, but certainly not least, I thank President-Elect John Owens, Vice-President Rick Manley, the Executive Council and all of the bar commissioners for their friendship, hard work and support. In my opinion there is not a stronger or more representative state bar governing body than our board.

As you have probably read elsewhere by now, General Robert Norris is resigning his position as general counsel to go into private practice in Birmingham. General Norris came to the

Continued on page 202

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NOTICE TO SHOW CAUSE

• Notice is hereby given to **Timothy Patrick McMahon** of Foley, Alabama that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated March 31, 1995, he has 60 (sixty) days from the date of this publication, (July 18, 1995), to come into compliance with the Mandatory Continuing Legal Education requirements. Noncompliance shall result in a suspension of his license.

[CLE No. 95-16]

NOTICE TO SHOW CAUSE

• Notice is hereby given to **Timothy Patrick McMahon** of Foley, Alabama that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated May 9, 1995, he has 60 (sixty) days from the date of this publication, (July 18, 1995) to come into compliance with the Client Security Fund Assessment. Noncompliance with this assessment shall result in a suspension with his license. [CSF No. 95-10]

President's Page

Continued from page 200

Alabama State Bar after serving splendidly as Judge Advocate General of the Air Force. We are indeed indebted to Bob Norris for the great job he has done in taking charge of and improving greatly the bar's Center for Professional Responsibility and our disciplinary system. We will miss Bob and Martha and we wish them the very best in the future.

Now in parting I say: This is a great bar. I said at the beginning of my term that we can be better and that the only thing holding us back is the divisiveness and a lack of unity which has come about in recent years. I believe we have helped to improve on our lack of unity. We have not cured it.

It is my fervent hope that the Alabama State Bar will never be used by any members to foster positions supportive of special interests such as a particular viewpoint in the civil justice system. It is good for all lawyers to seek to serve the bar but the guiding light of those who seek an office in this bar should always be to serve for the purposes for which it exists. If we serve this bar with the resolve to rise above special interests and self interests to address the greater professional and public good - as I believe has been done for the last 117 years - we will continue to have an Alabama State Bar that truly serves all Alabama lawyers and the people of Alabama as it was created to do.

In 1941, as he left the office of president of this bar, a great lawyer from Mobile, Sam M. Johnston, said of the office, "It is an honor worthy of any lawyer's ambition." I agree with Mr. Johnston and I again thank each of you for giving me this opportunity to serve our profession.

EXECUTIVE DIRECTOR'S REPORT

A GLANCE AT YOUR ALABAMA STATE BAR, PART II

Fiscal Operations

How is the Alabama State Bar funded?

All programs and activities of the Alabama State Bar are funded by license fees, special membership dues or user fees, e.g. bar examination. Although the bar's budget goes through the state budgeting process and is included in the state's general fund, no state revenues are included in the bar's budget.

Keith B. Norman

Which programs are managed on a break-even or partial funding basis?

A number of bar programs are expected to break even financially each year. These "break-even" programs are funded by revenues other than annual member fees:

1. Admissions
2. Pro Hac Vice
3. Alabama Bar Reporter
4. Specialization

Which programs are funded primarily by member fees?

Most bar programs or activities are funded by member fees. Typically, these are public service programs or the regulatory responsibilities of the bar.

1. Communications Program
2. Client Security Fund Administration
3. Lawyer Referral Service
4. Member Periodicals
5. Discipline
6. MCLE
7. Board of Commissioners
8. Committees and Task Forces

What is the history of the bar's budget over the past five years?

FY 1989-1990 $1.364MM
FY 1990-1991 $1.476MM
FY 1991-1992 $1.601MM
FY 1992-1993 $1.965MM
FY 1993-1994 $2.144MM

The budget has grown significantly in the past five years basically in response to new or enhanced programs, activities and services offered to the membership and the public as approved by the board of bar commissioners. Much of the budget growth is attributed principally to increasing administrative and regulatory services.

As bar membership has increased and programs have expanded, we have added administrative staff to meet this increased demand. Regulatory services have increased because of the rising number of grievances filed and investigated, the rising number of UPL investigations and prosecutions, and the processing of more Client Security Fund claims, while insuring lawyer compliance with the Client Security Fund Rules, MCLE Rules and Interest on Lawyers' Trust Account Rules.

The four principal areas of ongoing interest of bar committees and task forces are, with the number of committees or task forces in parenthesis, focus on the profession (20), bench and bar (3), public service (12) and bar management and governance (3).

What are examples of the bar's activity in these key areas?

Public Service

1. Committee on Client Security Fund. The staff provides administrative support to this committee which reviews, evaluates, determines and pays claims filed by members of the public for attorney malfeasance. Last year the fund paid $49,814.08 in claims.
2. Committee on Access to Legal Services. This committee has oversight of the bar's Volunteer Lawyer Program and works directly with the VLP director to recruit lawyers for the program by increasing awareness of the public and the profession. More than 1,600 lawyers are now participating in this program.

3. Committee on Alternative Dispute Resolution. Formerly a task force and now a committee, this group has been instrumental in the supreme court's adoption of civil mediation rules, and the establishment of the Center for Dispute Resolution, as well as recommending the Supreme Court Commission on Dispute Resolution.
4. Judicial Selection Task Force. The task force members have studied the issue of judicial selection as well as the financing of judicial campaigns. The findings and recommendations of this task force have been furnished to the Third Citizens' Conference on Alabama State Courts.
5. Other committees and task forces involved in public service include Indigent Defense Committee, Prepaid Legal Services Committee, Law Day Committee, Citizenship Education Committee, Committee on Correctional Institutions and Procedures, and the Adult Literacy Committee.

Bench and Bar

Bench and Bar Committee. This committee has worked to encourage joint activities between the bench and bar including joint programs at the mid-winter meeting of the circuit and district judges associations, and the recent "Unity Conference" involving representatives of different segments within the bar.

Other committees and task forces include the Supreme Court Liaison Committee and the Judicial Conference for the State of Alabama.

Focus on the profession

1. Editorial Board of *The Alabama Lawyer*. The board of editors is an advisory board and assists the editor in publishing *The Alabama Lawyer* and other publications assigned to it by the board of bar commissioners.
2. Permanent Code Commission. The Commission works closely with members of the general counsel's staff in monitoring whether the Rules of Professional Conduct meet the needs of the legal profession and the public, as well as serving as a clearing house for all proposed amendments or changes to the rules.
3. Committee on Lawyer Public Relations. This committee works directly with the bar's director of communications to provide public education and public information and publicize the services available to the public from the bar.
4. Task Force on Solo and Small Firm Practitioners. Working with bar staff, the charge of this task force is to determine any significant problems or issues that confront solo practitioners and members of small firms and what the bar can do to assist these members in particular. For the purpose of this task force's mission, "small firm" includes five or fewer members.
5. Other committees and task forces involved in this area include Insurance Programs Committee, Task Force on Minority Participation and Opportunity, Ethics Education Committee, Women in the Profession Task Force, and Committee on Local Bar Activities and Services.

Bar management and governance

Long Range Planning Task Force. With the adoption of a long range plan by the board of bar commissioners, this committee works with the staff and other bar committees and task forces to accomplish the ten broad objectives of this plan.

Future of the bar

The long range plan was approved in September 1994 at the recommendation of the Long Range Planning Task Force ably chaired by Camille Cook of Tuscaloosa. The long range plan, the work product of that task force, is a blueprint for the future of the Alabama State Bar. The bar's mission statement as contained in the long range plan states:

"The Alabama State Bar is dedicated to promoting professional responsibility and competence of its members, improving the administration of justice, and increasing the public understanding of and respect for the law."

To accomplish this mission, the plan sets forth ten general objectives that will serve as a road map into the next millennium. A copy of the long range plan can be obtained by contacting state bar headquarters.

Conclusion

This quick overview does not detail the full menu of bar programs and activities, but by highlighting those I believe to be of specific interest to most of you, I hope to have provided a more complete picture of the Alabama State Bar. ■

About Members, Among Firms

ABOUT MEMBERS

David A. McDonald announces the opening of his office at 208 S. Warren Street, Mobile, Alabama 36602. The mailing address is P.O. Box 832, Mobile 36601. Phone (334) 434-0045.

Mark G. Montiel, former judge of the Alabama Court of Criminal Appeals, announces the opening of his office at 6754 Taylor Circle, Montgomery, Alabama 36117. Phone (334) 277-7525.

Edward E. Blair announces the relocation of his office to 200 W. Court Square, Suite 51, Huntsville, Alabama 35801. The mailing address is P.O. Box 2855, Huntsville 35804. Phone (205) 534-9995.

Wayne K. Alexander, Jr., formerly of the Morgan County District Attorney's office, announces the opening of his office at 302 Second Avenue, Southeast, Suite C, Decatur, Alabama 35601. The mailing address is P.O. Box 1286, Decatur 35602. Phone (205) 355-9591.

Paula I. Cobia, formerly of Bolt, Isom, Jackson & Bailey, announces the opening of her office at Security Bank Building, 10 W. 11th Street, Suite 2D, Anniston, Alabama 36201. The mailing address is P.O. Box 1195, Anniston 36202. Phone (205) 235-3903.

Kenneth Wilson, former assistant state superintendent of education, announces the opening of his office at 200 Sand Mountain Drive, NW, Albertville, Alabama 35950. Phone (205) 878-9720.

Robert C. Gammons announces the relocation of his office to 108 South Side Square, Huntsville, Alabama 35801. Phone (205) 534-4557.

AMONG FIRMS

Ernest Cory, Leila H. Watson, Charles R. Crowder, D. Bruce Petway, and Annesley H. DeGaris announce the formation of **Cory, Watson, Crowder & Petway.** Offices are located at 300 21st Street, North, Suite 900, Birmingham, Alabama 35203. Phone (205) 328-2200.

Donna Wesson Smalley announces the association of **Jason Baird.** Offices have been relocated to 601 Greensboro Avenue, Tuscaloosa, Alabama 35403. The mailing address is P.O. 1488, Tuscaloosa 35403. Phone (205) 758-5576.

Gary D. Hooper and **R. Stephen Griffis** announce the formation of **Hooper & Griffis.** Offices are located at New South Federal Savings Building, 8th Floor, 215 N. 21st Street, Birmingham, Alabama 35203. Phone (205) 251-7788.

James C. King and **Garve Ivey, Jr.,** formerly of Wilson & King, announce the formation of **King & Ivey. Barry A. Ragsdale** joined the firm as an associate in the Birmingham office, and **Charles E. Harrison** and **Clatus Junkin,** former circuit judge, have joined the Fayette office.

Richard A. Freese has joined the firm of **Langston, Frazer & Sweet.** The new name is **Langston, Frazer, Sweet & Freese.** Offices are located at 1040 Financial Center, 505 N. 20th Street, Birmingham, Alabama 35203. Phone (205) 458-3550.

Rutland & Braswell announces that **L. Cooper Rutland, Jr.** has joined the firm as an associate. Offices are located at 208 N. Prairie Street, Union Springs, Alabama. The mailing address is P.O. Box 551, Union Springs 36089. Phone (334) 738-4770.

Weathington & Associates announces that **Corey B. Moore** has joined the firm. Offices are located at 819 Parkway Drive, Southeast, Leeds, Alabama 35094. Phone (205) 699-6164.

Watson, Fees & Jimmerson announces that **Charles H. Pullen** has become a partner. Offices are located at AmSouth Center, 200 Clinton Avenue, West, Suite 800, Huntsville, Alabama 35801. The mailing

address is P.O. Box 46, Huntsville 35804. Phone (205) 536-7423.

Donald, Randall, Donald, Tipton & Donaldson announces that **Laurie K. Pratt** has become an associate. Offices are located at AmSouth Bank Building, 2330 University Boulevard, 9th Floor, Tuscaloosa, Alabama 35401. The mailing address is P.O. Box 2155, Tuscaloosa 35403. Phone (205) 758-2585.

Wallace, Jordan, Ratliff, Byers & Brandt announces the opening of their Montgomery office and that **Algert S. Agricola, Jr.** has joined as *of counsel*. Offices are located in Montgomery and Birmingham, Alabama.

Bainbridge, Mims & Rogers announces that **Alfred F. Smith, Jr.**, formerly with Maynard, Cooper & Gale, has become a partner. The firm's new name is **Bainbridge, Mims, Rogers & Smith**. Offices are located at The Luckie Building, 600 Luckie Drive at Highway 280, South, Suite 415, Birmingham, Alabama. The mailing address is P.O. Box 530886, Birmingham 35253. Phone (205) 879-1100.

White, Dunn & Booker announces that **Oscar W. Adams, Jr.**, associate justice (Retired), Supreme Court of Alabama, has joined the firm *of counsel*, and **Robert W. O'Neill**, formerly vice-president and general counsel for South Central Bell Telephone Company, and **James L. Sanders, II** have joined the firm. Offices are located at 1200 First Alabama Bank Building, Birmingham, Alabama 35203. Phone (205) 323-1888.

Miller, Hamilton, Snider & Odom announces that **A. Carson I. Nicolson** and **James Rebarchak** have become members, and **Joseph E. Yesutis, W. Ben Broadwater** and **A. Lynne Wiggins** have become associates. **E. Barry Johnson** has relocated to the Montgomery office. Offices are located in Mobile and Montgomery, Alabama and Washington, D.C.

Feld & Hyde announces the association of **Katherine N. Barr**. Offices are located at 2100 SouthBridge Parkway, Suite 590, Birmingham, Alabama 35209. Phone (205) 802-7575.

Burdine, Collier & Burdine announces the association of **Roy Edgar Long**, and the new firm name is **Burdine, Collier, Burdine & Long.** Offices are located 102 S. Court Street, Suite 412, Florence, Alabama 35630-5656. Phone (205) 767-5930.

Joseph W. Strickland, Patrick F. Smith, Melissa K. Smith and **James A. Haggerty, Jr.** announce the formation of **Strickland, Smith & Haggerty.** Offices are located at 4 Office Park Circle, Suite 212, Birmingham, Alabama 35223. Phone (205) 870-4440.

Balch & Bingham announces that **Rebecca J. Brown, B. Davis Butler** and **Paul B. Seeley** have joined the firm as associates. Offices are located in Birmingham and Huntsville, Alabama and Washington, D.C.

James W. May and **Kathryn D. Ferrell** announce the formation of **May & Ferrell.** Offices are located at 307 S. McKenzie Street, Foley, Alabama 36535. The mailing address is P.O. Box 549, Foley 36535. Phone (334) 943-2881 or (334) 943-2333.

Burns, Cunningham & Mackey announces that **Gary W. Fillingim** has become an associate. Offices are located at 50 Saint Emanuel Street, Mobile, Alabama. The mailing address is P. O. Box 1583, Mobile 36633. Phone (334) 432-0612.

Sirote & Permutt announces that **Charles A. Stewart, III** has joined as a shareholder and **Dana Claire Gibson** as an associate in the Montgomery office.

Michael D. Rogers, Thomas H. Young and **Stephen K. Wollstein,** formerly partners with Bolt, Isom, Jackson & Bailey, announce the formation of **Rogers, Young & Wollstein.** Offices are located at Williamson Commerce Center, 801 Noble Street, Anniston, Alabama. Phone (205) 235-2240.

Vickers, Riis, Murray & Curran announces that **C. Richard Wilkins** has become a member of the firm. Offices are located at First Alabama Bank Building, Mobile, Alabama.

Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves announces that **James E. Robertson, Jr.** and **Scott G. Brown** have become members. Offices are located at 1300 AmSouth Center, Mobile, Alabama. Phone (334) 405-1300.

Tingle, Watson & Bates announces that **Mark T. Waggoner** has become an associate. Offices are located at 900 Park Place Tower, 2001 Park Place, North, Birmingham, Alabama 35203-2759. Phone (205) 324-4400.

Lanier, Ford, Shaver & Payne announces that **George E. Knox, Jr.** has become a member and **Jamie Manasco Brabston, Louise C. Porter** and **P. Scott Arnston** have become associates. Offices are located at 200 W. Court Square, Suite 5000, Huntsville, Alabama 35801. The mailing address is P.O. Box 2087, Huntsville 35804. Phone (205) 535-1100.

Bond, Botes, Thornton & Carlson announces that **Mary Frank Brown** has joined the firm as an associate. Offices are located at the Colonial Financial Center, One Commerce Street, Suite 101, Montgomery, Alabama 36104. Phone (334) 264-3363.

The following attorneys announce the relocation of their offices to # 15 Office Park Circle, Suite 100, Birmingham, Alabama 35223: **James M. Kendrick** (205) 871-3116; **D. William Rooks** (205) 802-7063; **James S. Witcher** (205) 871-3056; **Michael J. Romeo** (205) 871-5859; and **A. Dozier Williams** (205) 871-5050.

Olschner & Associates announces that **J. Mark Hart** has become a shareholder, and the new firm name is **Olschner & Hart.** Offices are located at 17 Office Park Circle, Suite 100, Birmingham, Alabama. The mailing address is P.O. Box 531228, Birmingham 35253. Phone (205) 879-9905.

Richard A. Thompson announces that **C. Brandon Halstead, Jr.** has become an associate. Offices are located at 2903 7th Street, Tuscaloosa, Alabama 35401. Phone (205) 759-1512.

Pierce, Carr, Alford, Ledyard & Latta announces that **James H. McDonald, Jr.** has joined the firm. Offices are located at 1110 Montlimar Drive, Mobile, Alabama 36609. The mailing address is P.O. Box 16046, Mobile 36616. Phone (334) 344-5151.

Steven C. Sasser and **Robert D. Weathers, Jr.** announce the formation of **Sasser & Weathers.** Offices are located at 801 Church Street, Suite 14, Decatur, Alabama 35601. The mailing address is P.O. Box 3043, Decatur 35602-3043. Phone (205) 351-1184. ■

BUILDING ALABAMA'S COURTHOUSES

MACON 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.*

The west side of the Macon County Courthouse shows fire damage from 1985.

MACON COUNTY

Macon County was one of ten new counties created by the Alabama Legislature on December 18, 1832. All of these counties came from former Indian lands – Choctaw, Cherokee, or Creek. Macon County formerly belonged to the Creeks who transferred the last of their lands east of the Mississippi River to the United States by a treaty in 1832.

The county was named for Nathaniel Macon, a Revolutionary War soldier and long-serving political leader. Macon was born in what is now Warren County, North Carolina, on December 17, 1758. He attended Princeton University in New Jersey in 1774 and joined the New Jersey militia in 1776. In 1777 he returned to North Carolina to study law, but in 1780 he rejoined the army when the British attacked the southern colonies.

Macon became an important political leader in North Carolina. From 1781 to 1786, he served in the North Carolina Senate. In 1788 he joined the anti-federalist movement in opposing the adoption of the United States Constitution. He was a fervent believer in states' rights: the ability of local people to govern themselves. He feared a strong central government. However, after the Constitution was adopted, he supported the new government and was elected in 1791 to serve in the House of Representatives.

Macon served continuously in Congress, either in the House or Senate, for the next 37 years. He was Speaker of the House from 1800 to 1807 and chaired the House Foreign Relations Committee. He served in the United States Senate from 1815 to 1828. During his final two years in the Senate, he was President Pro Tempore. He resigned from the Senate in 1828 when he reached age 70.

Macon was universally respected for his honesty. Economy with the public's money was the passion of his career. However, Macon opposed Federalist policies in Congress. He opposed any constitutional interpretation that expanded federal power. He opposed protective tariffs and the building of a navy. He opposed taxation to fund the War of 1812. He opposed the Missouri Compromise because he felt that to acknowledge the right of Congress to compromise on slavery would acknowledge a right to interfere with states' rights. In summary, Macon is not remembered by historians as a constructive force in Congress.

Macon continued to serve his state after retiring from Congress, first as trustee of the University of North Carolina and then in 1835, as president of the North Carolina Constitutional Convention. He died at his home on June 29, 1837.

Macon was popular among the settlers in the newly opened Indian lands in Alabama who came from the Carolinas, Georgia, Tennessee, and Virginia. They respected his long service and his politi-

cal leanings, including his defense of slavery and states' rights, and his position that secession was the only remedy for usurpation of power by the federal government. The 1832 Alabama Legislature named one of the ten new counties in the state "Macon" in his honor.

On January 12, 1833, the Alabama Legislature passed an act establishing a three-member commission which would select a site for the courthouse of Macon County. The commission was charged with locating the seat of justice at or near the center of the county if practicable or, if not, at the most eligible point not exceeding six miles from the center of the county. The members of the commission were General Thomas Woodward, Isaac Ray and John Thompson. They chose a site on the headwaters of Calebee Creek on an old Indian trail near the center of the area. The town was laid out in 1833 and named Tuskegee.

As with many Indian names, there are several theories concerning the history and derivation of the name "Tuskegee". One tradition is that the word comes from a Creek Indian word "taskialgi" which means "warriors." Another theory is that the town was named for a tribe – the Tuskigis. A third possibility is that the town was named in honor of an Indian town, Taskigi, which was located near Fort Toulouse in the triangle formed by the Coosa and Tallapoosa rivers. A final suggestion is that the town was named for a Creek Indian chieftain– Tuskegee. At any rate, Tuskegee became county seat of Macon County in 1833 and has served continuously since as its only county seat.

The first election of county commissioners took place on the first Monday in March 1833. General Thomas Woodward, a member of the original selection committee, was among the first commissioners elected. He built the first house in the town of Tuskegee.

The first Chancery Court met in April 1833. The initial courthouse was a log cabin-type structure with a dirt floor. It was also used by the Methodist congregation.

In 1841 this old log structure was replaced by a two-story brick courthouse constructed in the center of the town square. This courthouse was designed by Joshua F. Mitchell and Benjamin H. Cameron. It was identical to the Greek Revival courthouses built in Chambers County in 1837, Tallapoosa County in 1839, and Randolph County in 1840.

By the 1850s Macon County had grown and thrived due to the richness of its soil. Plantations prospered there. The total population approached 27,000. Fine homes were constructed, including the Varner-Alexander House, commonly known as Grey Columns, which today is one of the largest and most elaborate

Gargoyle detail on the courthouse

The 1853 Greek Revival courthouse located in Tuskegee

ante-bellum homes still standing in the state. It was acquired by the National Park Service in 1975 to serve as a reception center and headquarters for the Tuskegee Institute National Historic Site. Its front gates were used in the movie "Gone With The Wind."

Also, by the 1850s, Tuskegee had become a center of educational opportunities and culture, especially for young women. There were 46 public schools in the county and several private schools and colleges. On February 2, 1854, the Tuskegee Female College was chartered by the State of Alabama. This school was later taken over by the Methodist Church and became known as the Alabama Conference Female College. In 1909 the college moved to Montgomery. In 1935 its name was changed again, this time to Huntingdon College. Thus, Huntingdon, which still thrives today as a private college, can trace its roots directly to the college chartered by the state in Tuskegee in 1854.

By the mid-19th century the citizens of Macon County wanted a new courthouse that would reflect the wealth and prestige of the county. Montgomery architect Charles C. Ordeman designed a new building that was erected in the town square. The cornerstone was laid on June 24, 1853. His design was similar to the 1854 Montgomery County Courthouse for which he also served as architect.

The style for this third Macon County Courthouse was Greek Revival. It included a raised portico, reached by paired curving staircases, and four fluted columns. The cost was $14,000. Besides being used in Macon County, this basic design was imitated in other central Alabama courthouses, including the Tallapoosa County Courthouse at Dadeville, the Lowndes County Courthouse at Hayneville, the Butler County Courthouse at Greenville, and the Lee County Courthouse at Opelika. These courthouses all expressed the view that the place of justice should be a "temple of democracy" and so they were constructed in the fashion of ancient Greek temples.

At the outbreak of the Civil War, Tuskegee was the center for trade and culture in a large county that included such towns as Auburn, Union Springs, Notasulga, and Loachapoka. After the Civil War, Macon County lost territory, population, wealth, and influence.

The Reconstruction legislature of 1866 created several new counties. Among these were Bullock and Lee. Much of the territory used to create these counties came from Macon County. In 1870 the population of Macon County had declined to less than 18,000, and its area had been reduced to 622 square miles.

The 1880 census revealed a further decline in the population of Macon County. Yet, despite this problem, the elec-

tion of 1880 set the stage for Tuskegee and Macon County to become known around the world.

In 1880, many residents of Macon County were trying to unseat the two county legislators. The election result could not be predicted. These legislators made a political promise to Lewis Adams, a black leader, that in return for the black vote that year they would support the establishment of a vocational school for black students. The two won re-election with the help of black voters, and then kept their promise. On February 12, 1881, Governor Rufus Cobb signed the bill creating the Tuskegee Normal and Industrial Institute. The Institute opened its doors with 40 students on July 4, 1881. Through the efforts of Booker T. Washington, George Washington Carver and others, Tuskegee Institute helped to transform the South through education. The school is now Tuskegee University.

When Macon County decided to build a new courthouse in 1905, the style chosen was Richardsonian Romanesque. Romanesque architecture is a basic architectural style dating back almost 1,000 years. Its characteristics include rounded arches, barrel vaults and thick walls. The style is noted for its strength and solidity.

Between 1880 and 1910, a variation of the Romanesque style became quite fashionable for public buildings in the United States. The style was popularized by Henry Hobson Richardson of Boston. His version of Romanesque contained massive pyramidal roofs, peaked towers, turrets, and low, rounded Syrian arches for porches or other openings. This style is called Richardsonian Romanesque.

The 1905 Macon County Courthouse, which continues to serve the county, is quite impressive for a rural county and is one of the best preserved turn-of-the-century courthouses in Alabama. The main or southern side of the building contains a six-story central clock tower with flanking octagonal turrets. The roofs over the tower and turrets are steep-pitched pyramids. Rounded arches predominate in the openings of the tower. The structure is brick with granite trim. A special feature of the clock tower is the decorative granite gargoyles located at each corner. These gargoyles are an artistic combination of an eagle and a dragon. The Macon County Courthouse is the only courthouse in Alabama with gargoyles.

Since the courthouse is irregularly shaped, the western side is totally different from the southern exposure. The western entrance has a one-story flat-roof portico with rounded arches for the three openings. The entrance is framed by twin four-story towers. Directly above the entrance is a gabled dormer matching the height of the twin towers.

The courthouse is located directly northeast of the town square. The two previous courthouses were located in the center of the square. When the present courthouse was completed, the Greek Revival structure in the square was torn down. The square now serves as a memorial park.

The present Macon County Courthouse was designed by J. W. Golucke and Company of Atlanta who also designed the Chambers County Courthouse of 1899 and the Calhoun County Courthouse of 1900. Remarkably the Macon County structure was completed in 1906 at a cost of only $42,000. It was named to the National Register of Historic Places on November 17, 1978.

Macon County has a unique distinction in Alabama history. In the 1950s, due to civil rights-era hysteria, the county was targeted not simply to be reduced as in 1866, but to be abolished. Fears of a black majority taking control of county government motivated the legislature to propose a constitutional amendment that would alter the boundaries, reduce the area, or entirely abolish Macon County based on the proposal of a committee. The committee was composed of senators and representatives from Bullock, Elmore, Lee, Montgomery, Macon, and Tallapoosa counties. This

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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.

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committee could recommend the transfer of all Macon County territory in various portions to contiguous counties.

On December 17, 1957, the citizens of Alabama, by a two to one majority, approved this proposal, and it became Amendment No. 132 to the Alabama Constitution. The amendment provided that a report of the "abolition" committee had to be submitted to the legislature by the first Friday in October 1958.

The committee met, but could arrive at no recommendation for the legislature. The representatives failed to reach any agreement on how to divide up the population and territory of a county where blacks outnumbered whites seven to one. The "abolition" committee soon disbanded.

This amendment remained a part of the Alabama Constitution until 1982. Theoretically, the committee could have been revived to once again consider abolition of the county. On March 2 of that year, the voters of Alabama passed Amendment No. 406 which repealed the previous amendment.

Tragedy struck the Macon County Courthouse on August 2, 1985, when a fire destroyed much of the interior. The county rented a building across the street and moved the courts and some offices into this courthouse annex. The structure had a small, make-shift courtroom with folding chairs. Other county offices were scattered throughout town.

For approximately two years the county leaders debated the fate of their courthouse. Some argued for a new building while others desired to retain the uniquely designed but damaged old courthouse. Finding the funds for any project was a problem. Finally, in 1987, plans were initiated to remodel the old courthouse. Construction began in 1989.

Because of limited resources, the Macon County Commission had to be creative in financing and implementing this project. Major L. Holland of Tuskegee was architect, and Hardaway Construction Company of Nashville, Tennessee, was construction manager. However, to save money in construction, the county itself served as its own general contractor. The county divided the original bid into 16 bid projects and purchased materials directly for each phase. The county used inmate labor from the Bullock County Correctional Facility at Union Springs to further bring down costs. With the use of various cost-saving measures, the project totalled $1.7 million instead of the originally estimated $2.5 million.

A view of the main or south facing entrance after renovation

The historic Macon County Courthouse was rededicated in a ceremony held on Sunday April 7, 1991, almost six years after the destructive fire. Representatives from the Governor's office, the supreme court, the Alabama Legislature, the U.S. Congress and Senate, other state agencies, and the City of Tuskegee were present for the ceremonies.

One day the city of Tuskegee and the county of Macon hope to undertake a joint venture to build a city-county justice center complete with courtrooms and jail. Due to careful foresight in the renovation project, if a new building is ever constructed, the old court facilities at the courthouse can be easily and cost-effectively converted into county offices. With an eye on the future but recognizing its past, Macon County should be saluted for saving its historic courthouse building. ■

The author extends thanks to the Macon County Commission and its president, Frank H. Lee, for providing information and photographs for use in preparing this article.

BOOK REVIEW

by Patrick C. Cooper

BUS RIDE TO JUSTICE

By Fred D. Gray, Sr.

Fred D. Gray's autobiography, *Bus Ride to Justice*, is a "must read" for students of the Civil Rights Movement and for those interested in the tactical maneuvering and legal underpinnings of several of the most important constitutional cases to emerge from Alabama. It is also a wonderful, illuminating story of how a talented community-based lawyer, dedicated to a cause, used the law as a catalyst for effecting change in our society.

Mr. Gray's story begins in Montgomery. Although he excelled academically at Alabama State College (what is now Alabama State University), Mr. Gray was forced to attend law school outside the state because the University of Alabama would not admit blacks. For some blacks, that injustice might have caused them to never look back. For Mr. Gray, the experience of exclusion acted as a magnet: he pledged to return to his hometown, law degree in hand, to "destroy everything segregated I could find."

Providence smiled on Mr. Gray. One of his first clients was Rosa Parks, who was arrested for violating Montgomery's segregation laws by refusing to vacate her seat on a bus to a white man. Parks' criminal conviction triggered the massive 14-month boycott of Montgomery's segregated buses by blacks. It also ushered onto center stage a little-known 26-year old Baptist minister named Martin Luther King, Jr. who, as Mr. Gray points out, was the "default" candidate to lead the protest because selection of either of the two obvious choices for that position would have alienated the other's supporters.

Much has been written about the Montgomery bus boycott, but Mr. Gray's book provides a rare, first-hand description of the legal and political battles that issued from that groundbreaking event. Indeed, a central thesis of Mr. Gray's book is that several of the most significant constitutional and civil rights cases decided by the Supreme Court have roots in Ms. Parks' courageous refusal to give up her seat—that "bus ride to justice."

Mr. Gray's rapid rise as a civil rights lawyer, though, almost came as briskly to a halt in 1956. In the midst of the boycott, he was indicted by a Montgomery County Grand Jury for purportedly representing a plaintiff without her consent in a federal desegregation lawsuit. (The

Fred D. Gray, Sr.

indictment was made notwithstanding the fact that Mr. Gray had obtained, prior to filing the suit, a written retainer agreement from his client *and* a tape recording of her oral agreement.) Here, Mr. Gray relates a poignant story about how Judge Frank Johnson, then two months new to the United States District Court for the Middle District of Alabama, came discreetly to Mr. Gray's aid.

At the conclusion of a meeting in Judge Johnson's chambers on another matter, the judge inquired about the status of the prosecution. Mr. Gray responded and, as he turned to leave, the judge suggested offhandedly: "You know whatever offense there was, if any, was committed when the lawsuit was filed on the second floor of this courthouse, of which the United States government has exclusive jurisdiction." Those words proved prophetic because the Montgomery County District Attorney soon dropped the charge for lack of jurisdiction. In his book, Mr. Gray also counters the notion that Judge Johnson was a liberal, activist jurist, pointing out that Judge Johnson ruled against him on several significant civil rights cases. But Judge Johnson was extraordinary among Southern judges of the time, Mr. Gray writes, because he had the "intestinal fortitude" to interpret the Constitution as protecting the rights of all people.

Mr. Gray's career, which includes a stint as a state legislator and work as a minister, has been long and full. The list of cases he has litigated reads like a road map of constitutional and civil rights landmarks. A few examples of those cases are:

- *Gomillion v. Lightfoot*, in which the United States Supreme Court dealt a body blow to racial gerrymandering and laid the groundwork for the principle of "one man, one vote" later enunciated in *Baker v. Carr*;
- *Lee v. Macon County Board of Education*, which resulted in a statewide injunction ordering the desegregation of all of the primary and elementary schools in Alabama;
- *Sullivan v. New York Times*, a landmark United States Supreme Court libel case holding that a public official may not recover damages for libel absent proof that the statement was made with "actual malice";
- *Vivian Malone v. University of Alabama* and *Franklin v. Auburn*, the cases that desegregated the University of Alabama and Auburn University, respectively;
- *St. John Dixon v. Alabama State Board of Education*, in which the Eleventh Circuit for the United States Court of Appeals held, for the first time, that students have a constitutional right to an education at state-supported institutions, and that the Due Process

Clause of the Fourteenth Amendment requires notice and an opportunity to be heard before a student may be expelled from a public institution; and

- *State of Alabama v. NAACP*, in which the United States Supreme Court made clear that a civil rights organization has a legal right to assert and protect the rights of its members and to refuse to disclose its members' names and addresses.

In a recent interview, Mr. Gray discussed his book, his legal career and Alabama:

Q: Why is the *Gomillion* case one of your favorites?

A: That case was very challenging. Moreover, I probably felt that one more keenly because I realized the problem African-Americans were having in obtaining the ballot in the City of Tuskegee. They had been litigating in Tuskegee for the right to vote long before I became involved in the case. It goes all the way back to the Boswell Amendment which I think was passed back in the forties. They went through a very difficult time in getting the ballot. Finally, when municipal elections were coming up, and we had about 400 blacks in the city, and we knew we would at least play a role in who would be elected, they put everybody out of the city. It was very ingenuous the way they did—by just changing the city limits and then saying that it is a "political issue" which the courts could not touch. It was challenging to come up with a theory that would work, and to find lawyers who would have enough faith and confidence in what I was trying to do and who would be willing to help me with it....

Q: What do you see as the present challenges facing those who were involved in the Civil Rights Movement?

A: I really think this whole business of economic disparity is one of the areas that I have real serious problems with. Somehow we need to do something to be sure that all people can share in the economic prosperity of this nation. And clearly there is disparity between blacks and whites in this area. Just like we were able to come up with some of the strategies for attacking overt racial discrimination, there should be some way that young legal minds, including yours, can go into the Constitution and see if there isn't some way to come up with ideas and theories that can be advanced to solve these problems.

Q: What is your opinion of the present state of race relations in Alabama given your long perspective?

A: I think we have made a lot of progress in race relations. I'm impressed with the substantial increase in the number of elected officials. I think Alabama now probably has the largest number of black elected officials of any state in the Union. When I started practicing we had maybe one or two from the one or two black towns we had in the state at that time. Most of these positive changes can be traced back to* Gomillion v. Lightfoot *and related issues that arose as a result of that case. I'm also glad to see a substantial improvement in terms of African-Americans employed in state government. When I was in the state legislature in 1970-74, there were absolutely no blacks doing anything other than janitorial work in state government. I went the other day to the legislature with Mr. McGregor in connection with casino bills and you have blacks in meaningful positions all over the state house. So I think we have made a lot of progress....

Q: Did you ever imagine when you returned to Alabama in 1954 that you would be as successful and integrated into the Alabama State Bar as you are today?

A: That never entered my mind. The reason it didn't was that the press of every day, the sheer pressure of what I had to do, was so great that all I could do was think about what I had to do to survive. As you can tell from the book, my career has taken so many twists and turns that I don't where it is going next, other than I know that I am trying to back away from it. But I never really thought about where it was ultimately going to lead to, and I never lost focus on my desire and why I became a lawyer—and that was to destroy everything segregated I could find. I took it day by day and worked with it. It doesn't seem like it has been over 40 years. ■

Patrick C. Cooper
Patrick C. Cooper is a graduate of Yale College and Yale Law School. He clerked for Chief Judge Sam C. Pointer of the United States District Court for the Northern District of Alabama. He practices with the firm of Maynard, Cooper & Gale in Birmingham, Alabama.

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Rebecca Lynn Wright

Lawyers in the Family

Frank T. McCollum (1995) and James Terry McCollum, Jr. (1990) (admittee and brother)

Allison Black Anderson (1995) and Patrick J. Anderson (1994) (admittee and husband)

William Terry Bullard, Jr. (1995) and W. Terry Bullard (1980) (admittee and father)

Rebecca Farris (1995) and Dwight Jett, Jr. (1987) (admittee and brother)

Stan McDonald (1995) and Robert Aderholt (1992) (admittee and brother-in-law)

Bernard D. Nomberg (1995) and Joel M. Nomberg (1967) (admittee and father)

Patrick D. Pinkston (1995) and John E. Enslen (1972) (admittee and father-in-law)

Don J. Gilbert (1995) and Judge Sharon G. Yates (1982) (admittee and sister)

P. Leigh Sansone (1994) and Peter Maury Mitchell (1993) (admittee and cousin)

Lawyers in the Family

Michele Falletta Durham (1995) and Bart Durham (1963) (admittee and father-in-law)

Thomas Ralston Long, IV (1995) and Harry Pharr Long (1979) (admittee and brother)

Jodee Loaring Rowe (1995) and Charles Warren Rowe (1972) (admittee and father)

Malvern U. Griffin, III (1995) and Malvern U. Griffin, II (1951) (admittee and father)

Murray H. Gibson, Jr. (1995) and Dana C. Gibson (1993) (admittee and sister-in-law)

John A. Daugherty (1995) and Cheryl A. Daugherty (1982) (admittee and wife)

Roger Hepburn (1995), D. Tara Middleton (1995) and Tim R. Wadsworth (1985) (admittee/ fiance, admittee/ fiancee and [future] father-in-law/stepfather)

February 1995 Bar Exam Statistics of Interest

Number sitting for exam	282
Number certified to Supreme Court of Alabama	136
Certification rate	48 percent

Certification percentages:

University of Alabama School of Law	60 percent
Cumberland School of Law	61 percent
Birmingham School of Law	26 percent
Jones School of Law	56 percent
Miles College of Law	10 percent

Lawyers in the Family

John Robert Colvin (1995) and Judge Gus Colvin, Jr. (1965) (admittee and father)

John J. Davis (1995) and Henry D. Binford (1982) (admittee and brother-in-law)

Louis C. Rutland (1969) and L. Cooper Rutland, Jr. (1995) (father and admittee)

BAR BRIEFS

• **The Alabama Association of Legal Secretaries** held its annual meeting May 5-7, 1995 in Tuscaloosa, Alabama and the following new officers were installed:

- **President**—Ginny Cheek, Cabaniss, Johnston
- **President-elect**—Debbie Whitman, Montgomery County District Attorney's Office
- **1st Vice-president**—Barbara Malone, Collins, Galloway & Smith
- **2nd Vice-president**—Beverly Lynn, Balch & Bingham
- **Secretary**—Nell Yarbrough, Schuessler, Sandlin & Thigpen
- **Treasurer**—Babs DeKeyser, Hon. Michael E. McMaken
- **National Director**—Susan Turner, Burr & Forman and
- **Tammy Denson** of Williams & Williams in Tuscaloosa was named 1995 Member of the Year.

• Two Alabama attorneys, **Phillip E. Adams, Jr.** of Opelika and **Fred David Gray** of Tuskegee, were recently elected Fellows of the American Bar Foundation.

The Fellows is an honorary organization of attorneys, judges and law teachers whose professional, public and private careers have demonstrated outstanding dedication to the welfare of their communities and to the highest principles of the legal profession.

Established in 1955, Fellows encourage and support the research program of the American Bar Association.

Adams, of the firm of Walker, Hill, Adams, Umbach, Meadows & Walton, graduated from Auburn University in 1965 and the University of Alabama School of Law in 1968. He has served as president of the Lee County Bar Association and the Alabama State Bar. A member of the ABA since 1969, he has served on the House of Delegates since 1991. He was a municipal judge for the City of Opelika from 1976 to 1991.

Gray, senior partner of the firm of Gray, Langford, Sapp, Davis & McGowan, received his undergraduate degree from Alabama State University and his law degree from Case Western Reserve University. He has served as president of the Macon County Bar Association.

He was a member of the Alabama House of Representatives from 1970 to 1974, a state bar commissioner for the Fifth Judicial Circuit in 1983, and presently serves on the Alabama Advisory Committee to the Civil Rights Commission.

• The American College of Trust and Estate Counsel announces that **Ralph H. Yeilding** has been elected a Fellow of the College. Yeilding practices with the Birmingham firm of Bradley, Arant, Rose and White.

• **Mahala Ashley Dickerson,** a partner with the Anchorage, Alaska firm of Dickerson & Gibbons, was chosen as one of six recipients of the Fifth Annual Margaret Brent Women Lawyers of Achievement Award, sponsored by the ABA Commission on Women in the Profession. Ms. Dickerson, a 1948 admittee to the Alabama State Bar, was the featured speaker at the state bar's 1994 Grande Convocation.

The awards honor outstanding women lawyers who have achieved professional excellence and who have contributed to the success of women throughout the profession. The ceremony will be held August 6, 1995 at the ABA Annual Meeting in Chicago. ■

Your Alabama State Bar Staff

By Pamela L. Mable

Keith B. Norman, executive director

Keith has been the executive director of the bar since September 1, 1994. With this new position, Keith wears three hats. As executive director, Keith's duties and responsibilities include overseeing admissions and licensing and working with the general counsel's office on such matters as coordinating ongoing disciplinary issues affecting the bar.

In addition to his responsibilities as executive director, Keith is an elected officer of the board of bar commissioners. He serves as secretary to the board of bar commissioners, and his duties include overseeing everything related to the board, such as providing notices to the commissioners, organizing the agenda for meetings, taking minutes of the meetings, having those minutes transcribed and distributed, insuring that the board's policies are implemented, handling the electoral functions by making sure that members are properly elected; notifying the judicial circuits when a vacancy is coming up; and seeing that the various committee appointments are made.

The third hat that Keith wears is the "associational" hat. In this capacity Keith works with other state agencies and the Legislature in matters concerning the bar (which is a state agency) and maintains fiscal policies that are consistent with the Finance Department's and Examiner of Public Accounts' policies and procedures.

Prior to becoming executive director, Keith served as the state bar's director of programs for six years. Keith worked with the law firm of Balch & Bingham in Montgomery before joining the state bar staff.

Keith is married to Teresa Norman, an attorney, who serves as the staff attorney for Justice Ralph Cook of the Alabama Supreme Court. They have four children.

Margaret Boone, administrative assistant

Margaret has been with the bar for 17 years. Her main responsibilities include being secretary to the executive director; assisting in the preparation of all annual meetings, commissioners' meetings and commissioners' elections; and maintaining records and personnel files.

Margaret is familiar with many aspects of the bar because she has worked as the receptionist, as the lawyer referral secretary and as the bookkeeper.

Margaret is a native of Prattville where she currently lives with her husband. They have three sons and five grandchildren.

Edward M. Patterson, director of programs

Ed joined the state bar in October 1994 as the director of programs. He has had a varied past including clerking with Justice Hugh Maddox for two years, working with the bar for four and a half years as the first assistant general counsel, and 14 years in private practice including with the Montgomery law firm of Hill, Hill, Carter, Franco, Cole & Black, and as a sole practitioner.

Ed enjoys proactive management and the challenge of providing expanded services programs to the membership. His goal is that some program will enhance the personal or professional life of Alabama practitioners in a practical way.

As director of programs, his responsibilities are multi-faceted and changing in view of the ever-changing legal and social environment. For example, Ed is responsible for directing the MCLE program. At present, this is the most time-consuming aspect of Ed's job. In addition, he serves as the liaison and administrative support person between the state bar and the various committees and task forces of the bar. He is also involved in the future of specialization as administrator of the legal specialization board, a 12-member board appointed by the board of bar commissioners, which became effective January 1994 to approve the certification of attorneys within such current specialized areas such as bankruptcy law, and civil and criminal trial advocacy.

Ed is a native of Montgomery. He is married and has two daughters, one who is a sophomore at Auburn University and another who is a senior at Trinity Presbyterian School.

Diane Weldon, administrative assistant for programs

Diane has been with the bar since 1978, when she came as a student worker as part of a business office education course during high school. In 1982, she became a full-time staff member and has been with the CLE program since its inception. Her job entails handling all correspondence relating to CLE, reviewing proposed CLE programs, keeping a running list of all programs and sponsors, maintaining all CLE records and files, and working with the Disciplinary Commission certifying attorneys who fail to get their required annual CLE hours. Diane also is involved with working with the various committees, task forces and sections of the bar. A new area with which she is assisting is the development of legal specialization in Alabama.

Heidi Alves, programs secretary

Heidi, a native of Manhattan, Kansas, has been with the bar as the programs secretary since May 1994. Heidi attended Kansas State University where she received her bachelor of science in management. Prior to that, she was stationed at Fort Jackson, South Carolina. Heidi has a daughter who is one and a half years old.

As programs secretary, Heidi's duties include keeping track of the different sections of the bar and the members of those sections, handling the committee and task force mailings, entering approved CLE programs into the computer system, and maintaining and updating the transcripts indicating CLE credits to be given to lawyers.

Susan H. Andres, director of communications & public information

Susan joined the bar in November 1994 in the newly created position of director of communications and public information. Susan's job focuses on both outreach and inreach programs. Out-

reach programs involve establishing the state bar as the central resource for obtaining and distributing accurate information regarding the legal profession; establishing media contacts; and publicizing major bar activities, such as the Citizen's Conference to be held this year and other bar programs, such as the Alternate Dispute Resolution Center, IOLTA grants and the Volunteer Lawyers Program.

A primary aspect of the inreach program is the ASB "Roadshow '95." With other state bar staff members, Susan is traveling to local bar associations in the state, presenting an overview of the bar's long-range plans. This is also an opportunity to receive input from the local bars on concerns and areas to be addressed in the future.

A major project for 1995, in conjunction with *The Alabama Lawyer* editorial board, is the publication of a newsletter.

Before coming to the bar, Susan served as the executive director of the Chattanooga Bar Association. In addition to her experience in Tennessee, Susan managed the Alabama Radio Network in Birmingham, and she and her husband owned and operated a radio station in Arkansas. They are the parents of a daughter and a son.

Margaret L. Murphy, publications director

Margaret has been with the state bar for ten and a half years as publications director. She serves as the managing editor of *The Alabama Lawyer* and the *Alabama Bar Directory*, and works with those two committees to produce the bimonthly journal and annual directory. In addition to editing these two publications, Margaret is responsible for all the various bookkeeping, advertising and subscription duties related to the two bar publications.

Margaret, a native of Montgomery, is married and has two sons. She attended Brenau College in Gainesville, Georgia and received her degree in communications from Auburn University at Montgomery.

Linda F. Smith, communications assistant

Linda works full-time for the Communications & Public Information department as a communications assistant. Previously, she divided her responsibilities between the Volunteer Lawyers Program and *The Alabama Lawyer*. Before joining the state bar staff, she worked as an administrative secretary at Auburn University at Montgomery and Washington University in St. Louis, Missouri.

Linda is a native of Savannah, Georgia. She has a certificate as a business stenographer/word processor programmer and has obtained her certificate as a legal secretary. She attended Armstrong State College in Savannah.

Christie Tarantino Freeman, membership services director

Christie has been with the state bar for two years. She is the membership services director and her job responsibilities include issuing licenses, collecting fees, maintaining the member records, handling pro hac vice applications and collecting the applicable fees for the client security fund. In addition, Christie also maintains all the current addresses and telephone numbers of the members of the bar.

Christie, a native of Montgomery, worked at the VA Hospital in Montgomery. In 1991, she received her bachelor of science degree in political science from Auburn University at Montgomery and in 1993 she received her master's degree in public administration from AUM. You may have noticed Christie's new last name; she married last month.

Kelly H. Carden, membership assistant

Kelly has been with the bar since January 1994 and she assists with all matters relating to membership. This includes processing the occupational and special licenses, administering pro hac vice applications and maintaining the membership files.

Kelly is originally from Covington, Louisiana. She attended Louisiana State University. She and her husband currently reside in Montgomery with their son, and are expecting another child in November.

Dorothy D. Johnson, director of admissions

Dorothy has been with the state bar for three years. Dorothy's duties include screening bar applications, reviewing law student registration applications, coordinating the bar examination with the board of bar examiners, administering the bar examination, and scheduling/attending Character and Fitness Committee hearings for student and bar applicants.

Dorothy and her husband, both natives of Montgomery, and their two children returned home when her husband retired from the Navy. Dorothy received an accounting degree from Alabama State University.

Judy Keegan, director, Alabama Center for Dispute Resolution

Judy Keegan became the director of the Alabama Center for Dispute Resolution in the fall of 1994. She maintains educational and resource materials and a roster of mediators for use throughout the state court system, and works to coordinate all alternative dispute resolution programs in the State of Alabama. The Center operates under the supervision of the Alabama Supreme Court Commission on Dispute Resolution and in conjunction with the Alabama State Bar Committee on Alternative Methods of Dispute Resolution.

Judy's main duties include providing support to local bar association ADR committees; assisting with the presentation of ADR seminars; maintaining statistical data to evaluate the effectiveness of ADR programs; assisting state agencies in implementing ADR concepts in the administrative process; and promoting conflict resolution programs in the courts, schools and neighborhoods.

Judy, a native of Florida, received her law degree from Catholic University in 1986. She is married and lives in Montgomery.

Tracy Daniel, Alabama Law Foundation, Inc. executive director

Although not technically part of the state bar staff, Tracy is the executive director of the Alabama Law Foundation, Inc. The Alabama Law Foundation is housed at the bar's offices in Montgomery. The foundation runs the IOLTA program and administers various scholarships, including the Kids' Chance Scholarship endowed by the Workers' Compensation Section of the bar and the Cabaniss, Johnston, Gardner, Dumas & O'Neal Scholarship for second-year law students.

Tracy has been with the foundation for over seven years. Before that, she worked as an assistant with the bar's admissions office.

Tracy is a native of Hurtsboro, Alabama, but became a Montgomery transplant after attending Huntingdon College where she received her degree in marketing. She also has a master's in business administration from Auburn University.

Dawn Howard, ALF assistant

Dawn Howard is one of our newest employees at the bar, having only been here since the end of April. She works for the Law Foundation as an assistant to Tracy Daniel and she also works for the bar one day a week. Dawn is a native of Montgomery and received her degree in marketing from Auburn University in August of 1991. She was a sales representative with Alltel Mobile before joining the state bar staff.

Elizabeth Shwarts, admissions assistant

Some of Elizabeth's duties include processing student applications and assisting in the processing of bar examination applications, handling requests for copies of bar applications and admission information packets, assisting in the administration of the bar examination and monitoring special accommodations examinees.

Elizabeth served as a secretary for two ministers at First Baptist Church located on Perry Street in Montgomery. Elizabeth is a native of Montgomery where she graduated from Lanier High School. She has two children, a boy and a girl, ages 11 and 13.

Gale Skinner, bookkeeper

Gale started with the bar 13 years ago, and it goes without saying that she has seen much growth over those years. Gale has served as the bookkeeper for nine years where her primary responsibilities include accounting for all funds coming into and going out of the bar, maintaining financial records, dealing with the state Comptroller's Office and Examiners of Public Accounts, and handling bar investments. One change that has occurred relatively recently is the direct receipt by the bar of bar license fees. By centralizing the collection of these fees, the state bar knows more quickly who is licensed to practice and who is not.

Before becoming the state bar's bookkeeper, Gale worked as the lawyer referral secretary. She lives in Wetumpka with her husband and two children.

Margaret (Maggie) Stuller, graphics arts director

Maggie has been with the bar for ten years in the graphics arts department, where she is responsible for running the in-house print shop. This includes offset printing of the Alabama Bar Reporter, envelopes, stationary and other forms. She also helps in developing and typesetting the various forms, pamphlets and memos which are printed in-house.

Maggie attended John Patterson Technical College for graphic arts in Montgomery. Prior to that she served in the Air Force for four years at Maxwell Air Force Base. She is a native of Oregon, Ohio where she graduated from Cardinal Stritch High School.

Katherine C. Creamer, Lawyer Referral Service director

As director of the Lawyer Referral Service, Katherine operates the lawyer referral service by receiving all incoming calls from people who do not have a lawyer or who do not know how to obtain the services of a lawyer. Katherine then refers that client to an attorney in a county in which they need help for their particular problem. In addition, she is responsible for the coordinating and billing of the Alabama Bar Reporter.

Katherine has been with the state bar for three years. She is a native of Montgomery, where she attended Robert E. Lee High School and has attended George Wallace Junior College.

Jennie Logan, receptionist

Jennie is that very pleasant voice that you hear when you call the state bar. She professionally and courteously directs telephone calls received and greets guests to the state bar. Before joining the bar in January 1994, Jennie served as Governor Hunt's receptionist. She is a native of Elmore County. She is married and has two children, a daughter who will be graduating from Auburn University and a son who is currently in high school.

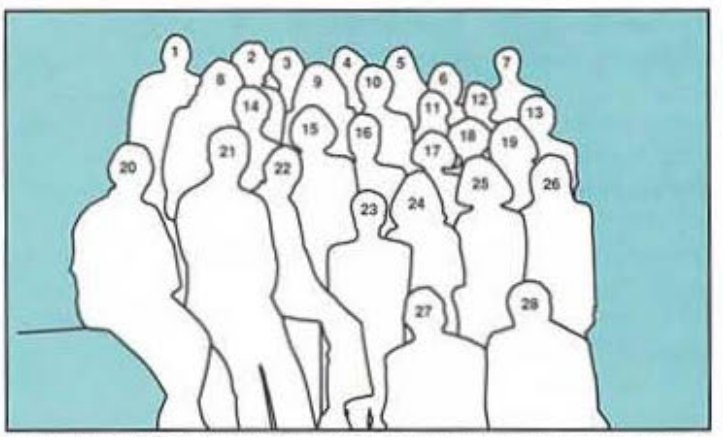
Robert W. Norris, general counsel

General Norris has been the general counsel of the state bar since 1988. He and his staff are responsible for enforcement of the Rules of Professional Conduct, representing the bar in state and federal court, providing advice to bar members on ethics matters and as legal advisor to the officers and commissioners of the bar. The general counsel's staff has grown from six in 1985 to 11 today, including four lawyers, three investigators and four administrative assistants.

General Norris received his law degree from the University of Alabama and a master's in tax law from George Washington University. He served 31 years as a lawyer (Judge Advocate) in the Air Force, retiring in 1988 as the Air Force Judge Advocate General. He is married with two children and three grandchildren.

J. Anthony McLain, assistant general counsel

Tony McLain has served as assistant general counsel since October 1988. He received his undergraduate degree from Auburn University in 1974 and his law degree from Cumberland School of Law in 1977. Upon graduation from law school, Tony went to work with the Alabama Attorney General's Office as an assistant attorney general. After two years with the AG's Office, he left to enter private practice in Montgomery as a part-



1. Linda F. Smith, 2. Dorothy Johnson, 3. Margaret L. Murphy, 4. Kim Ellis, 5. Christie Tarantino Freeman, 6. Bonnie Mainor, 7. L. Gilbert Kendrick, 8. Elizabeth Shwarts, 9. Katherine C. Creamer 10. Kelly H. Carden, 11. Heidi Alves, 12. Margaret Boone, 13. Myrna McHenry, 14. Edward M. Patterson, 15. Susan H. Andres, 16. Vivian Freeman, 17. Gale Skinner, 18. Jennie Logan, 19. Cheryl Rankin, 20. Maggie Stuller, 21. Keith B. Norman, 22. Robert W. Norris, 23. Diane Weldon, 24. Peggy Garrett, 25. Judy Keegan, 26. Vicki Glassroth, 27. J. Anthony McLain, 28. Milton L. Moss

ner in a two-man firm. After nine years in private practice, Tony came to work for the bar.

His primary responsibilities as assistant general counsel are providing ethical opinions to attorneys, prosecuting cases of ethical misconduct involving attorneys, and representing the bar, its officers and staff in litigation in the state and federal courts.

He is married and has two children

L. Gilbert Kendrick, assistant general counsel

Gil Kendrick began working for the Office of General Counsel on a part-time basis in January 1991 and became full time in 1992. As assistant general counsel his duties include prosecuting violations of the Rules of Professional Conduct and providing opinions in response to ethical inquiries.

Gil is a native of Butler County, Alabama and attended the University of Alabama undergraduate and law schools. After law school, he clerked for Judge James Bloodworth on the Alabama Supreme Court and served as an assistant attorney general for eight years. He was in private practice for 12 years prior to joining the Office of General Counsel.

He is married and has three children.

Milton L. Moss, assistant general counsel

Milton has been with the Center for Professional Responsibility as an assistant general counsel since January 1991. He has the duty of dealing with disciplinary cases from the initial screening stage through the appellate stage. Also, Milton deals with requests from lawyers and others seeking advice regarding ethical problems or interpretations of the Rules of Professional Conduct.

Milton is originally from Racine, Wisconsin, but was raised primarily in St. Louis, Missouri. After attending the University of Missouri and the University of Alabama School of Law, Milton clerked for Justice James Faulkner of the Alabama Supreme Court, served as an assistant U.S. Attorney in Montgomery and in Alaska, and practiced law in Alaska. He returned to Montgomery in 1989 and practiced law here until 1991. He is married and has two children, one a graduate of AUM and one a graduate of Emory University.

Vivian Freeman, general counsel's secretary

Vivian's title as the secretary to the general counsel is somewhat misleading because her job entails more than secretarial duties. Vivian also handles petitions for reinstatements, maintains statistical data for disciplinary purposes, and files any appeals which are received through the admissions office dealing with character and fitness. She is also the ethics opinion coordinator which entails indexing all informal opinions given by the lawyers in the discipline office. Vivian also is responsible for indexing and upkeeping formal opinions written by the Office of General Counsel.

Vivian has been with the bar staff since 1981.

Kim Ellis, complaints intake & advertising coordinator

Kim, like many of the other staff members, wears more than one hat. As the complaints intake coordinator, she opens files on each complaint that comes to the Center for Professional Responsibility. As the advertising coordinator, she receives all legal advertisements which must be submitted according to the Rules of Professional Conduct. She reviews each advertisement that is submitted to insure that it complies with the Rules and maintains all such advertisements in the files.

Kim has been with the Center for Professional Responsibility for two years. Before that, she worked with the CLE division of the state bar.

Kim is a native of Montgomery and graduated from Jeff Davis High School. She has attended Auburn University. She is married and has three sons.

Bonnie Mainor, Unauthorized Practice of Law, Client Security Fund claims administrator, and CSF & CLE Compliance coordinator

Bonnie has a variety of responsibilities in her duties at the bar. As Client Security Fund claims administrator, she handles claims to the fund and presents an investigative report on each claim to the Client Security Fund Committee for payment or denial. In addition, Bonnie handles the delinquent Mandatory Continuing Legal Education files and the files of those attorneys who have not complied with the CSF assessment. Bonnie also takes care of any unauthorized practice of law matters and works closely with the UPL Committee.

Bonnie worked with the Grievance committees from 1976 until she left the bar in 1981. In 1989 she was rehired to work as Tony McLain's secretary. She worked in that position for five years and for the last year has worked in her current job. Bonnie has been with the bar for a total of ten and a half years.

She is originally from Lincoln, Illinois. She is married and has three children. Her younger daughter is 11 and will be attending the ISIA World Ice Skating Competition in Houston this summer. Her son attends Southern Union Community College in Opelika, Alabama and her older daughter is married and lives in Florida.

Vicki Glassroth, paralegal/investigator

Vicki's job is two-fold. She has served both as a paralegal and investigator since February 1991, primarily for Gil Kendrick. As a paralegal she researches legal issues, attends hearings, summarizes depositions and helps prepare for hearings and appeals. She also fields questions from complainants needing clarifications of the Rules of Professional Conduct and any other questions that may come in the office. As an investigator for Gil, Vicki receives a certain number of complaints which are assigned to her office that she summarizes. She also maintains records of any "repeat offenders". If a complaint is deemed to be meritorious, she commences an investigation of the allegations which can include working with law enforcement agencies, such as the U.S. Attorney's Office, the Attorney General's Office and local district attorney offices.

Vicki is from Montgomery where she resides with her husband, Stephen, an attorney, and their son. Vicki attended the University of Alabama where she received her degree in English and subsequently her paralegal certification. Vicki was the first president of the Montgomery County Bar Association, Legal Assistant Section.

Pamela L. Mable
Pamela L. Mable is a graduate of Samford University and the University of Alabama School of Law. She is an associate at Thorington & Gregory, and a member of the editorial board of *The Alabama Lawyer*.

Robin Key, secretary

Robin is the newest staff member of the disciplinary office. Her main jobs are the closing of all discipline files, sending out press releases, placing discipline ads in the newspapers, requesting supreme court orders, backing up the complaint intake coordinator, and assisting all other employees, if and when the need arises.

Robin is a native of Alexander City. She moved to Montgomery in 1993 to continue her education at Auburn University at Montgomery. While attending AUM Robin received certification as a paralegal and was a member of the AUM pre-law society. Robin graduated this June with a Bachelor of Science degree in Justice and Public Safety.

Peggy Garrett, investigator/paralegal

Peggy joined the state bar staff in May 1992, and provides staff support to Milton Moss. Her main duties include research, preparing for trials/hearings, assisting in the appeal of disciplinary matters handled by Milton, statewide attorney assistance, working with state and/or local agencies during the investigation and discovery stages of complaints, summarizing new complaints, investigation of meritorious complaints, and maintaining the law library for the Office of General Counsel.

In addition, Peggy has communicated with other state bars regarding their rules, regulations, policies and procedures involved in the disciplinary process to see where improvements could be made at the Alabama State Bar.

Peggy obtained her associate degree/certification in paralegal studies at Auburn University at Montgomery in March of this year. She is presently attending AUM, majoring in jurisprudence. She lives in Montgomery, and has two children, a daughter and a son.

Cheryl Rankin, investigator

Cheryl, a Columbia, Mississippi, native, has been with the state bar since September 1988. Before that, she worked for a law firm in Hattiesburg, Mississippi. When Cheryl first came on board, she served as the complaints intake coordinator. In September 1994, she became an investigator.

As an investigator, Cheryl works primarily with Tony McLain. In addition to screening complaints and investigating all complaints deemed meritorious, Cheryl interviews witnesses and does clerical work for Tony, such as maintaining trial and hearing dates. Also, by working with Tony, Cheryl assists with any civil litigation that the bar is involved in directly.

Cheryl attended Mississippi State College for Women in Columbus, Mississippi. ■

C·L·E OPPORTUNITIES

The following in-state programs have been approved for credit by the Alabama Mandatory CLE Commission. However, information is available free of charge on over 4,500 approved programs nationwide identified by location date or specialty area. Contact the MCLE Commission office at (334) 269-1515, or 1-800-354-6154, and a complete CLE calendar will be mailed to you.

JULY

10 Monday
COBRA COMPLIANCE
Birmingham, Holiday Inn Redmont
A.E. Roberts Co.
Credits: 5.5 Cost: $260
(800) 486-4585

11 Tuesday
SECTION 125 PLANS
Birmingham, Holiday Inn Redmont
A.E. Roberts Co.
Credits: 3.8 Cost: $145
(800) 486-4585

MASTERING REAL ESTATE TITLES AND TITLE INSURANCE
Mobile, Admiral Semmes
National Business Institute, Inc.
Credits: 6.0 Cost: $149
(715) 835-8525

DEFENDING WRONGFUL DISCHARGE CLAIMS UNDER ALABAMA LAW
Birmingham, Harbert Center
National Business Institute, Inc.
Credits: 6.0 Cost: $149
(715) 835-8525

12 Wednesday
MASTERING REAL ESTATE TITLES AND TITLE INSURANCE
Montgomery, Madison Hotel
National Business Institute, Inc.
Credits: 6.0 Cost $149
(715) 835-8525

DEFENDING WRONGFUL DISCHARGE CLAIMS UNDER ALABAMA LAW
Huntsville, Marriott
National Business Institute, Inc.
Credits: 6.0 Cost: $149
(715) 835-8525

13 Thursday
ALABAMA/FEDERAL FIDUCIARY INCOME TAX WORKSHOP
Birmingham
Professional Education Systems, Inc.
Credits: 6.7 Cost: $149
(800) 826-7155

14 Friday
ALABAMA/FEDERAL FIDUCIARY INCOME TAX WORKSHOP
Mobile
Professional Education Systems, Inc.
Credits: 6.7 Cost: $149
(800) 826-7155

18 Tuesday
LIMITED LIABILITY COMPANIES: THE ENTITY OF CHOICE
Birmingham, Harbert Center
National Business Institute, Inc.
Credits: 6.0 Cost: $149
(715) 835-8525

19-22
ANNUAL MEETING
Birmingham, Wynfrey Hotel
Alabama State Bar
(334) 269-1515

21 Friday
WORKERS COMPENSATION IN ALABAMA
Mobile
Lorman Business Center, Inc.
Credits: 6.0 Cost: $159
(715) 833-3940

27 Thursday
INSURANCE LAW
Birmingham
Lorman Business Center, Inc.
Credits: 6.0 Cost: $159
(715) 833-3940

AUGUST

4 Friday
INTRODUCTORY ARBITRATOR TRAINING
Birmingham
American Arbitration Association
Credits: 6.3 Cost: $75
(404) 325-0101

9-11
MEDIATOR TRAINING WORKSHOP
Montgomery
American Arbitration Association
Credits: 20.0 Cost: $600
(404) 325-0101

OPINIONS OF THE GENERAL COUNSEL

By ROBERT W. NORRIS, general counsel

QUESTION:

Through Legal Services Corporation I have agreed to represent an indigent individual in a petition to modify his divorce decree to terminate or reduce his child support since he is now unemployed. He quit his job with a nervous breakdown and has been hospitalized twice for suicide attempts. He has stopped seeking psychological counseling because he is scared of indigent health care systems and has feelings of paranoia about being watched and or investigated. It has now come to my attention that, in fact, there is an ongoing investigation about his alleged sexual abuse of one of his children two years ago. He has not been allowed visitation with his children in over a year pursuant to terms in the divorce decree for this very reason.

Every time I talk to him about any facet of his case he has a complete emotional breakdown. He cannot handle any stress right now. I cannot convince him to seek psychological counseling because of his fear of what might be revealed.

He is so unstable, I do not believe I can proceed with the petition to modify, because I will not be able to get him through a court proceeding or even the discovery necessary to prove his case. He has no immediate family that I can call upon for help.

I have been approached by opposing counsel (who must represent his client, the ex-wife, who will not consent to a temporary termination of the court ordered child support) that he would be willing to allow an in-chambers presentation to the judge about our dilemma. If I do so I will be divulging to the judge that the man has a serious emotional problem that the judge might want me to establish or he might even order psychological testing to see if my client can adequately assist me with the case. In either event, if the man goes to any counselor further evidence would be revealed about his serious feelings of guilt and remorse which could be used against him in a criminal investigation.

I cannot counsel with my client as to which course to take because he cannot deal with conflict without an emotional breakdown and I feel this could jeopardize his life (i.e. another suicide attempt and/or because he is incapable of making rational decisions). On the other hand I cannot leave him without relief from the decree of divorce because the arrearages would just keep adding up at $911.56 per month. (He was formerly employed at a very good wage working in an intensive care unit at a local hospital which caused such a high child support award).

I am convinced my client's emotional instability is real and I have experience and training to make that judgment.

How must I proceed in properly representing my client?

This is, of course, urgent because a trial date is coming up in a few weeks and I am further concerned for my client's well being."

ANSWER:

The Alabama Rules of Professional Conduct allow you to seek appointment of a guardian for your client, or to take any other protective action if you reasonably believe that your client cannot adequately act in his own interest. Further, the rules allow you to disclose such confidential information as may be required to adequately represent your client and advance your client's interest.

Rule 1.14, Alabama Rules of Professional Conduct, states as follows:

"Rule 1.14 Client Under A Disability

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."

The Comment portion of Rule 1.14 takes note of the fact that disclosure of your client's disability could adversely affect his interest. The Comment directs that the lawyer may seek guidance from an appropriate diagnostician in furtherance of the client's best interest.

The issue which you face requires consideration of the obligation of confidentiality, but also requires that you assess the situation and make a determination as what you feel would be best, under the totality of the circumstances, for your client's interest. In RO-90-67, the Disciplinary Commission stated that Rule 1.14 "... [R]ecognizes that a lawyer may, on occasion best serve a client by taking action that, on first blush, might appear to be adverse to the client."

In RO-95-03, the Disciplinary Commission reasoned that a lawyer confronted with such a dilemma must determine what is in the best interest of the client based on the lawyer's analysis of all aspects of the situation, including opinions of medical experts. The Commission further stated:

"Much of the burden of this decision is placed on the

NOTICE TO SHOW CAUSE

Notice is hereby given to **Timothy Patrick McMahon** of Foley, Alabama that he must respond to disciplinary file ASB 95-45 within 30 (thirty) days from the date of this publication (July 18, 1995). Failure to respond shall result in further action by the Office of General Counsel. [ASB No. 95-45]

lawyer who must keep foremost in his mind the increased standard of responsibility when dealing with a disabled client. He must assess all aspects of the situation, including expert medical opinions, balancing the client's ability to communicate and to appreciate the serious decisions to be made. If the lawyer has doubts, he should resolve those doubts in a manner that best serves his client. The lawyer should also appreciate the Court's increased concern in matters involving lawyers and their representation of incompetent clients. 'The normal limitations on a lawyer's self-enrichment at the expense of a client are applied with enhanced strictness when the client is a child or otherwise not capable of making fully informed and voluntary decisions.' " Wolfram, *supra*, p. 159.

Hazard and Hodes, in their treatise *The Law of Lawyering*, deal with Rule 1.14 and give an illustrative case wherein a lawyer is representing a criminal defendant with diminished capacity. Hazard and Hodes determined that the lawyer acts properly in urging his client, who has diminished capacity, to accept a plea bargain offered by the prosecution and to waive a possible insanity defense, even though it would mean a conviction on the client's record and a short jail term. Hazard and Hodes conclude that the lawyer may judge that his client's long-term best interest would be best served by accepting a short jail term rather than a determinant stay in a mental institution. Hazard and Hodes feel that in close cases, the lawyer "cannot be disciplined for any action that has a reasonable basis and arguably is in his client's best interests". Section 1.14: 201

Finally, Rule 1.6, Alabama Rules of Professional Conduct, deals with "confidentiality of information". Subsection (b) of Rule 1.6 allows disclosure of information by a lawyer which is otherwise confidential if the lawyer reasonably believes disclosure is necessary to prevent the client from committing a criminal act which the lawyer believes is likely to result in imminent death or substantial bodily harm. The Comment provision to Rule 1.6 allows that the lawyer has professional discretion to reveal information in order to prevent such consequences. Therefore, if you determine that the best interest of your client would be served by making disclosure to the court of your client's condition, and the possibility that he might harm himself, and that protective measures should be taken to prevent such harm, the Rule would allow such. In conjunction with Rule 1.14, if you make this determination, then you could seek appointment of legal representative for your client to further protect your client's interest.

There is no definitive standard which can be applied in such a situation to guarantee the best result. The rules are fashioned to allow the lawyer to analyze the client's emotional state, in the interest to be advanced by the lawyer on behalf of the client, and then pursue whatever action the lawyer deems best under obviously difficult circumstances. Once the lawyer has determined what he feels to be the proper course of action to best serve his client, the rules allow the lawyer to do what is necessary to advance the interest of the client, while, at the same time, insuring protection of the client and his well-being. ■

[RO-95-06]

LEGISLATIVE WRAP-UP

By ROBERT L. McCURLEY, JR.

Over 1,100 bills have been introduced in the Legislature. The Alabama Law Institute has presented to the Legislature eight of these bills which are the most ever presented in any one legislative session. Pending before the Legislature are Unincorporated Nonprofit Associations (see November 1994 *Alabama Lawyer*); revised Articles 3 & 4 of the Uniform Commercial Code (see March 1995 *Alabama Lawyer*); and four bills concerning family law (see May 1995 *Alabama Lawyer*). These bills and their sponsors are as follows:

Revised Articles 3 & 4
Representative Hill – HB 110
Senate Windom – SB 237

Unincorporated Nonprofit Associations
Representative Gaines – HB 218
Senator Ghee – SB 204

30–Day Cooling Off Before Divorce
Representative Guin – HB 168
Senator Bailey – SB 125

Legal Separation
Representative Black – HB 108
Senator Hale – SB 210

Retirement Benefits Part of Property Settlement
Representative Petelos – HB 208
Senator Lindsey – SB 218

Joint Custody
Representative Hawk – HB 156
Senator Bedford – SB 280

Partnership

A committee of the Institute chaired by Fred Daniels of Birmingham with Reporter Professor Tom Jones of the University of Alabama School of Law has worked for several years on this new act.

The National Conference of Commissioners on Uniform State Laws has promulgated a newly revised Uniform Partnership Act. The Law Institute convened a committee to review Alabama's Partnership law in comparison with the new revised Partnership Act. The committee met for the first time in November 1993 and established three subcommittees as follows:

Creation/Property – Gordon Rosen;

Governance/Liability – Bob Johnson; and

Dissolution, Conversions, Mergers – John Lyle

Although the UPA retains the basic historical character of a partnership, there have been some changes to adapt to the way business is currently done and is expected to be done in the next century. Under the UPA the partnership formed is an entity and not an aggregate of individuals. The UPA does not require filing a certificate to form a partnership, preserving availability of the partnership form of organization to both large and small entities. It does, however, permit the filing of a statement of partnership authority which may be used to limit the capacity of a partner to act as an agent of the partnership and to limit a partner's capacity to transfer property on behalf of the partnership. Such statement is voluntary. No partnership need file such a statement nor is the existence of the partnership dependent upon the filing of the statement. However, the statement, if filed, has an impact upon a third party dealing with the partnership. Nonetheless, a limitation upon a partner's authority does not affect any third party who does not know about the statement, except as to real estate transactions. If there has been some limitation as to real estate transactions that are filed in the records office, then a third party dealing with that partner is held to know of that limitation.

The draft contains articles on: Nature of the Partnership; Relations of Partners to Persons Dealing with Partnership; Relations of Partners to Each Other and the Partnership; Transfers and Creditors of Partners; Partner's Disassociation; Partner's Dissolution When Business Not Wound Up; Winding Up a Business; and Conversions.

Additionally, a separate committee of lawyers, many of whom helped draft the Limited Liability Company Act, drafted a Limited Liability Partnership Article to add to the UPA. Because about half the states have already passed a LLP Act and much interest has been expressed that Alabama should also have LLPs as an alternate entity, it has been added to the Revised Uniform Partnership Act.

Revised Article 8 of the Uniform Commercial Code

In late 1992, a committee was formed to study revisions to Article 8 of the Uniform Commercial Code. This committee was chaired by E.B. Peebles of Mobile

Robert L. McCurley, Jr.
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with Reporter Professor Howard Walthall of Cumberland School of Law. In 1977 a revised Article of the Uniform Commercial Code was promulgated by the National Conference of Commissioners on Uniform State Laws and the American Law Institute. Although 48 states have enacted the 1977 Revised Article 8, Alabama is still following the pre–1977 version. A newly revised Article 8 was adopted by the National Conference of Commissioners and the Council of the American Law Institute. The committee reviewed the current Alabama statutory and case law in conjunction with the proposed changes to Revised Article 8. Several subcommittees have been formed to insure an indepth review of each area.

Article 8 of the Uniform Commercial Code provides the commercial law rules applicable to investment securities. The Official Comment to the first section of Alabama's present version of Article 8 notes, the article is neither a Blue Sky law nor a corporations code, instead playing the role of a negotiable instruments law for investment securities. Related provisions of Article 9 deal with secured transactions involving investment securities.

The present Alabama version of Article 8 was enacted as part of Alabama's initial adoption of the Uniform Commercial Code in 1965. Alabama Acts 1965, No. 549. It was based upon the UCC's original Article 8, drafted in the 1940s and 1950s and approved by the American Law Institute and the National Conference of Commissioners on Uniform State Law—the sponsoring bodies of the Uniform Commercial Code—as part of the 1962 Official Text of the UCC. The original Article 8, which became law in Alabama effective midnight, December 31, 1966, superseded the Uniform Stock Transfer Act, adopted in Alabama in 1931.

The original Article 8, like the earlier Uniform Stock Transfer Act, is based on the assumption that the ownership of securities is evidenced by possession of physical certificates, and that transfers of securities are effected by the delivery of the certificates. It assumes, in short, a "paper–based" system for the ownership and transfer of securities. In the 1960s, however, securities markets and their participant firms encountered difficulty in dealing with a high volume of securities trading when required to settle trades through the physical delivery of certificates. In response to this problem, often referred to as the "paperwork crunch" problem, state corporation codes were amended to permit the issuance of "uncertificated securities" and in 1978 the sponsoring bodies of the UCC to provide rules for the holding and conveyance of "uncertificated securities." The 1978 Amendments to Article 8, which also moved the rules dealing with security interests in investment securities from Article 9 to Article 8, were never adopted in Alabama.

As it turned out, "uncertificated securities" did not emerge as the solution to the paperwork crunch. Instead there developed a system of indirect holding of securities, under which "jumbo certificates" are issued to a depository institution, The Depository Trust Company, which holds the securities for its member broker–dealers and banks, who in turn hold the securities on behalf of their customers. For participants in the indirect holding system, trades are effected by bookkeeping entries on the books of the Depository Trust Company and on the books of member banks and broker –dealers, rather than through the delivery of physical certificates. Whether an investor is an individual or an institutional investor, such as a pension trust or insurance company, the investor's ownership of investment securities is typically evidenced by bookkeeping entries on a securities account maintained by the broker–dealer or other custodian of its investments, rather than by the physical possession of tangible certificates.

However, neither the original Article 8 nor 1978 version of Article 8 dealt comprehensively with the commercial law issues involved in holding and transferring securities held in the indirect holding system, or with the use of investment securities so held as collateral for loans. Accordingly, the sponsors of the Uniform Commercial Code—the American Law Institute and the National Conference of Commissioners on Uniform State Laws—promulgated in 1994 this revision of Article 8. It includes a new Part 5, entitled "Security Entitlements" the purpose of which is to provide the commercial law framework for the holding and transfer of interests in investment securities held in the indirect holding system. It also contains amendments to Article 9 dealing with the use of such interests as collateral for loans. Since Alabama did not adopt the 1978 version of Article 8, this revision also provides for the first time in Alabama rules providing for uncertificated securities.

The annual meeting of the Alabama Law Institute will be held at 4 p.m., Thursday, July 20, 1995 during the Alabama State Bar Annual Meeting at the Wynfrey Hotel in Birmingham.

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. ■

Fraudulent Suppression's Duty To Disclose —

Has Exception Swallowed the Rule?

by Madeline H. Haikala

The Alabama Supreme Court consistently has held that a plaintiff cannot prevail on a fraudulent suppression claim unless he can prove by sufficient evidence that the defendant had a duty to disclose material facts to him. Until recently, unless a defendant undertook to advise or counsel a plaintiff, the Court was reluctant to recognize a duty to disclose. In the past year, however, the Court has recast the circumstances under which a duty to disclose may arise. This article will review the precedential background against which the tort has evolved and will examine recent developments regarding the circumstances under which the Court now will recognize a duty to disclose. Given the new parameters of a duty to disclose, the article also suggests a number of defenses which should have application to the tort.

Historical background of the tort of fraudulent suppression

In *Jordan v. Pickett*, 78 Ala. 331 (1884), an early case regarding fraudulent suppression, the Alabama Supreme Court opined that:

> silence, in order to be actionable fraud, must relate to a material matter, known to the party, and which it was his legal duty to communicate to the other contracting party, whether the duty arises from a relationship of trust, from confidence, inequality of condition and knowledge, or other attendant circumstances.

Id. at 338-39. The tort of fraudulent suppression later was codified and now is located at Alabama Code § 6-5-102 (1975). Section 6-5-102 provides that:

> [s]uppression of a material fact which a party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case.

Id. "A party must have knowledge of a fact to be liable for its suppression," and the information omitted must be material. *McGowan v. Chrysler Corp.*, 631 So. 2d 842, 847 (Ala. 1993); *Dodd v. Nelda Stephenson Chevrolet, Inc.*, 626 So. 2d 1288, 1293 (Ala. 1993); *Hardy v. Blue Cross & Blue Shield of Alabama*, 585 So. 2d 29, 32 (Ala. 1991); *King v. National Foundation Life Ins. Co.*, 541 So. 2d 502, 505 (Ala. 1989). Additionally, a fraudulent suppression claim should not be presented to a jury if the plaintiff cannot prove by substantial evidence that the defendant had a present intent to deceive him, and the alleged deception proximately caused the plaintiff's injury. *McGowan*, 631 So. 2d at 846-47 (citing *Crowder v. Memory Hill Gardens, Inc.*, 516 So. 2d 602, 604-05 (Ala. 1987)). Finally, absent active concealment, a plaintiff must be able to prove that the defendant had a duty to communicate a material fact to the him. "Mere silence is not fraudulent in the absence of a duty to disclose." *Dodd*, 626 So. 2d at 1293; *Hardy*, 585 So. 2d at 32.

Much of the litigation concerning fraudulent suppression pertains to the scope of a defendant's duty to disclose. A duty to disclose may be imposed upon a defendant either (1) because of a confidential relationship, (2) because the plaintiff requested information, or (3) because of the particular circumstances of the case. *McGowan*, 631 So. 2d at 846; *Dodd*, 626 So. 2d at 1293. To the extent that such a duty purportedly arises out of a defendant's confidential relationship with a plaintiff, the legal definition of a "confidential relationship" appears to be well-settled. In *Bank of Red Bay v. King*, 482 So. 2d 274, 284 (Ala. 1985), the Alabama Supreme Court explained that:

> A confidential relationship is one in which one person occupies toward another such a position of adviser or counselor as reasonably to inspire confidence that he will act in good faith for the other's interests, or when one person has gained the confidence of another and purports to act or advise with the other's interests in mind; where trust and confidence are reposed by one person in another who, as a result, gains an influence or superiority over the other; and it appears when the circumstances make it certain the parties do not deal on equal terms, but, on the one side, there is an overmastering influence, or, on the other, weakness, dependence, or trust, justifiably reposed; in both an unfair advantage is possible.'

Bank of Red Bay, 482 So. 2d at 284 (citations omitted). It also is fairly clear that if a plaintiff asks a defendant for information, then the defendant is obligated to provide it. Moreover, once the defendant has supplied some information to a plaintiff regarding a particular topic, the defendant is required to make a full disclosure. *Lucas v. Hodges*, 589 So. 2d 154, 158 (Ala. 1991)

(once pest control company "undertook to issue a letter concerning the last inspection" of the plaintiffs' house, company had "a duty to disclose the *full* situation.") (emphasis supplied); *Jackson Co. v. Faulkner*, 55 Ala. App. 354, 315 So. 2d 591 (1975).

The "particular circumstances" test for a duty to disclose is far murkier than the others. If a situation does not involve a fiduciary relationship or a request for information, then a "duty to speak depends upon the relation of the parties, the value of the particular fact, the relative knowledge of the parties, and other circumstances." *Bank of Red Bay*, 482 So. 2d at 284-85 (citations omitted); *see also Hines v. Riverside Chevrolet-Olds, Inc.*, No. 1921764, 1994 WL 474206, *5 (Ala. Sept. 2, 1994); Ala. Code at § 6-5-102. The question of whether or not a duty to disclose arises from the "particular circumstances" of a case is determined on case-by-case basis. *McGowan*, 631 So. 2d at 847.

The cornerstone of a duty to disclose even under the "particular circumstances" test traditionally has been the relationship of the parties. For instance, in the past, before a court would recognize a duty to disclose, there at least had to be some direct dealings between the parties. If a defendant did not have direct contact with the plaintiff, then the defendant was under no obligation to disclose information to a plaintiff, material or otherwise. *Century 21-Reeves Realty, Inc. v. McConnell Cadillac, Inc.*, 626 So. 2d 1273 (Ala. 1993); *Cobb v. Southeast Toyota Distributors, Inc.*, 569 So. 2d 395 (Ala. 1990). Even if the plaintiff and the defendant did deal directly with one another, the Alabama Supreme Court rarely found that here were special circumstances warranting a duty to disclose if the defendant did not counsel or advise the plaintiff or hold himself out as an expert in a particular area. *Compare, e.g., Hardy*, 585 So. 2d at 32 (no special circumstances giving rise to a duty on part of insurer to inform insured that she needed to purchase a conversion policy to give her coverage during new plan's waiting period), *and Lucas*, 589 So. 2d at 158 (although pest control company did not deal directly with plaintiffs, where company held itself out as expert and made a partial disclosure that would lull plaintiffs into sense of security, company had a duty to disclose all information regarding infestation of house).

The evolving "Particular Circumstances" rule

Recently, the emphasis in "particular circumstances" cases seems to be shifting away from the relationship between the parties. Instead, the Alabama Supreme Court has highlighted the relative knowledge of the parties. In *Independent Life & Accid. Ins. Co. v. Harrington*, No. 1921093, 1994 Ala. Lexis 384 (Ala. Aug. 5, 1994), the Court stated, "this Court has emphasized that where one party has superior knowledge of a fact and the other party's having the same knowledge would cause the other party to take a different course of action, then a duty to disclose arises, if the other party cannot discover the fact himself."[1]

In *Hines v. Riverside Chevrolet-Olds, Inc.*, No. 1921764, 1994 WL 47206 (Ala. Sept. 2, 1994), the Court found that the defendant manufacturer's superior knowledge of a purportedly material fact *established* a relationship between the manufacturer and the plaintiff. In *Hines*, the plaintiff contended that the left rear quarter panel of his Oldsmobile had been repainted before the car was sold to him, and that the repair lowered the value of his car. The plaintiff alleged that both the dealership from which he bought the car *and* the car manufacturer had a duty to disclose the flaw in the car's paint. The manufacturer had no contact with the plaintiff with respect to the sale of the car. *Id.* at *5. In reversing a summary judgment in favor of the manufacturer on the plaintiff's suppression claim, the Court opined that:

> The fact that two parties have no contractual relationship or other dealings does not preclude the finding of the legal duty not to make a material misrepresentation or to suppress a material fact. The absence of a contractual relationship or other dealings, therefore, likewise does not preclude the finding of a relationship on which to base a duty to disclose.

Id. at *7. The Court concluded that:

> Because the [plaintiffs] were members of a group or class or persons who [the manufacturer] expected or had special reason to expect would be influenced by its decision not to disclose information about the repainting of damaged automobiles, [the manufacturer] and the [plaintiffs] had a sufficient relationship on which to base a duty to disclose.

Id. The Court overruled *Century 21* and *Cobb* to the extent that they are inconsistent with the holding in *Hines*. The holding incorporates the negligence concept of "foreseeability" into the elements that define a duty of disclosure.

Following similar reasoning in *Duckworth v. National Bank of Commerce*, No. 1930416, 1994 Ala. Lexis 610 (Ala. Dec. 22, 1994), a *per curiam* opinion, the Court abrogated the rule that a bank does not have a duty of disclosure to third parties with whom the bank has no contractual relationship.[2] The plaintiffs were investors in a real estate development. The defendant bank held a mortgage on the property. The plaintiffs and the bank did not deal directly with one another, at least with regard to the development. To entice the plaintiffs to invest in his project, the developer agreed to get a written concession from the bank that the plaintiffs would have priority over the bank's mortgage in the event the project ran into financial difficulties. The developer forged a bank officer's signature to the written assurance and gave it to the plaintiffs. The plaintiffs gave the developer their money. *Id.* at *1-*3.

The bank officer discovered the forgery, but he told no one about it. When the project went sour, the officer initially denied knowledge of the forgery. Later, he admitted that he had discovered the forgery but had not reported it. *Id.* at *3-*5. The trial court directed a verdict for the bank on the plaintiffs' fraudulent suppression claim. The Alabama Supreme Court reversed, finding that even though the bank did not have a relationship with the investors, the bank should have known that the investors would rely on the verification letter when they contributed to the development, so the bank had a duty to disclose the forgery. *Id.* at *9-*10. Justice Houston, dissented, noting the Court's departure from precedent and it's establishment of conflicting duties. *Duckworth*, 1994 Ala. LEXIS 610, *11-12 (Houston, J., concurring) ("What affirmative duty does a bank owe to third parties regarding its customers? None. I believe this Court answered this question in *Reynolds v. McEwen*, 416 So. 2d 702 (Ala. 1982); *Cahaba Seafood, Inc. v. Central Bank of the South*, 567 So. 2d 1304 (Ala. 1990); and *Hackney v. First Alabama Bank*,

555 So. 2d 97 (Ala. 1989). In fact, financial institutions have a duty to maintain the confidentiality of their customers").

The Court's decisions in these cases are difficult to reconcile with its most recent decision in *Mason v. Chrysler Corp.*, No. 1931199, 1995 WL 19652 (Ala. Jan. 20, 1995). Justice Shores authored the unanimous opinion. The plaintiffs in *Mason* saw advertisements for Chrysler Fifth Avenues. They visited the defendant car dealership and spoke with a salesperson who allegedly told them that Fifth Avenues were comparable to other luxury cars and that the warranty on the Fifth Avenue was as good as the warranty on other luxury vehicles. At the time, the dealer and the manufacturer knew that the Fifth Avenue line had "hesitation" problems. In fact, the manufacturer had supplied dealers with a "repair kit" that would reduce the hesitation problem. *Id.* at *1.

The Masons sued the manufacturer and the dealership from which they bought their car. They claimed, among other things, that the defendants failed to disclose that they knew that Fifth Avenues had recurring defects. The trial court granted the defendants' motions for summary judgment on all of the plaintiffs' claims. *Id.* at *2.

The Alabama Supreme Court affirmed the summary judgment, finding with regard to the plaintiff's suppression claim that neither the manufacturer nor the dealer had a duty to disclose their knowledge of the recurring defect.

> This Court has stated that whether one has a duty to speak depends upon a fiduciary, or other relationship of the parties, the value of the particular fact, the relative knowledge, and other circumstances of the case. When the parties to a transaction deal with each other at arms length, with no confidential relationship, no obligation to disclose information arises when the information is not requested. There was no evidence of a confidential relationship between the Masons and either of the two defendants, and there were no special circumstances to give rise to a duty to speak. The Masons' contacts with Chrysler Corporation consisted primarily of their viewing national advertisements before they purchased the vehicle and their presenting the vehicle for repair. Neither the Masons' depositions nor their affidavits in opposition to the summary judgment motion contain any evidence indicating that they inquired of Chrysler Corporation or Royal Motors Company regarding whether problems similar to theirs had occurred in other automobiles.

Id. at *4.

Surely, the mechanical defects in the Masons' car were more erious and had a greater impact on the value of their car then ıe paint defect in Mr. Hines' car. Nonetheless, the Court found duty to disclose in the latter case, based upon the manufactur-r's superior knowledge of the defect and the foreseeability of the laintiff's "need to know" the information, but the Court held ıat there was no relationship or other special circumstance in ıe former case that would give rise to a duty to disclose. The con-ary results perhaps can be explained by the fact that the Court ı *Mason* may have felt constrained by its opinion in *McGowan*, case virtually identical to *Mason* in which the Court found that ıe arms' length relationship of the parties precluded the impo-tion of a duty upon the manufacturer to disclose the known efects. *McGowan*, 631 So. 2d at 847-48.

A Pandora's box

The ramifications of the "particular circumstances" rule as it appears to be developing in recent cases are far reaching. Consider the following scenario. Ms. Jones is a salesperson. Mr. Smith approaches her and tells her that he wants to purchase a product that performs a particular function. Ms. Jones shows Mr. Smith one of the products that she distributes. She tells Mr. Smith that it is the product on the market best-suited to his needs; however, Ms. Jones knows that in less than one month, the manufacturer that supplies the products that Ms. Jones distributes will introduce a product that will better serve Mr. Smith. The new product will be slightly cheaper than the product Ms. Jones sells Mr. Smith. Only members of the industry have knowledge of the new product. Does Ms. Jones have a duty to tell Mr. Smith about the upcoming product? Under *Harrington* and *Hines*, it appears that she does: Mr. Smith certainly would like to know about the better, less-expensive product, and he cannot discover the new product on his own; only people in the industry are aware of it. Under *Hines*, the manufacturer of the product that Ms. Jones sells also may have a duty to share with Mr. Smith the information that it has regarding the new product.

The burdens which a duty of disclosure impose upon a defendant who has no direct contact with the plaintiff, such as the manufacturer in the example above, are substantial. What type of disclosure that will satisfy the defendant's duty if the defendant does not deal directly with the plaintiff? A written disclosure is sufficient under Alabama law *unless* the plaintiff cannot understand the document or is not given the opportunity to read it. *Henson v. Celtic Life Ins. Co.*, 621 So. 2d 1268, 1273-74 (Ala. 1993) (where application for insurance policy contained information that plaintiff argued was concealed, "no material fact was undisclosed"); *Hardy*, 585 So. 2d at 32-33 (no suppression where employee booklet disclosed insurance plan's 270-day waiting period); *Roper v. Associates Financial Services of Alabama, Inc.*, 533 So. 2d 206, 209 (Ala. 1988); *but see, Howard v. Mutual Savings Life Ins. Co.*, 608 So. 2d 379 (Ala. 1992) (finding that information in documents was not sufficient to put plaintiff on notice of fraud as a matter of law where documents were "complex"). Because a defendant that had no direct contact with a plaintiff ordinarily would have to rely on a third party to convey a disclosure, the defendant could not possibly determine whether the plaintiff could read or was given a chance to read a written disclosure. Can a party such as a manufacturer be held liable for suppression if the person who bought its product could not read the manufacturer's written disclosure? Does a manufacturer have to train its distributor to ensure that an appropriate disclosure is made?[3]

Madeline H. Haikala

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Possible solutions

Although the Alabama Supreme Court's shift in emphasis from the relation of the parties to the relative knowledge of the parties may mean a wider variety of defendants, such as defendants who have had no contact with a plaintiff, will be subject to a duty to disclose, a defendant should not be found liable for fraudulent suppression as a matter of course simply because the defendant has a duty to disclose. As the focus of the "particular circumstances" test has shifted to the relative knowledge of the parties, the tort of fraudulent suppression has become strikingly similar to the tort of negligent failure to warn. In Alabama, "[a] manufacturer is under a duty to warn users of the dangerous propensities of a product only when such products are dangerous when put to their intended use." *Gurley v. American Honda Motor Co., Inc.*, 505 So. 2d 358, 361 (Ala. 1987). Many of the defenses that have been recognized in failure to warn cases should translate to fraudulent suppression cases. One concept from negligent failure to warn cases already has made its way into fraudulent suppression cases. Just as a manufacturer has no duty to warn of a danger that is open and obvious, a person does not have a duty to provide information to another party if the party can discover the fact himself. *Id.*; *Harrington* at *11.

In a failure to warn case, "[w]here a warning is necessary, the warning need only be one that is reasonable under the circumstances and it need not be the best possible warning." *Gurley*, 505 So. 2d at 361. Applying this rule to a fraudulent suppression case, an adequate written disclosure should suffice to discharge a party's duty to inform if the party has not dealt directly with the plaintiff, even if the plaintiff is unable to read or is otherwise prevented from reading the disclosure. The disclosure must be conspicuous and unambiguous.

The learned intermediary defense from warnings cases also should be available as a defense in fraudulent omission cases. In failure to warn cases, a manufacturer "ought not to be held liable where it has made reasonable efforts to convey warnings and/or product information that, due to circumstances beyond the manufacturer's control, were not passed on to or received by the ultimate user. Where the third party has an independent duty to warn the ultimate user, ... the manufacturer is justified in relying upon the third party to perform its duty." *Purvis v. P.P.G. Industries, Inc.*, 502 So. 2d 714, 720-22 (Ala. 1987). Similarly, if a party with an obligation to disclose provides pertinent information to a third party who deals directly with a plaintiff and who has a duty to transmit the information to the plaintiff, then the obligor has fulfilled his duty to disclose. For instance, in *Hines*, if the manufacturer had told the car dealer about the paint defects, then the manufacturer should have a complete defense as a matter of law to the plaintiff's fraudulent suppression claim. The manufacturer would have discharged his duty by providing all material information to the car dealer, and it would have become the responsibility of the car dealer, the party that dealt directly with the plaintiff, to convey the information to the plaintiff.

In addition, just as a plaintiff's failure to read the labels on a product bar a failure to warn claim, proof that the plaintiff was able to read a document in which an allegedly inadequate disclosure was made but that he did not do so should foreclose a fraudulent suppression claim. *Deere & Co. v. Grose*, 586 So. 2d 196, 198 (Ala. 1991) ("a negligent-failure-to-warn-adequately case should not be submitted to the jury unless there is substantial evidence that an adequate warning would have been read and heeded and would have prevented the accident").

Finally, the Alabama Supreme Court recently recognized the "competitor's privilege" as a defense to tortious interference with business relations cases. *The Soap Co., et al. v. Ecolab, Inc., et al.*, 646 So. 2d 1366 (Ala. 1994). Under that doctrine, a party may intentionally cause another either not to enter into a "prospective contractual relation with another who is his competitor" or to discontinue a contract terminable at will if the party "does not employ wrongful [i.e. illegal] means." *Id.* This defense also should apply to fraudulent suppression cases so that in competitive situations, one party does not have to disclose information about a competitor's product absent a direct inquiry.

Conclusion

It is unclear whether the Court's decisions in *Harrington*, *Hines* and *Duckworth* are isolated departures from the Court's prior opinions regarding the "particular circumstances" test in fraudulent suppression cases, or whether the emphasis for the test indeed has shifted from the relationship of the parties to the parties' relative knowledge. If the requirement of some degree of direct relationship between the plaintiff and a defendant as a prerequisite to imposing a duty of disclosure in fact has been discarded, then the implications of the new direction that the rule is taking may be dramatic. If the "particular circumstances" test has undergone a metamorphosis, and the Court's decision in *Mason* is to be regarded as the exception rather than the rule, then defendants should be permitted to avail themselves of defenses that the Court previously has recognized in other contexts, such as the learned intermediary doctrine and the "competitor's privilege." ■

ENDNOTES

1. The Court cited *Interstate Truck Leasing, Inc. v. Bender*, 608 So. 2d 716 (Ala. 1992), in support of this proposition. In *Bender*, a realty company that negotiated a lease with the plaintiff lessee failed to disclose to the lessee that the rental property was the subject of condemnation proceedings. The lessee had requested certain information from the realtor regarding the subject property, and the lessee could not have discovered the condemnation proceeding through due diligence. The Court held that a jury would have to determine whether the realtor had a duty to disclose. The lessor argued that he was entitled to summary judgment on the plaintiff's suppression claim because he dealt with the plaintiff only through the realty company and had no direct contact with the plaintiff. The Court found that the lessor could be liable to the plaintiff under the theory of *respondent superior*, so it reversed the summary judgment in the lessor's favor. Significantly, the Court did *not* find that the lessor had an independent duty to disclose the condemnation proceedings, even though his knowledge of them was superior to the plaintiff's knowledge. Therefore, although the Court was concerned with the relative knowledge of the parties, it would not impose a duty of disclosure in the absence of a relationship between them. *Bender*, 608 So. 2d at 720.
2. Alabama courts traditionally have viewed the relationship between a lender and a borrower as a creditor/debtor relationship, and refused to impose a fiduciary duty of disclosure on the lender. *Power Equip. Co. v. First Ala. Bank*, 585 So. 2d 1291, 1297 (Ala. 1991); *Hackney v. First Ala. Bank*, 555 So. 2d 97 (Ala. 1989); *Lee v. United Fed. Sav. & Loan Ass'n*, 466 So. 2d 131 (Ala. 1985); *Baylor v. Jordan*, 445 So. 2d 254 (Ala. 1984).
3. If a manufacturer does train a salesperson to make an adequate disclosure, does the manufacturer exercise sufficient control over the salesperson so as to convert the salesperson from an independent contractor to an agent, thereby making the manufacturer liable for any misconduct in which the salesperson might engage within the scope of his employment?

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Montgomery County Bar Association Establishes New Volunteer Lawyers Program

by Donna Sims, executive director, MCBA

The Montgomery County Bar Association, in conjunction with the Alabama State Bar and the Montgomery Regional Office of Legal Services Corporation of Alabama, has recently established the Montgomery County Bar Association Volunteer Lawyers Program (VLP). This program creates a new and much needed avenue to the court system for low income citizens of Montgomery County.

The Montgomery County Bar Association Legal Aid Committee, chaired by Frank Riggs, oversees the program and attorney recruitment. The Legal Aid Committee members spent many volunteer hours individually contacting other attorneys about the program and encouraging their participation to ensure the project's success. Also serving on this committee are attorneys Teddi Carte, Ellen Hastings, Debra Hollis, Bobby Segall (also chairman of the Board of Directors of Legal Services Corporation of Alabama) and Jim Smith, managing attorney of the Montgomery Regional Office of Legal Services Corporation of Alabama.

Lee Copeland, president of the MCBA, meets with Judge John L. Carroll, U.S. Magistrate, to coordinate pro bono services available for use by federal magistrates in certain types of prisoners' civil actions.

Many local law firms and sole practitioners are supporting the VLP. Approximately 1,171 attorneys are currently licensed to practice in Montgomery County. Of these attorneys, 722 are actually eligible to accept direct referral of pro bono cases; 447 others hold special memberships in the Alabama State Bar and are therefore eligible to participate in special VLP projects. As of May 26, 1995 over 100 attorneys had volunteered to participate in the VLP, with many more expected to enroll during the final two stages of the current recruitment drive. Case referrals through the program are expected to begin no later than August 1, 1995.

Montgomery County attorneys are enrolling in great numbers in the new VLP due in large part to the variety of civil case types being handled through the program. In the past, the Montgomery County pro bono program focused on domestic abuse cases, thus excluding many attorneys not practicing in this family law area. Under the newly organized project, attorneys may choose to accept referred pro bono cases in a wide variety of practice areas including, among others, adoptions, Chapter 7 bankruptcy, consumer problems, real estate matters, tax problems, probate matters, and VA issues. The tremendous success of the recruitment drive thus far is indicative of the public service spirit and support which is found in abundance among members of the Montgomery County Bar Association. When a need arises, Montgomery County attorneys willingly respond.

Upon enrolling in the new VLP, each attorney voluntarily agrees to accept two civil non-fee-generating case referrals per year or 20 hours of free legal services, whichever comes first. The project, which is administered through the Alabama State Bar Volunteer Lawyers Program, is a "panel model" pro bono project meaning that attorneys are assigned cases only in the area(s) of his or her choice as indicated on the enrollment form. Potential clients are first interviewed for income eligibility by the professional staff of the

Montgomery Regional Office of Legal Services Corporation of Alabama. Eligible clients are then referred to the Alabama State Bar Volunteer Lawyers Program for direct referral to a VLP attorney. The volunteer attorney is expected to handle only the specific legal matter referred. Paperwork and reporting requirements associated with the project are kept to a minimum so that the volunteer attorney is free to spend his or her entire time on the actual representation rather than on administrative matters.

Vision and leadership for creation of the new VLP were provided by Lee Copeland, 1995 president of the Montgomery County Bar Association, and Dorothy Norwood, the 1994 president. Both worked diligently to produce a successful program which would not only benefit indigent clients, but also appeal to bar members volunteering their valuable time. As local bar president, Copeland has chosen the VLP as his personal project, pledging to see that the program begins operation and is successfully underway during his term. The officers and board members have agreed wholeheartedly with this plan due to the fact that the new VLP will reach out to a client community greatly in need of free legal services while also fulfilling the moral responsibility of all attorneys to provide access to justice for all citizens regardless of their financial circumstances.

Copeland is also responsible for the creation of a unique services component within the VLP. After discussions with Judge John L. Carroll, U.S. Magistrate for the Middle District of Alabama, Copeland realized that magistrates in this district need the capability of referring indigent citizens to a volunteer attorney who will provide initial services free of charge. Case types most often seen by the magistrates in this regard were then added to the enrollment form of the VLP by Copeland and administrative details were coordinated with the clerk's office of the District Court. This cooperative effort between the federal judiciary and a local bar association to serve indigents through a pro bono project is unique in Alabama. No other VLP or pro bono program in this state currently has such a project as part of its services. Montgomery County attorneys are thus serving as role models for attorneys throughout Alabama. It is hoped by Copeland and the board members of the Montgomery County Bar Association that other pro bono programs will review this special project and institute a similar one within their local VLP project.

Finally, it must be noted that one major reason for the success of the VLP has been the cooperation of Jim Smith and the staff of the Montgomery Regional Office of Legal Services Corporation of Alabama. Legal Services programs nationwide are now threatened with decreased funding or zero funding by Congress. In light of this, pro bono services from the private bar are greatly needed to assist Legal Services staff in meeting the ever increasing legal needs of indigent clients. Smith and his entire staff have pledged their support to the Montgomery County Bar Association and will provide income eligibility screening for the VLP. Without this screening mechanism, the new VLP simply could not exist. Montgomery County attorneys are grateful for this active support by Legal Services attorneys and staff and look forward to working cooperatively to better meet the civil legal needs of indigent Montgomery County citizens.

The newly restructured VLP has proven to be very successful in a short period of time. Recruitment efforts will continue in the months ahead. Members of the Montgomery County Bar Association may be proud of their long-standing commitment to the provision of pro bono legal services and service to the community generally. Recognition of those attorneys will be a high priority for the coordinator of the VLP; however, participating volunteers know that helping clients in a time of great personal crisis is sufficient reward in and of itself. If you are a practicing attorney in Montgomery County and have not yet joined the VLP, please call the VLP coordinator (located in the Alabama State Bar building) at 269-1515. ■

Allied-Bruce Terminix, Inc. v. Dobson:

Widespread Enforcement of Arbitration Agreements Arrives in Alabama

By Henry C. Strickland

Introduction

The United States Supreme Court case of *Allied-Bruce Terminix, Inc. v. Dobson*, 115 S.Ct 834 (1995), recently held that the Federal Arbitration Act (the FAA) governs all contracts within Congress's interstate commerce power. This holding significantly changes arbitration law in many states, because the FAA liberally enforces prospective agreements to submit disputes to arbitration. Many state arbitration statutes precluded enforcement of prospective arbitration agreements in certain categories of contracts, and those arbitration agreements will now be enforceable under the FAA.

Nowhere will the case have more impact than in Alabama. Although Alabama has long enforced arbitration awards after parties voluntarily pursue them to conclusion, Alabama law has always refused to enforce prospective agreements to submit disputes to arbitration. Widespread application of the FAA, therefore, will revolutionize arbitration law in this state. For the first time, enforcement of contractual arbitration provisions will be the rule rather than the exception in Alabama. In the wake of this change, many Alabama lawyers will need to become better acquainted with the FAA. More importantly, they must reconsider the advice they give clients about whether to include arbitration provisions in their contracts and whether to sign contracts containing arbitration provisions.

Alabama Arbitration Law and the Alabama Supreme Court's resistance to the FAA

Nearly all arbitration comes about because the parties at some time voluntarily agreed to arbitrate their disputes rather than take them to court. Parties might make such an agreement after a dispute arises; or, more commonly, parties to a contract might agree to arbitrate any disputes that later arise from their contractual relationship. In either case, if one party subsequently refuses to arbitrate and instead files a court action, then the court must decide whether to enforce the agreement to arbitrate.

Nearly alone among the states, Alabama completely refuses to enforce all such agreements. Not only have Alabama courts continued to embrace the old common law hostility toward arbitration agreements, the Alabama Code expressly prohibits their enforcement. Ala. Code § 8-1-41(3). Under Alabama law, therefore, a party to an arbitration agreement may revoke his agreement any time before an arbitration award is rendered.[1] As a result, arbitration agreements have been meaningless in Alabama, and the use of arbitration has been limited.

The Alabama Supreme Court summed up Alabama arbitration law as follows:

> [A]t this juncture, this Court feels compelled to point out its disfavor of predispute arbitration agreements. In fact, Ala. Code [of] 1975, [section] 8-1-41(3), explicitly prohibits the enforcement of predispute arbitration agreements. This somewhat hostile attitude toward predispute arbitration agreements is rooted in the belief that parties should not be permitted, by their agreement, to oust the courts of their jurisdiction....
>
> "The public policy of this state is to encourage arbitration and amicable settlements of differences between parties; but public policy also holds void an agreement in advance to oust or defeat the jurisdiction of all courts, as to differences between the parties."

H.L. Fuller Construction Co. v. Industrial Development Board, 590 So.2d 218, 221 (Ala. 1991)(*quoting Wells v. Mobile County Board of Realtors*, 387 So.2d 140,144 (Ala. 1980)).

This antagonism toward arbitration agreements conflicts with the policies embodied in the FAA. Congress enacted the FAA specifically to avoid the common law rule that arbitration agreements were void and against public policy. *Southland Corp. v. Keating*, 465 U.S. 1, 13-14 (1984). The FAA thus specifically provides that any arbitration agreement to which the Act applies "shall be valid, enforceable, and irrevocable, save upon such grounds as exist... for the revocation of any other contract." 9 U.S.C. § 2 (1988).

To avoid preemption by the FAA of Alabama's policy against the enforcement of arbitration agreements, the Alabama Supreme Court narrowly construed the scope of the FAA's applicability.[2] It first held that the FAA applied only to cases in federal court—not cases in state court. "The wording of the Act and its legislative history," the court said, "indicate a desire by Congress to create a law only applicable in federal courts in diversity cases." *Ex Parte Alabama Oxygen Co.*, 433 So.2d 1158, 1162 (Ala. 1984). This interpretation enabled Alabama courts to continue denying enforcement of all arbitration agreements brought before them.

The United States Supreme Court overturned this interpretation of the FAA, however, in *Southland Corp. v. Keating*, 465 U.S. 1 (1984). The Court held in *Southland* that the FAA "creates a body of federal substantive law" based on Congress's power to regulate interstate commerce. *Id.* at 12. While conceding some ambiguity in the FAA's legislative history, the Court held that Congress intended the central provisions of the FAA to apply in

state as well as federal courts.

After *Southland*, the applicability of the FAA hinged on the FAA's interstate commerce requirement. By its own terms, the FAA applies and requires enforcement of arbitration agreements only if they are in a "maritime transaction or a contract evidencing a transaction in [interstate] commerce." 9 U.S.C. §§ 1 & 2. If neither the maritime transaction nor the interstate commerce requirement is satisfied, then the FAA does not apply; and state law controls. In Alabama, that means the arbitration agreement is void and unenforceable.

Again trying to salvage Alabama's policy disfavoring arbitration agreements, the Alabama Supreme Court limited the applicability of the FAA by narrowly construing its interstate commerce requirement. The test for determining whether a contract is one "evidencing a transaction in [interstate] commerce" and thus enforceable under the FAA, the Alabama court held, is "whether, at the time [the parties] entered into [the contract] and accepted the arbitration clause, they *contemplated* substantial interstate activity." *Ex Parte Jones*, 628 So.2d 316 (Ala. 1993)(*quoting Ex Parte Warren*, 548 So.2d 157, 160 (Ala. 1989), *and Metro Industrial Painting Corp. v. Terminal Construction Co.*, 287 F.2d 382, 387 (2d Cir.) (Lombard, J., concurring)(emphasis in original)). Application of this test, which was substantially more restrictive than tests used by most other courts, resulted in numerous contracts being deemed outside the coverage of the FAA. Consequently, Alabama law continued to govern many arbitration agreements in Alabama (particularly those relating to consumer transactions), making them unenforceable.[3]

Allied-Bruce Terminix Companies, Inc. v. Dobson

The United States Supreme Court again overturned the Alabama court's narrow interpretation of the FAA in *Allied-Bruce Terminix Companies, Inc. v. Dobson*. That case concerned an arbitration agreement in a termite protection contract between an Alabama homeowner and an Arkansas corporation doing business in Alabama. The contract provided that Terminix would provide termite protection for the lifetime of the residence in exchange for an annual fee. It further provided that Terminix would arrange and pay for any repairs made necessary by subsequent termite damage. When termites were later discovered, Terminix provided extermination treatments and performed various repairs. The homeowners later filed a civil action against Terminix, however, claiming that Terminix breached the termite protection contract by failing to provide all necessary repairs.

Relying on an arbitration provision in the contract, Terminix filed a motion to stay the litigation to allow arbitration to proceed. The trial court denied the motion, and the Alabama Supreme Court affirmed. An arbitration agreement is enforceable in Alabama, the court noted, *only* if it falls within the coverage of the FAA. Applying its "contemplation of substantial interstate activity" test, the court held the FAA inapplicable because the homeowners did not contemplate substantial interstate activity when they entered the contract. They dealt with Terminix in its Daphne, Alabama office, and they purchased services for and protection of their home in Fairhope, Alabama.

The United States Supreme Court, however, held that the FAA did apply to the termite protection contract and required enforcement of its arbitration provision. The Court rejected the "contemplation of substantial interstate activity" test used by the Alabama Supreme Court. The relevant inquiry, the Court said, is whether the contract in fact involved interstate commerce—not whether the parties contemplated such commerce. More importantly, the Court held that the phrase "involving commerce" used in the FAA is the "functional equivalent" of the phrase "affecting commerce," a phrase that "signals a congressional intent to exercise its Commerce Clause powers to the full." *Id.* at 839. The Court thus concluded that the Act reaches to the limits of Congress's commerce power. Under this standard, the termite protection contract clearly involved interstate commerce. "In addition to the multistate nature of Terminix...," the Court noted, "the termite- treating and house-repairing material used by [Terminix] in its (allegedly inadequate) efforts to carry out the terms of the Plan, came from outside Alabama." *Id.* at 843.

Applicability of the FAA after *Allied-Bruce Terminix*

Under *Allied-Bruce Terminix*, then, the FAA applies to all arbitration agreements within Congress's commerce power. Traditional wisdom and the many Supreme Court decisions construing the commerce power indicate that it is almost limitless. It extends to any activity or transaction that "affects interstate commerce." *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 276-77 (1981). Applying this standard, the Supreme Court has held that even "intrastate activities of a very small scale [can] be federally regulated if they might affect commerce when combined with similar small-scale activities." John E. Nowak, et al., *Constitutional Law* 153-54 (3d ed. 1986). In *Wickard v. Filburn*, 317 U.S. 111 (1942), for example, the Court held that Congress could use its commerce power to regulate a farmer's production of grain on his own farm for his own consumption. The reach of Congress's commerce power and thus of the FAA, therefore, is immense.

The only case in more than 50 years to suggest any limit to the commerce power is the recent case of *United States v. Lopez*, 1995 WL 238424 (April 16, 1995). That decision struck down a federal statute

banning the possession of firearms in school zones specifically on the ground that it was beyond Congress's commerce power. The decision may be limited to the peculiar facts of the case, or it may mark a renewed initiative by the Court to narrow Congress's commerce power. In any event, it suggests that while the scope of the FAA's applicability may be immense, it is not limitless.

Despite *Lopez*, the FAA has almost universal applicability, since the Court's other cases interpret the commerce power so expansively and since the FAA now applies to the limits of that power.[4] *All* commercial arbitration agreements (and nearly all arbitration agreements of any kind) affect interstate commerce, are within the federal commerce power, and are thus governed by the FAA. The result is that virtually all arbitration agreements are enforceable as a matter of federal law, and all courts—including Alabama courts—are obligated to enforce them pursuant to the FAA.

Enforcing arbitration agreements under the FAA[5]

A. The Mechanics of Enforcing Arbitration Agreements Under the FAA: Orders to Stay Litigation and to Compel Arbitration

The FAA provides two avenues for enforcing arbitration agreements within its coverage: (i) a stay of litigation pending arbitration and (ii) an order compelling arbitration. *See* 9 U.S.C. §§ 3 & 4 (1976). If a lawsuit is brought on an issue that is subject to a valid arbitration agreement, section 3 provides that the court on application of one of the parties must stay the action until the parties submit to an arbitration proceeding in accordance with the terms of their agreement. 9 U.S.C. § 3 (1976). In order to obtain the stay, the party seeking to enforce the arbitration agreement must show (1) that a valid and enforceable written agreement to arbitrate exists; (2) that the controversy involved in the lawsuit is referable to arbitration under that agreement; (3) that the controversy arises from a maritime transaction or a contract involving interstate commerce; and (4) that the party seeking the stay is not in default in proceeding with such arbitration. *See* 9 U.S.C. § 3 (1976).

Section 4 provides procedures for obtaining a court order to compel a recalcitrant party to proceed with arbitration as agreed. In order to obtain such an order, a party must show: (1) that a valid and enforceable written agreement to arbitrate exists; (2) that a dispute exists between the parties; (3) that the dispute is referable to arbitration under the arbitration agreement; (4) that a demand for arbitration was made; (5) that the other party failed or refused to arbitrate; and (6) that the dispute arises from a maritime transaction or a contract involving interstate commerce. Section 4 clearly contemplates that such petitions shall be addressed to federal district courts, but it limits federal jurisdiction to hear such petitions to cases in which the federal courts have independent subject matter jurisdiction. It is not presently clear whether state courts must issue orders compelling arbitration pursuant to § 4.

B. Contract Law and the FAA

As indicated by the above requirements for obtaining an order staying litigation or compelling arbitration, proceedings to enforce arbitration agreements under the FAA raise a variety of issues not directly addressed by the Act. Arbitration agreements, after all, are simply contracts, and the substantive portion of the FAA on its face does little more than require these contracts to be enforced like all other contracts. Attempts to enforce or circumvent arbitration agreements, therefore, raise a host of contract issues just as attempts to enforce other contracts do. Parties may argue, for example, that the contract—including the arbitration clause—is void on grounds of fraud or unconscionability; or they may argue that a particular dispute is not covered by the language of the applicable arbitration clause.

Although state contract law could reasonably govern these issues, the United States Supreme Court has construed the FAA to provide federal rules to govern many of these contract issues as they relate to arbitration agreements. These federal rules preempt state law whenever the FAA applies. Indeed, the Alabama Supreme Court has stated: "In cases governed by the FAA, the federal substantive law of arbitration governs, despite contrary state law. . . .Further, the provisions of the FAA govern all questions of the validity, interpretation, construction, and enforceability of the arbitration agreement". *See Maxus, Inc. v. Sciacca*, 598 So.2d 1376, 1379 (Ala. 1992).

These federal rules of arbitration contract law, based on either the language of the FAA or the policies implicit in it, reflect a strong policy favoring arbitration. As summarized below, the Court's decisions actually make arbitration agreements more enforceable than other types of contracts. Indeed, an arbitration provision is more enforceable than the substantive provisions of the contract that contains it.

1. Issues Relating to the Validity of the Contract

In deciding whether to enforce an arbitration agreement, a court must first determine that the parties actually entered a valid contract to arbitrate and that no defenses exist to defeat the contract. The FAA expressly provides that arbitration agreements within its coverage are "valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*." 9 U.S.C. § 2 (1976). A party thus may defeat an arbitration agreement under the FAA by showing lack of consideration, fraud, unconscionability, or any other contract defense.

In order to prevent enforcement of an arbitration provision, however, a contract defense must relate specifically to the arbitration provision itself. The federal doctrine of severability treats the arbitration provision as if it were separate from the remainder of the contract. A contract defense that concerns the contract as a whole, therefore, will not prevent arbitration; rather, the court will require that defense to be addressed to the arbitrator. If, for example, a party contends that a contract containing an arbitration provision was fraudulently induced, the court will nonetheless order arbitration unless the party shows that the fraud related specifically to the arbitration provision. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). A claim

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of fraud that relates directly to the arbitration provision will be decided by the court, but a claim of fraud that relates to the contract as a whole must be addressed to the arbitrator. The effect is that an arbitration provision is more enforceable than other parts of the contract because it is immune to contract defenses directed at the contract as a whole which may render void the remainder of the contract.

2. Issues Relating to the Interpretation of the Arbitration Agreement

Even after a court determines that there exists a valid arbitration contract governed by the FAA, the court must still interpret that contract. Since the obligation to arbitrate is contractual, courts can require a party to arbitrate only those disputes he or she agreed to submit to arbitration. The court thus must determine whether the dispute in question is covered by the parties' arbitration agreement. In other words, the court must determine whether the dispute is "arbitrable."

As it does with issues relating to the existence of a contract, the federal common law of arbitration tilts in favor of arbitration the standards governing the construction of arbitration provisions. Like any other contract interpretation, this inquiry requires the court to determine and give force to the parties' intent. The Supreme Court has recognized a presumption of arbitrability, however, that requires courts to order arbitration if any reasonable interpretation of the arbitration agreement would cover the dispute in issue. *See Moses H. Cone Memorial Hospital v. Mercury Construction Co.*, 460 U.S. 1, 24-25 (1983). Indeed, the Court has stated:

> "An order to arbitrate... should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

United Steel Workers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960).[6]

In sum, the FAA now applies to virtually all arbitration agreements. Under the Act and the Supreme Court's construction of it, arbitration agreements are not only as enforceable as other contracts, they are more enforceable. Arbitration provisions that are denied enforcement under the FAA, therefore, will be rare.

A new look at arbitration

Now that contractual arbitration provisions will be routinely enforced in Alabama, Alabama lawyers must take a closer look at the advantages and disadvantages of arbitration in order to advise clients about the advisability of entering arbitration agreements. Arbitration differs from litigation in a number of respects. While these differences may offer many advantages over litigation, the desirability of arbitration and an arbitration provision must be evaluated independently in light of each client's needs.

First, arbitration is usually (but not always) faster and less expensive than a judicial trial. Arbitration ordinarily entails less pretrial maneuvering, and the arbitration hearing usually takes place long before the case could get to trial. Since the matter proceeds to hearing more quickly, arbitration can precipitate a settlement more quickly. The arbitration hearing itself also is generally shorter than a trial. This relative speed of arbitration is, of course, generally advantageous, because it usually makes the process less costly than litigation and it ends the dispute more quickly so that the parties can focus on more productive endeavors. This speed can of course be detrimental if a client has some interest in delaying resolution of the dispute.

Second, parties in arbitration have substantially more flexibility and control over the process. They usually can determine the time and location of the hearing. More importantly, the parties can by agreement select or devise arbitration procedures that best suit their particular circumstances. They may adopt procedures devised and published by organizations like the American Arbitration Association, or they may tailor procedures to fit a particular dispute or contract.

Third, arbitration procedures usually are less formal and technical than court procedures. They typically provide little or no pretrial discovery, and they generally do not require adherence to legal rules of evidence. These characteristics contribute to the relative speed and low cost of arbitration, and they generally create less hostility among the parties and counsel than in litigation. Consequently, arbitration is more likely to permit the continuation of profitable relationships. These same characteris-

tics, however, may create disadvantages. Formal judicial procedures were designed to protect the accuracy and integrity of judicial decisions, and dispensing with those procedures may compromise the values they protect. The parties nonetheless can control these matters in arbitration because they may use full judicial procedures if they choose.

Fourth, parties in arbitration have greater control over the selection of the decision maker(s). They can choose arbitrators who are expert in the subject matter of the dispute. Organizations such as the American Arbitration Association maintain lists of available arbitrators who are expert in a variety of fields. Such expert arbitrators are better able to understand the sometimes technical subject matter of commercial disputes and the specialized context in which the disputes arise.

Fifth, arbitration provides a greater measure of finality than litigation. Except for a few narrowly defined grounds for appeal, the decision of the arbitrator is final and binding. 9 U.S.C. § 10. This finality contributes to the lower cost and greater speed of arbitration. At the same time, it sometimes precludes the correction of erroneous decisions by arbitrators. For this reason, arbitrators are not strictly bound to follow legal precedent. Clear legal rules are thus less binding and definitive in arbitration than in court.

The last key difference between arbitration and litigation is the relative privacy of arbitration. Unlike court proceedings, all arbitration hearings can be closed, and the proceedings are not a matter of public record. This characteristic—like others—may be an advantage or a disadvantage depending on the circumstances.

Conclusion

Because of the many potential advantages arbitration offers, its use around the country is widespread and growing. While arbitration is not appropriate in every case and its use should not be mandated, parties should be able to agree voluntarily to arbitrate their disputes. To have any meaning and effect, these agreements must be enforceable. The FAA provides that enforcement. The expansive application of the FAA announced by *Allied-Bruce Terminix*, therefore, finally provides modern arbitration for Alabama.

As indicated by the recent *Lopez* case, however, the reach of Congress's commerce power and thus the FAA has limits. Some few arbitration agreements remain beyond the FAA's coverage. Consequently, Alabama still needs to enact modern arbitration legislation to reverse its antiquated treatment of arbitration agreements and to make enforceable agreements not governed by the FAA.

A bill to accomplish that end has been proposed by Rodney A. Max and is currently pending in the Alabama legislature. The proposed bill would repeal section 8-1-41(3), which prohibits specific enforcement of arbitration agreements. It also would modify section 6-6-1, which previously purported to encourage arbitration but had no real effect. Under the proposal, section 6-6-1 would read as follows:

> The public policy of this state encourages the resolution and settlement of pending and future controversies through negotiation, mediation, arbitration, and other alternative dispute resolution mechanisms. Agreements providing for arbitration or other alternative dispute resolution mechanisms shall be specifically enforceable.

This bill should be enacted. Combined with the expanded application of the FAA, it would enable Alabamians to take full advantage of not only arbitration but also the increasing array of alternative dispute resolution mechanisms. ■

The author thanks Professor Stephen J. Ware for helpful comments on earlier drafts of this article.

ENDNOTES

1. The language of Ala. Code § 8-1-41(3) prohibits specific enforcement of any arbitration agreement—regardless of whether it was entered before or after a dispute arose. All of the reported cases applying the section, however, concern predispute arbitration agreements, and the Alabama Supreme Court in each instance has been careful to note that the agreement deemed unenforceable was a predispute arbitration agreement. The enforceability under Alabama law of arbitration agreements entered after a dispute has arisen is thus somewhat uncertain.
2. The FAA does not create federal question jurisdiction. Therefore, issues regarding its application remain in state court unless the underlying case contains independent grounds for federal jurisdiction (i.e. the action raises a substantive claim based on a federal statute or meets the requirements for diversity of citizenship jurisdiction).
3. For a review and analysis of these Alabama cases, see Henry C. Strickland, Rodney A. Max & David Hall, *Modern Arbitration for Alabama: A Concept Whose Time Has Come*, 25 Cumb.L. Rev. 59, 66-73 (1995). For a review and analysis of other courts' treatment of the interstate commerce issue, see Henry C. Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 Hofstra L.Rev. 385 (1992).
4. The FAA excludes from its coverage "contracts of employment of seamen, railroad employees, or any other class of worker engaged in foreign or interstate commerce." 9 U.S.C. § 2. The courts have construed this provision to exclude from the FAA only employment contracts of workers engaged in the actual movement of goods across state lines or work closely related to that movement. *See* Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 2 J. Disp. Resol. 259, 263-70 (1991).
5. A comprhensive analysis of the FAA and cases applying it can be found in Ian R. MacNeil, Richard E. Speidel, & Thomas J. Stipanovich, *Federal Arbitration Law: Agreements, Awards, and Remedies Under the Federal Arbitration Act* (1994).
6. This case concerned collective bargaining arbitration, which is governed by the Labor Management Relations Act, 29 U.S.C. § 185(a), rather than the FAA. Courts have adopted this standard for FAA cases as well. *See Explo, Inc. v. Southern Natural Gas Co.*, 788 F.2d 1096, 1098 (5th Cir. 1986).

THE THIRD CITIZENS' CONFERENCE ON ALABAMA STATE COURTS

by Associate Justice Hugh Maddox

"Reform of the justice system is too important to be left to lawyers and judges."

This statement was made by Chief Justice William Rehnquist of the United States Supreme Court to a Just Solutions Conference organized by the American Bar Association and held May 1-3, 1994, in Leesburg, Virginia, attended by 380 conferees, a majority of whom were nonlawyers — educators, civic leaders, citizen activists, media representatives, business people, labor representatives, elected and appointed officials, consumer activists, and others.

In a report resulting from that conference, entitled *Just Solutions, Seeking Innovation and Change in the American Justice System,* the conferees noted:

> "The American justice system is at a crossroads, facing challenges unprecedented in the nation's history, challenges unforeseen as recently as a generation ago, challenges for which the system is neither designed nor is now equipped to handle. While the system is among the world's finest—indeed, it remains one of the nation's hottest exports—change is clearly called for."
>
> "....
>
> "In the justice system, change is most likely when it occurs 'where the rubber meets the road'—at the state and local level, where it touches real people every day. If change is to be lasting it cannot be imposed from Washington, or even from the benches of state supreme courts and statehouse chambers. It must originate in cities and towns, and it must reflect the concerns of everyday people. While the agenda should be informed and advanced by justice system 'insiders'—national, state, and local bar associations prominent among them—it is the public, above all, that the system must not fail, and it is the public interest that must be this mission's compass."[1]

Alabama, of course, learned the value of citizen involvement in changing the justice system almost 30 years ago when the Alabama State Bar, under the leadership of its president, Howell Heflin, took an active role in convening the First Citizens' Conference on Alabama State Courts to address problems faced by the judiciary at that time. While he was president of the Bar, Heflin had appointed a "Committee on the Feasibility of a Citizen's Conference" and two other committees that were tasked to study the problem of the congestion of cases in the circuit and appellate courts.[2] The Feasibility committee recommended that the Alabama State Bar, with the help of the American Judicature Society, sponsor a "Citizen's Conference on Alabama State Courts."[3] The First Citizen's Conference was held in Montgomery on December 8, 9, and 10, 1966. The conferees were from every part of the state and were diverse in their professions and trades; and at the conclusion of their meeting, they adopted a consensus statement recommending the abolishment of justices of the peace, the creation of a unified judicial system, and the establishment of a judicial administrative office of courts at the state level.[4]

Some recommendations of the First Citizens' Conference were adopted by the Legislature in 1969 and 1971,[5] but the major overhaul of the judicial system would come later when Howell Heflin was elected Chief Justice of the Supreme Court of Alabama, and a Second Citizens' Conference was convened that made its final recommendations in 1973. Those recommendations ultimately resulted in the creation of the Unified Judicial System and the adoption of the Judicial Article Implementation Act, and Alabama's judiciary became a model for the rest of the country.[6]

After creating the Unified Judicial System, the Legislature did more. It provided for continuing planning by continuing the Alabama Judicial Conference that had earlier been authorized, and by creating the Alabama Judicial Study Committee.[7] Neither the Judicial Conference nor the Judicial Study Committee was structured, as the first two citizens' conferences had been, to provide for the type of citizen involvement.

After having heard of the usefulness of comprehensive planning at the Conference of Chief Justices, Chief Justice Sonny Hornsby, in the fall of 1992, requested the Administrative Office of Courts to initiate a statewide planning program, designed to allow the judiciary to examine itself and to define its priorities. Fifty representatives of the trial and appellate courts, all connected with the Unified Judicial System, served as a steering committee and met in Birmingham. Former Governor Albert P. Brewer and Dr. James W. Williams, Jr., president and executive director, respectively, of the Public Affairs Research Council of Alabama, served as facilitators, and the group identified several areas in which improvement could be made.[8]

The specific objective of this "in-house" planning group was to reconfirm or redefine the mission, goals, and objectives of the Unified Judicial System, to identify alternatives for improving the efficiency and effectiveness of court processes and services, to develop a comprehensive program for implementing the changes recommended, and to establish an ongoing process to monitor and evaluate any changes that were made.

At an initial meeting of the Judicial Planning Committee in November 1992, former Governor Albert P. Brewer asked each member of the committee to redefine the mission, goals, and objectives of the Judicial System and to identify issues,

areas, procedures, or processes that might need to be refined or changed, so that a comprehensive plan could be developed to improve the efficiency and effectiveness of the Unified Judicial System. Each committee member was specifically asked to "dream" and to define his or her individual vision of how the Unified Judicial System could better serve the public. A joint meeting of the committee and the various subcommittees appointed to address specific problem areas was held in Tuscaloosa in September 1993. At this combined meeting, the members defined various "visions" of an ideal system for the courts of the future, and they adopted the following mission statement for the Unified Judicial System:

> "The mission of the Alabama [Unified] Judicial System is to provide equal justice under law in all cases, controversies, and matters within its powers and jurisdiction and to be accountable for the provision of judicial services in a just, speedy, and efficient manner so that the integrity of the system and the public's respect for it will continue to be maintained."

One of the first findings of the committee was that the Unified Judicial System was, for the most part, operating reasonably efficiently. The second major finding was that, while a formal "planning document" may never have been published, the officials of the Unified Judicial System had been planning and were still planning; however, the citizen input that had been evident in the citizens' conferences was missing, and a recommendation was made that the feasibility of reconvening a citizens' conference be explored.[9]

At its' annual meeting on December 1993, the Judicial Planning Committee endorsed the concept of the citizens' conference and formally adopted a recommendation directing the Administrative Office of Courts to review the feasibility of funding a new citizens' conference and to report its findings at the Committee's 1994 meeting.

Interest in reconvening the conference heightened substantially after the November 1994 elections, in the hope the conference could look at several issues, especially concerning judicial selection and retention and financing for judicial campaigns. The Committee selected several of its members to serve on a steering committee to explore the feasibility of reconvening a citizens' conference, and securing the necessary funding.[10] Former Governor Albert P. Brewer agreed to chair the steering committee, and the Committee met on December 1, 1994, at Samford University. That steering committee of the Judicial Study Commission formally issued a resolution recommending that the Alabama Judicial Conference and the Alabama State Bar, which had called the First Citizens' Conference, be the appropriate group to jointly consider a calling for the citizens' conference.

On December 9, 1994, the Alabama State Bar, noting the "widespread public concern, which is shared by the Alabama State Bar, about judicial elections in Alabama," and that the Bar's Task Force on Judicial Selection had previously "spent much time extensively studying issues involving the elected judiciary," adopted a resolution in which it called for and authorized the formation of a Third Citizens' Conference on the Alabama State Courts, "to be modeled generally on the 1966 and 1973 Conferences, to study the selection of judges in Alabama, judicial campaign financing and other important issues affecting the administration of justice in Alabama."

On March 10, 1995, the Alabama Judicial Conference, after noting that "the Alabama Judicial Planning Committee, after two years of study [of] a number of issues affecting the structure, organization, and administration of the Alabama state courts, [had] recommended that the Alabama Judicial Conference and the Board of Bar Commissioners of the Alabama State Bar jointly issue a call for a Third Citizens' Conference on the Courts," adopted a resolution asking former Governor Brewer and Retired Justice Adams to solicit nominations for participants in such a conference. The Alabama Judicial Conference also asked that the Citizens' Conference "to make a report to the Judicial Conference and Board of Bar Commissioners on the issues of judicial selection and campaign financing as soon as possible, and if feasible, prior to the 1995 session of the Alabama Legislature and make all other reports on subsequent issues as soon as practicable."

The Third Citizens' Conference was convened and held its first meeting on March 23, 1995, in Birmingham at the Carraway Convention Center, where the conferees heard remarks from Broox Holmes, President of the Alabama State Bar, and Chief Justice Sonny Hornsby, chairman of the Judicial Conference. They also received an overview of the Alabama Judicial System from Abner R. Powell III of Andalusia. Attorneys Joe Whatley and David Boyd briefed the conference on the status of the two Voting Rights suits pending in the Eleventh Circuit Court of Appeals involving the structure of Alabama appellate and circuits courts, which could have an impact on what the conference was considering. Ms. Frances Zemens, vice president and executive director of the American Judicature Society of Chicago, spoke on the topic, "Judicial Selection in the United States," and Dr. Patrick M. McFadden, Loyola University School of Law, Chicago, talked about "Campaign Financing for Judicial Elections."

The conferees were assigned to discussion groups, where they discussed these questions: What do you like about Alabama's current process for selecting judges, both trial and appellate? What do you believe could be improved about

Alabama's current judicial selection process? How could the suggested improvement be addressed by continuing with partisan elections, or by changing to nonpartisan, either a merit/nominating commission, or merit Governor nominating, without a commission? The conferees then reassembled and the various discussion groups gave their reports.

The conference met a second time in Montgomery on May 4, 1995. Retired Judge Richard Holmes told the group about the operations of the Judicial Inquiry Commission relating to the discipline of judges, and Robert Elliott, Esq., of Lexington, Kentucky, discussed the operation of the nonpartisan election process in Kentucky. John Fox Arnold, Esq. of St. Louis, discussed the "Missouri Plan," a merit selection plan for selecting and retaining judges.

Although the conference was initially established to consider judicial election and retention and financing for judicial campaigns, the Third Citizens' Conference could be a long lived group, and judicial selection and retention and campaign financing were only the priority items that needed attention because the Legislature was in session.

The initial steering committee designated by the Judicial Planning Committee to consider the feasibility of convening a citizens' conference considered the ABA Model for Commission Creation and Membership, and specifically considered the following, which were adapted from *Just Solutions, Seeking Innovation and Change in the American Justice System,* ABA, 1994, pp. 65-71:

Suggested mandates for court reform commissions:

- Creating and then supporting projects, programs, and initiatives to improve the justice system in the jurisdiction;
- Increasing public awareness of and gaining public support for justice system improvements;
- Enlisting public and government support for fair and adequate funding for the state's justice system;
- Identifying and disseminating models of successful initiatives from other jurisdictions;
- Conducting periodic assessments of system-wide and local justice problems and public opinion about justice;
- Enhancing cooperation among the three branches of government by creating a standing forum at which to work collegially toward effective solutions; and
- Accepting such other tasks to improve the quality of state and local justice as one or more of the three branches of government may assign.

Justice Hugh Maddox

Justice Hugh Maddox received his undergraduate and law degrees from the University of Alabama. Before becoming an associate justice on the Supreme Court of Alabama in 1969, he served as legal advisor to three governors. He was chosen the Montgomery County YMCA Man of the Year in 1989. He is a member of *The Alabama Lawyer* editorial board.

Commission Lifespan:

The work of the commission should require a significant contribution of time. It is recommended that the commission be long-lived.

Commission support and opposition:

It is essential that all three branches of state government support both the process and the result. Opposition to the effort should be identified as early as possible and converted to support.

Commission tasks:

- Gathering qualitative and quantitative data relating to demographic, economic, and sociological trends that affect the quality of justice in the state;
- Creating task forces (including non-commission member experts where appropriate) to study and make recommendations on specific issues, being careful not to overuse the task force model because of the risk of commission fragmentation, lack of continuity, and loss of diversity of viewpoint;
- Conducting public opinion and justice-consumer research on a regular basis through, e.g., professional telephone polling; written questionnaires; and jury pool and jury panel exit polls;
- Collecting, reviewing, and disseminating research results and model initiatives from other sources, for example: other state commissions; the State Justice Institute; the National Center for State Courts; the Conference of Chief Justices; and private think tanks (e.g., the RAND Corporation) and university-based research and practice-oriented projects;
- Convening periodic public/professional symposiums and conferences to bring together justice system stakeholders to discuss specific issues, evaluate reaction to new initiatives and facilitate communication and feedback on the justice system generally.

Commission time lines:

To ensure timely completion of the initiatives, time-specific dates for completion should be built into the authorizing statute, regulation, or judicial order.

Commission funding:

If all three branches of government will support the commission work, the costs can be spread. If nongovernmental funds, including in-kind contributions, are solicited, care must be taken to avoid any appearance of conflict. To the extent possible, support should be balanced between competing interests.

Issues recommended by the Judicial Planning Committee in December 1993 to be referred to a citizens' conference on the courts:

- Establishment of a comprehensive family court and restructuring of the Unified Judicial System into a one-tier court system;
- Finality of judgments by the courts of limited jurisdiction and appeals for trial de novo in the circuit courts;
- Procedures for the selection of judges; and
- Use of six-person juries.

As is apparent from this listing, the issues are many and the life span of the Third Citizens' Conference could be perpetual, and the Third Citizens' Conference could be the group that would give credibility to a statement in a report of the ABA sponsored Just Solutions Conference:

> "If the justice system is to work, if it is to have credibility, it must have the public's trust and confidence. For the public to have confidence in the system, not only must it have a voice in reform, but it

must be a voice that is listened to. Chief Justice Rehnquist, speaking at the conference's conclusion, recalled Clemenceau's famous cautionary words — 'War is too important to be left to the generals.' Similarly, said the Chief Justice, so is 'reform of the justice system... too important to be left to lawyers and judges.' Creating just solutions cannot be a cookie-cutter, top-down process. The initiatives, the energy, and the solutions must be local in origin and local in application, and above all, they must begin with the public."

It is apparent that the State of Alabama, by creating the Alabama Judicial Planning Committee and convening the Third Citizens' Conference, has set in motion a process that can accomplish what the two prior citizens' conferences have accomplished: a better judicial system. ■

ENDNOTES

1. The Just Solutions Conference and initiative was under the leadership of ABA President R. William Ide III, and the Conference's steering committee was chaired by former ABA President Talbot (Sandy) D'Alemberte. *Just Solutions, Seeking Innovation and Change in the American Justice System* A Report on the American Bar Association's "Just Solutions" Conference and Initiatives, Stephen P. Johnson for the American Bar Association, (1994), pp. 3, 7, 9, 12.
2. *Scope and Function of New Committees*, 26 Ala. Law. 351, 361.
3. 27 Ala. Law. 116.
4. A list of the conferees and some of their individual comments on the success of the conference are published in Volume 28 of the Alabama Lawyer at 131-223. The late Justice Pelham J. Merrill gave the keynote address at that conference and, during his years on the Alabama Supreme Court was instrumental in getting the recommendations of the conference adopted and approved by the Legislature.
5. The Court of Civil Appeals was created by 1969 Acts of Ala., Act No. 987, p. 1744, and the size of the Supreme Court was increased from seven to nine members by 1969 Acts of Ala., Act No. 602, p. 1087.
6. Amendment 328 to the Alabama Const. of 1901 (the Judicial Article) was proposed by 1973 Acts of Ala., Act No. 1051, p. 1676, was submitted to the voters of the state on December 16, 1973, and was proclaimed ratified December 27, 1973. The Judicial Article Implementation Act is Act No. 1205, 1975 Acts of Ala., p. 2384.
7. Ala. Code 1975, § 12-8-1. Creation; composition; designation of members.

   A judicial conference for the state of Alabama is hereby created, which shall consist of: the chief justice of the supreme court of Alabama and two associate justices of such court, designated by the chief justice; a member of the court of criminal appeals, designated by the presiding judge of that court; a member of the court of civil appeals, designated by the presiding judge of that court; three circuit judges of the state, designated by the president of the association of circuit judges; three lawyers, who are members in good standing of the Alabama state bar, designated by the president of the Alabama state bar; one probate judge, designated by the president of the association of probate judges; and, subsequent to establishment of the district courts of Alabama, two district court judges, designated by the president of the association of district judges, and two municipal court judges, designated by the president of the association of municipal court judges.

   § 12-9-1. Creation; duties generally.

   A permanent study commission on Alabama's judicial system is hereby created. This commission shall continuously study the judicial system of the state, the courts of the state, the administration of justice in Alabama, criminal rehabilitation, criminal punishment methods and procedures and all matters relating directly or indirectly to the administration of justice in Alabama and make recommendations pertaining thereto.

   § 12-9-2. Composition; appointment of certain members; terms of office of members.

   (a) Such commission shall be composed of the following members:
   (1) Six members of the house of representatives, one of whom shall be the chairman of the judicial committee and the other five of whom shall be appointed by the speaker of the house from the judicial committee of the house of representatives;
   (2) Six members of the state senate, one of whom shall be the chairman of the judicial committee and the other five of whom shall be appointed by the lieutenant governor of the state or, in the event there is no lieutenant governor, the presiding officer of the senate, from the judicial committee of the senate;
   (3) The members of the judicial conference, the membership of which is set forth in section 12-8-1; and
   (4) The lieutenant governor, the speaker of the house of representatives, the legal advisor to the governor of Alabama and a member of the staff of the attorney general appointed by the attorney general of Alabama.

   (b) The lieutenant governor and the members from the legislature shall serve during the term of office to which they were elected as members of the legislature. The member of the attorney general's staff shall serve at the pleasure of the attorney general. The members of the judicial conference shall serve as long as they remain members of such judicial conference.
8. It was at that meeting that the author of this article suggested that consideration should be given to reconvening the Citizens' Conference to assist in the planning process, because of the success of the first two conferences.
9. The author of this article made this recommendation, because he was intimately familiar with the work of the other two citizens' conferences and of the value of having had citizen input and citizen support in establishing the Unified Judicial System.
10. Citizens' Conference on the Courts included: Former Gov. Brewer; Justice Hugh Maddox, Justice Ralph Cook, Retired Justice Oscar W. Adams, Jr., Judge Sam Taylor, Judge William E. Robertson, Retired Judge Richard Holmes, Judge Joseph D. Phelps, Judge Ralph Grider, circuit clerk G. Daniel Reeves, municipal court clerk Gayle Kellenger, Carl E. Chamblee, Jr., Esq., and Keith Norman, Executive director of the Alabama State Bar.

YOUNG LAWYERS' SECTION

By HERBERT HAROLD WEST, JR.

The last few months have been very busy ones for the Young Lawyers' Section. The section held its annual seminar at the beach; put on its second annual minority participation conference; sent, in cooperation with the YMCA, winners of the high school mock trial competition to Denver, Colorado to participate in the National Mock Trial Competition; and planned and organized the admissions ceremonies for the spring admittees.

The annual seminar at the beach, which was held at the Sandestin Beach Resort in Sandestin, Florida once again was a big success. Approximately 260 lawyers registered to attend the seminar and were eligible for up to six hours of continuing legal education credit. The seminar featured an outstanding lineup of speakers, including: **Judge Arthur Hanes; Dean Charles Gamble; Professor Brad Bishop; Miguel J. Cortez** (clerk for the Eleventh Circuit); **Skip Ames; Tom Dutton; David Dowd;** and **Charlie Anderson.** The topics on which they spoke ranged from DUI law to evidence to procedure to the new corporate code. Each morning session of the seminar was followed by the usual entertainment in the afternoon and evening at which the lawyers attending the seminar had an opportunity to meet and exchange ideas. On behalf of the YLS, I extend a special thanks to the firms and companies which sponsored those social events: **Pittman, Hooks, Marsh, Dutton & Hollis, P.C.; Jackson, Taylor & Martino, P.C.; Beasley, Wilson, Allen, Main & Crow, P.C.; Hare, Wynn, Newell & Newton; Foshee & Turner;** and **Insurance Specialists, Inc.** I also thank **Judson Wells, Gordon Armstrong, Robert Hedge,** and **Andy Birchfield** for their hard work in putting on the seminar.

On May 5, 1995, the section put on the Second Annual Minority Participation Conference. The conference was held at Alabama State University and provided minority high school students an opportunity to meet with minority judges and lawyers and ask questions about legal careers. This year approximately 110 high school students participated in the forum. This year's attendance of 110 students was an increase from last year's attendance of 75. **Fred Gray,** who chairs the committee, was responsible for the conference. He is commended for his efforts.

The section is also responsible for the spring admissions ceremony which took

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place on May 23, 1995. Over 100 new lawyers were admitted to the state bar at the ceremony. The section also planned and organized a luncheon after the ceremony in honor of the admittees and their guests. This project is one of the most difficult and time-consuming of all of the section's projects, and **Tom Albritton** and **Bryan Horsley** are commended for their hard work in planning and organizing the ceremony.

I can also report that, following a statewide competition held in Montgomery, an all-star team of high school mock trial competitors represented the state at the National Mock Trial Competition in Denver, Colorado. The group did very well despite the fact that it was hampered because its members were from schools across the state and were unable to practice as a team like most of the teams against which it was competing.

Finally, the section has agreed with the YLS of the Birmingham Bar Association to sponsor a band party at Sloss Furnace on Thursday, July 20 during the state bar convention. The party will begin at 6:30 p.m. with the band starting at 8 p.m. The proceeds from the party will be donated to the YWCA program for abused and battered women and children. Tickets are $10 and may be purchased when registering for the convention, from the Birmingham YLS or at the gate.

This is my last article as president of the YLS, so I take this opportunity to thank you for allowing me to serve as your president for the past year. It has been an honor and a privilege. I thank the officers and the members of the Executive Committee for their hard work and dedication. ■

DISCIPLINARY REPORT

Public Reprimands

• On May 12, 1995, the Alabama State Bar administered a public reprimand, without general publication, to Montgomery attorney **Keith Ausborn**. Ausborn was listed as attorney for the petitioner in a matter wherein the petitioner was seeking to terminate the parental rights to and secure permanent custody of a juvenile. The child's mother had executed a written document stating that she wanted to give up her parental rights to the child.

The court inquired of the mother as to how she had come to execute the written document. The mother stated that even though she had an attorney at the time she executed the document, she did not discuss the document with her attorney, nor did she advise her attorney that she had executed the document. When asked by the court if she had prepared the document herself, the mother stated, "I prepared it myself but I had some legal advice from Mr. Ausborn." The court then inquired of Ausborn as to how he had come to be the attorney who prepared the document for the mother when, in fact, Ausborn knew the mother had an attorney, and Ausborn was representing an adverse party. In response, Ausborn stated, "The only communication I had with her (the mother) was indirectly through Mrs. Newberry (Ausborn's client)."

Ausborn's conduct was found to have violated Rule 4.2, which rule prohibits an attorney from communicating about the subject of the representation with a party the attorney knows to be represented by another attorney. The Disciplinary Commission also found that Ausborn's conduct involved dishonesty, fraud, deceit or misrepresentation, a violation of Rule 8.4(c), was conduct prejudicial to the administration of justice, a violation of Rule 8.4(d), and thereby violated the Rules of Professional Conduct by engaging in conduct which adversely reflected on Ausborn's fitness to practice law, violations of Rules 8.4(a) and (g). [ASB No. 94-170]

• On March 12, 1995, Tuscaloosa attorney **John Alan Bivens** was administered a public reprimand, with general publication, by the Alabama State Bar.

Bivens had been hired by a woman from Mississippi to represent the woman's son in an appeal of a criminal conviction. Bivens made the mother and son understand that his fee would cover the appeal for the son, on both the state and federal level. A letter from Bivens to the mother supported the mother and son's interpretation of their employment contract with Bivens.

Bivens initially informed his clients that the appeal would be ready to file in January of 1988. However, this was not done. There were numerous requests from the clients for information concerning the status of the case beginning in April of 1988, and continuing up and until the clients filed a grievance against Bivens in December of 1993.

Petitions filed by Bivens on behalf of the son were ruled upon by the Mississippi Supreme Court in April of 1990. However, Bivens failed to inform his clients about the denial of these motions until the mother came to Bivens' Tuscaloosa office for information in February of 1991. At that time, Bivens also offered to file a petition for writ of habeas corpus in the federal court. However, he failed to pursue this.

The Disciplinary Commission determined that Bivens' actions violated Rule 1.3, in that he willfully neglected a legal matter entrusted to him, Rule 1.4(a), in that he failed to keep his client reasonably informed about the status of the matter, Rule 1.5(a), in that he charged or collected a clearly excessive fee, and Rule 8.4(d), in that he engaged in conduct prejudicial to the administration of justice, all of which adversely reflect on his fitness to practice law, a violation of Rule 8.4(g). [ASB No. 93-466]

• On May 12, 1995, Leeds, Alabama attorney **Nancy L. Franklin** was publicly reprimanded for willfully neglecting a legal matter entrusted to her and failing to communicate with a client. A client made arrangements with Franklin to handle a Social Security disability benefits case. After the initial consultation, the client heard nothing for eight months. Numerous calls and phone messages were ignored. When the Birmingham Bar Association investigated the client's complaint, Franklin did not respond to the allegations. The Disciplinary Commission had determined that a public reprimand without general publication was appropriate in this case, and Franklin accepted that decision. [ASB No. 94-173]

Suspensions

• Scottsboro attorney **Richard M. Payne** was suspended from the practice of law by Order of the Supreme Court of Alabama for a period of three years, said suspension effective February 21, 1995. The order of the Supreme Court affirms the action of the Disciplinary Board of the Alabama State Bar which suspended Payne on the basis of evidence that he had misappropriated and converted to his own use funds belonging to his client. [ASB No. 93-091]

• Gadsden attorney **Milford Leon Garmon** has been suspended from the practice of law in the State of Alabama for a period of 225 days, said suspension to be effective April 22, 1995. The Supreme Court of Alabama ordered that Garmon be suspended for having committed multiple violations of the Code of Professional Responsibility of the Alabama State Bar. [ASB Nos. 89-99(A), 89-173, 89-341 & 90-775]

• On May 18, 1995, the Disciplinary Commission of the Alabama State Bar ordered that Gadsden attorney **Joseph Gullatte Hunter, III** be interimly suspended from the practice of law in the State of Alabama pursuant to Rule 20 of the Rules of Disciplinary Procedure. [Rule 20(a); Pet. # 95-02] ■

RECENT DECISIONS

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

SUPREME COURT OF ALABAMA

Telephone pager and $800 in cash can be constructive evidence of drug possession

Rowell v. State, 29 ABR 359 (January 1995). Is evidence of $800 cash and a telephone pager admissible to prove possession of cocaine? In an opinion authored by the chief justice, the Alabama Supreme Court answered in the affirmative.

Rowell was arrested for illegal possession of cocaine following a police search of an automobile co-owned by Rowell and a friend, who had recently died and against whom cocaine charges had been pending at the time of his death. The search, which was performed pursuant to a search warrant, disclosed a match box containing crack cocaine under the carpet of the floor on the driver's side and $800 in cash hidden in a boot located in a trunk of the automobile. At the time of Rowell's arrest, he was found wearing a telephone pager (beeper). At trial, Rowell's lawyer made a motion *in limine* to exclude the evidence regarding the telephone pager and the cash that had been found in the search of Rowell's car.

Ultimately, the Alabama Court of Criminal Appeals ruled that the trial court had erred in allowing the evidence to be admitted holding that although the evidence would be material to a charge of cocaine distribution, it was not material on the charge of cocaine possession. The Alabama Supreme Court reversed and remanded the case.

Alabama law is not clear on what type of circumstantial evidence may be used to show that the defendant had knowledge of drugs located within a car, not in the defendant's exclusive possession. However, it is common knowledge that telephone pagers and large sums of cash are often associated with the illegal sale of drugs and constitute, so to speak, tools of the trade. Chief Justice Hornsby ultimately concluded:

> We conclude that Alabama case law recognizes that large sums of cash are relevant and material to a charge of constructive possession of a controlled substance, and our case law supports the admission of the evidence regarding the $800 found in the boot in the trunk of Rowell's car.

Accordingly, the $800 and the telephone pager were properly admitted to prove the defendant's constructive possession of the cocaine.

UNITED STATES SUPREME COURT

Is *Batson* a two-step or a waltz for the prosecution?

Purkett v. Elem, No. 94-802, 1995 WL 283453 (May 15, 1995). The supreme court made it easier for prosecutors to counter allegations that they have improperly eliminated potential jurors based upon race.

The supreme court's May 15, 1995 *per curiam* decision held that prosecutors faced with a *Batson* objection do not necessarily have to offer a "persuasive or even plausible" reason for their jury selection tactics. Instead, it is up to the defendant to convince the judge that racial considerations motivated the exclusion of a potential juror.

The supreme court's ruling, without oral argument, reinstated a Missouri man's robbery conviction by reversing the Eighth Circuit Court of Appeals which had held that two black men were unlawfully excluded from the trial jury. The Eighth Circuit had dismissed as implausible the prosecutor's explanation that he did not like the way the two men looked because they had long curly hair, were unkempt, and had facial hair.

By way of brief review, the supreme court's 1986 decision in *Batson* held that the Equal Protection Clause of the Fourteenth Amendment forbids a prosecutor to use peremptory challenges to exclude African Americans from jury service because of their race. The court articulated a three-step process for proving such violations. First, a pattern of peremptory challenges of black jurors may establish a *prima facie* case of discriminatory purpose. Two, the prosecutor may rebut that *prima facie* case by tendering a race-neutral explanation for the strikes. Third, the court must decide whether the explanation is pretextual. At the second step of this inquiry, neither a mere denial of improper motive nor an incredible explanation will suffice to rebut the *prima facie* showing of discriminatory purpose.

At a minimum, as the court earlier held in *Batson*, the prosecutor "must articulate a neutral explanation related to the particular case to be tried."

The supreme court's seven-to-two ruling held, "that the Court of Appeals for the Eighth Circuit erred by combining *Batson's* second and third steps into one, requiring that the justification tendered at the second step be not just neutral, but also minimally persuasive, i.e., a "plausible" basis for believing that the person's ability to perform his or her duties as a juror will be affected. It is not until the third step that the persuasiveness of the justification becomes relevant, a step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." The court's reasoning went on to state, "...At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. But to say that a trial judge may choose to disbelieve a silly or superstitious reason at step three is quite different from saying that a trial judge must terminate the inquiry at step two when the face-neutral reason is silly or superstitious. The latter violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike."

In a stinging dissent, Justices Stevens and Breyer wrote as follows: "Today, without argument, the Court replaces the *Batson* standard with the surprising

announcement that any neutral explanation, no matter how 'implausible or fantastic,' ante, at 3, even if it is 'silly or superstitious,' ibid., is sufficient to rebut a prima facie case of discrimination. A trial court must accept that neutral explanation unless a separate 'step three' inquiry leads to the conclusion that the peremptory challenge was racially motivated. The Court does not attempt to explain why a statement that 'the juror had a beard,' or 'the juror's last name began with the letter 'S'' should satisfy step two, though a statement that 'I had a hunch' should not... It is not too much to ask that a prosecutor's explanation for his strikes be race neutral, reasonably specific, and trial related. Nothing less will serve to rebut the inference of race-based discrimination that arises when the defendant has made out a prima facie case.

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.

Supreme Court upholds judge override in Alabama capital cases

Harris v. Alabama, No. 93-7659, 63 LW 4147 (February 21, 1995). The United States Supreme Court has upheld the constitutionality of Alabama's override scheme in capital cases by concluding that the Eighth Amendment does not "require the State to define the weight the sentencing judge must give to an advisory jury verdict."

Alabama law vests capital sentencing authority in the trial judge, but requires the judge to "consider" an advisory jury verdict. After Louise Harris was convicted of capital murder, the jury recommended that she be imprisoned for life without parole, but the trial judge sentenced her to death by concluding that the statutory aggravated circumstances found and considered by the court outweighed all the mitigating circumstances. The Alabama Court of Criminal Appeals affirmed the conviction and sentence rejecting Harris's argument that the capital sentencing statute is unconstitutional because it does not specify the weight the court must give to the jury's recommendation, and thus, permits the arbitrary imposition of the death penalty. The Alabama Supreme Court affirmed.

The United States Supreme Court granted *certiorari* to review the Alabama capital sentencing scheme. Nearly 25 percent of Alabama's death row prisoners receive life without parole verdicts by the capital jurors who hear their cases. Alabama is the only state in the country which permits a trial judge to override a jury verdict of life in a capital case without directing or guiding the judge's consideration of the jury's sentencing recommendation. Three other states that permit judge override of a jury verdict of life without parole have required their judges to conform to some legal standard, i.e., yardstick, that is reviewable to the litigants and to the court.

The Supreme Court, in a decision authored by Justice O'Connor, held that the Eighth Amendment does not require the State to define the weight the sentencing judge must give to an advisory jury verdict. Because the Constitution permits the trial judge, acting alone, to impose a capital sentence, *see Spaziano v. Florida, 468 U.S. 447, 465,* it is not offended when a state further requires the judge to consider a jury recommendation and trust a judge to give it the proper weight. Alabama's capital sentencing scheme is much like Florida's except that a Florida sentencing judge is required to give the jury's recommendation "great weight," *Tedder v. State, 322 So.2d 908, 910,* while an Alabama

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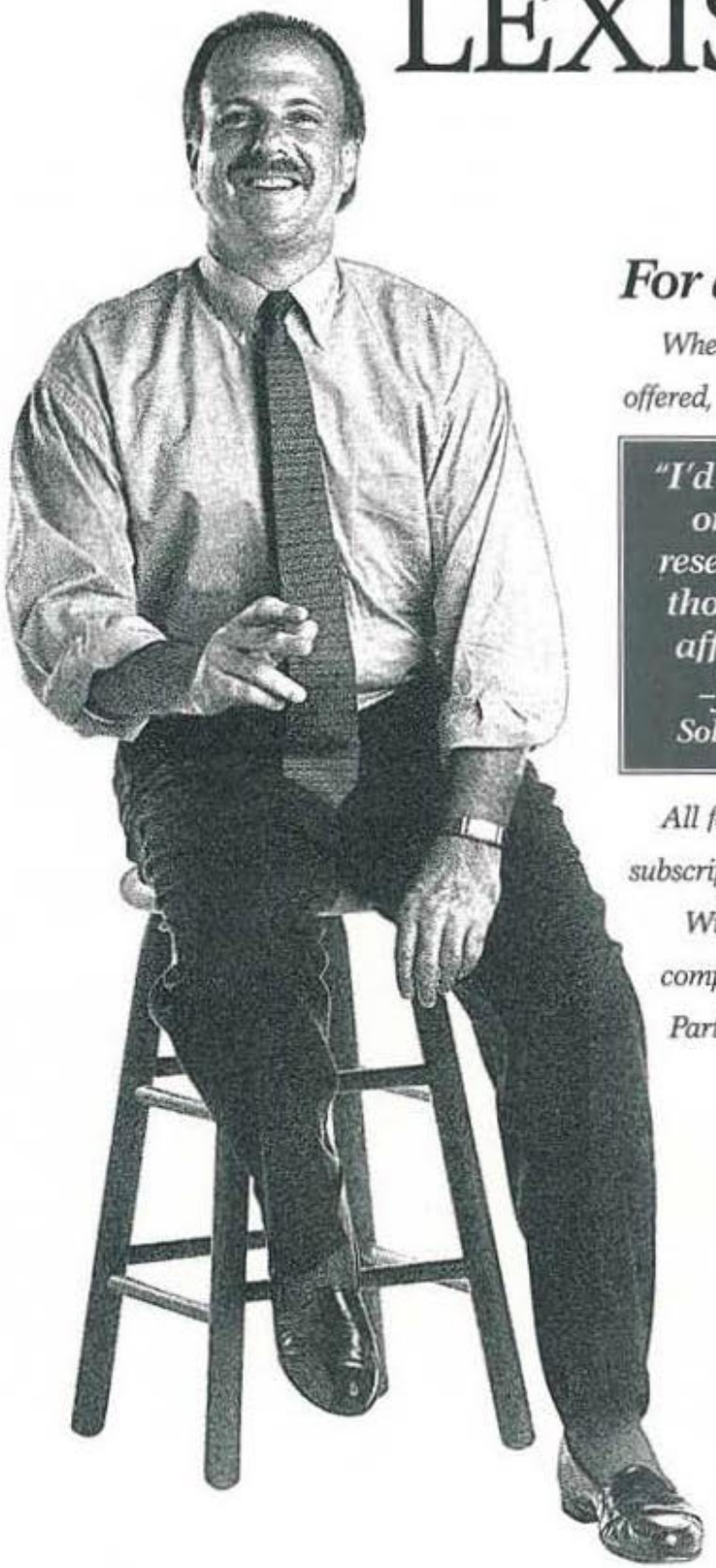

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Recent Decisions

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judge is not.

The Supreme Court further reasoned that, "...to impose the *Tedder* standard here would offend established principles governing the criteria to be considered by the sentencer, *See e.g., Franklin v. Lynaugh, 487 U.S. 164, 179*, and would place within constitutional ambit micro management tasks that properly rests within the State's discretion to administer its criminal justice system."

Interestingly, the Court did not address whether Alabama's override system may violate the Fourteenth Amendment's Equal Protection Clause under those circumstances where particular bias can be established.

PRACTICE TIP: The writer suggests that because the Fourteenth Amendment issue of judge override may still be viable, attorneys should continue challenging the legitimacy of death sentences imposed where juries have returned life verdicts.

In a lengthy dissent, Justice Stevens criticized Alabama's scheme and focused on the "real world issue" of whether elected politics might influence judicial decision making in hard cases.

RECENT BANKRUPTCY LEGISLATIVE COMMENT

Bankruptcy Code §550(c) under the 1994 Amendments now provides as follows:

> If a transfer made between 90 days and one year before the filing of the petition—
>
> (1) is avoided under section 547(b) of this title; and
>
> (2) was made for the benefit of a creditor that at the time of such transfer was an insider; the trustee may not recover under subsection
>
> (a) from a transferee that is not an insider.

This amended section was intended to overrule the *DePrizio* line of cases by verifying that non-asset transferees should not be subject to preference claims beyond the 90-day statutory period. The *DePrizio* case had ruled that payment by the debtor to a non-insider lender which held a personal guarantee from an insider more than 90 days preceding bankruptcy but less than one year could be a preference under section 547(b), for the reason that the transfer benefitted the insider guarantor. As noted, the amendment provides that the transfer can only be recovered from the insider guarantor who is the party actually receiving the benefit, and not from the non-insider lender.

Bankruptcy scholars are now pointing out that the Reform Act amendment did not amend subsection 547(b) which begins as follows:

> *** the trustee may avoid any transfer of any interest of the debtor in property***

As this subsection was not amended, it still can be contended that if the debtor granted a lien to a non-insider holding an insider guarantee during the one-year preference period for insiders, the granting of such lien to an insider may still be avoided. If courts follow Justice Scalia on the *Ron Pair Enterprises* Supreme Court case, then lien avoidance under section 547 will remain as a remedy, separate and distinct from section 550 property recovery. Conversely if courts follow what was undoubtedly the intent to include lien avoidance in the amendment, then the courts will write "result-oriented" opinions. The Eleventh Circuit has already adopted *DePrizio*, and thus it remains to be seen as to what will occur with the courts in this circuit.

BANKRUPTCY

For preference determination date, Seventh Circuit rules that garnishment or attachment does not transfer property to creditor until date of final order, or date attachment is issued

In the Matter of Freedom Group Incorporated, 50 F.3d 408, 26 B.C.D. 1147 (7th Cir. March 14, 1995). Well-known Circuit Judge Richard A. Posner entered the opinion in this case which was submitted on stipulated facts. On June 2, Laphan-Hickey (L-H) obtained a $7,335.49 judgment against Freedom Group in an Indiana state court. Ten days later, the same court entered an order called "notice of garnishment", which was served on Freedom Group's bank on June 15. Freedom Group had only around $100 in the bank on the day served, but the following day $18,000 was deposited. On June 17, the court entered an order on the garnishment directing the bank to pay the judgment, which was done. On September 14, Freedom Group filed bankruptcy. June 15 was 91 days before bankruptcy - the final order on garnishment was 89 days before bankruptcy. As a preferential transfer is considered avoidable to parties other than insiders, only if made within 90 days before transfer, time is most material. Judge Posner, in reviewing the law, first declared that federal law governs the issue of when the transfer occurs, but that state law determines the definition of "property" and "interest in property." The court noted that in Indiana, the "notice of garnishment" prevents the debtor from withdrawing the funds, and further impresses a lien in favor of the creditor for the amount due on the judgment. The court thus held that although there was a lien impressed in favor of L-H on June 15, no transfer was effected until June 17. Judge Posner took issue with the argument of L-H that the date of service of the notice was the critical day because it perfected the creditor's claim to the contents of the bank account. He admitted that different circuits have held that the time begins running on the date of the notice, mentioning *inter alia In re Conner*, 733 F.2d 1560 (11th Cir. 1984). He believed they no longer apply because of *Barnhill v. Johnson*, 112 S. Ct. 1386, 1389 (1992) holding that a transfer of money in a checking account (for determining time of preferential payment) occurs not when the check is delivered, but when paid. Following this reasoning, he determined that a garnishment or attachment does not effect the transfer until a final order of garnishment or attachment issued.

Comment: This case should reopen the holdings, pre-*Barnhill v. Johnson*, in all

circuits, and there may be variances in the different states, because of interpretation of state law. I suggest that if the reader has the question presented, Alabama law as to definition of "property" and "interest in property" be examined, and then considered together with a close reading of the garnishment and attachment statutes.

Eleventh Circuit holds that tax liability is due discharge even if debtor knowingly failed to pay taxes

In re Haas, 48 F.3d 1153 (11th Cir. Mar. 30, 1995). Between 1977 and 1985, debtor paid no income or employment taxes, but he did file tax returns. In 1987, he entered a guilty plea for failure to pay income taxes from 1980 to 1982, and received a suspended sentence of one year and five years probation, conditioned upon remaining current on estimated tax and paying monthly on the delinquencies. He complied with the conditions of his probation until 1991 when debtor and his wife filed a Chapter 11 petition. The IRS filed a claim for over $700,000, and debtor filed an adversary proceeding to determine dischargeability for the 1977-87 tax years. The bankruptcy court ruled for the debtor on the premise that the failure to pay taxes did not constitute an attempt to evade or defeat his taxes under §523(a)(1)(C). The district court vacated the decision of the bankruptcy court and remanded with instructions to determine whether debtor's failure to pay the taxes was "willful." The bankruptcy court again held the taxes dischargeable finding that debtor made no affirmative attempt to evade his taxes but merely used his income to pay other debts. On further appeal, the district court reversed holding that debtor's failure to pay his taxes when he was financially able to and choosing instead to pay other obligations constituted a willful attempt to evade his tax obligations rendering them nondischargeable. The debtor then appealed to the Eleventh Circuit.

The Eleventh Circuit, following *Ron Pair, Inc.*, 109 S. Ct. 1026, 1031 (1984), said the plain meaning of the statute must be followed. Under section 523(a)(1)(C), a debtor may not discharge a tax "with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax." The Sixth Circuit has held previously that a debtor's conscious failure to file and pay the tax fell within the exception to discharge. The Eleventh Circuit said to extend that holding to the facts of this case would make all tax debts non-dischargeable, reasoning that if Congress wished to make all taxes non-dischargeable, it would have done so. The opinion compared IRC §7201 with Bankruptcy Section 523(a)(1)(C), calling to attention that IRC §7201 contained words referring to payment, viz "or the payment thereof", while the bankruptcy section omits the words referring to payment. In §523(a)(1), Congress limited the exception from discharge to those taxes covered by §507(a)(8) which includes certain taxes incurred within three years of bankruptcy. The Eleventh Circuit upon this basis held that the district court erred in determining the tax to be nondischargeable.

Comment: This case contains a dissertation on statutory construction which could be helpful in non-related cases. Insofar as the particular holding is concerned, it seems rather clear that an affirmance would have made inoperative the implications of the provisions of §507(a) (8), that taxes incurred more than three years previously are dischargeable. ■

• M·E·M·O·R·I·A·L·S •

Marion R. Vickers

Whereas, Marion R. Vickers, a distinguished member of this association died on February 2, 1995, and the Mobile Bar Association desires to remember his name and recognize his contributions both to our profession and to this community; and

Whereas, Marion R. Vickers was born on December 24, 1901 in Mobile, where he attended St. Vincent Parochial School, and received his undergraduate degree from Spring Hill College and his law degree from Georgetown University. He began practice in Mobile in 1923, with Lyons, Chamberlain & Courtney, then as a sole practitioner before forming firms which became known as Vickers, Leigh & Thornton, and Vickers, Riis, Murray & Curran. His civic and professional activities included serving in the Alabama House of Representatives in the 1920s, serving as an assistant district attorney, serving as chairman of the Community Chest (predecessor to the United Fund) in 1944, serving as president of the Mobile Bar Association in 1945, and participating in numerous other civic and charitable affairs in and about the City of Mobile; and

Whereas, Marion R. Vickers practiced law in Mobile more than 60 years, specializing in business transactions and was recognized and admired by his fellow lawyers as being skilled and able in this and other areas of the practice. Among his many accomplishments, of which he was particularly proud, were:

(i) instigating and handling the transfer by the Glennon family of the Point Clear properties for the purpose of building the new Grand Hotel, as the main facilities of the hotel exist today;

(ii) serving as an incorporator, director and general counsel of Southern Industries Corporation during its entire existence; during which it developed into a publicly held corporation and later merged into Dravo Corporation, a New York Stock Exchange company;

(iii) serving as director and shareholder in connection with the formation of the Prichard National Bank and Loop National Bank, which were later merged into the Merchants National Bank of Mobile (now First Alabama Bank);

(iv) serving on the board of regents of Spring Hill College and acting as counsel to the college during most of his active practice; and

(v) serving as a trustee in connection with the charitable trusts created under the wills of Edward A. Roberts and Belle G. Roberts, which trusts have been and will continue to be a significant source of funding for charities in Mobile County in perpetuity; and

Whereas, Marion R. Vickers accomplished many other things in his life, and was an immensely charming gentleman with a magnetic personality, gifted with an ability to visualize economic changes and regardless of his age, to accommodate to changes in the law and business transactions; and

Whereas, Marion R. Vickers was predeceased by his wife of 57 years, Jean Dumas Vickers, and by his only son, Marion R. Vickers, Jr., also an attorney and member of the Mobile Bar Association, and is survived by his daughter, Elizabeth V. Courtney, eight grandchildren, great-grandchildren, and numerous other relatives.

Alton R. Brown, Jr.
President
Mobile Bar Association

Richard O. Fant

Whereas, Richard O. Fant was a member of the Tuscaloosa County Bar Association for more than 40 years died July 10, 1994; and

Whereas, he served his country as a combat veteran of World War II, and later in the local Army Reserves; and

Whereas, he had served many years as commander of the Tuscaloosa Chapter of the Veterans of Foreign Wars and was active in the National Organization of the Veterans of Foreign Wars; and

Whereas, he was a dedicated member of the Lions Club of Tuscaloosa for decades; and

Whereas, he was a loyal member of the Sons of Confederate Veterans and attended many national conventions, always representing Tuscaloosa in his own inimitable manner; and

Whereas, he was a lifelong member and generous supporter of the First Presbyterian Church of Tuscaloosa; and

Whereas, Richard was always vigorous in representing his clients, even though he may have been somewhat outspoken at times; and

Whereas, his distinctive pleadings and his unique typing skills were always recognized by clerks, judges, and his fellow members of the bar; and

Whereas, Richard O. Fant never lacked perseverance or confidence when trying cases before a judge or jury; and

Whereas, Richard O. Fant was always a colorful personality who never seemed discouraged in spite of the slings and arrows of outrageous fortune; therefore

LET IT NOW BE RESOLVED that the bar association of Tuscaloosa County regrets his untimely death, that it recognizes his contributions to our community, and that this resolution be recorded in the minutes of this organization and published to his family.

Alyce Manley Spruell
Secretary
Tuscaloosa County Bar Association

• M·E·M·O·R·I·A·L·S •

Willard W. Livingston

Willard W. Livingston, a distinguished member of this association, passed away on October 7, 1993. The Montgomery County Bar Association desires to remember his name and recognize his contributions made to our profession and to this community.

Willard W. Livingston was a native of Notasulga, Alabama, where he attended public schools. He graduated from the University of Alabama in 1937 with an A.B. degree in history. He attended the University of Alabama School of Law where he graduated in 1941.

Willard was a U.S. Army veteran of World War II and completed 33 years of military service in the Judge Advocate General's Department, Air Force Reserve, retiring with the rank of colonel in 1967. He served 29 years as an assistant attorney general, including 19 years as chief counsel for the Alabama Department of Revenue. He was a member of the First Baptist Church, Montgomery Rotary Club, and Phi Gamma Delta Social Fraternity.

Willard was the son of the late Chief Justice J. Ed Livingston and Marie Wise Livingston. He was a devoted family man and left surviving him his wife, Ann Key Murphree Livingston, Montgomery; three sons and daughters-in-law, Willard, Jr. and Margaret Fullton Livingston, Mobile; Ed and Louise Baker Livingston, Montgomery; and Harold and Carolyn Swindall Livingston, Tupelo, Mississippi; a daughter, Ann Livingston Ray, Montgomery; a daughter and son-in-law, Amy and Randy Goff, Gardendale; one brother and sister-in-law, Edwin B. and Louise Runge Livingston, Sylacauga; and seven grandchildren.

Willard was a true gentleman in every sense of the term, both in his private and professional life. He was recognized and respected for his proficiency in his area of the practice of law and for his mannerly and ethical conduct. This association desires to spread upon its permanent records a token of our gratitude to the Almighty for allowing us to have known and to have been associated with this fine and genteel lawyer.

Therefore, be it resolved by the members of the Montgomery County Bar Association in annual meeting duly assembled, that the association and its members hereby unanimously express their gratitude for the life and service of Willard W. Livingston, and further express their grief and extend their sympathy to his widow, to his son and our beloved friend and member, Ed Livingston, and to the other members of Willard's family.

W. Mark Anderson
Secretary
Montgomery County Bar Association

Warren S. Reese, Jr.

Whereas, this association lost one of its most colorful, beloved and popular members on June 21, 1994 with the passing of Warren S. Reese, Jr.; and

Whereas, Warren's age was known only to his deceased father, deceased mother and Warren but it is known that he was a senior, possibly the senior, member of this bar association; and

Whereas, Warren was an avid Alabama football fan, a decorated U.S. Army veteran, was educated at Barnes School, Harvard University, Tulane University and the University of Alabama and practiced law for 65 years; and

Whereas, he left surviving him a devoted wife, Margaret, a daughter, Stonie, and two popular members of this Association, Judge Gene Reese and lawyer Elna Lee Reese;

Therefore, be it resolved, that the Montgomery County Bar Association at its January 1995 meeting does mourn the death of our brother, Warren, and extends its deepest sympathy to Margaret, Stonie, Gene, Lynn and Elna Lee.

W. Mark Anderson
Secretary
Montgomery County Bar Association

Please Help Us

The Alabama Lawyer "Memorials" section is designed to provide members of the bar with information about the death of their colleagues. The Alabama State Bar and the Editorial Board have no way of knowing when one of our members is deceased unless we are notified. Please take the time to provide us with that information. If you wish to write something about the individual's life and professional accomplishments for publication in the magazine, please limit your comments to 250 words and send us a picture if possible. We reserve the right to edit all information submitted for the "Memorials" section. Please send notification information to the following address:

Margaret L. Murphy
The Alabama Lawyer
P.O. Box 4156
Montgomery, AL 36101

• M·E·M·O·R·I·A·L·S •

Claude Harris, Jr.

Whereas, it is with deep and abiding grief that the Tuscaloosa County Bar Association records the lamentable death of an esteemed member of this association, Claude Harris, Jr., of Tuscaloosa, Alabama, on October 2, 1994; and

Whereas, Claude was a highly regarded member of his community, who was widely known for his service and support of many organizations and programs that had a great impact on the good and well-being of his fellow man; and

Whereas, Claude served his country as a member of the Alabama National Guard since 1965, rising in rank from private to colonel, during that time; and

Whereas, Claude served his county and state as an assistant district attorney from 1965 to 1976, an advocate for victims of crime, and a staunch supporter of the law enforcement officers of this community; and

Whereas, Claude continued his service to the public as circuit judge of this county and circuit from 1977 to 1985, as an exemplary administrator of justice; and

Whereas, upon his retirement as circuit judge, he continued his service to the good of his state and country as an immensely popular and outstanding United States Congressman for three consecutive terms from 1987 to 1993, a steady supporter of legislation to make Congress more responsive to the people; and

Whereas, Claude concluded his exemplary career as a true public servant as United States Attorney for the Northern District of Alabama from September 1993 until his untimely death; and

Whereas, Claude, who is survived by his beloved wife, Barbara Cork Harris, was the loving father of two sons, Jeff and Trip, and his loss is a source of deep and abiding grief to them all; and

Whereas, it may be most succinctly said of Claude that he made a difference, a very positive difference, in all our lives and this, our brother lives on; now therefore,

Be it resolved by the Tuscaloosa County Bar Association, that we commemorate the life of Claude Harris, Jr., lawyer, jurist, and statesman, and direct that a copy of this resolution shall be spread upon the minutes of this association.

Alyce Manley Spruell
Secretary
Tuscaloosa County Bar Association

David B. Ellis

Whereas, David B. Ellis, a fellow legal practitioner, who received his undergraduate degree from Birmingham Southern College, his law degree from the University of Alabama School of Law, and was admitted to the Alabama Bar in 1974, died unexpectedly on Wednesday, August 10, 1994.

Whereas, David Ellis was an excellent trial lawyer and a community leader; and

Whereas, he was not only a respected colleague but a good friend to all who needed him; and

Whereas, during his career he exemplified the good in attorneys, protecting the meek and mild against the strong and powerful; and

Whereas, his brilliance and devotion to the law was manifested in his intense desire to do the best for his clients and his community; and

Whereas, he took the time to give young lawyers guidance with compassion and understanding; and

Whereas, he was a loving family man and a devoted husband, and was known and cherished for his effervescent personality and his warm and loving smile; and

Whereas, David was an avid fisherman and outdoorsman; and

Whereas, he devoted countless hours to charitable events and promoted good will among the community; and

Whereas, in his passing we feel the loss of a dear and cherished friend who always displayed a sense of fairness, justice and selflessness in his dealings with others; therefore,

BE IT RESOLVED that the Tuscaloosa County Bar Association by this means expresses its deepest sympathy and regrets at the passing of our dear friend, David B. Ellis.

Alyce Manley Spruell
Secretary
Tuscaloosa County Bar Association

Edward B. Crosland
Bethesda, Maryland
Admitted: 1935
Died: April 10, 1995

William Aubrey Dominick
Tuscaloosa
Admitted: 1929
Died: April 27, 1995

William Lewis McElroy
Birmingham
Admitted: 1942
Died: March 21, 1995

Marcus Eugene McConnell, Jr.
Birmingham
Admitted: 1941
Died: April 25, 1995

Annie L. Sorge
Birmingham
Admitted: 1974
Died: February 17, 1995

Marion Richard Vickers
Mobile
Admitted: 1923
Died: January 31, 1995

• M·E·M·O·R·I·A·L·S •

John Peter Kohn

Whereas, John Peter Kohn, Jr. was born on December 27, 1902, the son of John Peter Kohn and Clementina Rebecca Cram Kohn, and was a fifth generation Montgomerian; his mother was a great granddaughter of General John Scott, a founder of Montgomery; and

Whereas, he attended private schools in Montgomery, and graduated from the University of Alabama; and

Whereas, he married Margaret Patteson Thorington, a fifth generation Montgomerian, whose father, Jack Thorington, was a prominent Montgomery lawyer; and

Whereas, John Peter Kohn, Jr. was a distinguished lawyer, who frequently represented the underdogs, and was described by a journalist as a "fighter who admired fighters;" and

Whereas, he was known as an adviser to governors, and was described on the occasion of his death by journalist Bob Ingram as being "one of the most powerful behind-the-scene power brokers and policy makers in Alabama politics;" and

Whereas, his celebrated career included service as president of the Montgomery County Bar Association, special circuit judge in Montgomery County in 1961, Montgomery County attorney, and a short tenure as an associate justice of the Alabama Supreme Court; and

Whereas, John Peter Kohn, Jr. died on November 27, 1993, at the age of 90; and

Whereas, it is both fitting and proper that the Montgomery County Bar Association pay special tribute to this distinguished lawyer and gentleman for the many years of service he rendered to his beloved profession and to his community;

Now, there, be it resolved by the Montgomery County Bar Association that the association pay special tribute to the life of John Peter Kohn, Jr., a lawyer's lawyer, who distinguished himself in so many ways as an outstanding member of the legal profession and as a distinguished community leader.

Be it further resolved that this resolution be spread upon the minutes of the Montgomery County Bar Association and that a copy be sent to his surviving daughter, Mrs. Doy Leale McCall, Jr.

W. Mark Anderson
Secretary
Montgomery County Bar Association

Joe G. Burns

Joseph G. Burns, Jr., "Buck" Burns as he was known to the west Alabama community that loved him, died on October 7, 1993. Buck had practiced law for many years in Tuscaloosa with his father, the late Joseph G. Burns, Sr. and most recently with the late David Ellis.

In Buck's passing, Tuscaloosa lost one of its most unforgettable and best loved citizens, a fine attorney, a loving husband and father, a sportsman, turkey hunter extraordinaire, and a great friend to so many.

Buck was a man without guile, a man without pettiness and a man without enemies, no small achievement. Buck's magic was fundamental and direct.... It was easy to be Buck's friend. His warmth of personality, his humor or his kindness would draw you in.

Buck's love of people was evident in his compassion and his willingness to help others. His love of life was evident in his wonderful storytelling and gentle humor. Through his force of personality, Buck could transform even a docket call into a memorable occasion.

This past year, for many of us who knew Buck Burns, has held moments of disbelief at the thought of his passing. The vividness of the recollection of Buck seems to deny his loss. It is hoped to be always so, for those fortunate to have called Buck Burns "friend."

Alyce Manley Spruell
Secretary
Tuscaloosa County Bar Association

Miles S. Hall

Miles S. Hall, a distinguished member of this association, departed this life on July 29, 1994.

Born in Kentucky on April 5, 1909, he moved to the Montgomery area with his family as a child. He attended school in Pintlala, Alabama, at Sidney Lanier High School in Montgomery, and at the University of Alabama. He was admitted to the practice of law in 1934 and continued to practice in Montgomery until his death 60 years later. In addition to his private practice, he served for a while as city attorney for Montgomery. He was president of this association in 1950.

Miles Hall was a Mason and a member of the Oak Park Masonic Lodge. Active in his church, he taught Sunday school and held almost every office at Capitol Heights Methodist Church. He demonstrated his strong Christian belief in the way he conducted his own affairs and in the way he dealt with others.

He was a devoted husband and father, and left surviving him his wife, Louise, his two children, Ann and Miles, and four grandchildren.

Miles Hall was respected as a lawyer and as a gentleman by all members of our profession who knew him well. We shall miss him.

W. Mark Anderson
Secretary
Montgomery County Bar Association

• M·E·M·O·R·I·A·L·S •

Annie L. Sorge

Whereas, Ann L. Sorge, an active member of the Birmingham Bar Association and the Alabama State Bar since 1975, died on February 17, 1995; and

Whereas, Ann was a native of Alabama, and she graduated in June 1948 as a registered nurse from Howard College and in May 1974 from Cumberland School of Law; and

Whereas, Ann had approximately 45 years of service at Carraway Methodist Medical Center in various positions, such as scrub nurse, director of nursing and assistant administrator. She served on the board of directors at Carraway Methodist Hospital, and retired as the assistant administrator and in-house counsel for Carraway Methodist Hospital; and

Whereas, Ann was recognized and highly regarded by both the medical and legal professions. She served on the Medical Liaison Committee of the bar, and by combining her skills as a registered nurse and attorney, the patients, employees of Carraway Methodist Medical Center, fellow attorneys of the bar, and the community at large benefited from the many hours of caring, dedication, advice and counsel she so freely rendered; and

Whereas, Ann is survived by her husband, Raymond D. Sorge; four children, Sharon Morgan, Donnie Sorge, John Sorge and Teresa Adams; stepmother, Mrs. Walter C. Glass; two sisters, Dean Vandegrift and Bertha Shirkey; and seven grandchildren; and

Whereas, Ann was an inspiration to all caring and devoted people who had the pleasure of knowing her. We hereby express our deep regard for Ann Sorge and our profound sense of loss in the passing of our colleague who served our profession so well.

J. Fredric Ingram
President
Birmingham Bar Association

Carl Webster Bear

Carl Webster Bear, 80, a longtime civic, business and bar leader, died on Monday, October 18, 1993. He and his family were prominent in civic and business affairs in Montgomery and the state of Alabama.

Carl Bear graduated from Washington & Lee University in Lexington, Virginia and received his law degree from the University of Alabama Law School. He practiced law in the 1940s, and then left practice to join his father and brothers in Bear Lumber Company and Bear Brothers Construction.

Carl Bear was a leader in the Alabama court reform movement of the late 1960s and early 1970s, which resulted in the adoption of the Judicial Article of the Alabama Constitution. Because of his successful efforts for judicial reform, Carl Bear was awarded the prestigious Herbert Lincoln Harley Award of the American Judicature Society in 1974 in recognition of his service in promoting the effective administration of justice and court modernization in Alabama.

Carl Bear and his family were prominemt for many years in educational endeavors. He was chairman of the board of directors of Montgomery Academy in its formative years. He was also prominent in business and civic affairs in Montgomery and the state of Alabama. He was a former president of the Montgomery and State of Alabama chambers of commerce; a former member of the board of directors of the YMCA in Montgomery; and a former member of the board of directors of Western Railway of Alabama.

Carl Bear served as an officer in the United States Navy in World War II.

Now, therefore, be it resolved that the Montgomery Bar Association desires to remember and recognize Carl Bear's many outstanding contributions to our profession and to this community, and does so resolve by the adoption of this resolution.

W. Mark Anderson
Secretary
Montgomery County Bar Association

Ernest Ray Acton

Whereas, Ernest Ray Acton, a member of the Montgomery County Bar Association, died at the age of 72 on September 2, 1994; and

Whereas, Mr. Acton, a graduate of the University of Alabama, served his county with distinction during the Second World War, serving in the European theatre of operations at such places as Omaha Beach, Bastogne and Remagen; and

Whereas, Mr. Acton served as mayor of Homewood from 1952-56, but took time off from the job in 1954 to serve as the military mayor of Phenix City when martial law was declared; and

Whereas, Mr. Acton served as assistant U.S. Attorney in Birmingham during the turbulent 1960s before joining the state Attorney General's staff in 1971 and later serving as chief counsel for the Alabama Department of Public Safety; and

Whereas, Mr. Acton spent 40 years in public service, four years in municipal government, ten years in federal government, 20 years in state government, and six years in the active military service during which public service he was responsible for convicting, impeaching or otherwise removing innumerable dishonest public officials; and

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

W. Mark Anderson
Secretary
Montgomery County Bar Association

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September 8	**Health Care Law** - Birmingham [co-sponsored by Baptist Health System, Inc.]
September 15	**Legal Writing Workshop** - Birmingham
September 22	**Expert Witnesses** - Birmingham
September 23	**How To Prepare and Try a Soft Tissue Injury Case** - Birmingham
September 29	**Recent Developments in Criminal Law and Procedure** - Birmingham
October 6	**6th Annual Bankruptcy Law Seminar** - Birmingham
October 6	**AUBA CLE Conference: Ethics for Lawyers and Judges** - Auburn [co-sponsored by Cumberland School of Law]
October 8-10	**30th Anniversary Conference on the Voting Rights Act of 1965** - Birmingham [co-sponsored by the Birmingham Civil Rights Institute]
October 13	**Alternative Dispute Resolution in Alabama** - Birmingham
October 20	**Winning Numbers: Accounting and Finance for Lawyers** - Birmingham
October 27	**New Alabama Rules of Evidence** - Birmingham
November 3	**9th Annual Workers' Compensation Seminar** - Birmingham
November 10	**Advanced Jury Selection: Making the Process Work for You** with *William A. Barton* - Birmingham
November 17	**Representing Alabama Businesses** - Birmingham
December 1	**Employment Law** - Birmingham
December 1	**Recent Developments for the Civil Litigator** - Mobile
December 7	**Recent Developments for the Civil Litigator** - Birmingham
December 15	**Class Action Lawsuits** - Birmingham
December 21-22	**CLE By The Hour** - Birmingham

Brochures specifically describing the topics to be addressed and a listing of 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.

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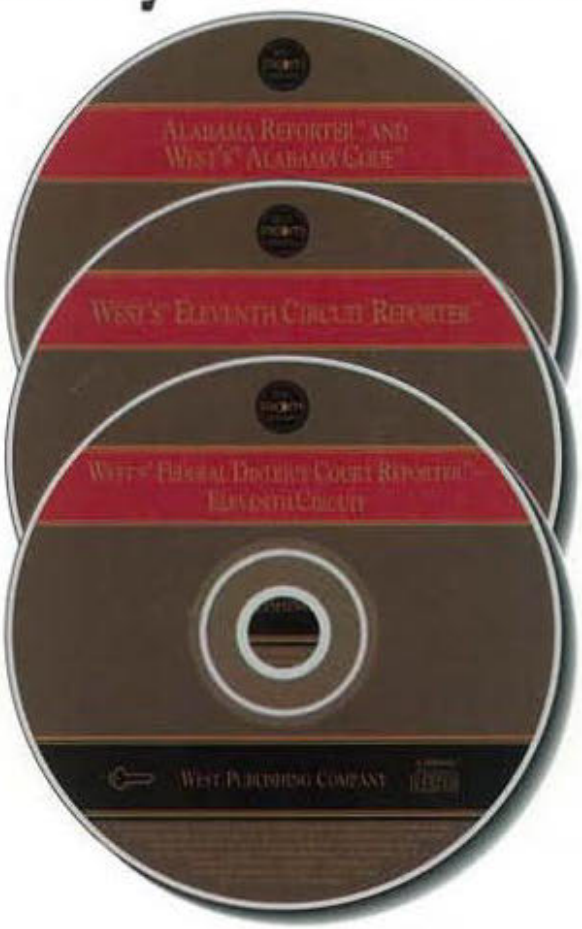

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