# The Alabama Lawyer

Vol. 52, No. 5 SEPTEMBER 1991

**PHILLIP E. ADAMS, JR.**

***1991-92 President, Alabama State Bar***


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# IN BRIEF

SEPTEMBER 1991 Volume 52, Number 5

**ON THE COVER:** Phillip E. Adams, Jr., the newly installed president of the Alabama State Bar, is shown with his family in his law office in Opelika, Alabama. (Standing, left to right, are Kirk, 11, wife Chris and Josh Adams, 12.

*Photo by Charles Jernigan Photography, Opelika*

**INSIDE THIS ISSUE:**



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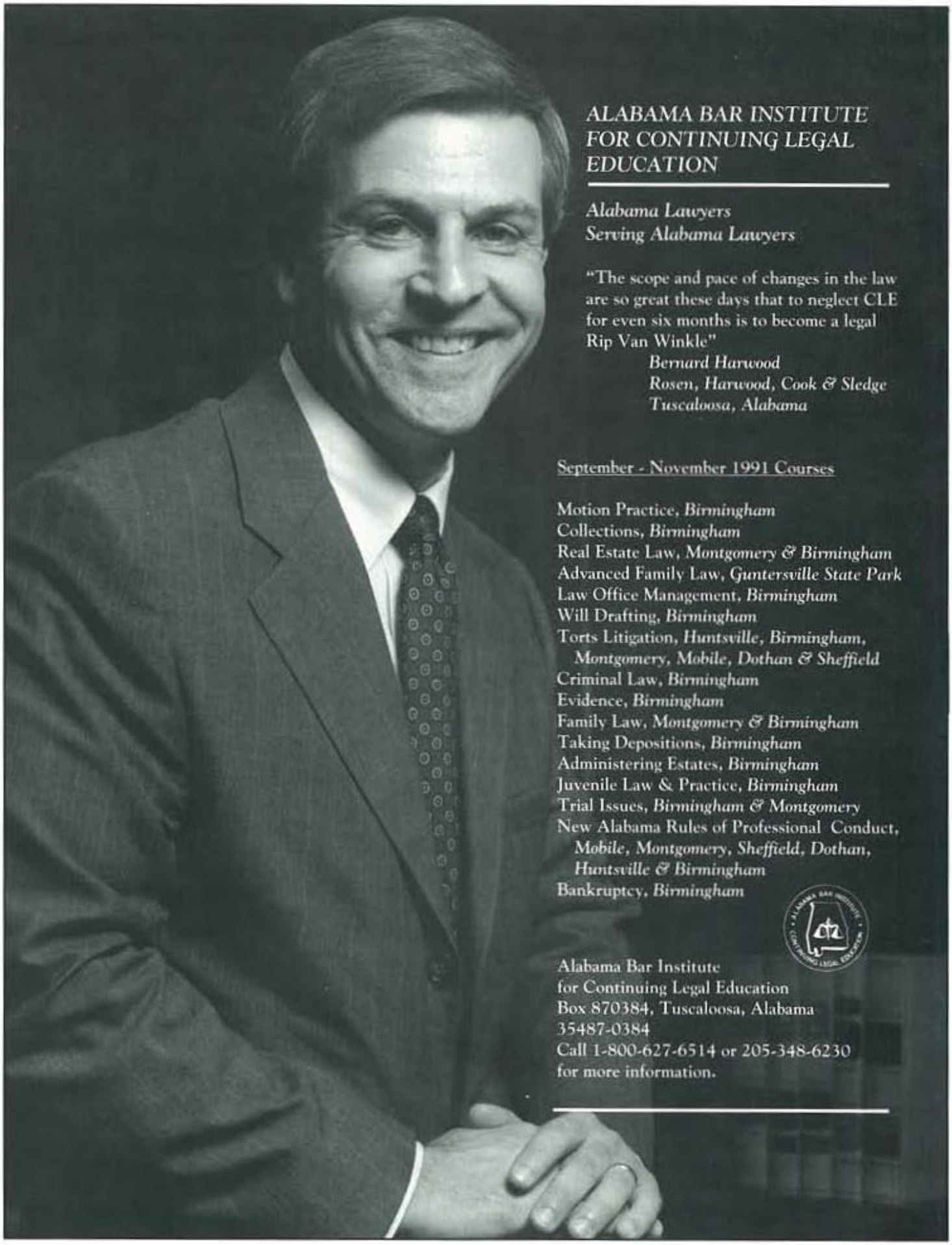

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# PRESIDENT'S PAGE

*These were remarks prepared for delivery at the Grande Convocation at the annual meeting at Orange Beach.*

After serving on our board of bar commissioners for the past nine years and observing the activities of our state bar, I have reached the conclusion that looking at our bar association is much like looking at an ant bed. You can see it from a distance and not much appears to be happening. But the closer you get, the more apparent it becomes that there is a lot happening involving a lot of workers. This work is exciting to me and the beginning of our year is an exciting time. It is a time for task forces and committees to establish goals and activities for the coming year. It is also a time to decide whether new task forces and/or committees should be formed to confront current issues involving our profession. This is a challenge I accept with commitment and enthusiasm.

**Phillip E. Adams, Jr.**

Having served on the board of commissioners during nine administrations, I have seen the work product generated by hundreds of volunteer lawyers as they worked for the betterment of our profession. Allow me, for your information and interest, to review just a few of the many accomplishments of these volunteers. Over the past nine years, the commission approved and recommended to the Alabama Supreme Court a new code of professional responsibility, new rules of disciplinary enforcement, the establishment of an IOLTA program for the benefit of the profession and public, and the establishment of the client security fund to protect clients victimized by dishonest lawyers. I also witnessed the organization and capitalization of our highly successful Attorneys Insurance Mutual Insurance Company. The work done by our association in a professional, constructive way during the time our legislature was considering tort reform was outstanding. All of these accomplishments were the direct result of the efforts of volunteer Alabama lawyers seeking to serve the profession and the citizens of this state.

As a result of the work done in past years, several committees and task forces either have recently reported or are close to making a final report and recommendation to the board. The Task Force on Professionalism is close to making its final recommendations, the task force studying the proposed workmen's compensation legislation has been working hard in recent weeks and made its final report at Wednesday's commission meeting, and the Task Force to Consider Possible Restructuring of Alabama's Appellate Courts submitted its report at the June meeting of the board of commissioners. You will be hearing more in the coming months about the activities and recommendations of these task forces.

President Albritton established a task force to study and implement the pro bono or volunteer lawyer program in Alabama. After hearing Melinda Waters, I am sure you agree that we are fortunate to have her leadership in this most important program. Melinda's offices are in Montgomery, but in the coming months, she will be traveling this state to enlist lawyers for this program. Because of the obvious need in this area, I hope that you will volunteer and give of your time and talent to make this program a success.

Construction has begun on the addition to the bar headquarters. The estimated cost of this addition is in excess of $3,000,000. When completed, it will allow all our staff to work under one roof and should improve the service to our members and the efficiency of all bar activities. Based upon our best current estimates, this facility should serve our needs for at least 30 years. The fund raising effort began last year and will continue this year. Much work needs to be done in this area. If every practicing lawyer contributed $300, we would be able to easily pay for this fine facility. I invite you to come by bar headquarters the next time you are in Montgomery to inspect firsthand this building. I also urge you to help us by not only making your own contribution, but by soliciting and obtaining contributions from fellow lawyers. Together we can easily reach our goal.

This year, one new task force, chaired by past President Walter Byars, has been formed. This task force is called Lawyer Mentoring, and its purpose is to study and determine whether a mentor program might benefit the legal profession in this state. The objective of a mentor program is for experienced lawyers to volunteer to assist younger lawyers in properly establishing and operating a law office in a professional, ethical and profitable manner. I am excited about the prospects of this program and hope that this task force will make its report during the next 12 months.

In preparation for my talk, I reviewed the remarks made at the annual conventions by the nine immediate predecessors to my office. I noted with interest that although the projects of the bar differed over the years, each incoming president sounded a familiar theme. Each president addressed the importance of a return to professionalism. I do not know about your experience, but when I have talked with lawyers around the state, many have expressed to me frustration and disappointment with the practice of law. They say things like, "It's just not fun anymore," and "It is such a terrible grind". I often have heard lawyers say negative things about other lawyers. If lawyers talk

in such a negative way about each other, then it is certainly no surprise why the public's perception of lawyers is so low. As I am sure you are aware, every opinion poll conducted about lawyers reveals that the public does not have a very high regard for our profession. It seems that every time I attend a social gathering or civic club meeting, I hear others make disparaging remarks and jokes about lawyers.

Earlier today I introduced to you three of my classmates in Mrs. Annie Pearl Crockett's eighth grade English class at Alexander City Junior High. As eighth-graders we learned that over 200 years ago the Scottish poet Robert Burns felt that people might benefit from how others viewed them as we recited, in our best Scottish brogue, the line of his poem, "Ode to a Louse". This well-known verse says:

*"O wad some power the giftie gie us.*
*To see oursel's as ithers see us."*

How do others view us? Is it accurate? Is there room within our profession for self-examination and improvement without compromising the lawyer's role in society? It seems to me that if some people view lawyers as overly self-regulating, ambulance-chasing, win-at-all-costs, backstabbing, money-grubbers, then we should pause, evaluate and determine the merits of that opinion and decide what, if anything, personally and professionally we might do to improve that image.

If there is some merit in the public's negative perception, I believe the bar might begin by doing two things. First, the bar should have a method making known the good works of our members. This year I hope we can develop and implement methods to professionally and positively promote the programs of our bar that benefit our state. Second, I believe each lawyer should take ten minutes to sit down and re-read the preamble to our newly adopted Alabama Rules of Professional Conduct. It can be found in the directory edition of *The Alabama Lawyer*. This preamble begins with the sentence:

"A lawyer is a representative of clients, an officer of the legal system and a public citizen having *special responsibility for the quality of justice.*"

This preamble ends with the following paragraph:

"Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The rules of professional conduct, when properly applied, serve to define that relationship."

The overwhelming majority of lawyers in this state care deeply about our profession and conduct themselves in an honorable, ethical and professional way. We should not and cannot allow ourselves to change to suit public opinion and perception if such changes compromise our ultimate professional duties and responsibilities. However, I am sure we all agree that our profession does have room for improvement without compromising our role in society.

Our association serves **all** the lawyers of this state, from the big city lawyer to the country lawyer, from the specialist to the general practitioner. I urge all lawyers to take a close look at our "ant bed", **get involved**, let the bar association work for you.

I believe our association has the finest executive director and general counsel in the United States and we have a most capable staff in Montgomery available to help us. Please call upon them if you have any questions, comments or complaints. Feel free to call me if I may be of service. Let us know what we are doing right and where we need improvement.

Together, we can improve our profession and our role as the preservers of society. I am humbled by the honor that you have given to me and look forward to being of service to you in the coming year.

# EXECUTIVE DIRECTOR'S REPORT

### Building program

Construction of the addition to the bar headquarters continues on schedule. We are still comtemplating being fully operational in the new building around the first of 1992. The contractors are hanging the exterior walls as I write this. Much of the electrical, plumbing and interior framing has been completed within the limitations of protection from the elements. The elevator and windows have arrived. We still continue to receive much-needed pledges and monies toward this project. If you have not yet made a contribution to your profession's future, please use the pledge card in this issue to do so.

Even though most had already made pledges, the past presidents of this association have voted to give an additional $1,000 each to dedicate a past presidents' room. Our Labor Law Section made a $3,000 contribution at the annual meeting and other sections are considering similar contributions. Plan some time for a short tour of the new building when you are in Montgomery. I think you will be pleased and proud as have been the substantial number of lawyers who have already toured the new facilities during construction.

**Reginald T. Hamner**

### The beach

Clearly, the 1991 Annual Meeting was a big hit with all who attended. Every letter we received has nominated the Orange Beach coast as the permanent site for future meetings. The hotel performed beautifully. The exhibit Expo '91 was a big hit. Everyone has praised the food and the Perdido Pals program for the children. The weather was perfect — and not one outdoor event was rained upon. The speakers were well-received. Unfortunately, the Perdido Hilton is not available for a confirmed booking until the 1996 meeting. The 1992 meeting is already planned for the Wynfrey, and 1993 is set for Mobile. We have a first alternate's position for the hotel on the 1994 dates at the Gulf. It is hoped the current holder of these dates will change its plans.

### Congratulations Judge David A. Rains

Circuit Judge David A. Rains of the Ninth Judicial Circuit was named the recipient of the bar's 1991 Judicial Award of Merit. He was recognized formally at the Bench and Bar Luncheon at the annual meeting. Letters nominating him were received from across the state and were universal in their praise of his outstanding judicial qualities. In presenting the award, President Albritton noted:

"Perhaps the most revealing comment was a postscript on one of the letters supporting his nomination: 'He also uses the term "this court" instead of the term "my court".' Perhaps this statement is the reason another nominator was caused to say, 'We often forget judges are foremost public officials, and it is in this area that Judge Rains personifies the very best impressions to the citizens he serves.' Jurors have described experiences in his court as their best-ever civics lesson."

### October 1 is near

Notices appear elsewhere in this issue regarding 1991-92 licensing requirements. Be sure to purchase your 1991-92 license if you are in private or corporate practice and not otherwise exempt from the requirements of §40-12-49, *Code of Alabama*, 1975, between October 1 and October 31. Special memberships are also due between the same dates. The state bar will send statements for special membership dues; however, licenses are obtained through the probate judges and license commissioners in your county. Some offices send courtesy notices, but most do not. These licenses should not be confused with municipal licensing requirements. ■

# Book Review

*By GREG WARD*

## Alabama Law of Evidence

*By JOSEPH A. COLQUITT*

The Michie Company, Charlottesville, Virginia, 801 pages

*"But beyond this, my son, he warned: the writing of many books is endless. . . ."*[1]

Most sole practitioners or members of small firms remember the early days of building their law library. Every book was tempting; each one offered and claimed to be the "last one" that you would ever need on a subject to be "authoritative". Few lived up to these expectations. Most attorneys wound up with many books that they subscribed to, only to be disappointed when most of them turned out to be lacking in depth or insufficient in some other important way. Some of those books quickly became out of date due to their lack of use, or to their being better covered in other treatises.

When I received Joseph C. Colquitt's *Alabama Law of Evidence* initially I viewed it with a little reluctance. After all, we already have several books on Alabama evidence. But those existing are incomplete — assuming, of course, that any book attempting to teach about evidence could be complete. Could this book replace those, or could it fill the gaps?

Colquitt begins the book by returning to first principles, by taking us by the hand and distinguishing the various forms of evidence. He begins each subsequent section with a primer on that section's topic. Generally, it is difficult to do this without talking down to the reader, but Colquitt succeeds in this and I think that this is one of the highlights of the book.

The book has 13 chapters: an introductory chapter; judicial notice; presumptions; relevancy; privileges; witnesses; opinions, expert testimony and scientific evidence; hearsay; authentication and identification; writings, recordings and photographs; applicability of rules and judicial comment on evidence; burdens of proof; and evidence issues on appeal. There are three appendices, covering constitutional provisions and statutes which address evidence issues, Alabama rules which address evidence issues, and the Federal Rules of Evidence.

Perhaps the most difficult rule of evidence is the hearsay rule, a rule which succumbs to its exceptions. In hearsay, the issue is how to remain within its bounds or, perhaps more accurately, how to remain within one of its many and varied exceptions. Colquitt devotes about 58 pages to this, exception by exception, and at the end of each he adds to the already-given citations listing of further references. His efforts are commendable.

*Alabama Law of Evidence* falters only where other such books falter: it is not exhaustive. Excellent authors have attempted to be exhaustive on this topic with various degrees of success. But Colquitt does an excellent job in his coverage. The writing style is clean and easily understandable. He backs up what he says with ample references. And the index is easy to use — something sorely lacking in this book's counterparts.

I have no doubt that this book should be added to most law libraries. Its ease of use and quickness of index alone make it a good starting point for research on evidence. And, perhaps, the best way to reconcile the various Alabama evidence treatises is to cross-reference them, gleaning the best from each. This is a book that will hold up well over time, and not one whose subscription will falter from lack of use. ■

**Footnote**

*Ecclesiastes* 12:12 (New American Standard).

**Greg Ward**

Greg Ward is a graduate of Auburn University and the University of Alabama School of Law. He practices in Lanett, Alabama and served on the editorial board of *The Alabama Lawyer*.

# ALABAMA STATE BAR
# 1991-92 DUES NOTICE

(All Alabama attorney occupational licenses and special memberships expire September 30, 1991)

## Annual License — Special Membership Dues
## Due October 1, 1991* Delinquent after October 31, 1991


**License**
**(purchase through the county of primary practice)**

If you are admitted to the Alabama State Bar and engaged in the practice of law, you are required to purchase an annual occupational license. Section 40-12-49, *Code of Alabama* (1975), as amended. This license gives you the right to practice law in the state of Alabama through September 30, 1992. The cost of the license is $150, plus the county's nominal issuance fee, and is purchased from the probate judge or license commissioner (where applicable) in the county in which you primarily practice. In addition to the state license, all practicing attorneys should check with their municipal revenue departments to be sure that the licensing requirements of the city or town are also being met. Please send the Alabama State Bar a copy of the license when it is purchased, and you will receive a wallet-sized duplicate of your license (pictured above) for identification purposes during the 1991-92 license year.


**Special Member**
**(paid directly to the Alabama State Bar)**

Special membership status is acquired pursuant to Section 34-3-17 or Section 34-3-18, *Code of Alabama* (1975), as amended. Federal and state judges, district attorneys, United States attorneys, and other government attorneys who are prohibited from practicing privately by virtue of their positions are eligible for this membership status. Likewise, persons admitted to the bar of Alabama who are not engaged in the practice of law or are employed in a position not otherwise requiring a license are eligible to be special members. Attorneys admitted to the bar of Alabama who reside outside the state of Alabama who do not practice in the state of Alabama also are eligible for this status. With the exception of state attorneys and district attorneys, and those who hold a license at any time during the bar year, special members are exempt from mandatory continuing legal education requirements; however, this annual exemption must be claimed on the reporting form. Special membership dues are paid directly to the Alabama State Bar. In the event you enter the practice of law during the bar year, which necessitates the purchase of an occupational license, these dues are not refundable after December 31, 1991, and no credit will be given for payment of special membership dues. Membership cards, as shown in the sample above, are issued upon receipt of the dues and are good for the license year. Special membership dues are $75.

Dues include a $15 annual subscription to *The Alabama Lawyer*. (This subscription cannot be deducted from the dues payment.)

**If you have any questions regarding your proper membership status or dues payment, contact Alice Jo Hendrix, membership services director, at (205) 269-1515 or 1-800-392-5660 (in-state WATS).**

# BAR BRIEFS

### Christopher makes list of nation's best

Christopher

Thomas H. Christopher of the firm of Kilpatrick & Cody in Atlanta has been chosen to be included in a total of 11,501 lawyers nationwide and 247 lawyers from the state of Georgia in the 1991-92 edition of *The Best Lawyers in America.*

Christopher is listed under Labor and Employment Law. Based on a year-long survey, the list represents only slightly more than 1 percent of the nation's 715,000 lawyers.

Christopher was admitted to the Alabama State Bar in 1976.

### Founder of *Georgia Law Review* honored

Réaves

John Daniel Reaves, a partner in the Washington, D.C. firm of Banker & Hostetler was recently honored as the "founding father" of the *Georgia Law Review.*

Reaves was recognized as part of the publication's 25th anniversary celebration.

Reaves was hired in 1966 as an assistant professor at the University of Georgia School of Law with the special assignment of founding the law review. The Georgia Law Review is now the 13th most cited law review in the country.

A graduate of Auburn University and the University of Virginia Law School, Reaves was admitted to the Alabama State Bar in 1965. He had previously served as a law clerk to the late Richard T. Rives, U.S. Circuit Judge, Fifth Circuit, in Montgomery.

Reaves is a native of Camp Hill, Alabama.

### Silberman and Whittington inducted into college

Wilbur G. Silberman, a partner with the firm of Gordon, Silberman, Wiggins & Childs, P.C., and John P. Whittington, a partner with the firm of Bradley, Arant, Rose & White, received the honor of being inducted into the American College of Bankruptcy. Criteria for admission into the college include a minimum of 15 years of practice, distinguished service to the bankruptcy community and contributions to its educational activities. The induction ceremony was held May 4, 1991 in the Great Hall of the United States Supreme Court.

### Kilpatrick chosen president-elect

Kilpatrick

Paul V. Kilpatrick, Jr. of Columbus, Georgia has been elected president-elect of the State Bar of Georgia. He will be installed as president in June 1992.

Kilpatrick received his undergraduate degree from the University of Georgia in 1963 and his law degree from the University in 1965. He has been in private practice in Columbus since 1968.

He has been a member of the Alabama Trial Lawyers Association and was admitted to the Alabama State Bar in 1987.

### Featheringill elected president of alumnae association

Featheringill

Professor Carolyn Burgess Featheringill of the Cumberland Law School faculty has been elected president of the Randolph-Macon Woman's College Alumnae Association. The first Alabamian to hold this post, she began her three-year tenure of office in June.

Randolph-Macon Woman's College is located in Lynchburg, Virginia. It was the first women's college in the South to be accredited and the first to be awarded a Phi Beta Kappa chapter.

Featheringill graduated cum laude from Randolph-Macon in 1969. After receiving her law degree from the University of Virginia, she was admitted to the Alabama State Bar in 1972 and was associated with the Birmingham firm of Bradley, Arant, Rose & White.

### Alabama Rules of Court now available

West Publishing Company's *Alabama Rules of Court, State and Federal,* 1991 provides attorneys with access to the latest rules governing state and federal practice in Alabama. This two-volume set replaces the 1990 edition and includes amendments received through April 15, 1991.

The state volume includes, for the first time, Alabama Rules for Using Videotape Equipment to Record Court Proceedings, Canons of Judicial Ethics, Rules Governing Admission to the Alabama State Bar, and, effective October 1, 1990, the Standards and Recommendations Relating to Delay Reduction.

New Alabama Rules of Criminal Procedure, Alabama Rules of Professional Conduct, Alabama Rules of Disciplinary Procedure, and Alabama Standards for Imposing Lawyer Discipline,

included within, are all effective January 1, 1991.

The federal volume contains the new Local Bankruptcy Rules of the United States Bankruptcy Court for the Southern District of Alabama, effective July 1, 1991 as well as the amended Eleventh Circuit Rules, Internal Operating Procedures, and Addenda, effective April 1, 1991, and the amendments to the federal Rules of Appellate Procedure that will be effective December 1, 1991, absent contrary Congressional action.

For more information about *Alabama Rules of Court*, contact West Publishing Company at 1-800-328-9352.

### Newton appointed to board

Alex Newton of the Birmingham firm of Hare, Wynn, Newell & Newton has recently been appointed to a six-year term on the board of directors of the Birmingham Airport Authority. This agency operates and maintains all airport facilities, including management of the real estate, parking, concessions, and the airlines. The board has 80 employees and supervises approximately 4,500 employees who work on the premises.

### West announces new bankruptcy filing software

West's Bankruptcy Practice Systems-Chapter 7, a new software package from West Publishing Company, is scheduled to be released October 1. The software package is built around the new official bankruptcy forms which became effective August 1, 1991. This new bankruptcy software contains all of the forms necessary to produce a complete Chapter 7 filing, such as client intake forms, official filing forms, procedural forms, a reaffirmation agreement, and client support documents. Also included are references to West's Bankruptcy Code, Rules and Forms, as well as on-line practice tips and commentary from three national bankruptcy experts.

This software package requires little or no training. Once the program is activated, extensive on-screen instruction guides the user through a series of questions and requests for additional information. The forms for the basic Chapter 7 filing are automatically generated upon conclusion of the session.

The package is designed to work with an IBM or IBM-compatible personal computer with a hard drive disk and a Hewlett-Packard compatible laser printer.

### Rains receives Judicial Award of Merit

Circuit Judge David A. Rains, of the Ninth Judicial Circuit, received the Alabama State Bar Judicial Award of Merit at the 1991 Annual Meeting in Orange Beach, Alabama.

Rains, of Fort Payne, Alabama, received his undergraduate degree from the University of Alabama in 1967 and his law degree from the University's School of Law in 1970. Previous work experience includes serving as research assistant to Daniel J. Meador, then dean of the School of Law at the University of Alabama, and as a research assistant for the Alabama Law Institute. Rains also was a judge advocate with the U.S. Air Force for four years and in the private practice of law in DeKalb County for a number of years.

He was appointed a circuit judge in 1981.

The Judicial Award of Merit is given to the judge who has contributed significantly to the administration of justice in the State of Alabama. ■

# LEGISLATIVE WRAP-UP

*By ROBERT L. McCURLEY, JR.*

The Alabama Legislature adjourned Monday, July 29, 1991. In the final two days, the Legislature passed 78 percent of all the bills for the entire session.

| 1991 Regular Session | Senate Bills | House Bills |
|---|---|---|
| Bills Introduced: | 739 | 1,104 |
| Bills Passed: | 83 | 398 |
| Percent Passed: | 11.2% | 36.0% |
| Resolutions Introduced: | 161 | 473 |
| Percent Passed: | 92.0% | 91.0% |

Of the Senate bills that passed, 54 percent of them were of a local and special nature, while in the House, 65 percent of the bills that passed were of a local or special nature.

Because of the last-minute frenzy of passing bills, I will attempt only to highlight some of the 20 or 30 bills that would be of interest to the majority of the lawyers.



### Family laws

**S.B. 97** — authorized the State Department of Human Resources to enter into an interstate adoption compact to provide medical services to special needs children.

**S.B. 443** — extends the juvenile court jurisdiction in child protection cases to enable the judge to order a person to stay away from a child or the family, to vacate the home, to limit visitation rights, and to deny access to the home, and it may require that person to cooperate with a counseling plan and/or pay temporary support, and is to be read in pari materia with the protection from abuse act which is found in §30-5-1.

**S.B. 466** — amends §38-10-9 which provides the Department of Human Resources to conduct investigations regarding the financial ability of persons who owe child support and to require employers to furnish the obligee's financial condition to the court upon request.

**H.B. 593** — amends §30-3-61 and -62 to require the employer to remit to the court child support payments withheld within ten days from the date the employee is paid.

**H.B. 437** — completely revises the mental health commitment law.

**H.B. 319** — provides for the appointment of a private, nonprofit corporation to serve as the guardian for a person who is developmentally disabled provided the entity meets the guidelines for such a guardian that have been set down by the Department of Mental Health/Mental Retardation.

### Business

Two bills dealing with "rent-to-own" leasing were passed to make clear that an automobile lease could not be determined to be a sale or a security agreement simply because the lease provided a buy-out provision (H.B. 146). S.B. 96 amended 7-1-201 and 8-25-1 relating to rental purchase agreements to authorize certain practices now prohibited.

**H.B. 787** — the Uniform Commercial Code §7-9-43 was further amended to provide that with consumer goods or goods less than $2,000, the financing statement will remain effective until 30 days after maturity of the instrument.

**H.B. 392** — allows limited partnerships to merge with other limited partnerships, corporations or other business entities.

**H.B. 294** — Alabama's worthless check law, §13A-9-13.1, was amended to increase the merchant's charge from $15 to $20 for a returned check.

### Criminal

**H.B. 691** — the "Crimestoppers" were successful in the passage of an act which permits the judge to place as a condition of probation the payment to Crimestoppers of a sum not to exceed $50.

**H.B. 34** — creates the "Alabama Community Punishment and Corrections Act of 1991" which provides for alternative sentencing. This may include house arrest or other alternative sentencing.

**H.B. 194** amends §14-9-41 to provide for incentive "good time" for prisoners whose sentences are under 15 years. Currently, this is allowed for sentences up to ten years.

### Miscellaneous

**S.B. 47** — physicians are currently required to report to the Medical Licen-

sure Board medical malpractice judgments and settlements. Sections 27-26-5 and 34-24-56 were amended to provide that judgments and settlements entered against professional associations and professional corporations must likewise be reported to the Medical Licensure Board.

**S.B. 400** — prohibits discrimination in the selling, renting, leasing or financing of housing.

**H.B. 85** — community volunteers who serve without compensation are now immune from liability except for intentional acts.

**H.B. 135** — Alabama's legal holidays, which are specified in §1-3-8, have been amended to include National Memorial Day and Mardi Gras for Mobile and Baldwin counties.

**S.B. 412** — The probate judges were successful in obtaining the passage of a bill which provided that upon retirement they would draw 75 percent of their salary.

**H.B. 509** — the circuit clerks were successful in raising their minimum salary to $50,000.

**H.B. 27** — traffic fines have been increased with an amendment to §12-19-171 *et seq.*

These are by no means an exhaustive review of acts with which lawyers should be concerned. The pocket parts to the *Code* are not expected until mid-November. Anyone wishing a copy of these bills may write the house of origination.

In the Senate, contact:
McDowell Lee,
Secretary of the Senate,
Senate Chamber, State House,
Montgomery, Alabama 36130.

In the House, write:
Greg Pappas,
Clerk of the House,
Alabama State House,
Montgomery, Alabama 36130. ■

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

# RECAP OF COMMITTEE AND TASK FORCE FINAL REPORTS

The final reports for the following committees and task forces reflect their high level of activity and accomplishments during the 1990-91 bar year. Committee and task force chairs, as well as the members, deserve much credit for their dedication and hard work. Below is a recap of the activities of the past year.

## COMMITTEE ON ACCESS TO LEGAL SERVICES

**— Kenneth W. Battles, Sr., Birmingham, chair**

The primary objective of the committee this year has been to implement the volunteer lawyer program approved by the Alabama State Bar Board of Commissioners. The program was implemented by the hiring of Melinda Waters as director. The committee has met with her to review and discuss various aspects of the program's immediate and long-term plans and objectives. The committee will continue to monitor, oversee and assist her with this program's implementation statewide during the upcoming year.

## TASK FORCE ON DISASTER RESPONSE

**— Richard F. Allen, Montgomery, chair**

The task force developed a comprehensive plan to respond in the event of a future disaster. The plan incorporates three separate plans as briefly outlined below.

(1) *A network to provide legal assistance to victims*-The plan anticipates that the bar will be notified by the Alabama Emergency Management Agency immediately upon the occurrence of a disaster. The AEMA contacts the office of the attorney general and the Alabama National Guard, which have been designated for on-site damage assessment and coordination of assistance. On appropriate determination, volunteer lawyers will maintain a desk at the disaster assistance center in the locale affected. Volunteer lawyers will be provided in cooperation with the Young Lawyers' Section of the state bar, in addition to those who volunteer for service. For the purpose of this plan, the state has been divided into four geographic regions and a volunteer coordinator has been assigned for each region. The coordinator will identify lawyers who are willing to participate and put them in touch with the state bar's coordinating officer on the scene who will work the volunteers into a schedule that the coordinator will maintain.

(2) *Parachute lawyer plan*-The thrust of the plan is to deal with the problem of "parachute lawyers" by generating public awareness to help protect victims in the event of a disaster. In a mass disaster, the AEMA will notify state bar headquarters and provide as much information as available. The official taking the call then will convene the crisis task force made up of the state bar president, the executive director of the bar, the president.of the local bar association (the disaster site), the general counsel of the state bar, and the director of programs. The task force will decide the appropriate level of response, if any. Options include a press release or an on-site response team which will function in conjunction with the AEMA and the local bar association. Once on the site, the response team evaluates the situation and determines what public statements, media releases, etc., would be required to protect the rights of the victims of the disaster.

(3) *Reconstitution of local bar and local judiciary*-The plan for reconstituting the local bar is divided into four phases. The first is a pre-disaster phase during which equipment and supplies that might be furnished in the event of an Elba-like disaster are located and recorded on the computer at state bar headquarters. This information is to be updated on a regular basis. Once a disaster strikes, a needs assessment is conducted by the bar commissioner or commissioners in the affected area in connection with the leadership of the local bar association. Once it is determined that the disaster has affected lawyers to the extent that reconstitution plans should be implemented, the bar commissioner for the affected area will make such recommendation to the president of the state bar, who will direct the execution of the reconstitution plan. In the third phase, the bar commissioner and local bar leadership would determine specifically what is needed by the local lawyers and this information would be

channeled to the staff of the state bar. The state bar then would review the items on the computer listing to determine what can be made available and, in conjunction with the bar commissioners and the local bar leadership, would contact the firms holding the equipment and arrange for it to be shipped to the affected area.

No physical transfer of supplies or equipment would be made until such time as a disaster strikes. During the pre-disaster phase, lawyers and law firms that have excess equipment will keep it on hand and merely notify the bar of its availability.

### ETHICS EDUCATION — Richard Thigpen, Tuscaloosa, chair

This committee was active in many areas, including designing a comprehensive plan for dissemination of the new *Alabama Rules of Professional Conduct* which became effective January 1, 1991. In addition, a lesson plan and syllabus for seminars regarding the newly-adopted Code of Professional Conduct were developed and sent to local bar associations.

The Sub-committee on Law School Ethics Education has worked with the state bar Task Force on Legal Education to compose a survey on ethics education to send to law schools in other states which could then be completed and shared with the full committee, the bar and law schools in the state. Another sub-committee was charged with public education on the lawyer discipline process. Finally, at the committee's recommendation, the MCLE Commission approved a regulation to award double CLE credit for hours earned in continuing legal education devoted to the new Rules of Professional Conduct. The regulation is applicable for the 1991 and 1992 reporting years.

### IMPAIRED LAWYERS COMMITTEE — J. Michael Conaway, Dothan, chair

The committee devised a plan to assist chemically dependent lawyers. The program plan is based upon a similar program offered by the State Bar of North Carolina. For the PALS (Positive Action for Lawyers) program, the committee recommended operational guidelines, and a program of identification, investigation and rehabilitation, as well as follow-up recovery for lawyers. In addition, the committee has contacted and is working with the Permanent Code Commission to draft an amendment to the Rules of Professional Conduct assuring the confidentiality of a member of the PALS Committee who is attempting to assist an impaired lawyer.

### INDIGENT DEFENSE COMMITTEE — Hampton Brown, Birmingham, chair

Legislation restructuring the delivery of indigent defense services in the state of Alabama was drafted by the committee and the Administrative Office of Courts. Included in the comprehensive legislation bill was an increase in hourly lawyer fees for both in-court and out-of-court time. A second bill to increase various state court fees also was drafted as a recommended means for paying the cost of the proposed increase in lawyer fees. The board of commissioners endorsed the proposed legislation restructuring the delivery of indigent defense services while it chose not to endorse the legislation for increasing various court fees. The endorsed legislation was not introduced for lack of a legislative sponsor.

### TASK FORCE ON JUDICIAL SELECTION — Robert Denniston, Mobile, chair

The task force continues to monitor the pending Alabama voting rights litigation. In June 1991, the United States Supreme Court issued an opinion dealing with the Voting Rights Act which will profoundly affect Alabama litigation. Also, the board of commissioners approved the task force resolution favoring the nonpartisan election of appellate, circuit and district court judges. With the endorsement of the resolution by the board of commissioners, the task force solicited the support of appellate, circuit and district court judges and local bar associations, as well as the media, for the proposed legislative changes. The committee did not arrange for actual introduction of appropriate legislation during the 1991 legislative session because of lack of adequate commitments from sponsors. A comprehensive article on the subject was published in the May issue of *The Alabama Lawyer*, asking support from the members of the bar in general. Both the Birmingham and Mobile bar associations went on record supporting the nonpartisan *selection* of judges, along with several other smaller local bar associations.

A sub-committee of the task force has studied in detail all pertinent aspects of limitations on campaign contributions with a view to developing recommendations. The report of the sub-committee will be presented for consideration at the next general meeting of the task force with a view to developing such recommendations.

Finally, the task force has continued to monitor the activities of bar and citizens groups in voting rights litigation in Texas, Louisiana, Mississippi and Georgia. The bar will continue to study merit selection in Alabama and elsewhere with emphasis on its impact on minorities and females.

### COMMITTEE ON LAWYER ADVERTISING AND SOLICITATION — Glenda Cochran, Birmingham, chair

Thirty-second television spots were aired statewide encouraging citizens to report acts of lawyer solicitation to the state bar. Funding for the television spots was obtained through an IOLTA grant which the committee prepared and submitted to the Alabama Law Foundation in December 1989. The spots aired in the major metropolitan markets throughout Alabama.

### COMMITTEE ON LAWYER PUBLIC RELATIONS —Bryant A. Whitmire, Jr., Birmingham, chair

The Public Relations Committee met four times last year. During this time, the committee discussed priorities which the committee should emphasize and decided on two areas. One was to educate the public concerning the laws of Alabama and what lawyers do in conjunction with them. The second was to assist in getting as much public recogni-

tion as possible during Operation Desert Storm. The committee members had numerous meetings with the *Birmingham News* and were disappointed in the newspaper's attitude toward publishing any articles. Consequently, the committee is in the process of dispersing articles through the smaller newspapers throughout the state. These articles will be written by lawyers on a topic a layperson could understand and should make the public feel better about the way the court system is handling their cases. Several local bar associations were very active in Desert Storm and assisted the soldiers in numerous ways. These actions were reported in the newspaper and showed the legal profession's patriotic assistance to the soldiers going overseas. The committee also recommended that the state bar hire a full-time public relations person. The committee's feeling was that it would take someone full-time to handle the workload which is involved in public relations.

### TASK FORCE ON LEGAL EDUCATION — Orrin K. Ames, III, Mobile, chair

The task force has devised proposed regulations for non-accredited law schools in Alabama. The proposed regulations will be submitted to the board of commissioners for action and, assuming favorable action, then to the supreme court.

### JUDICIAL BUILDING TASK FORCE — Maury Smith, Montgomery, chair

The Alabama Building Commission reviewed and approved the proposed contract between the Alabama Judicial Building Authority and the Brasfield, Gorry Construction firm for the construction of the new judicial building. There remain some final details to be negotiated. However, the order of the commission authorizes the contractor to proceed with the construction in August. The anticipated construction time is 26 months.

The bid package to the contract has listed seven alternatives in the contract. The bidding period to the alternatives related to limestone for the building. It was determined that the building would be constructed with all limestone in the columns, exterior walls and other places called for in the specifications, rather than concrete. This will greatly enhance the building.

The chief justice and the administrative staff continue to give the building project special attention in every detail. Adequate parking for employees and members of the public using the building is a matter the Judicial Building Authority continues to address. However, no solution to this important matter, to our knowledge, has been reached.

### TASK FORCE ON SPECIALIZATION — William W. Lawrence, Talladega, chair

The task force began the year by compiling information received from other states concerning their successes and problems encountered with their specialization programs. The task force received a number of responses from other states which have implemented programs and feels that the information received from them will prove to be helpful in establishing a program for the Alabama State Bar. At its last meeting, the task force proposed distributing a questionnaire, perhaps through various sections of the bar, to get a feel from the bar as a whole regarding specialization. The task force hopes to follow up with this soon and have some responses to furnish the committee.

### COMMITTEE ON SUBSTANCE ABUSE IN SOCIETY — Honorable William J. Wynn, Birmingham, chair

The committee focused its attention on speaking to teachers, counselors and young persons in grade school and high school. The committee worked with the Center for Law and Civic Education in Birmingham to accomplish these goals. The committee chair was recently contacted by the ABA and was informed of a joint ABA/AMA program where doctors and lawyers combine efforts in speaking to young people about substance abuse. The committee intends to fully explore this option and work further in carrying out its mission and goals.

### PERMANENT CODE COMMISSION — J. William Rose, Jr., Birmingham, chair

The commission is unanimously resolved to recommend to the board of commissioners that information disclosed by a lawyer to another lawyer in connection with the first lawyer's seeking assistance in dealing with his or her substance abuse problem be treated as privileged and confidential information under the new rules of conduct.

The commission also considered the potential for unequal treatment of judges and non-judge lawyers in the supervision of their judicial campaign tactics and conduct. The commission plans to recommend to the board of commissioners that a single set of standards be enforced by one entity, without any presumption on the commission's part as to which entity.

### QUALITY OF LIFE TASK FORCE — James Jerry Wood, Montgomery, chair

Through a sub-committee the task force has developed some specific areas to be explored in a survey of the state bar population. The task force has preliminarily determined to ask the board of commissioners to consider funding a bar-wide survey during the 1991-92 year.

### TASK FORCE ON ALTERNATIVE METHODS OF DISPUTE RESOLUTION — J. Noah Funderburg, Tuscaloosa, chair

The primary focus of the work of the task force this year has been the education of the bench and bar about the availability and feasibility of various forms of the ADR. This goal was achieved in large part through the publication in the May 1991 issue of *The Alabama Lawyer* of three articles on various forms of ADR. A sub-committee of the task force also made a presentation regarding summary jury trials to a group of Jefferson County circuit court judges. The presentation was favorably received, and members of the task force practicing in Jefferson County have committed to assisting the judges and Jefferson County lawyers in finding suit-

able cases for employing the summary jury trial technique. The task force has also recommended an ADR educational program for the 1992 state bar annual meeting. Finally, one issue which has remained in limbo during 1990-91 has been the proposal by the state bar to the Alabama Supreme Court to amend Rule 16 of the Alabama Rules of Civil Procedure to accomodate voluntary mediation. That rule change is still pending before the Alabama Supreme Court with no definite timetable for final action.

### ALABAMA LAWYER REFERRAL SERVICE BOARD OF TRUSTEES

**— James E. Williams, Montgomery, chair**

The Alabama Lawyer Referral Service has operated in a very effective manner for the past few years primarily due to the hardworking diligence of Joy Meininger, the secretary for the service. The plan of action for the trustees for 1990-91 was to continue to review the operation of the service and identify and remedy any problems that were encountered. The trustees also sought to further publicize the availability of legal services through the service by attempting to recruit additional attorneys.

From January 1, 1991 to May 1, 1991, the referral service actually made 5,993 referrals to attorneys throughout the state. The secretary for the service receives approximately 1,000 telephone calls a month requesting an attorney. The program provides a service to the general public and to lawyers interested in the program.

### UNAUTHORIZED PRACTICE OF LAW COMMITTEE

**— James W. Porter, II, Birmingham, chair**

A lawsuit which has been approved by the board of commissioners and is ready for filing awaits action by the supreme court concerning the immunity of the chair and of the committee in initiating this lawsuit. In regard to other matters of interest, the committee reiterates its official position that the statutes prohibiting the practice of law by an unauthorized person apply to the practice of law before administrative boards and bodies. The committee is authorizing a letter to all such boards and bodies. This is related to the new *pro hoc vice* rules and regulations which have been recommended to the supreme court which should clarify that those rules do apply to administrative proceedings held within the state.

### TASK FORCE ON ILLITERACY

**— Lynne B. Kitchens, Montgomery, chair**

The task force has worked with the Alabama Literacy Coalition, which has served as a useful source of information and advice. The bar is taking an active role in the coalition's continuing education function by not only co-sponsoring a literacy conference but also by playing an active role in the planning stage. As a result of the resolution drafted by the task force and approved by the board of commissioners, the chief justice of the Alabama Supreme Court has demonstrated his interest in court/literacy referral programs and has directed the Administrative Office of Courts to determine the feasibility of establishing such programs statewide as a part of alternative sentencing. Having identified two programs already in existence, the task force is trying to foster such programs by taking steps to ensure that both judges and illiteracy providers are informed about them. An awareness session was held at the District and Circuit Judges' Conference in Gulf Shores and is to be repeated at the fall or winter conference. At the task force's suggestion, the largest, most successful court/literacy referral program has produced a 15-minute video about its program. The video, funded by TVA, gives a nuts-and-bolts approach in setting up literacy referral as an integral part of alternative sentencing.

Finally, the task force requested permission of the board of commissioners to apply for an IOLTA grant to co-sponsor a fall literacy conference, an annual event handled by the Alabama Literacy Coalition. Other co-sponsors will include Alabama Power and Russell Corporation. It will be held at South Central Bell's headquarters in Birmingham. The tentative theme of the conference is "Literacy — Everybody's Business: What You Can Do!" The task force is involved in the planning of the conference and is designing a session around the court/literacy referral programs and possibly another to focus on the ways that lawyers can deal with the problem of literacy. The publicity generated for the bar by this conference, it is hoped, will provoke even more interest in the problem of illiteracy on the part of lawyers and law firms. ■

# About Members, Among Firms

## ABOUT MEMBERS

**L. Scott Johnson, Jr.** announces the relocation of his primary office to 307 S. McKenzie Street, Foley, Alabama 36535. Phone (205) 952-0742.

**Henry Taliaferro** announces the relocation of his office to 418 19th Street-Ensley, Birmingham, Alabama 35218. Phone (205) 785-9600.

**Victor H. Lott, Jr.** announces the opening of his office under the name of **Victor H. Lott, Jr., P.C.**, at 150 Government Street, Suite 3005, The LeClede Building. The mailing address is P.O. Box 1073, Mobile, Alabama 36633. Phone (205) 438-6800.

**Gregory N. Norton** announces the opening of his office at 1121 Noble Street, Anniston, Alabama 36201. Phone (205) 237-7555. The mailing address is P.O. Box 2442, Anniston 36202.

Correction: In the July issue of *The Alabama Lawyer*, **Robert K. Lang's** name was misspelled. The editor regrets any inconvenience this may have caused.

## AMONG FIRMS

**Larry R. Newman, Stephen L. Sexton** and **Mark E. Martin** announce the formation of **Newman, Sexton & Martin**, with offices are 3021 Lorna Road, Suite 310, Birmingham, Alabama 35216. Phone (205) 823-5515.

The firm of **McRight, Jackson, Dorman, Myrick & Moore** announces that **Richard T. Dorman, Charles R. Mixon, Jr.** and **K.W. Michael Chambers** have become partners in the firm, and **Patricia Ponder, David R. Peeler, Lynda B. Nagrich** and **Cecily Kaffer** have become associated with the firm. Offices are located at the First Alabama Bank Building, 106 St. Francis Street, Mobile, Alabama. Phone (205) 432-3444.

The firm of **Miller, Hamilton, Snider & Odom** announces that **Christopher G. Hume, III** and **M. Kathryn Knight** have become members of the firm, **Todd H. Katz, Mark J. Tenhundfeld** and **Christopher Kern** have become associated with the firm, **James B. Newell, Jr.** and **Hugh H. Smith** have become *of counsel* to the firm, and **Bill J. Braswell** has become director of administration with the firm. Offices are located in Mobile and Montgomery, Alabama and Washington, D.C.

The firm of **Rushton, Stakely, Johnston & Garrett** announces that **Jack B. Hinton, Jr.**, former law clerk to Justice J. Gorman Houston, Jr., has become an associate of the firm. The mailing address is P.O. Box 270, Montgomery, Alabama 36101-0270. Phone (205) 834-8480.

The firm of **Durward & Arnold** announces the relocation of their offices to 1150 Financial Center, 505 North 20th Street, Birmingham, Alabama 35203. Phone (205) 324-6654.

**Johnston, Barton, Proctor, Swedlaw & Naff** announces that **Raymond P. Fitzpatrick, Jr.** has joined the firm as counsel. Offices are located at 1100 Park Place Tower, Birmingham, Alabama 35203. Phone (205) 322-0616.

**Frazer, Greene, Philpot & Upchurch** announces that **D. Brent Baker** has become a member of the firm. Offices are located at First National Bank Building, 107 Saint Francis Street, Suite 2206, Mobile, Alabama 36602. Phone (205) 431-6020.

**Douglas H. Scofield, Kimberly R. West** and **Michael B. French** announce the formation of **Scofield, West & French**. Offices are located in The Massey Building, Suite 205, 2025 Third Avenue, North, Birmingham, Alabama 35203. Phone (205) 328-9908.

**Gorham, Waldrep, Stewart, Kendrick & Bryant, P.C.** announces that **Victor Kelley** has joined the firm as an associate. Offices are located at 2101 6th Avenue, North, Suite 700, Birmingham, Alabama 35203. Phone (205) 254-3216.

**Parnell, Crum & Anderson, P.A.** announces that **A. Richard Pyne** has received his master of laws in taxation and has become a member of the firm. The mailing address is P.O. Box 2189, 641 South Lawrence Street, Montgomery, Alabama 36104. Phone (205) 832-4200.

**Jennings, Carter, Thompson & Veal** announces the relocation of their offices to 2001 Park Place, North, Suite 525, Birmingham, Alabama 35203. Phone (205) 324-1524.

The firm of **Sherrill & Batts** announces that **William G. Mathews** has become a partner with the firm, and the name has been changed to **Sherrill, Batts & Mathews.** Offices are located at 102 South Jefferson Street, P.O. Box 853, Athens, Alabama 35611. Phone (205) 232-0202.

The firm of **Maynard, Cooper, Frierson & Gale, P.C.** announces that **Asa Rountree** has become a member of the firm and that **Gail C. Washington, Carl S. Burkhalter, Jeffrey R. McLaughlin, Sarah E. Yates, Thomas C. Clark, III, Christopher B. Harmon, Jeffrey A. Lee, Warren B. Lightfoot, Jr., Robert W. Tapscott, Jr.** and **Thomas W. Thagard, III** have become associates of the firm. The firm has offices in Birmingham and Montgomery, Alabama.

**Lloyd, Bradford, Schreiber & Gray, P.C.** announces that **Gerald A. Templeton** has joined the firm as an associate and the firm is now located at Two Perimeter Park, South, Suite 100, Birmingham, Alabama 35243. Phone (205) 967-8822.

**Burr & Forman** announces that **Robert B. Rubin** and **Michael L. Hall** have become partners in the firm and **Kendall W. Maddox** has become associated with the firm. Offices are located in Birmingham and Huntsville, Alabama.

The firm of **Bell, Richardson & Sparkman, P.A.** announces the firm name has changed to **Bell Richardson, P.A.** The office remains at 116 South Jefferson Street, P.O. Box 2008, Huntsville, Alabama 35804. Phone (205) 533-1421. The firm also announces that **J. Michael Broom** and **Stuart E. Smith** have become members of the firm.

The firm of **Prince, Baird & Poole, P.C.** announces the addition of **Silas G. Cross, Jr.**, formerly of Starnes & Atchison, as an associate. Offices are located at 2501 Sixth Street, Tuscaloosa, Alabama 35401. Phone (205) 345-1105.

The firm of **Dominick, Fletcher, Yeilding, Wood & Lloyd, P.A.** announces that **Clark Collier** has become a member of the firm, and **Jane Emily Crosswhite, B. Boozer Downs** and **Mary P. Thornton** have become associated with the firm. Offices are located at 2121

Highland Avenue, Birmingham, Alabama 35205. Phone (205) 939-0033.

The firm of **Glenda G. Cochran** announces that **Kathryn H. Sumrall**, formerly a partner with Emond & Vines, has joined the firm. The firm name is changed to **Cochran & Sumrall, P.C.** Offices are located at 305 Park Place Tower, Birmingham, Alabama 35203. Phone (205) 328-5050.

**Inzer, Suttle, Swann & Stivender, P.A.** of Gadsden announces that as of July 1, 1991 the firm name has been changed to **Inzer, Stivender, Haney & Johnson, P.A. James S. Sledge** is no longer a member of the firm, having been appointed a judge for the U.S. Bankruptcy Court, Norhtern District of Alabama. **Robert D. McWhorter, Jr.** has joined the firm.

**ESPN, Inc.** announces that **James B. Noel** has joined the company. Headquarters are located at ESPN Plaza, Bristol, Connecticut 06010-9454. Phone (203) 585-2000.

**Energen Corporation** announces the promotion of **Dudley C. Reynolds** to general counsel and secretary, and **J. David Woodruff, Jr.** to vice-president-legal and assistant secretary. Offices are located at 2101 Sixth Avenue, N, Birmingham, Alabama 35203-2784. Phone (205) 326-8184.

The firm of **Conwill & Justice** announces that **Roy M. Johnson, III** has become a member of the firm, and the firm name will be **Conwill, Justice & Johnson**, located at Main Street, Columbiana, Alabama. The mailing address is P.O. Box 557, Columbiana 35051. Phone (205) 669-6701.

The firm of **Luker & Brewer** announces the change of the firm name to **Luker, Brewer, Shores, Umstead, Erskine & Bramer**, and that **Michael C. Shores, Cynthia Hooks Umstead, Tamera K. Erskine**, and **Jeffrey D. Bramer** have become partners of the firm. Offices are located at Barrister Hall, 2205 Morris Avenue, Birmingham, Alabama 35203. Phone (205) 251-6666.

**Rosemary Clark**, formerly of Sirote & Permutt, P.C. in Huntsville, has become a senior attorney of the **Resolution Trust Corporation** in Baton Rouge, Louisiana. Offices are located at 100 St. James Street, Building H, Baton Rouge, Louisiana 70802. The mailing address is P.O. Box 91183, Baton Rouge 70821. Phone (504) 339-1322.

**Samuel M. Johnston, Jr., Robert B. Wilkins, J. Michael Druhan, Jr., James C. Johnston, D. Charles Holtz,** and **Joseph S. Johnston** announce the formation of **Johnston, Wilkins, Druhan & Holtz**, 157 North Conception Street, P.O. Box 154, Mobile, Alabama 36601. Phone (205) 432-0738.

**J. Floyd Minor** announces that **Calvin M. Whitesell, Jr.** became associated with the firm, effective May 20, 1991. The firm's address is 458 South Lawrence Street, Montgomery, Alabama 36104. Phone (205) 265-6200.

The firm of **Gorham, Waldrep, Stewart, Kendrick & Bryant, P.C.** announces that **Victor Kelley**, formerly of the U.S. Attorney's Office, Northern District of Alabama, became associated with the firm, effective February 19. Offices are located at 2101 6th Avenue, N, Suite 700, Birmingham, Alabama 35203. Phone (205) 254-3216.

The firm of **Bradley, Arant, Rose & White** announces that **Andrew Robert Greene**, former deputy regional counsel for the U.S. Environmental Protection Agency, has joined the firm as a partner, effective May 1. Offices are located in Birmingham and Huntsville, Alabama.

The firm of **Williams & Williams** announces that **Randall M. Cheshire** has become an associate of the firm. Offices are located at 2617 Eighth Street, Tuscaloosa, Alabama 35401-2103. Phone (205) 345-7600.

**Central Bank of the South** announces that **Daniel B. Graves** has been appointed senior legal counsel. Prior to working at Central, Graves was a partner with Miller, Hamilton, Snider & Odom in Mobile. Offices are located at 701 South 20th Street, Birmingham, Alabama 35233. Phone (205) 933-3690. ■


# Failure To Read This Article May Result In The Dismissal Of Your Appeal

*By KERRY R. GASTON and CELESTE W. SABEL*

Appellate practice in Alabama is undergoing change. That change is reflected in numerous amendments to the Alabama Rules of Appellate Procedure and changes in court policy that will become effective October 1, 1991.

All too often, notices similar to the title of this article are sent out by appellate courts. In lieu of "to read this article," insert wording such as "advise us of the status of the case" or "file brief" or "file transcript" and you have the idea. This article is to alert the practitioner to the changes to come so that notices such as the above may be avoided.

The appellate rules amendments — amendments which should have appeared in the September 19, 1991, advance sheets of the Southern Reporter (after this article went to press)—will apply to all appeals filed on and after October 1, 1991. Briefly, some of the changes: A docketing statement will be required to accompany a newly modified version of the notice of appeal form currently in use. Rather than indicating the proceedings to be transcribed in the notice of appeal, the appellant will now complete a "Transcript Purchase Order Form." Rule 10(b), requiring "satisfactory arrangements" to be made with the court reporter for preparation of the transcript, has been amended to require payment of the estimated cost of the transcript within 7 days of the filing of the notice of appeal. There are now time limits for supplementing the record on appeal and a change in policy relating to extensions for the filing of briefs. Each of the rule changes will be discussed in greater detail below.

Rule 1 of the Rules of Appellate Procedure provides that the rules are to "be construed so as to assure the just, speedy, and inexpensive determination of every appellate proceeding on its merits." It is in the spirit of affording litigants "just, speedy, and inexpensive" review that the new rule amendments were adopted.


## New Notice of Appeal Form for Civil Cases

Amendment to Rule 10(b), A.R.App.P.

The notice of appeal form, Form 1, found in Appendix I of the Alabama Rules of Appellate Procedure, has been modified. The notice no longer includes the section entitled "Designation of Reporter's Transcript." Now, designation of the reporter's transcript will be made by use of a "Transcript Purchase Order Form." The notice of appeal does contain, however, a "Transcript Status" section in which the appellant will indicate whether a transcript will be ordered and each of the court reporters who will be preparing the transcripts.

## Docketing Statement

Amendment to Rule 3, A.R.App.P. Addition of Section (e)

The "Docketing Statement," which will be required by a new section designated (e) in Rule 3, A.R.App.P., must accompany the notice of appeal in all appeals to the Court of Civil Appeals and all civil appeals to the Supreme Court. The appellate docketing statement is similar to the circuit court cover sheet currently required at the trial level. The docketing statement requires, among other things, information relating to the finality of the case, information concerning appropriate appellate jurisdiction, and brief summaries of the facts and issues. The form, which will be used by the appellate courts for case-management and statistical purposes, is designed to alert the appellate courts of possible jurisdictional problems early in the appeal. The practitioner is strongly

urged to use the form as a tool to review his or her case for any finality problems, to determine if the appeal is being filed with the correct appellate court, and to narrow issues. While accurate summaries are expected, the appellant will not be penalized if there is a variance in the issues stated in the docketing statement and the issues stated in the briefs.

The docketing statement also has a space for the appellant to indicate whether the case is one which may be appropriate for a settlement conference. If the appellant indicates a willingness to participate in a settlement conference, counsel will be notified of the procedure to be followed.

Filing of the docketing statement is not jurisdictional, as is the notice of appeal. It should be noted, however, that strong sanctions — including dismissal of the appeal or contempt of court — may ensue for failure to file.

### Transcript Purchase Order - Civil

Amendment to Rule 10(b)(2), A.R.App.P.

One of the greatest hindrances to "speedy" appellate relief is delayed transcript preparation. The existing Rule 11, A.R.App.P., requires the court reporter to file the designated reporter's transcript with the clerk of the trial court within 56 days from the date of the notice of appeal. This is not accomplished, however, if there is a dispute over costs of preparing the transcript. Under the current rules, the appellate court has no way of knowing of such disputes until the time for filing the certificate of completion of the reporter's transcript has passed. While disputes over transcript preparation are in most cases ultimately resolved satisfactorily for all concerned, the appeal may have been delayed by many months.

Rule 10(b)(2) was amended to alleviate this problem. In all appeals filed October 1, 1991, and after, the appellant will be required to pay the court reporter the estimated cost of the reporter's transcript within 7 days of the filing of the notice of appeal. Additionally, a "Transcript Purchase Order of Appellant - Civil" form must be filed. One section of the transcript purchase order form will be completed by the appellant and distributed to the court reporter, the appellee, and the trial court. The court reporter will be required to complete another section of the form where the estimated completion date, the estimated cost, and whether or not payment has been made is designated. Copies of this section of the form are to be forwarded to the appellate court.

*Rule 1 of the Rules of Appellate Procedure provides that the rules are to "be construed so as to assure the just, speedy, and inexpensive determination of every appellate proceeding on its merits."*

If the appellee deems that other parts of the proceedings are necessary, the appellee must pay the estimated cost of transcription of the additional proceedings to the court reporter within seven (7) days of the receipt of the appellant's transcript purchase order. The appellee and the court reporter must complete sections of the transcript purchase order form and forward the form to the courts and parties listed above. While the requirement that the appellee pay may seem harsh, the rule does provide that the appellee may, at any time, ". . . apply to the trial court for an order requiring the appellant to reimburse the appellee . . .".

This new procedure for transcript preparation is intended to result in the early determination and resolution of any potential problems and significantly reduce delay due to transcript preparation disputes.

### Transcript Purchase Order - Criminal

Amendment to Rule 10(c), A.R.App.P.

Rule 10(c), A.R.App.P., relating to the record on appeal in criminal cases, has several important amendments establishing new procedures that should be reviewed very carefully. Of particular importance is the new requirement that the appellant complete and file with the clerk of the trial court a "Reporter's Transcript Order - Criminal" form. This form is to be filed at the time written notice of appeal is filed. If notice of appeal is given orally, the form must be filed within seven (7) days after oral notice of appeal is given. The appellant is required to mail copies of the form to the Clerk of the Court of Criminal Appeals, the district attorney, the Attorney General and to each court reporter who reported proceedings designated for inclusion in the reporter's transcript.

The appellant *must* certify on the transcript order form that satisfactory financial arrangements have been made with each court reporter responsible for preparing a portion of the reporter's transcript. Only two exceptions apply: (1) the defendant proceeded at trial as an indigent, and such status is not subsequently revoked or (2) the defendant is granted permission to proceed on appeal in forma pauperis. It should be noted that the rule does not provide an exception from this requirement for appellants who have "pending" motions for leave to proceed in forma pauperis. For this reason, financial arrangements must be made within the time required in order to prevent dismissal of the appeal, regardless of any pending motions for treatment as an indigent.

If financial arrangements have not been made by the date the transcript order is received by the court reporter, the reporter is required to complete a "Notice of Insufficient Financial Arrangements" form, file the original with the Court of Criminal Appeals, and serve copies on the appellant and the Attorney General. The notice shall state the date the original was forwarded to the Clerk of the Court of Criminal Appeals. Within 14 days after the date the notice is forwarded to the appellate court, the appellant must file an affidavit with the Clerk of the Court of Criminal Appeals stating

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**Celeste W. Sabel**
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either (1) that the court reporter has been paid or (2) that adequate financial arrangements have been made. If the affidavit containing the required statement is not filed, the appeal will be dismissed.

Each proceeding in the case to be transcribed for the appeal must be specifically designated on the reporter's transcript order. General designations such as "all proceedings" are not sufficient. The appellant will not be permitted to raise any issue on appeal relating to any proceeding in the case that is not specifically designated in the reporter's transcript order unless such proceeding is not required by law or rule to be reported.

### Supplementing or Correcting the Record - Civil

Amendment Rule 10(f), A.R.App.P.

Rule 10(f), governing correction or modification of the record, has been amended and restricted to civil cases. The Court has adopted an additional section to Rule 10, section (g), which will govern criminal cases (to be discussed below).

While the current Rule 10(f) sets no time limits for filing motions or issuing rulings thereon with regard to correction or modification of the record, the new 10(f) sets strict time limits. In that regard, the rule is completely different from the current Rule 10(f). This rule specifically provides that any motion requesting correction or supplementation of the record must first be filed in the trial court, not the appellate court.

The amended Rule 10(f) provides that the appellant has fourteen (14) days from the date shown on the copy of the certificate of completion of the record on appeal in which to file the 10(f) motion. The appellee, too, is limited to fourteen (14) days from the filing of the appellant's brief in which to file the motion.

It should be noted that this rule restricts any motion to correct or supplement to items correctly designated in compliance with Rule 10(b), but inadvertently omitted from the record. In other words, practitioners must be sure to designate every aspect of the trial proceeding needed in the appeal at the time the notice of appeal is filed.

After the motion to supplement or correct is filed, the trial court has fourteen (14) days in which to take action on the motion. If the trial court fails to rule on the motion within fourteen (14) days, *the motion will be deemed denied.* After the motion has been disposed of, whether by court order or by operation of the rule, a dissatisfied party has seven (7) days to seek appropriate relief in the appellate court. If either court grants the motion to correct or supplement the record, the circuit clerk and the court reporter (if a transcript is required) have no more than twenty-one (21) days to complete the supplemental or corrected record.

Note that the appellate briefing schedule will *not* be stayed unless there is a specific order from the appellate court granting such a stay.

### Supplementing or Correcting the Record - Criminal

Amendment to Rule 10, A.R.App.P. Addition of Section (g)

Section (g) of Rule 10 is a new section applicable to appeals in criminal cases. It is similar to 10(f), except in two key areas:

First, if the trial court fails to rule on an appellant's motion to supplement the transcript within fourteen (14) days, it is deemed *granted*, provided the supplemental proceedings were originally designated in the reporter's transcript order. Any other motions pursuant to this rule are automatically denied if not ruled upon within 14 days from filing. Secondly, unlike appeals in civil cases, once a motion to supplement or correct the record is filed in the trial court, the briefing schedule is stayed until the denial of the motion. If the motion is granted, the briefing schedule shall be suspended until the record is supplemented or corrected.

### Appendix System

Rescission of Rule 30, A.R.App.P

When the appellate rules were adopted, appellants were given the option of filing an appendix to the briefs or filing a second copy of the record. The Court, having found that there was an average of only two parties a year using the appendix method, has rescinded Rule 30, A.R.App.P.

### Second Copy of the Record

Amendment to Rule 11(a)(4), A.R.App.P.

The Supreme Court requires a second copy of the record. The rules allowing use of the "appendix method" as an option permitted the parties until the time their briefs were due to choose whether to use the appendix method. Consequently, according to Rule 30 (now rescinded), the second copy did not have to be filed until fourteen (14) days after the date the appellee was required to file his or her brief. The appendix system no longer being an option, the amendment to Rule 11(a)(4) now requires that a second copy of the record be filed with the clerk of the appellate court within fourteen (14) days after the date shown on the copy of the certificate of completion of the record on appeal.

Presently, determination of jurisdictional or finality problems occurs after the record is received and the appeal briefed. Receipt of the second copy of the record at an earlier stage, as required by amended Rule 11(a)(4), will provide the Court a more efficient time-frame for resolving any such problems.

### Extension of Time for Completion of Record; Reduction in Time

Amendment to Rule 11(c), A.R.App.P.

The amendment to Rule 11(c) simply requires that any extensions granted to a court reporter by the trial court or the appellate court be limited to seven-day increments. The court reporter may still receive a one-week extension from the trial court without a showing of good cause. For good cause shown, the trial court may grant up to three additional seven-day extensions; however, no more than a total of four seven-day extensions may be granted by the trial court.

The trial court may also grant a seven-day extension of time to complete the clerk's record and, for good cause shown, the trial court may grant an additional seven-day extension, but no more than a total of two seven-day extensions.

Motions for additional time may be made to the appellate court.

### References in Briefs to the Record

Amendments to Rules 28(e) and 10(b), A.R.App.P.

An amendment to Rule 10(b) eliminates the requirement of clerks' offices or reporters putting a "CR" or "RT" before the page numbers in the record. Each section of the record will begin with page 1 and be numbered consecutively. With the "CR" and "RT" references having been removed from the record, there can potentially be two pages with identical page numbers. For example, there can be a page 25 of the clerk's record and a page 25 of the reporter's transcript. It is the attorney's responsibility to designate in the brief which part of the record is being referenced. The amendment to Rule 28(e) provides that this be done by putting the letter "C" before any reference in a brief to a page in the clerk's record, and if a reference is made to a page in the reporter's transcript, the reference shall be preceded by the letter "R".

### Time for Serving and Filing Briefs

Amendment to Rule 31(a), A.R.App.P.

The amendment to Rule 31(a) provides that the appellee's brief shall be filed within twenty-one days after the *filing* of the brief of the appellant in the appellate court. The old rule stated that the time ran from the service of the brief. This amendment brings the rule in line with current Supreme Court practice. Likewise, the appellant's reply brief is due to be filed within fourteen (14) days after the *filing* of the brief of the appellee in the appellate court.

### Length of Briefs

Amendment to Rule 28(g), A.R.App.P.

This rule was modified to limit the argument section in a rehearing brief to no more than twenty (20) pages of standard commercial printing or twenty-five (25) type-written pages.


### REGARDING EXTENSIONS FOR BRIEFS

One seven-day extension of time, as provided by Rule 31(d), A.R.App.P., may be granted to each side. A request for an extension may be granted over the telephone; however, the extension must be confirmed in writing to the appellate clerk's office, and the confirmation letter must state the exact date the brief is due and be sent to opposing counsel.

Motions for enlargements of time to file the brief after the seven-day extension will not be granted unless extraordinary good cause is shown. A heavy workload, vacation, etc., will not be considered good cause. Any request for an enlargement of time to file the brief after the seven-day extension must be made by motion to the appellate court and the motion must be received in the appellate court *before* the first extension has expired.

Extensions will not be granted for filing a brief in support of an application for rehearing or for filing a reply brief to the application for rehearing.

Please note that while the courts will retain the rather liberal policy of allowing the one seven-day extension of time as provided by Rule 31(d), any enlargements of time to file the briefs will be strictly reviewed. It is recommended to the practitioner that the brief be filed within the original twenty-eight (28) day time period and that the seven-day extension of time be used as an emergency measure only. This will allow the party filing the brief to have twenty-eight days plus a seven-day safety valve. Do not count on any enlargements of time. Unless there is an unanticipated event or emergency which results in extreme hardship, it can be assumed by the practitioner that a motion for an enlargement of time to file the brief after the seven-day extension will not be granted by the appellate courts.

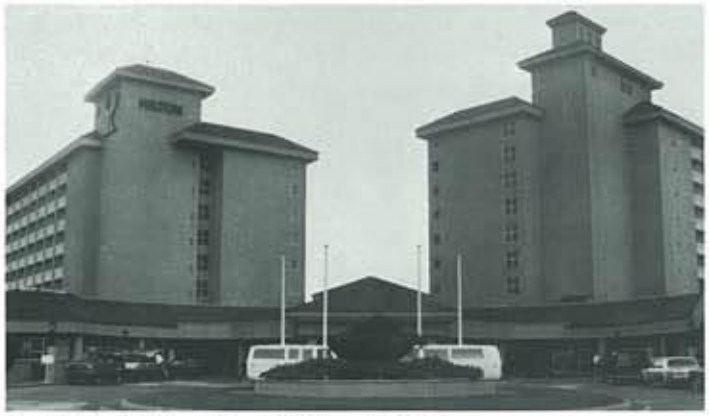
### CONCLUSION

**A reminder:** The discussed rule amendments and modifications should have appeared in the September 19, 1991, advance sheets of the Southern Reporter. Also, if you need help or clarification at any stage of your appeal, staff members of each of the appellate court clerk's offices are available to answer questions. ■

# 1991 Alabama State Bar Annual Meeting

# HIGHLIGHTS

ORANGE BEACH, ALABAMA



Perdido Beach Hilton, site of 1991 Annual Meeting

President Albritton thanked Judge Buchmeyer, Bench & Bar Luncheon speaker

Judge David A. Raines received Judicial Award of Merit

President Albritton and wife Jane enjoyed 1991 convention

Alabama attorneys took advantage of LEXIS® training

(LEFT) Over 600 attended Membership Reception

E.T. Brown of Birmingham received Walter P. Gewin award

# 1991 Alabama State Bar Annual Meeting

# HIGHLIGHTS

ORANGE BEACH, ALABAMA

Past presidents gathered for annual breakfast

Robert P. Wilkins conducted "Technology in the Law Practice"

Tom Jones with wife Shelly honored at University of Alabama Alumni Luncheon

Golfers picked up boxed lunches before tournament

(RIGHT) Participants in golf scramble at Perdido Bay Golf Course

# 1991 Alabama State Bar Annual Meeting

# HIGHLIGHTS

ORANGE BEACH, ALABAMA

Shearen Elebash with Jane and Harold Albritton

Elebash entertained at Annual Dinner

Bradley Hale spoke on chemical dependencies

President Albritton with 50-year certificate recipients

Alva Caine presented President Albritton with president's plaque

President Albritton presented memorial resolution to family of Broox G. Garrett

(LEFT) President Albritton's family recognized at Grande Convocation

# 1991 Alabama State Bar Annual Meeting

# HIGHLIGHTS

ORANGE BEACH, ALABAMA

President Albritton and President-elect designate Small at drawing for prizes

Labor & Employment Law Section gave $3,000 to building fund

Joe Cassady of Enterprise . . .

. . . and Lewis Page of Birmingham, Award of Merit recipients

Past President Albritton, '91-'92 President Adams and President-elect Small

Ben H. Harris, winner of IBM computer

# 1991 ALABAMA STATE BAR ANNUAL MEETING

# HIGHLIGHTS

ORANGE BEACH, ALABAMA

Judge Albritton with visiting law students from Czechoslovakia

Mandy Beason at Club '91 Cabaret

Expo '91 exhibitors included Michie Company . . .

. . . Parkside of Alabama . . .


. . . Lanier . . .


. . . and ValCom Computer Center.

## WINNERS IN THE 1991 ALABAMA STATE BAR GOLF SCRAMBLE

### 1st Place

Charles Elliott, *Birmingham*
Robert Gonce, *Florence*
Tim Reynolds, *Opelika*

### 2nd Place

Rod Alexander, *Moulton*
Jim Baker, *Birmingham*
Don McCabe, *Daleville*

### 3rd Place

Wade Baxley, *Dothan*
Joe Cassady, Sr., *Enterprise*
Mark South, *Blountsville*
Steve Still, *Birmingham*

### 4th Place

Steve Brunson, *Gadsden*
Bent Owens, *Birmingham*
Steve Stine, *Birmingham*

### 5th Place

Wayne Causey, *Calera*
E.B. Hamner, *Florence*
Gorman Jones, *Sheffield*
Marion Walker, *Birmingham*

# PUNITIVE DAMAGES

## A Historical Perspective

By GORMAN HOUSTON

In Greek mythology, Memory (Mnemosyne) was the mother of all culture, and Clio, her eldest daughter, was the patroness of history, responsible for keeping orderly accounts of past events. Law (Themis), who sat by Jove on his throne to give him counsel, was the mother of the three Fates, who spun the thread of human destiny and were armed with shears to cut the thread when they pleased.[1]

The United States Supreme Court has used a case that originated in the Alabama judicial system as the vehicle for upholding punitive damages against a due process constitutional challenge. *Pacific Mutual Life Insurance Co. v. Haslip*, __ U.S. __, 111 S.Ct. 1032 (1991). From a careful review of the majority opinion in *Pacific Mutual* and from the actions of the United States Supreme Court since it announced its decision in *Pacific Mutual*, it appears that the Alabama procedure for post-verdict review of punitive damages had a greater impact on that decision than I originally assumed. Therefore, the powers that be at *The Alabama Lawyer* thought that it might be of interest to members of the Alabama State Bar if a sitting justice, befriending Clio, while keeping the daughters of Law close by to cut off the account if it approached a pending or impending case, recounted the events that led to the Alabama Supreme Court's post-verdict review of punitive damages.

It is interesting to note that *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), the seminal case on post-verdict review, did not involve punitive damages. That case went to the jury only on the city's innocent misrepresentation, which would not support an award of punitive damages. The trial court did not instruct the jury on punitive damages, and the plaintiff did not request such an instruction. Anything in *Hammond* concerning punitive damages is therefore *obiter dicta*. However, without the *Hammond* procedure for reviewing damages when they are challenged, post-verdict, as excessive, it is probable that the United States Supreme Court would have held that the method of awarding punitive damages in Alabama did not meet the due process requirements of the United States Constitution.

**Justice J. Gorman Houston**

Justice J. Gorman Houston has been an associate justice on the Alabama Supreme Court since September 1985. Prior to that, he practiced law in Eufaula, Alabama and served as a bar examiner, a bar commissioner, a member of the Alabama State Bar Disciplinary Commission, and president of the Bar Association of the Third Judicial Circuit.

Justice Houston graduated from the University of Alabama School of Law, where he was a member of the Farrah Order of Jurisprudence and an associate editor of *The Alabama Law Review*.

To understand why *Hammond* was written broadly enough to encompass both compensatory and punitive damages, we must look to *General Motors Corp. v. Edwards*, 482 So.2d 1176 (Ala. 1985), *Alabama Farm Bureau Casualty Insurance Co. v. Griffin*, 493 So.2d 1379 (Ala. 1986), and *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986). In *General Motors*, the trial court had remitted $600,000 in each of two wrongful death cases. In addressing the remittitur issue, Justice Maddox noted the inconsistency of the Alabama Supreme Court when presented with the issue of excessive judgments, and for a plurality of this court, wrote the following:

> "[T]his Court has not yet adopted *specific standards* for courts to apply in granting or denying remittitur. We believe that the time has come for this Court to study the remittitur practice in Alabama, and to adopt a rule or rules of practice which would also protect the public's interest in decreased court costs and a speedy and just determination of every case upon the merits. *We do not adopt those standards in this case, because to do so would effect a major change in current remittitur practice, and such a major change should be adopted only after adequate notice and deliberate study by the full Court.*"

482 So.2d at 1199. (Emphasis added.) At that point, the following footnote appeared: "Justices Shores [the author of *Hammond*] and Houston are recused in this case."

In the dissent in *General Motors*, written by Justice Almon and concurred in by two other justices, including Justice Jones[2], it was noted:

> "The purpose of punitive damages is to punish and deter wrongdoing. The nature of the wrong and the wealth of the defendant are pertinent to the decision on the amount necessary to punish the wrongdoer. *Because the jury should not consider the wealth of the defendant, it would be proper for the trial court to consider such matters in a post-trial hearing on the motion for new trial or remittitur.*"

482 So.2d at 1200. (Emphasis added.)

In 1985, the United States Supreme Court granted certiorari in *Aetna Life Insurance Co. v. Lavoie*, and that case was orally argued before the United States Supreme Court on December 4, 1985, less than three weeks after the opinion in *General Motors*, supra, was released by the Alabama Supreme Court. Based upon the questions asked by the United States Supreme Court justices at oral argument, court watchers were of the

opinion that the constitutionality of punitive damages would be the principal issue addressed by that Court when it released its opinion.

Meanwhile, the issues of remittitur and excessiveness of verdicts continued to be presented to the Alabama Supreme Court. In *Alabama Farm Bureau Mutual Casualty Insurance Co. v. Griffin*, a *per curiam* plurality opinion released on January 17, 1986, the Alabama Supreme Court refused to address the issue of excessiveness:

> "This Court has not established specific standards for trial courts to apply in granting or denying new trial motions on the grounds of excessiveness. *General Motors Corp. v. Edwards*, 482 So.2d 1176 (Ala. 1985). We presume that a trial court's ruling on the issue of damages is correct and we will not disturb such a ruling unless we find it to be plain and palpable error."
>
> 493 So.2d at 1384.

Two justices (Maddox and Jones) were recused in *Griffin*, just as two Justices had been recused in *General Motors*. Three justices dissented in *Griffin*, based on the trial court's failure to specifically address the excessiveness issue, just as three Justices had dissented when a plurality of the court had refused to address the issue of the trial court's remittiturs in *General Motors*.

I wrote for the three dissenting justices in *Griffin* and attempted to formulate a standard to be applied when a motion for remittitur was filed with the trial court. This standard was basically a comparison of the punitive damages judgment with punitive damages judgments in similar cases involving a similar tort, looking primarily to the enormity of the wrong and the necessity for punishment and deterrence of the particular defendant.

On April 26, 1986, the United States Supreme Court released its opinion in *Aetna Life Insurance Co. v. Lavoie*. The case was not resolved on the issue of the constitutionality of punitive damages. However, Chief Justice Burger, in an opinion concurred in by six justices, wrote the following in regard to punitive damages:

> "[Aetna] also argues . . . *that lack of sufficient standards governing punitive damages awards in Alabama violates the Due Process Clause of the Fourteenth Amendment . . . [This] argument [ ] raise[s an] important issue[ ] which, in an appropriate setting, must be resolved . . . .*"
>
> 475 U.S. at 830, 106 S.Ct. at 1589. (Emphasis added.)

Two and one-half months later on July 11, 1986, the Alabama Supreme Court released its unanimous opinion in *Hammond v. City of Gadsden*.

The same day that the opinion in *Hammond* was released, the court also released its opinion in *Harmon v. Motors Insurance Corporation*, 493 So.2d 1370 (Ala. 1986). In *Harmon*, the trial court had remitted $460,000 of a $500,000 verdict that had included punitive damages. Justice Steagall, for a unanimous court, wrote:

"The trial court did not set out the factors it considered in ordering a new trial unless the plaintiff filed a remittitur of $460,000. Therefore, we are unable to say whether the trial court erred on this issue. Today in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), this court has held that the trial court must enter an order stating its reasons for granting or denying motions of this kind. Therefore, the judgment of the trial court is reversed and the cause remanded for entry of an order consistent with the opinion in *Hammond v. City of Gadsden*."

493 So.2d at 1373.

On the same day that the opinions in *Hammond* and *Harmon* were released, rehearing was denied in *Griffin*. Therefore, it appeared to me that *Hammond* would deal only with the problem addressed in the dissent in *General Motors*, which basically involved the breadth of the constitutionally guaranteed right to trial by jury (Article I, 11, Alabama Constitution of 1901), and which was excepted out of the general powers of government by Article I, 36, of the Constitution. It did not appear to me that *Hammond* addressed the due process challenge to punitive damages or cases in which trial courts refused to grant remittiturs without stating reasons, i.e., *Griffin*.

During the summer and fall of 1986, I read every law review article and treatise on punitive damages in the Alabama Supreme Court Library and most major opinions from other jurisdictions on punitive damages, and I prepared what ultimately became my special concurrence in *Aetna Life Insurance Co. v. Lavoie*. The seven factors that I suggested that trial courts should consider when confronted with the issue of excessiveness of punitive damages in that special concurrence came (1) from my ultimately withdrawn dissent in *Griffin*,[3] (2) from the dicta concerning punitive damages in *Hammond* ("culpability of defendant's conduct, desirability of discouraging others from similar conduct, and impact upon the parties"), (3) from Justice Almon's dissent in *General Motors* and Justice Jones's special concurrence in *Ridout's-Brown Service, Inc. v. Holloway*, 397 So.2d 125 (Ala. 1981), and (4) from numerous law review articles and treatises on punitive damages published before September 1986. My special concurrence was written to address specifically Chief Justice Burger's warning that whether the lack of sufficient standards governing punitive damages violated the Due Process Clause of the Fourteenth Amendment was an important issue, "which in an appropriate setting must be resolved."

Subsequently, the court recognized that the excessiveness issue presented by *Griffin* should be reviewed in accordance with the procedures set out in *Hammond*, and on October 31, 1986, the court did what it very seldom does, and granted the second application for rehearing and remanded *Griffin* to the trial court for the entry of an order consistent with *Hammond*. At that time, I withdrew my dissenting opinion in *Griffin*. I have often wondered if I would have spent the time that I spent in formulating standards that I thought would comply with due process, if the majority of the court had granted the first application for rehearing in *Griffin* and had remanded the case for a hearing in accordance with *Hammond* at that time. I had done this research and prepared a special concurrence in *Aetna Life Insurance Co. v. Lavoie* by the time the second application for rehearing was granted, so I published my special concurrence when *Aetna Life Insurance Co. v. Lavoie* was released in January 1987.

Two years later, *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989), was appealed to the Alabama Supreme Court. In *Green Oil Co.*, Judge Jim Avary, the trial judge, had conducted a *Hammond* hearing on punitive damages and had found that although the culpability of Green Oil Company was great and the wrong to the plaintiffs was substantial, it did not take a $150,000 punitive damages award "to be heard and felt a few miles down the road in Union Springs by two local individuals." The trial court ordered a remittitur of $125,000 of the punitive damages award or a new trial. In *Green Oil Co.*, with the chief justice and six justices concurring in the opinion, one justice concurring specially and writing, and one justice concurring in the result, the Alabama Supreme Court affirmed Judge Avary's judgment and held as follows:

"The following could be taken into consideration by the trial court in determining whether the jury award of punitive damages is excessive or inadequate:

"'(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.

"'(2) The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or "cover-up" of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.

"'(3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.

"'(4) The financial position of the defendant would be relevant.

"'(5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.

"'(6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.

"'(7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award.'

"*Aetna Life Insurance Co. v. Lavoie*, 505 So.2d 1050, 1062 (Ala. 1987), Houston, J., concurring specially."

539 So.2d at 223-24.

In *Pacific Mutual Life Insurance Co. v. Haslip*, Justice Blackmun, in footnote ten in the opinion of the Court referring to

these seven substantive standards that this Court had developed for evaluating punitive damages awards, wrote:

"This, we feel, distinguishes Alabama's system from the Vermont and Mississippi schemes about which Justices expressed concern in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989), and in *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988). In those respective schemes, an amount awarded would be set aside or modified only if it was 'manifestly and grossly excessive,' *Pezzano v. Bonneau*, 133 Vt. 88, 91, 329 A.2d 659, 661 (1974), or would be considered excessive when 'it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience,' *Bankers Life & Casualty Co. v. Crenshaw*, 483 So.2d 254, 278 (Miss. 1985)."

__ U.S. at __, 111 S.Ct. at 1045. Justice Blackmun in *Haslip* also wrote:

"Pacific Mutual thus had the benefit of the full panoply of Alabama's procedural protections. The jury was adequately instructed. The trial court conducted a post-verdict hearing that conformed with *Hammond* . . . Pacific Mutual also received the benefit of appropriate review by the Supreme Court of Alabama. It applied the *Hammond* standards and approved the verdict thereunder. It brought to bear all relevant factors recited in *[Green Oil Company v.] Hornsby*."

__ U.S. at __, 111 S.Ct. at 1046.

The Alabama Supreme Court resolved the inconsistency in dealing with issues of excessiveness and remittitur of punitive damages called to its attention by Justice Maddox (*General Motors*) and heeded the warning of the United States Supreme Court in *Aetna Life Insurance Co. v. Lavoie*. Under the leadership of Justice Shores (*Hammond*), Justice Steagall (*Harmon*), Justice Almon (*General Motors*, dissent), and Justice Jones (*Ridout's*, special concurrence), the court developed a system for trial and appellate courts to evaluate and review punitive damages awards, using the *Green Oil Co.* substantive standards, in a manner that comports with the due process requirements of the Fourteenth Amendment to the United States Constitution. ■

**Footnotes**

1. T. Bulfinch, *Bulfinch's Mythology* (Avenel 1978), pp. 8-9; Mihaly Csikszentmihalyi, *Flow-The Psychology of Optimal Experience* (Harper & Row), "Befriending Clio," pp. 132-34.
2. Five years before *General Motors*, Justice Jones, in a special concurence in *Ridout's Brown Service, Inc. v. Holloway*, 397 So. 2d 125, 127-28 (Ala.1981), had noted that our existing system of awarding punitive damages addressed only the gravity of the wrongful act and not the amount of damages necessary to punish the particular defendant in each case. Justice Jones suggested a bifurcated proceeding whereby "the adequacy *vel non* of damage" could be determined in a post-judgment proceeding by way of judicial review.
3. That dissent, issued January 17, 1986, was withdrawn too late to avoid publication in the advance sheet of Southern 2d. It does not appear in the bound volume.



# ATTENTION

## Local Bar Presidents

There is an increasing need for a current listing of local bar presidents, and it is difficult to keep up with all the changes since the elections vary with each association. We are asking for your assistance in maintaining an up-to-date list.

Please let us know as soon as possible when there is a change within your local group.

You may send this information to:

**Alice Jo Hendrix**
Membership Services Director
P.O. Box 671
Montgomery, Alabama 36101
or call 1-800-392-5660 (in-state WATS)
or 269-1515

# YOUNG LAWYERS' SECTION

*By KEITH B. NORMAN*

## Farewell to the Old

It is not exactly the time of the year for a reprise of "Auld Lang Syne", but the time has arrived to bid a fond farewell to several YLS officers and welcome our newest members to the Executive Committee.

I thank **Steve Shaw** of Birmingham and **Taylor Flowers** of Dothan who have been active members of the Executive Committee and contributed much during their tenure on the committee. Both will be missed.

Next, I welcome our newest members of the committee, **Paula Baker** of Birmingham and **Denise Ferguson** of Huntsville. We are very fortunate to have both of them, and I believe they will add greatly to the vitality and industry of the committee. In fact, each has already accepted a special committee assignment willingly and enthusiastically.

At the section's annual business meeting held during the state bar's annual meeting at the Perdido Beach Hilton, Executive Committee members **Hal West** of Birmingham and **Duane Wilson** vied for the office of treasurer, with Hal's being elected. The rest of the officers and Executive Committee members serving for the 1991-92 bar year are listed at right.

Finally, comments about the Executive Committee would not be complete without taking a moment to mention **Percy Badham**, our section's former president. I feel fortunate that Percy will continue to serve in an *ex officio* capacity as immediate past president. As president, Percy did an outstanding job throughout his tenure on the Executive Committee. His regular attendance at American Bar Association Young Lawyers' Division meetings and involvement with YLD committees has kept Alabama in good stead with YLD leaders. This has resulted in greater opportunities for members of our state affiliate and local affiliates to participate in YLD committees and activities. Thanks, Percy, for an outstanding year as president and for your long and continuing commitment to the young lawyers in Alabama.

### Section programs

Last September, the Executive Committee adopted the following as a statement of purpose to guide our section's activities:

> To encourage the creation of new affiliates; to strengthen the existing affiliates; to seek the active participation of all young lawyers, especially women and minorities, in the activities of the section; to focus on statewide outreach by encouraging the networking of local affiliates in statewide public service and service to the profession; to help young lawyers become more skilled advocates through the development and promotion of CLE programs; to help improve younger lawyers' quality of life; and to foster professionalism among all lawyers.

In each of my president's articles, I plan to highlight section programs which illustrate efforts to fulfill this commitment. Two programs I mention in this issue are **Pre-law Conferences for Minority High School Students** and the **Law Student Liaison Project.**

Minority pre-law conferences are designed to encourage minority students

### 1991-92 OFFICERS & EXECUTIVE COMMITTEE MEMBERS

PRESIDENT-ELECT:
**Sid Jackson**, Mobile

SECRETARY:
**Les Hayes,** Montgomery

EXECUTIVE COMMITTEE:

**Charlie Anderson,** Montgomery
**Paula Baker**, Birmingham
**Robert Baugh**, Birmingham
**Rebecca Bryan**, Montgomery
**Laura Crum**, Montgomery
**Denise Ferguson**, Huntsville
**Fred Gray, Jr.**, Tuskegee
**Warren Laird,** Jasper
**Frank Potts**, Florence
**Buster Russell,** Montgomery
**Jim Sasser**, Gadsden
**Amy Slayden**, Huntsville
**Buddy Smith**, Birmingham
**Jay Smith,** Birmingham
**Alyce Spruell**, Tuscaloosa
**Trip Walton,** Opelika
**Duane Wilson**, Tuscaloosa
**Frank Woodson,** Mobile
**Barry Ragsdale**, Birmingham

to consider the practice of law as a career option. This is accomplished by inviting minority students to participate in a conference where they have an opportunity to meet and hear from jurists and prominent lawyers concerning personal experiences as minorities in the legal profession. Young lawyer affiliates in other states which have sponsored minority pre-law conferences have met with great success. Our plan is a little different, however. We hope to have not one, but several, minority pre-law conferences across the state. In addition, we hope that these conferences will become an annual event. **Fred Gray, Jr.** of Tuskegee has agreed to chair the planning committee for these conferences and **Paula Baker** of Birmingham will serve as vice-chiar. The following young lawyers will serve on the planning committee: **David Long**, Birmingham; **Hon. Jo Celeste Pettway**, Camden; **Claude Hundley**, Huntsville; **Theron Stokes**, Montgomery; **Marla Newman**, Dothan; **Byron Perkins**, Birmingham; **Mia Louise Puckett**, Huntsville; **Willie Huntley**, Mobile; **Courtney Tarver**, Montgomery; **Evelyn Teague**, Birmingham; **Phyllis Wimberly**, Tuscaloosa; **Shelbonnie Coleman-Hall**, Mobile; **Barry Ragsdale**, Birmingham; **Jay Smith**, Birmingham; **Susan Russ**, Montgomery; and **Charles Tatum**, Jasper.

The other new project that I am very excited about is the Law Student Liaison Project. This program is chaired by **Alyce Spruell** of Tuscaloosa. It will involve groups of young lawyers meeting with law students in the law schools of Alabama. It is designed to increase the awareness among law students about the YLS; to provide candid information regarding the realities of law practice; to assist law students in their ability to assess career opportunities within the state; and to provide a liaison between the section and law schools to assist students in their transition from student to a member of the Alabama State Bar.

As these newest two programs indicate, the YLS is active. In my next article, I will highlight our local affiliates and their importance to programs involving public service and service to the profession. ■

# Workers' Compensation Law Section
## ALABAMA STATE BAR

GREETINGS:

It is my pleasure to announce that the Alabama State Bar has recently established a Workers' Compensation Law Section. We organized at the 1991 Annual Meeting at Orange Beach, and the officers are Steve Ford of Tuscaloosa, chairperson; Charles Carr of Birmingham, vice-chairperson; and Gary Pears of Birmingham, secretary/treasurer.

As a new section, it is our desire to raise the awareness and understanding of the bar community with regards to workers' compensation legal matters. As part of that effort, we hope to publish a section newsletter, conduct informative meetings and seminars, and promulgate programs helpful to the public concerning workers' compensation issues.

Your membership is encouraged. If you wish to become a member, please complete and return the statement (right) at your earliest convenience. If you have any questions, please contact any of the officers listed above.

Steve Ford, chair

Clip and Return

**$20.00**

Workers' Compensation Law Section
c/o Gary Pears, secretary/treasurer
P.O. Box 10406
Birmingham, Alabama 35202
Telephone (205) 254-7111
Facsimile (205) 254-7257

## MEMBERSHIP AND ANNUAL DUES STATEMENT 1991-92

Name _____

Firm Name _____

Mailing Address _____

_____

Committee Preference:

_____ Significant Decisions

_____ Seminar

I wish to be a working member of the Workers' Compensation Law Section for the year 1991-92. Enclosed is my check for $20 payable to the "Workers' Compensation Law Section" as full payment of my annual membership dues.

You may publish the information listed above in the section directory, and I will send any changes, in writing, as necessary.

_____

signature and date


# BUILDING ALABAMA'S COURTHOUSES

## CALHOUN 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.*

**Calhoun County Courthouse**

In more cases than not, the location of a county seat in Alabama has been decided by politics. In the case of Calhoun County, the same is also true concerning the county name. Calhoun County was originally established as Benton County on December 18, 1832 out of lands obtained from the Creek Indian Cession of March 1832. The story of why the name was changed says much about the political tenor of the times.

Thomas Hart Benton had played a role in the early history of Alabama. Benton was born in 1782 in North Carolina. His family later moved to Tennessee where he became active in local politics. In 1809 he became a state senator, and in 1811 was admitted to the Tennessee Bar. Benton was a friend of Andrew Jackson's and served under him in the Creek Campaign in Alabama. In 1814, he became commander of Fort Montgomery, near the site of Fort Mims, in Baldwin County.

Benton and Jackson became temporary enemies following a duel involving Benton's brother, Jesse, with a close friend of Jackson's. It was reported that a later encounter took place between Benton and Jackson in which Jackson brandished a whip, Benton had a pistol, Jackson pointed a gun at Benton, and Benton's brother shot Jackson in the shoulder. Jackson in turn shot at Benton but missed, and then Benton shot at Jackson and missed. A friend of Jackson's shot at Benton and he also missed. The melee involved other friends and acquaintances, but fortunately for American history, the marksmanship of the participants was poor, and no one was killed. Shortly thereafter Benton moved to the Missouri frontier. Sometime later the friendship between Jackson and Benton was restored.

When Missouri became a state in 1821, Thomas Hart Benton was one of its United States senators. He became a spokesman for the expansion of the West. He was also a strong supporter of Andrew Jackson and brought support from his region of the country to Jackson's Democratic Party.

In 1832, the Alabama Legislature honored Benton by naming a county for him. However, over the turbulent years which followed, Benton took the political position that slavery should not be further expanded in the West. This stand angered many Southerners, including members of the Alabama Legislature. On January 29, 1858 the Legislature officially changed the name of Benton County to Calhoun County in honor of John C. Calhoun of South Carolina, a proponent of states' rights and nullification. Thomas Hart Benton died later that year on April 10, 1858, and his name today is only a footnote in Alabama history.

When Benton County was originally

created, a public meeting was held to decide the location of the county seat. Alexandria, White Plains and Drayton were the suggested sites. Drayton, named for a prominent South Carolina family, won by one vote. The name of the town was soon changed to Madison, probably in honor of former President James Madison.

In 1833, a log cabin was used as the first courthouse. It was replaced in 1834 by a brick building constructed on a square in the town. Shortly thereafter the name of the town was changed again. This time it became Jacksonville in honor of then-President Andrew Jackson. The records at this courthouse were burned by Union forces during the War Between the States.

Following the war, entrepreneurs saw great potential for investing in the South. One such entrepreneur was Samuel Noble, an iron manufacturer from Rome, Georgia. With money borrowed from the Quintards, longtime friends in New York, he organized the Woodstock Iron Company on May 4, 1872. He also involved General Daniel Tyler of Connecticut, and his sons, Alfred L. Tyler and Edmund L. Tyler, in this project.

The Woodstock Iron Company bought up thousands of acres of land in Calhoun County for its manufacturing plants and for future development. Since there was already a post office assigned to a Woodstock, Alabama, the company town became known as Anniston, a shortened form of "Annie's Town", named for Mrs. Annie Scott Tyler, the wife of Alfred Tyler.

For its first 11 years of existence, Anniston was completely owned by the company. The town was formally opened for public sale of property on July 3, 1883. The ceremony was presided over by Henry W. Grady, a friend of the Nobles who was editor of the *Atlanta Constitution*.

As soon as Anniston, called the "Model City" because it was a planned company town, became a public community, a movement was started to change the county seat from Jacksonville to Anniston. The old courthouse in Jacksonville was in a sad state of disrepair. A grand jury in 1885 recommended either extensive renovation of the building or that new courthouse be built.

The county commissioners authorized the construction of a new courthouse in Jackson in early 1886. The Anniston newspapter, the *Hot Blast*, criticized this use of public money. The paper stated that the contractor was from Georgia, the bricks were from Chattanooga, and the construction was inferior. Besides, the courthouse should be built in Anniston.

The probate judge election of 1886 was hotly contested and served as an indicator of the relative strengths of Jacksonville and Anniston concerning the courthouse issue. The candidate from Anniston lost by a little over 300 votes, and this laid to rest the movement to remove the courthouse for the next few years.

By 1889, Anniston sought its own city court, and a bill creating it passed the Alabama Legislature that year. This action was an important step for demonstrating the need of removal of the courthouse from Jacksonville to Anniston, due to the volume of business. It was reported that the docket of the Anniston City Court would handle more cases in the next decade than the entire circuit court had disposed of at Jacksonville in the previous 60 years.

The issue of courthouse removal surfaced once again in 1898. The legislature passed a bill that was signed by the governor November 30, 1898 calling for a county seat election. In January 1899, a group of business leaders met and the decision was made that if the courthouse was moved to Anniston, the county would not have to pay for it because it would be built by the citizens of Anniston.

The fight for the courthouse was an extremely bitter one. Anniston argued

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

that it was an industrial town, a large rail center and more accessible to the majority of the citizens. Jacksonville countered with charges of Anniston's greed and crooked politics, as well as stressing the still relatively new facility in Jacksonville. In the election of February 1, 1899 Anniston was victorious over Jacksonville by a vote of 3,840 to 2,236.

Jacksonville initiated a court action and sought a writ of mandamus to prevent removal of the court records. It was denied. Then the constitutionality of the election itself was questioned and brought before the Alabama Supreme Court. This case was dismissed in July 1899. A new case was filed in September 1899. The final decision was not handed down by the supreme court until June 1900. After more than two generations, Jacksonville was no longer the county seat of Calhoun County, and Anniston was authorized to build a new courthouse. Plans were finalized in August 1900, and a cornerstone ceremony took place November 15 of that year.

Although extensively renovated over the years, the original courthouse begun in 1900 still serves as the Calhoun County Courthouse. It was constructed in the Neoclassical Revival style by architect J.W. Golucke of Atlanta. It is one of the earliest Neoclassical courthouses still standing in Alabama, being predated only by the Lee County and the Chambers County courthouses. The Chambers County Courthouse at Lafayette was also designed by J.W. Golucke.

The courthouse at Anniston was built by S.C. Houser and Wolsoncroft, Contractors, and the structure was completed in 1902 at a cost of $130,000. The building is a two-story brick structure built over a raised stone basement. The first floor windows are flat with raised keystones. The second floor windows are arched and capped by stone moldings with raised keystones. The upper floor contains a series of Corinthian pilasters with brick shafts. The central entrance-way contains three arches. The courthouse is topped by a clock tower. In 1924, an annex was added to the north side of the building for the county jail.

On January 15, 1931 the Calhoun County Courthouse burned. The exterior walls remained intact, but the entire interior was destroyed. The courthouse was reconstructed in 1932. Lockwood and Poundstone served as architects for the project, and Maurice R. Thomas was associate architect. The builder was J.P. Bradfield.

Additions were made to the courthouse in 1941 under the direction of Charles H. McCauley, an architect from Birmingham. Andrew and Dawson were the builders for this annex. Another addition was made in 1953. And, in 1963, a one-story windowless addition was attached to the southeastern corner of the courthouse building. James M. Hoffman was architect for this project, and Shenesey and Kay of Anniston were contractors.

The present Calhoun County Courthouse has served the county since 1902. It was placed on the National Register of Historic Places on October 3, 1985. Because of its various additions over the years, the building has become a patchwork. Several proposals have been made for a new courthouse, but no funding was ever found to replace the building. Instead, various county courts have had to relocate as their needs outgrew the old structure. Recently a tobacco tax was adopted by the Calhoun County Commission to provide a funding source for a two-phased courthouse renovation project. When work is completed, all courts will be albe to return to the renovated Calhoun County Courthouse.

Bentley Building Company, Inc. of Bynum, Alabama is the contractor for the courthouse renovation. The architect is William L. Christian of Christian and Associates with offices in Anniston and Atlanta. The renovation is expected to be completed by June 1992. The estimated cost of the project is $3.5 million.

*The author thanks Circuit Court Judge Malcolm Street for information concerning the renovation project.* ■

# ALABAMA STATE BAR BUILDING FUND HONOR ROLL

*Between May 29, 1991 and August 5, 1991 the following attorneys made pledges to the Alabama State Bar Building Fund. Their names will be included on a wall in the portion of the building listing all contributions. Their pledges are acknowledged with grateful appreciation. (For a list of those making pledges prior to May 29, please see previous issues of* ***The Alabama Lawyer****.)*

Larry Bruce Ables
William Marsh Acker, Jr.
Fred M. Acuff, Jr.
Phillip E. Adams, Jr.
Roger Carl Allen
Edward J. Azar
George B. Azar
Zack Michael Azar
Gordon F. Bailey, Jr.
Frank Mims Bainbridge
Julian Donald Banks
James Tutt Barrett
Maurice Solomon Bell
Michael Lester Bell
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Billy Lennard Carter
Gerald Dewitt Colvin, Jr.
Douglas P. Corretti
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Richard Cary Dean, Jr.
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Annette Elizabeth Dooley
Houston Thomas Eddens
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Fredrick T. Enslen, Jr.
Richard Owen Fant, Jr.
Richard E. Flowers
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Dan M. Gibson
Margaret L. Givhan
John Cooper Godbold
William P. Gray, Jr.
Madeline Hughes Haikala
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Frank Wood Hanvey
Tommie Brown Hardwick
Sidney Moxey Harrell
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Thomas Logan Jones
Rutherford Lyle Key, Jr.
David Richard King
John Thomas King
Mark Christian King
William Henry King, III
Lynne Brauer Kitchens
Robert Blake Lazenby
James Brooks Leach
Warren Bricken Lightfoot
William B. Lloyd, Jr.
Hugh Allen Locke, Jr.
William Ray Lucas, Jr.
Stanley Allen Martin
David Allen McDowell
Edward Ray McKee, Jr.
Michael Stephen McNair
James Edward Moore
Mac Mitchell Moorer
Robert Edward Moorer
Thomas Daniel Motley
Andrew Jackson Noble, III
Jack Merrell Nolen
Jack Merrell Nolen, Jr.
Theron Wayne Nolen
Adam Kennedy Peck
Robert H. Pettey
Joseph David Phelps
Harlan Irby Prater, IV
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William Macbeth Wagnon, Jr.
Eva M. Walding
Edwin Glenn Waldrop, Jr.
Charles H. Wampold, Jr.
John Ray Warren
Michael David Waters
Jere F. White, Jr.
John William White, II
Bryant A. Whitmire, Jr.
Bruce Edward Williams
Edward Hamilton Wilson, Jr.

*Between May 29 and August 5, 1991 the following firms made pledges to the building fund. Their names will also be included on a wall in the new building, listing all contributors. Their pledges are acknowledged with grateful appreciation. (For those contributing before May 29, please see previous issues of* ***The Alabama Lawyer****.)*

Armbrecht, Jackson, Demouy, Crowe, Holmes & Reeves
Burns & Mackey
Cassady, Fuller & Marsh
Labor Law Section
Najjar, Denaburg, P. C.
Turnbach & Warren

# C·L·E OPPORTUNITIES

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

## SEPTEMBER

**18 WEDNESDAY**

**Avoiding Environmental Liability in Alabama**
Birmingham
National Business Institute, Inc.
*Credits: 6.0* / Cost: $108
(715) 835-8525

**19 THURSDAY**

**Collections**
Montgomery
Alabama Bar Institute for CLE
*Credits: 6.0*
(205) 348-6230

**Employment and Labor Law in Alabama**
Birmingham
Lorman Business Center, Inc.
*Credits: 6.0* / Cost: $110
(715) 833-3940

**Avoiding Environmental Liability in Alabama**
Huntsville
National Business Institute, Inc.
*Credits: 6.0* / Cost: $108
(715) 835-8525

**20 FRIDAY**

**Basic Practice in Probate Court**
Birmingham, Edna Merle Carrway Center
Cumberland Institute for CLE
(205) 870-2865

**20-21**

**Advanced Family Law**
Guntersville, Guntersville State Park
Alabama Bar Institute for CLE
*Credits: 6.0*
(205) 348-6230

**22-25**

**Prosecution of Child Sexual Abuse**
Orange Beach, Perdido Beach Hilton
Alabama District Attorneys Association
*Credits: 8.7*
(205) 261-4191

**24 TUESDAY**

**Avoiding Environmental Liability in Alabama**
Mobile, Ramada Resort & Conference Center
National Business Institute, Inc.
*Credits: 6.0* / Cost: $108
(715) 835-8525

**25 WEDNESDAY**

**Avoiding Environmental Liability in Alabama**
Montgomery, Governor's House Hotel
National Business Institute, Inc.
*Credits: 6.0* / Cost: $108
(715) 835-8525

**26 THURSDAY**

**Employment and Labor in Alabama**
Huntsville
Lorman Business Center, Inc.
*Credits: 6.0* / Cost: $110
(715) 833-3940

**27 FRIDAY**

**Will Drafting**
Birmingham
Alabama Bar Institute for CLE
*Credits: 6.0*
(205) 348-6230

**Americans With Disabilities Act**
Birmingham, Harbert Center
Cumberland Institute for CLE
(205) 870-2865

## OCTOBER

**1 TUESDAY**

**OSHA Compliance in Alabama**
Birmingham
National Business Institute, Inc.
*Credits: 6.0* / Cost: $108
(715) 835-8525

**2 WEDNESDAY**

**OSHA Compliance in Alabama**
Huntsville
National Business Institute, Inc.
*Credits: 6.0* / Cost: $108
(715) 835-8525

**3 THURSDAY**

**Torts**
Huntsville
Alabama Bar Institute for CLE
*Credits: 6.0*
(205) 348-6230

**New Rules of Professional Conduct**
Montgomery
Cumberland Institute for CLE
(205) 870-2865

**4 FRIDAY**

**Torts**
Birmingham
Alabama Bar Institute for CLE
*Credits: 6.0*
(205) 348-6230

**Uninsured/Underinsured Motorist Coverage**
Mobile
Cumberland Institute for CLE
(205) 870-2865

**New Rules of Professional Conduct**
Birmingham
Cumberland Institute for CLE
(205) 870-2865

**8 TUESDAY**

**Buying and Trading Claims**
Birmingham
Cumberland Institute for CLE
(205) 870-2865

**Protection of Secured Interests in Bankruptcy**
Huntsville
National Business Institute, Inc.
*Credits: 6.0* / Cost: $118
(715) 835-8525

**10 THURSDAY**

**Torts**
Mobile
Alabama Bar Institute for CLE
*Credits: 6.0*
(205) 348-6230

**11 FRIDAY**

**Torts**
Montgomery
Alabama Bar Institute for CLE
*Credits: 6.0*
(205) 348-6230

**Bankruptcy for the General Practitioner**
Birmingham
Cumberland Institute for CLE
(205) 870-2865

**Advanced Bankruptcy**
Birmingham
Cumberland Institute for CLE
(205) 870-2865

**16 WEDNESDAY**

**Torts**
Dothan
Alabama Bar Institute for CLE
*Credits: 6.0*
(205) 348-6230

**17 THURSDAY**

**Criminal Law**
Birmingham
Alabama Bar Institute for CLE
*Credits: 6.0*
(205) 348-6230

**New Rules of Professional Conduct**
Mobile
Cumberland Institute for CLE
*Credits: 6.0*
(205) 348-6230

**Jury Psychology**
Birmingham
Cumberland Institute for CLE
(205) 870-2865

**22 TUESDAY**

**Asset Protection Planning**
Birmingham
Cumberland Institute for CLE
(205) 870-2865

**23 WEDNESDAY**

**Torts**
Florence
Alabama Bar Institute for CLE
*Credits: 6.0*
(205) 348-6230

**24 THURSDAY**

**Family Law Practice**
Montgomery
Alabama Bar Institute for CLE
*Credits: 6.0*
(205) 348-6230

**Fraud Litigation in Alabama**
Mobile
National Business Institute, Inc.
*Credits: 6.0* / Cost: $108
(715) 835-8525

**25 FRIDAY**

**Family Law Practice**
Birmingham
Alabama Bar Institute for CLE
*Credits: 6.0*
(205) 348-6230

**New Rules of Professional Conduct**
Gadsden
Cumberland Institute for CLE
(205) 870-2865

**Fraud Litigation in Alabama**
Montgomery
National Business Institute, Inc.
*Credits: 6.0* / Cost: $108
(715) 835-8525

**31 THURSDAY**

**Deposition Taking**
Birmingham
Alabama Bar Institute for CLE
*Credits: 6.0*
(205) 348-6230

## NOVEMBER

**1 FRIDAY**

**Business Torts**
Birmingham
Cumberland Institute for CLE
(205) 870-2865

**New Rules of Professional Conduct**
Auburn
Cumberland Institute for CLE
(205) 870-2865

**5 TUESDAY**

**RICO**
Birmingham
Cumberland Institute for CLE
(205) 870-2865

**6 WEDNESDAY**

**Successful Creditors' Strategies in Bankruptcy**
Mobile
National Business Institute, Inc.
*Credits: 6.0* / Cost: $108
(715) 835-8525

**7 THURSDAY**

**Administering Estates**
Birmingham
Alabama Bar Institute for CLE
*Credits: 6.0*
(205) 348-6230

**Uninsured/Underinsured Motorist Coverage**
Birmingham
Cumberland Institute for CLE
(205) 870-2865

**8 FRIDAY**

**Juvenile Law Practice and Procedure**
Birmingham
Alabama Bar Institute for CLE
(205) 348-6230

**Environmental Litigation**
Birmingham
Cumberland Institute for CLE
(205) 870-2865

**14 THURSDAY**

**Trial Issues**
Birmingham
Alabama Bar Institute for CLE
*Credits: 6.0*
(205) 348-6230

**Excellence in Advocacy**
Birmingham
Cumberland Institute for CLE
(205) 870-2865

# OPINIONS OF THE GENERAL COUNSEL

*By ROBERT W. NORRIS, general counsel*

**Question:**

"I have found myself in a situation where my opponent in litigation contends that my firm must withdraw from representation of a longtime client, Client A, for whom we have acted as general counsel, due to an alleged conflict of interest under Rule 1.7 of the Rules of Professional Conduct. Can we take advantage of the Comment to Rule 1.7 and withdraw from representing Client C and continue to represent Client A under Rule 1.9?

"The situation arose when I filed suit on behalf of Client A against B, an Alabama general partnership, and its general partners, C and D, for breach of a construction contract and fraud in the inducement and during performance of the contract. We also alleged a pattern and practice of fraud based on other jobs handled by D who was overseeing the construction work for B. C did not get involved with the construction project and did not commit any of the alleged fraud and is not claimed to be part of a pattern and practice. C is only included in the lawsuit by virtue of being a general partner in B, and thus liable for the acts of B.

"Shortly after filing suit, I learned that another lawyer in our firm, Jane, was representing C on a one-time matter which was totally unrelated to the litigation. This is the only time we have represented C. The unrelated matter involved the preparation of the necessary legal documents for a condominium development. The condominium project was not connected in any way with the project out of which the construction lawsuit arose. Different entities were the owners of the two projects and different people were involved in each project. The only connection of C with the construction project was that it was a general partner of the owner of the construction project, B, a general partnership.

"Legal work on the condominium project for C commenced in April 1989. For several years prior to this date, our firm had acted as general counsel for A. In September 1989, A entered into a construction contract with B for a project which was not in any way related to the condominium project. In November 1989, Client A asked us questions concerning the construction contract. We periodically thereafter gave A advice concerning its rights under the construction contract. Matters deteriorated between A and B, and in November 1990, A asked us to file suit against B. C was included as a defendant in the lawsuit since it was one of the general partners of B. Suit was filed November 13, 1990.

*In the situation where a lawyer takes part in litigation against an existing client, "the propriety of the conduct must be measured not so much against the similarities in litigation, as against the duty of undivided loyalty which an attorney owes to each of his clients."*

"In late November 1990, we discovered the potential conflict concerning C. We immediately notified A and C of the situation. We received verbal consent from both A and C to continue our representations in the respective matters.

"In January 1991, we were advised by counsel for C that C was withdrawing its consent to our representing A in the construction litigation because we had not fully informed C as to the extent of the potential conflict. This was surprising since C had a copy of the Complaint and had in-house lawyers on staff. Nevertheless, C insisted that we withdraw from our representation of A in the construction litigation but continue to represent C in the condominium project. C contends we must withdraw from representing A because of Rule 1.7 of the Rules of Professional Conduct and cites a portion of the Comment there (under subtitle 'Conflicts in Litigation') which states:

> 'Ordinarily, a lawyer must not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated.'

"Since the matter involving C is wholly unrelated to the construction litigation, it seems to me the Comment to Rule 1.7 controls how this claimed conflict could be resolved. The second sentence in the second paragraph of the Comment under 'Loyalty to a Client' states:

> 'Where more than one client is involved and the lawyer withdraws because a conflict arises after representation [has been undertaken], whether the lawyer may continue to represent any of the clients is determined by Rule 1.9.'

"Rule 1.9 would not seem to prevent us from continuing to represent A in the construction litigation, if we withdrew from representing C in the condominium project, since the construction litigation has no relationship or connection to the condominium project.

"This resolution of the asserted conflict was mentioned to C's counsel who responded by citing Wolfram's Hornbook on *Modern Legal Ethics* and the California bankruptcy case *In re California Canners and Growers*, 74 B.P. 336 (1987). The cited authority stated that in the situations involved in the authority, the lawyer could not choose between clients as to whom he would represent. However, the bankruptcy case seems to be distinguishable from

our situation since the two matters involved here are totally unrelated and since the case deals with the old code. Additionally, the portions of Wolfram cited talk about simultaneous litigation which we do not have in our situation. Moreover, the references seem to be at odds with the Comment section to Rule 1.7 cited above which seems to require withdrawal from representation of at least one client but allows continued representation of another if such would not violate Rule 1.9.

"Thus, the question presented is whether we may withdraw from representing C in the condominium project and continue to represent Client A in the construction litigation where C is a defendant by being a general partner of B, or whether we must do what C wants and withdraw from representing A in the construction litigation and continue to represent C in the condominium project, or whether we should do something else?"

**Answer:**

Your representation of Client A in the construction litigation is directly adverse to Client C and for that reason you must withdraw from representing A in that matter. You may continue to represent A and C in other matters totally unrelated to the construction litigation. Additionally, you may not, by discontinuing your representation of C, take advantage of the less stringent conflict rule regarding former clients and thereby continue to represent A.

Rule 1.7 of the Rules of Professional Conduct provides the following:

**"Rule 1.7 Conflict of Interest: General Rule**

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation."

As pointed out in the Comment to Rule 1.7, "loyalty is the essential element in the lawyer's relationship to a client." In the situation where a lawyer takes part in litigation against an *existing* client, "the propriety of the conduct must be measured not so much against the similarities in litigation, as against the duty of undivided loyalty which an attorney owes to each of his clients." *Cinema 5, Ltd. v. Cinerama, Inc.* 528 F. 2d 1384, 1386 (2nd Cr. 1976).

Much more latitude is permitted with respect to litigation against a former client. In this regard, Rule 1.9 of the Rules of Professional Conduct provides the following:

*We do not believe that the Comment [to Rule 1.7] was intended, in situations such as this, to allow the lawyer to disregard one client in order to represent another client. To hold otherwise would do great harm to the principle of loyalty which is bedrock in the relationship between lawyer and client.*

**"Rule 1.9 Conflict of Interest: Former Client**

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interest of the former client, unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known."

Here the emphasis is on the similarities in the litigation (a substantially related matter), and use of client confidences to the disadvantage of the former client.

In the instant situation there is no question that you could not continue to represent both Client A and C in non-substantially related matters while at the same time representing A in litigation against C. Rule 1.7 does not permit such divided loyalty unless the conflicting interest will not adversely affect the relationship of the other client and each client consents.

The more difficult question is whether you could cease to represent Client C, thus relegating C to former client status and thereby take advantage of the former client rule (Rule 1.9). Indeed, the Comment to Rule 1.7 seems to indicate that such a procedure would be ethically permissible. The second paragraph of the Comment provides that, "Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9." We do not believe that the Comment was intended, in situations such as this, to allow the lawyer to disregard one client in order to represent another client. To hold otherwise would do great harm to the principle of loyalty which is bedrock in the relationship between lawyer and client.

We find support for this view in *United Sewerage Agency v. Jelco Inc.*, 646 F.2d 1339, (9th Cir. 1981) where the Court held that:

> "The present-client standard applies if the attorney simultaneously represents clients with different interests. This standard continues even though the representation ceases prior to filing of the motion to disqualify. If this were not the case, the challenged attorney could always convert a present client to a 'former client' by choosing when to cease to represent the disfavored client." (*Supra* at 1345, N.4, citing, *Fund of Funds Ltd. v. Arthur Anderson & Co.*, 567 F.2d 225 (2nd Cir. 1977).

For the above reason, it is our view that you must cease your representation of A in the litigation that is directly adverse to Client C.

[RO-91-08] ■

# STATUTE OF LIMITATIONS

## Under the Alabama Legal Services Liability Act

*By JONATHAN H. WALLER*

*In 1988, the Alabama legislature enacted the Alabama Legal Services Liability Act (the "Legal Liability Act" or the "Act"), Ala. Code §6-5-570* ***et seq****. The Act includes a legislative finding that a crisis threatens the delivery and quality of legal service in Alabama. Section 6-5-570. A principal purpose of the Act is to provide "a complete and unified approach to legal actions against legal service providers" and to create "a new and single form of action and cause of action exclusively governing the liability of legal service providers known as a legal service liability action." A further purpose of the Act is to provide "for the time in which a legal service liability action may be brought and maintained", that is, a new statute of limitations.*

Prior to the Legal Liability Act, the applicable statute of limitations for actions against lawyers was six years pursuant to *Alabama Code* §6-2-34(8); *Baker v. Ball,* 446 So. 2d 39 (Ala. 1984). The Act reduced the limitations period to two years. However, the legislature borrowed limitations-related provisions from two previously enacted statutes relating to medical liability. Unfortunately, these borrowed provisions created a conflict in the Legal Liability Act regarding the two-year statute of limitations. Specifically, substantial questions arise under the Act as to (a) whether the new limitations period is effective retroactively or prospectively only; (b) the meaning and application of the "savings" clause in §6-5-574 of the Act; and (c) the accrual of a legal service liability cause of action. These questions have been substantially answered by the Alabama Supreme Court decision in *Michael v. Beasley*, _____ So. 2d ____, Case Number No. 89-1360, May 3, 1991.

1 *The Facts and Issues in Michael v. Beasley*: The defendant attorney filed a personal injury law suit in behalf of Mr. and Mrs. Michael on March 18, 1986, arising out of a collision with a logging truck. On August 13, 1987, the jury rendered a verdict in favor of the defendants in that action. The judgment of the trial court was affirmed by the Alabama Supreme Court on September 16, 1988. *Michael v. Gunnin Pulpwood, Inc.*, 533 So.2d 588 (Ala. 1988). The Michaels' attorney informed them of the Supreme Court affirmance on March 22, 1989.

On February 26, 1990, the Michaels sued their attorney alleging negligent representation in the logging truck case. The trial court dismissed the *Michael* complaint with prejudice on the basis of the two-year statute of limitations under the Legal Liability Act.

On appeal, the Supreme Court was required to decide

whether the old six-year limitations period or the new two-year period applied to a lawsuit filed *after* the effective date of the Legal Liability Act, April 12, 1988, but based upon alleged negligence before such date. If the two-year statute applied, then the dispositive issue became the date of accrual of the Michaels' cause of action: if the cause of action accrued on the date of the trial court verdict, then the Michaels' claim would be barred by the two-year limitations statute; if the cause of action accrued on either the date of the Supreme Court affirmance or the date the attorney informed the Michaels of the affirmance, then the claim was not time-barred. For the reasons discussed hereafter, the Supreme Court held in *Michael* that the two-year statute applied, that the cause of action for alleged negligent representation arose as of the trial court verdict, and that the Michaels' claim was time-barred. This ruling regarding accrual raises interesting policy issues briefly considered at the conclusion of this article.

2 *The Relevant Provisions of the Legal Liability Act*: As noted by the Court in *Michael*, the Legal Liability Act borrowed a "savings" provision from the Alabama Medical Liability Act of 1975 (the "1975 Medical Act"), §6-5-480 *et seq*. Specifically, §6-5-574 of the Legal Liability Act, "Limitation on time for commencement of legal service liability action", provides:

> (a) all legal service liability actions against a legal service provider must be commenced within two years after the act or omission or failure giving rise to the claim, and not afterwards; provided, that if the cause of action is not discovered and could not reasonably have been discovered within such period, then the action may be commenced within six months from the date of such discovery or the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; provided, further, that in no event may the action be commenced more than four years after such act or omission or failure; *except that an act or omission or failure giving rise to a claim which occurred before August 1, 1987, shall not in any event be barred until the expiration of one year from such date*. (emphasis added).

As discussed hereafter, the stated August 1, 1987 date is of particular significance because the Legal Liability Act was not effective until April 12, 1988.

This language substantially tracks the provisions of §6-5-482(a) of the 1975 Medical Liability Act. However, the "savings" clause of the 1975 Medical Liability Act provides as follows:

> . . . except that an error, mistake, act, omission or failure to cure giving rise to a claim which occurred before September 23, 1975, shall not in any event be barred until the expiration of one year from such date.

September 23, 1975, coincided with the effective date of the 1975 Medical Liability Act. Thus, the "savings" period under the 1975 Medical Liability Act was for one year *beginning* on the effective date of the Act. The 1975 Medical Liability Act did not specify whether the limitations period provided by §6-5-482 would apply prospectively or retrospectively.

The Legal Liability Act also borrowed from the "Tort Reform" legislation known as the Medical Liability Act of 1987 (the "1987 Medical Act"), §6-5-540 *et seq*. Section 6-5-552 of the 1987 Medical Act provides:

> This article applies to all actions against healthcare providers based on acts or omissions accruing after June 11, 1987, and as to such causes of action, shall supersede any inconsistent provision of law.

The Legal Liability Act provides, at §6-5-581, that:

> This article applies to all actions against legal service providers based on acts or omissions accruing after April 12, 1988, and, as to such causes of action, shall supersede any inconsistent provision of law.

This borrowing of language from the two prior medical acts created two significant problems under the Legal Liability Act. The provision in §6-5-581 that the Legal Liability Act applied to "acts or omissions accruing after April 12, 1988" indicated that the Act, and the new two-year limitations period, was intended by the legislature to have *prospective* application only and was not intended to apply to causes of action based upon acts or omissions prior to the effective date of the Act.

However, as the *Michael* Court explicitly noted, this "effective date" section of the Act clearly is inconsistent with the "savings" clause of §6-5-574 providing that "an act or omission or failure giving rise to a claim which occurred *before* August 1, 1987, shall not in any event be barred until the expiration of one year from such date". That is, the "savings" clause of §6-5-574 clearly contemplated applicability of the Legal Liability Act to alleged malpractice claims accruing not only before April 12, 1988, the effective date of the Act, but before August 1, 1987.

3 *The Legal Liability Act Limitations Period is Retroactive*: In attempting to resolve the "ambiguities" of the Legal Liability Act, the Supreme Court looked to its leading decision interpreting *Alabama Code* §6-5-482, the analogous section of the 1975 Medical Liability Act, containing a two-year limitations period and a one-year "savings" clause. *Street v. City of Anniston*, 381 So.2d 26 (Ala. 1980).

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In that medical malpractice action, plaintiff Street sued the defendants based upon an alleged incorrect pathology report, rendered on April 15, 1974. On February 12, 1978, the plaintiff had a malignant lump removed and re-examination of the original tissue which had been the subject of the 1974 pathology report indicated that that tissue had been malignant.

As in the case of legal providers, the prior statute of limitations applicable to healthcare providers had been six years. However, if the new two-year medical limitations period applied to Street's claim, that claim would be barred because the lawsuit was filed more than four years after the negligent act, the preparation of pathology report, and also more than one year after the date of enactment of the 1975 Medical Liability Act, and, therefore, after the one-year "savings" period.

The Court noted that if the legislature did not intend the 1975 Medical Liability Act to be retroactive and thereby to shorten the limitations period for already existing causes of action, then "the one year grace period would be unnecessary, for it is only where a newly-enacted statute of limitations is intended to apply to causes of action existing at the time of its enactment that a reasonable period of time after an enactment must be allowed within which such actions must be brought". 381 So.2d 30.

Therefore, in *Street*, the Supreme Court ruled that the plaintiff's claim was governed by the two-year limitations period existing when the law suit was filed and not by the six-year limitations period in effect when the cause of action arose. Similarly, in *Michael,* the Court followed the *Street* rationale and concluded that, but for the conflicting language of §6-5-581 of the Legal Liability Act, *Street* would control and the two-year limitations period would apply retroactively.

4 *"Correction" of the "Savings" Clause*: In addition, the *Michael* Court was faced with the problem of reconciling §6-5-574 with §6-5-581, providing that the Act applies to actions against legal providers based on acts or omissions accruing after April 12, 1988. In an effort to accommodate these conflicting provisions, the Court noted that "there are occasions when Courts must correct or ignore or supply obvious inadvertences in order to give a law the effect which was plainly intended by the legislature". The Court also relied upon the principle that: "an obvious error in the language of a statute is self-correcting. In such an instance, the Court may substitute the correct word when it may be ascertained from the context of the act".

The Court then proceeded to "correct" the "savings" clause of §6-5-574, not the conflicting language of §6-5-581. The Court noted that the 1975 Medical Liability Act was effective on September 23, 1975, and that the "savings" provision of that Act began on the same date, September 23, 1975. Thus, under the 1975 Medical Liability Act, the one-year "savings" period extended for one year from the effective date of that Act. Even though that Act reduced the statute of limitations from six years to two years, the Supreme Court in *Street* found that a one-year "savings" period, beginning on the effective date of the Act, was reasonable.

However, the one-year "savings" provision of §6-5-574 of the Legal Liability Act inexplicably began to run on August 1, 1987, and not April 12, 1988, the effective date of the Act. Thus, the *actual* "savings" period subsequent to the effective date of the Act was less than four months. The *Michael* Court concluded that such a short "savings" period, when a pre-existing statute of limitations is being substantially shortened, is not reasonable.

Accordingly, the *Michael* Court ruled that the legislature must have intended to provide an *effective* one-year "savings" provision and that, therefore, the one-year "savings" period under §6-5-574 would run from the effective date of the Act, April 12, 1988, through April 12, 1989. That is, the Court substituted April 12, 1988 for the stated date, August 1, 1987, in §6-5-574.

Although the *Michael* Court noted that there was a conflict between §6-5-574 and §6-5-581, it is not clear that the opinion resolves that conflict, since the only correction is made in the "savings" provision of the former section. It would seem that the inherent conflict between the two sections remains.

5 *Accrual of a Cause of Action Under the Legal Liability Act*: The remaining question before the *Michael* Court was to determine whether the Michaels' complaint was timely filed. This, in turn, involved the issue of whether the Michaels' cause of action accrued on August 13, 1987, the date of the jury verdict; on September 16, 1988, the date that the Supreme Court affirmed the trial court's judgment; or on March 22, 1989, the date on which the attorney informed the Michaels of the affirmance. If the cause of action accrued as of the date of the trial court judgment, the Michaels' claim would be barred because more than two years had expired between that date and the filing of their complaint on February 26, 1990, and because the complaint was filed after the expiration of the one-year "savings" period on April 12, 1989. Otherwise, the claim would be timely, since the suit was filed within two years of the final judgment on appeal.

In resolving the accrual question, the Court relied primarily on *Cofield v. Smith*, 495 So.2d 61 (Ala. 1986) and *Garrett v. Raytheon Company*, 368 So.2d 516 (Ala. 1979), the well-known radiation exposure decision, holding that the limitations period begins to run when the plaintiff suffers any injury, however slight, entitling the plaintiff to file a suit, and even though the plaintiff is not aware of the injury.

In *Cofield*, a legal malpractice action, the plaintiff pleaded guilty in 1978 to a felony. In 1985 the Jefferson County Circuit Court ruled on a writ of habeas corpus that the 1978 judgment was based upon a defective indictment. Following the favorable habeas corpus ruling, the plaintiff filed his civil malpractice action on June 11, 1985, more than six years after his original guilty plea. Relying on *Garrett* and *Payne v. Alabama Cemetery Association, Inc.*, 413 So.2d 1067 (Ala. 1982), the *Cofield* Court followed the traditional tort rule that the statute of limitations begins to run as soon as a party has suffered any injury and is entitled to maintain an action.

In *Cofield*, the Supreme Court held that a legal injury occurred to the plaintiff at the time of his original guilty plea based upon a defective indictment, and that the plaintiff would have been entitled to maintain a cause of action for damages at that time. Therefore, the Court ruled that the Cofield's claim

was barred by the then existing six-year limitations period.

Applying these earlier decisions, the *Michaels* Court held that the Michaels' claim accrued at the time of the jury verdict in the trial court on August 13, 1987 because "it was at this time that they sustained legal injuries sufficient for them to maintain an action against" the attorney. One distinction between the *Cofield* and *Michael* facts is that the *Cofield* guilty plea apparently was a final judgment, whereas the Michaels appealed the trial verdict and that verdict clearly was not a final judgment. However, the Court did not consider the significance, if any, of the fact that, in *Michael*, the trial court verdict was a non-final judgment and had been appealed.

In its conclusion, the *Michael* Court held that a cause of action against a legal service provider must be commenced within the longest time period allowed by the following alternative limitations periods arising under §6-5-574(a):

> (1) within two years after the cause of action accrued; (2) if the cause of action could not reasonably be discovered within two years, then within six months from the date of discovery of the cause of action or the date of the discovery of facts that would reasonably lead to discovery, provided that in no event can the action be commenced more than four years after the cause of action accrued; or (3) if the cause of action accrued before the effective date, then within one year after the effective date of April 12, 1988.

6 *Application of the Michael Rule in Other Cases:* In *Corte v. Massey*, ____So.2d ____, Case No. ____, June 21, 1991, plaintiff Corte filed a legal malpractice action against her attorney on February 3, 1989 alleging improper representation in connection with her prior divorce. The original divorce was entered on June 5, 1980. Under a settlement agreement, Mrs. Corte was to receive five annual alimony payments of $30,000. After the 1982 payment was not made, her attorney filed a copy of the divorce decree in the county of the husband's residence on February 8, 1983 to create a lien on that property, but the filing was defective. The defendant attorney asserted that the limitations period began to run on the date of the divorce, June 5, 1980 or, at the latest, when the husband failed to make the third payment in September, 1982.

The Supreme Court determined that the plaintiff suffered a legal injury on February 8, 1983 when the attorney filed the defective lien. Because the six-year limitations period was then applicable and had not expired as of the effective date of the Legal Liability Act, April 12, 1988, Mrs. Corte had until April 12, 1989, under the Supreme Court's "correction" of the "savings" clause, or until April 12, 1989 to file suit based upon the 1983 injury. Thus, the Court held that her suit, filed on February 3, 1989, was "saved" by §6-5-574 of the Act.

In *Pierce v. Schrimsher*, ____So.2d ____, Case No. 89-1832, May 3, 1991, the plaintiffs alleged that their attorney negligently rendered a title opinion in connection with a real estate transaction which closed on July 3, 1985. The malpractice action was filed on May 14, 1990, after expiration of the one-year "savings" period under §6-5-574. The Supreme Court held that the plaintiff's cause of action accrued on the date of the closing and that the claim was time-barred because it was filed after more than two years and after the expiration of the one year "savings" period under the Legal Liability Act. *See also Leighton Avenue Office Plaza Ltd. v. Campbell*, ___So.2d ___, Case No. _____, June 14, 1991, (involving multiple malpractice claims by different parties against the same attorney and illustrating the application of §6-5-574 to the different claims, some being barred and others surviving) *and Lomax v. Gibson*, ___ So.2d ___, Case No. 89-1449 February 1, 1991 (a pre-*Michael* decision, in which the Court noted "we need not attempt to unravel the mystery here "[interpretation of the conflicting sections of the Act] because the claim was barred even under the old six-year limitations period).

7 *Policy Issues Raised by the* ***Michael*** *Accrual Rule*: It seems that serious policy issues are raised by the *Michael* Court's ruling that litigation-related malpractice claims accrue as of the verdict in the trial court and not upon final judgment after appeal. It may be argued that the traditional tort accrual rule — that the claim accrues at the time of first injury, however slight — should not apply to malpractice claims arising out of litigation, simply because the injury is not clear until the judgment is final. In *Garrett v. Raytheon, supra,* the exposure to radiation caused physical injury which was not reversible or subject to appeal. In contrast, the "injury" from legal malpractice during the trial of a case may be substantially "cured" by a reversal

on appeal, thereby rendered a malpractice claim unnecessary or inappropriate.

The *Michael* accrual rule may encourage potentially unnecessary litigation in that a disappointed litigant may be put to the "Hobson's choice" of (a) finding another lawyer to handle an appeal and to sue his trial counsel, or (b) risk a statute of limitations bar while awaiting the result of an appeal handled by the original attorney against whom the litigant may be contemplating suit. Such a litigant would have to consider that a final judgment on appeal might be rendered so close to the expiration of the two-year limitations period that the litigant could not find a second attorney willing to timely file a suit against the original attorney.

A recent Alabama Federal Court decision, arising in the analogous context of insurance bad faith litigation, and involving alleged negligence by the insurer-provided lawyer at trial, considered these issues and apparently reached a different result. *Boyd Brothers Transportation Company v. Fireman's Fund Insurance Co.*, 540 F.Supp. 579 (M.D. Ala. 1982), 729 F.2d 1407 (11th Cir. 1984). There, Fireman's Fund insured a trucking company, Boyd, which was sued by a steel supplier for alleged damage in transit to steel coils. Fireman's Fund defended Boyd under a reservation of rights in the trial court in New York. The attorney provided by Fireman's Fund prepared an allegedly deficient affidavit in opposition to the plaintiff supplier's motion for partial summary judgment against Boyd *as to liability*. The trial court granted summary judgment as to liability against Boyd and this ruling was affirmed on appeal. Thereafter, the case was returned from the appellate court to the trial court for a hearing on damages, which resulted in an award against Boyd of $19,000 in 1980 and no further appeal was taken. In 1981, Boyd sued Fireman's Fund in Alabama for "bad faith and negligence/wantonness in defending the action above-described", within the one-year Alabama statute of limitations then applying to such tort claims against insurers. 729 F.2d 1407.

The Eleventh Circuit affirmed the trial court's ruling that the statute of limitations did not begin to run against Boyd Brothers for the alleged negligence of Fireman's Funds' agent — the lawyer — in defending the liability action in the trial court *until after the subsequent damages award became final*.

In *Boyd*, the trial court acknowledged the accrual rule set forth in *Raytheon, supra,* but expressed concern about applying the traditional tort accrual rule to insurance litigation. 540 F.Supp. 582. The Court noted a perceived rule that "in cases alleging negligence or bad faith on the part of the insurer in conducting or settling of litigation, the rule again is that the cause of action does not accrue until the underlying litigation has ended (citing cases)," and observed that a different accrual rule would lead to a multiplicity of lawsuits. 540 F.Supp. 582. The Court was also concerned about the "Hobson's choice" of requiring the insured to sue the insurer for alleged negligence of insurer-provided counsel prior to final judgment, since a reversal on appeal might cure the effect or impact of negligence in the trial court, if any. *See also Romano v. American Casualty Co.*, 834 F.2d 968 (11th Cir. 1987) (applying Florida law and *Boyd*, and holding that the statute of limitations on an alleged bad faith failure to settle claim does not accrue until final judgment) and *Farmers & Merchants Bank v. Home Insurance Co.*, 514 So.2d 825 (Ala. 1987) (claim for bad faith *denial* of coverage and *refusal* to defend accrues at time of denial — *compare* with claim for negligent defense or negligent failure to settle).

The facts of *Boyd* are somewhat unique, and there are distinctions between (a) claims against a lawyer and (b) claims against an insurer based on alleged attorney negligence; however, it seems that the policy issues discussed in *Boyd* concerning multiplicity of actions and the "Hobson's choice" have relevance to the Legal Liability Act. A further question to be litigated in the future may involve client claims of alleged fraud, or suppression and concealment, as a basis for avoiding the two-year limitations period, and to obtain benefit of the four-year limit applicable in the event of fraud under §6-5-574. Future litigants may assert that the defendant lawyer committed fraud by allegedly misrepresenting the true facts regarding the events in the trial court or by failing to advise the client of a pretrial dismissal of the client's claims in the trial court, pending an appeal. Does a losing attorney have a duty to advise the client that the limitations period begins to run after the trial court verdict?

Further, a question arises as to the statute of limitations now applicable in Alabama to a suit by an insured against the insurer for negligent defense or negligent failure to settle, particularly where the insurer asserts that it relied on legal advice. One wonders whether an insured suffering an excess judgment in the trial court can afford to wait for final judgment after appeal, before suing the insurer. Clearly, it appears that any suit against the insurer-provided lawyer now must be filed within two years of the trial court verdict. ■

# RECENT DECISIONS

*By WILBUR G. SILBERMAN*

# BANKRUPTCY

### Enhancement of attorney's fees

*Apex Oil v. Palons*, 21 B.C.D. 1152; _____ F.2d _____ (May 13, 1991). The bankruptcy court gave a 15 percent enhancement of $170,106.03 in addition to the $1,272,137.52 hourly fees earned by the examiner's law firm. The debtor objected to the enhancement and appealed to the district court. The district court held that because the determination of fees is discretionary, to reverse it was necessary to find an abuse of discretion, which means that the bankruptcy judge failed to apply the proper legal standard or failed to follow proper procedure.

A finding is "clearly erroneous" if the reviewing court firmly believes a mistake has been made. Here, the district court determined that the correct legal standard to apply is that an enhancement over the lodestar is justified only when the lodestar fails to adequately compensate the applicant, and is needed to make the award commensurate with comparable non-bankruptcy services. The court reversed the prior award, but did enhance approximately $48,000.

### Exemption under § 522 (f) (1)—judicial lien

*Farrey v. Sanderfoot*, U.S. Supreme Court , 21 B.C.D. 1160 (May 23, 1991) (West's Bankruptcy Reporter Advance Sheet, June 5, 1991). A Wisconsin's divorce court awarded the husband certain real estate but gave a lien to the wife equal to one-half of the value of the estate. Approximately four months after the decree, the husband filed a Chapter petition claiming homestead exemption and requesting that the lien be avoided under *Code* § 522 (f) (1). The bankruptcy court held that the lien could not be avoided as it protected the wife's interest in the property. However, the district court reversed, stating that the lien was avoidable because "it fixed on an interest of the debtor in the property". The court of appeals affirmed.

The U.S. Supreme Court, in reversing the Seventh Circuit, stated that § 522 (f) (1) of the Bankruptcy Code requires "a debtor to have possessed an interest to which a lien attached, *before it attached*, to avoid the fixing of the lien on that interest. (emphasis added). In effect, the Court held that since the debtor had not held the property free

# ATTENTION

## LOCAL BAR PRESIDENTS

There is an increasing need for a current listing of local bar presidents, and it is difficult to keep up with all the changes since the elections vary with each association. We are asking for your assistance in maintaining an up-to-date list.

Please let us know as soon as possible when there is a change within your local group.

You may send this information to:

**Alice Jo Hendrix,**
***Membership Services Director***
**P.O. Box 671**
**Montgomery, AL 36101**
**or call 1-800-392-5660**
**(in-state WATS)**
**or 269-1515**



and clear of the lien, the lien could not attach to "an interest of the debtor in property", and, thus, § 522 (f) (1) did not allow for avoidance of the lien.

*Dwight Owen v. Helen* Owen, 21 B.C.D. 1164 (May 23, 1991). In a divorce case, Helen obtained judgment for $160,000 against Dwight. Under Florida law (as is in Alabama), the lien was effective against after-acquired property, and later Dwight obtained a condo in Sarasota City. At the time he obtained the condo, such property was not exempt. Thereafter, Dwight filed for bankruptcy. One year later, the condos were made exempt as a homestead. The question which reached the U.S. Supreme Court was whether the condo was exempt under § 522 (f) (1).

The bankruptcy court had determined that the lien could not be avoided because the Florida Courts had decided that the homestead exemption was limited to property not encumbered by liens which attached before the property became a homestead. The district court and Eleventh Circuit affirmed.

Justice Scalia, in writing for the Supreme Court, stated the issue to be whether the lien impairs an exemption to which the debtor would have been entitled under § 522 (b)—the Homestead Exemption. In reversing and remanding, he stated that it made no difference that the State had limited the exemption to property not covered by a lien.

Justice Scalia further stated that the condo would be the debtor's homestead except for the lien and that a lien impairs a federal exemption if but for the lien, the lien would attach. He said that § 522 (f) does not make a distinction between federal and state exemptions and there is no reason that the state exemption should not receive like treatment.

### U.S. Supreme Court allows Chapter 13 following Chapter 7 to deal with lien claim even though personal liability has been eliminated

*Johnson v. Home State Bank, U.S. Supreme Court*, 59 U.S.L.W. 4609; 21 B.C.D. _____, (June 10, 1991). The debtor had a filed a Chapter 7 after the bank filed suit on defaulted notes partially secured by a real estate mortgage. The debtor received a discharge from his debts, and the bank was given relief from stay in order to foreclose. Before the bank could foreclose, the debtor filed a Chapter 13 showing the bank as a partially secured creditor. Both the district court and court of appeals ruled against the bankruptcy court which had confirmed a plan providing for payments to satisfy the bank's lien claim only. Justice Marshall, who wrote the opinion for the Court, stated that a claim against property is a claim against the debtor under §§102(2) and 101(5), and that after the Chapter 7 discharge, the lienholder still has equitable remedies of foreclosure, including the right to the proceeds of the foreclosure sale. In answering the argument that serial filings were contrary to law, Justice Marshall said that the law did not so provide, and it was up to Congress to prevent serial filings if it so desired. He mentioned that Congress had done so under some circumstances, but not under these facts.

### Individual may file for Chapter 11 relief even though no ongoing business is maintained

*Toibb v. Radloff*, U.S. Supreme Court, 59 U.S.L.W. 4633, 21 B.C.D._____, (June 13, 1991). In this case, the bankruptcy, district and Eighth Circuit courts held that an individual not engaged in business was ineligible to file a Chapter 11 reorganization case. Writing for the Court, Justice Blackmun said that there is no such language in the *Code* to support the lower court's holdings, and, thus, no foundation to deny the right. The opinion mentions the Eleventh Circuit case of *In re Moog*, 774 F.2d 1073, (1991), which previously had held the same as the Supreme Court in the instant case. ■

**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.

## ALABAMA STATE BAR VOLUNTEER LAWYERS PROGRAM

# ACCESS TO JUSTICE:
## *An Overview of Pro Bono Projects in Alabama*

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or at a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means. RULE 6.1 PRO BONO PUBLICO SERVICE, ALABAMA RULES OF PROFESSIONAL CONDUCT

I do solemnly swear that I will demean myself as an attorney, according to the best of my learning and ability, and with all good fidelity, as well to the court as to the client; *that I will use no falsehood or delay any person's cause for lucre or malice*, and that I will support the constitution of the State of Alabama and of the United States, so long as I continue a citizen thereof, so help me God.
OATH TAKEN UPON ADMISSION TO THE ALABAMA STATE BAR (emphasis added)

*By MELINDA M. WATERS*

Alabama attorneys may be proud of our longstanding commitment to providing legal services without expectation of compensation to individuals who cannot otherwise afford representation. As a condition to receiving the privileges and benefits of membership in the profession of law, we have accepted a public trust, that being the responsibility of assuring that each one of our citizens, wealthy or poor, has full, equal access to our legal system. Our ethicalroots are entwined with the public interest, service to the community and concern for the less fortunate among us.

This responsibility presents us with a tremendous challenge. By conservative estimates, there are over 780,000 persons living below the federal poverty level in Alabama and the numbers increase each year.With limited staff and budgets, federally funded Legal Services programs cannot handle all legal problems faced by these poverty-stricken Alabamians, leaving many poor persons waiting for, or even without, representation in matters vital to their well-being. Although attorneys give generously of their time and skills to improve the communities in which they live, those who are knowledgeable in the area of providing free legal services to the poor all agree that there are unmet needs to which we must continue to direct our energies and expertise.

Thus, the question facing us is how do we as attorneys insure that the courts and laws are within the reach of such large numbers of citizens of limited means? Many Alabama attorneys have responded in two ways: by participating in IOLTA and in organized pro bono activities in their communities. Four such programs, established by local bar associations, currently exist in this state. Each has proven to be a very effective means not only of delivering quality legal services to large numbers of low-income citizens but also of providing attorneys with an efficient vehicle through which to satisfy ethical responsibilities to pro bono work.

These four pro bono programs, sponsored by the local bar associations of Madison County, Montgomery County, Tuscaloosa County, and Mobile, were honored by the Alabama State Bar at this year's Annual Convention. The Honorable W. Harold Albritton, III, then president of the Alabama State Bar, presented each of these bar associations with a Certificate of Meritorious Service recognizing the membership for their demonstrated commitment to providing free legal services in civil matters to the disadvantaged in their communities. These attorneys uphold the highest traditions of our profession and have responded to the noblest of our ethical precepts by helping to assure that even the weak and defenseless in our society have access to justice.

## Madison County Bar Association

The Madison County Bar Association has a distinguished history of service to low-income citizens of Huntsville and the surrounding areas. The "Lawyer Referral and Information Service" was established in 1982 in cooperation with Legal Services of North Central Alabama. Attorneys pay an annual fee for placement on five panels of their choosing for referral of fee-generating civil cases. These attorneys are then required to accept one case per panel on a pro bono basis each year from the service.

In 1990, 201 pro bono cases were handled by Madison County attorneys. Lee Ann Pasker, an attorney, serves as full-time director of the service and personally handles many divorces on a pro bono basis. Currently, 93 lawyers participate in the project.

*Thomas Parker, a representative of the Madison County Bar Association, accepted the certificate from Judge Albritton on behalf of his local bar association.*

## Montgomery County Bar Association

The oldest continuing, organized pro bono program in our state was established by the members of the Montgomery County Bar Association. Attorneys in Montgomery have been donating their time to local pro bono projects since the 1950s. This rich tradition of public service continues today in the current project titled the "Montgomery County Bar Pro Bono Program" which was started in 1981.

Arthur Leslie, an attorney, is full-time director of this program. Clients in need of help with certain civil matters are referred to the project by the Montgomery Regional Office of Legal Services Corporation of Alabama. They are then referred to a local volunteer attorney who handles the problem on a pro bono basis. In 1990, 326 cases were closed by members of the Montgomery County Bar through this program. It is estimated that approximately 250 attorneys have participated in some way in this pro bono project.

*Dorothy Norwood, a member of the Board of Directors of the Montgomery County Bar Association, accepts the Certificate of Meritorious Service on behalf of the local bar association.*

## Tuscaloosa County Bar Association

Earlier this year, the members of the Tuscaloosa County Bar Association demonstrated their commitment to providing legal services to the poor by the passage of a resolution calling for each attorney to voluntarily perform not less than 24 hours of pro bono legal work annually. In April, this bar association held its first pro bono "Neighborhood Legal Clinic" in cooperation with the Tuscaloosa Regional Office of the Legal Services Corporation of Alabama. Since this beginning, a clinic has been held each first and fourth Tuesday of the month.

*Judge Albritton presents the Certificate of Meritorious Service to Douglas McElvy, immediate past president of the Tuscaloosa County Bar Association.*

Each clinic is staffed by volunteer private attorneys who give legal advice in civil matters without charge to walk-in clients. An income eligibility screening is first performed by Legal Services staff. The volunteer attorneys then agree to handle the matter themselves on a pro bono basis or refer the client to the Legal Services office for further services. Clinic sites change, but locations are chosen for easy accessibility to low-income citizens of Tuscaloosa. An average of 12 clients per clinic are receiving free legal services.

Olivia Willis, a staff attorney in the Tuscaloosa Regional Office of Legal Services, serves as project coordinator. Thus far, 35 attorneys are donating their time on a rotating basis at the clinics and 19 pro bono cases have opened through the program.

## Mobile County Bar Association

The Mobile Bar Association is justifiably proud of its highly successful "Pro Bono Program" whichstarted in 1986. Currently, 188 volunteer attorneys are providing quality legal services in civil matters to indigents in the Mobile area through this project.

This program offers its volunteers many options for service, including not only direct representation of income eligible clients but also the opportunity to provide advice and counsel in the office of the fulltime pro bono coordinator, Tonny Algood. Attorneys select the areas of law in which they are willing to accept referrals and are asked to voluntarily handle two case referrals per year from the program.

*The Certificate of Meritorious Service presented to the Mobile Bar Association was accepted by Champ Lyons, president of the local bar association.*

In 1990, 849 cases were opened through the Pro Bono Program and an equally impressive 624 cases were closed by project attorneys. It is clear from these numbers that many of the Mobile volunteers are accepting more than the minimum number of referrals each year from the program.

The delivery of legal services to the poor is an honored part of the legal profession. As attorneys, we hold the responsibility to see that the laws and the courts are within the reach of every citizen, and we understand that rights can be meaningless without access to the legal representation necessary to enforce those rights. By participation in organized pro bono programs, we can fulfill not only our country's promise of equal justice under law for Alabama's poor, but also our special responsibility to make equal access to our courts a reality for all citizens of this state. ■

# DISCIPLINARY REPORT

### Disbarment

Gadsden lawyer **Stephen Edward Harrison** was disbarred from the practice of law, effective April 2, 1991, for misappropriating the funds of a client in violation of the Rules of Disciplinary Procedure. (ASB Nos. 89-803, 90-274, 89-657, 90-248, 90-188, & 90-476)

### Suspension

**Eddie Lee Lewis**, whose whereabouts are unknown, was temporarily suspended from the practice of law, by the Disciplinary Commission of the Alabama State Bar, pursuant to Rule 20, Rules of Disciplinary Procedure (Interim).

Eddie Lee Lewis, by the Disciplinary Commission of the Alabama State Bar, was restricted from maintaining an attorney trust account in any financial institution.

The order of the Disciplinary Commission of the Alabama State Bar is subject to the dissolution and amendment provision of Rule 20, Rules of Disciplinary Procedure (Interim). (ASB Nos. 90-32, 90-390, 90-588, 90-634, 90-279, 90-719, & 90-990)

### Public Censures

On June 7, 1991, Birmingham lawyer **Charles Alexander Dauphin** was publicly censured for intentionally neglecting a legal matter entrusted to him and failing to seek the lawful objectives of his client. In 1988, Dauphin filed a medical malpractice action in U.S. District Court for the Middle District of Georgia. The defendants were not served with process for almost 19 months. Dauphin also failed to comply with applicable Georgia law for the filing of such an action. As a result, the plaintiff's case was dismissed upon motion of the defendants. The statute of limitations had run. (ASB No. 90-482[B])

On June 7, 1991, Bessemer lawyer **Robert William Graham** was publicly censured for willfully neglecting a legal matter entrusted to him, failing to seek the lawful objectives of his client, failing to carry out a contract of employment entered into with a client for legal services, and engaging in conduct involving fraud, deceit, dishonesty, and willful misconduct, all of which adversely reflected on his fitness to practice law. Graham was hired by a client to represent her in a divorce matter. The client paid Graham his quoted fee, but Graham failed to pursue the matter to a conclusion on behalf of the client. Graham also failed to timely respond to the bar's inquiries concerning the client's complaint. (ASB No. 90-445)

On June 7, 1991, Birmingham lawyer **James Cannon, Jr.** was publicly censured for having engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, and willful misconduct. Cannon solicited money on behalf of an investment company for an individual who invested $2,000 in the venture, which venture turned out to be worthless. Contained in the investment information package was a letter from Cannon on behalf of the venture. During the investigation of the complaint against Cannon, he denied any knowledge of the venture, and, further, failed to fully cooperate with the Grievance Committee investigating the complaint. (ASB No. 88-667)

On June 7, 1991, Gadsden lawyer **Leon Garmon** was publicly censured for having engaged in undignified or discourteous conduct degrading to a tribunal while appearing in his professional capacity before a tribunal, and for engaging in conduct that adversely reflects on his fitness to practice law. At a hearing before a domestic referee in Etowah County, Garmon, in commenting upon a ruling by the domestic referee, stated that the ruling was "the most idiotic and asinine ruling" that he had ever heard. Following exchanges between Garmon and the domestic referee, the referee ordered Garmon out of the room. Garmon continued to direct remarks toward the domestic referee, expressing his displeasure over the referee's ruling. Garmon appealed the issue to the Supreme Court of Alabama, which court affirmed the bar's finding that Garmon should be censured in this matter. (ASB No. 88-76)

### Private Reprimand

On June 7, 1991, a Birmingham lawyer was privately reprimanded for issuing a worthless check on his trust account, in violation of DR 9-102(B)(5). The lawyer also failed to respond to requests of the Grievance Committee investigating a complaint about the worthless check. (ASB No. 88-727) ■

## NOTICE

TO: **Jeffrey Howard Dial**
FROM: **Alabama State Bar**
RE: **Order to Show Cause, CSF 91-13**

Notice is hereby given to **Jeffrey Howard Dial**, attorney, whose last known address is 943 47th Street, N, Birmingham, Alabama 35212, that his name has been certified to the Disciplinary Commission for noncompliance with the Client Security Fund Rule requirements of the Alabama State Bar and that as a result thereof an ORDER TO SHOW CAUSE has been entered against him ordering him to show, within sixty (60) days from the date of entry of the order, why he should not be suspended from the practice of law. Said order having been entered June 19, 1991, the attorney has until September 20, 1991 to show cause.

*Disciplinary Commission*
*Alabama State Bar*
*1019 South Perry Street*
*Montgomery, Alabama 36104*

# NOTICE

## Disciplinary Proceedings

**Eddie Lee Lewis**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of September 10, 1991 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB Nos. 90-32, 90-390, 90-588, 90-634, 90-279, 90-719, and 90-990 before the Disciplinary Board of the Alabama State Bar. Done this the 10th day of September 1991.

*Disciplinary Commission*
*Alabama State Bar*
*1019 South Perry Street*
*Montgomery, Alabama 36104*

# NOTICE

## Disciplinary Proceedings

**William Lee Carroll**, whose whereabouts are unknown, must answer the Alabama State Bar's petition to suspend or disbar within 28 days of September 10, 1991 or, thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB Petition No. 91-04 before the Disciplinary Commission of the Alabama State Bar. Done this the 10th day of September 1991.

*Disciplinary Commission*
*Alabama State Bar*
*1019 South Perry Street*
*Montgomery, Alabama 36104*

# NOTICE

TO: **Albert Edward Sanders**
FROM: **Alabama State Bar**
RE: **Order to Show Cause, CSF 91-42**

Notice is hereby given to **Albert Edward Sanders,** attorney, whose last known address is 430 11th Street, SE, Birmingham, Alabama 35211, that his name has been certified to the Disciplinary Commission for noncompliance with the Client Security Fund Rule requirements of the Alabama State Bar and that as a result thereof, an ORDER TO SHOW CAUSE has been entered against him ordering him to show, within sixty (60) days from the date of entry of the order, why he should not be suspended from the practice of law. Said order having been entered June 19, 1991, the attorney has until September 20, 1991 to show cause.

*Disciplinary Commission*
*Alabama State Bar*
*1019 South Perry Street*
*Montgomery, Alabama 36104*

# NOTICE

TO: **Albert Edward Sanders**
FROM: **Alabama State Bar**
RE: **Order to Show Cause, CLE 91-29**

Notice is hereby given to **Albert Edward Sanders,** attorney, whose last known address is 430 11th Street, SE, Birmingham, Alabama 35211, that his name has been certified to the Disciplinary Commission for noncompliance with the mandatory continuing legal education requirements of the Alabama State Bar, and that as a result thereof, an ORDER TO SHOW CAUSE has been entered against him ordering him to show, within sixty (60) days from the date of entry of the order, why he should not be suspended from the practice of law. Said order having been entered April 11, 1991, the attorney has until September 20, 1991 to show cause.

*Disciplinary Commission*
*Alabama State Bar*
*1019 South Perry Street*
*Montgomery, Alabama 36104*

# • M·E·M·O·R·I·A·L·S •

## Ralph Roger Williams

Ralph Roger Williams, prominent Tuscaloosa attorney, died in Tuscaloosa May 19, 1991. He was born November 21, 1918 in Phenix City, Alabama, the son of Mr. and Mrs. Cary A. Williams. He attended public schools in Phenix City and graduated from Central High School in Phenix City in 1937.

In high school, he was an outstanding student and was president of a number of school organizations, including the journalism club and the glee club. He was editor of the school newspaper and the school magazine and was art editor of the annual.

He held four academic degrees and an honorary doctor of laws degree: bachelor of arts in journalism from the University of Georgia in 1941; master of arts in political science from Syracuse University in 1945; bachelor of laws from the University of Georgia Law School in 1947; master of laws from Stanford University School of Law in 1948; and doctor of laws from Atlanta Law School in 1960.

As an undergraduate, Williams was president of his freshman and sophomore classes, editor of the school newspaper and the school annual, and assistant editor of the school magazine, and was active in athletics. He was a member of Omicron Delta Kappa, Blue Key, X Club, Pi Kappa Delta debate society, the varsity debate team, Sigma Chi social fraternity, and the International Relations Club. In law school, he was a member of Phi Alpha Delta law fraternity and was an honorary member of Sigma Delta Kappa law fraternity.

Williams had an excellent record in law school and was one of the few first-year law students to pass the Georgia bar examination. He was admitted to the Georgia State Bar in 1946 while a freshman in law school.

He served in the U.S. Marine Corps (aviation) during World War II, rising from private to lieutenant. He was a part-time professor of history at the University of Georgia while a student in law school. He taught criminology and sociology at Wesleyan College, Macon, Georgia from 1948-49, and served as a full-time member of the law faculty of the University of Alabama from 1949-53.

After 1953, he was in the active practice of law in Tuscaloosa, Alabama.

He served as director of the Alabama Department of Industrial Relations and as a member of my cabinet during my term as governor from 1959 to 1963.

Beginning in 1950, Williams also served as an impartial arbitrator in labor-management disputes throughout the South. He was a member of the National Academy of Arbitrators for many years, serving on the board of governors from 1970 to 1972, and was on the national arbitration panels of the American Arbitration Association and the Federal Mediation and Conciliation Service.

He was married to the former Beatrice Hill of Crawfordville, Georgia and they had four sons, Roger, Cary and Craig, all graduates of the University of Alabama School of Law and attorneys in Tuscaloosa, and Locke, of Fairhope, presently serving as treasurer of Baldwin County. He loved his family and was particularly proud of the accomplishments of his four sons. He was good company, and his many friends throughout the state will remember his humor and keen wit.

Williams served as president of the Tuscaloosa Kiwanis Club, was an active member of the First Presbyterian Church of Tuscaloosa, was president of the Alabama Society of the Sons of the American Revolution, and was on the council of the Society of Colonial Wars in the State of Alabama.

He was a prolific writer and the author of numerous journal articles and nine law books, including *Standard Georgia Practice*, a six-volume, 3,700-page work on trial and appellate practice in Georgia, published in 1955-56 by Lawyers Cooperative Publishing Company, Rochester, NY. He was the author (with S.C. Stone) of *Tennessee Workmen's Compensation*, published in 1957 by Tennessee Law Book Company, and *Williams' Alabama Workmen's Compensation*, published in 1962 by Matthew Bender & Company. His last work was *Williams' Alabama Evidence*, published in 1967 by the Michie Company.

Dean Nathaniel Hansford of the University of Alabama School of Law noted Ralph's contribution to the faculty of the school of law and to the legal profession as an accomplished practitioner and arbitrator, and his major contribution as a legal scholar and author. I remember him as a boyhood friend and schoolmate at Central High School in Phenix City and especially for his major contribution to my administration as governor through his service as director of the Department of Industrial Relations and as a member of my cabinet. He made a tremendous contribution to the state and the Southeast through labor arbitration, and because of his outstanding reputation for fairness and good judgment, he was in constant demand by both labor and management. He was a distinguished member of the Alabama State Bar for more than 40 years.

*John Patterson, presiding judge*
*Alabama Court of Criminal Appeals*
*and former governor*
*of Alabama*

## Richard Earle Proctor

The bench and the bar of the 36th Judicial Circuit mourn the loss of its distinguished member, Richard Earle Proctor, on June 14, 1991.

He was born March 15, 1917 and graduated from the University of Alabama School of Law in 1938, receiving his LL.B. degree in that year. He commenced the practice of law in Moulton, Alabama in June 1938.

In February 1943, he entered the service of the Federal Bureau of Investigation as a special agent and served in that capacity until he resigned while serving in the San Diego office to enter the Navy.

He served in the Navy during World War II, and upon release from his naval service, he returned to Moulton where he again entered the practice of law. He served as the first bar commissioner for the 36th Judicial Circuit and county solicitor for Lawrence County. He rendered service in many capacities in Lawrence County, serving as county attorney, and was active in numerous civic organizations.

He was a lifelong member of the First United Methodist Church of Moulton, serving as district lay leader, district representative to the annual conference, local lay leader, member of the board of trustees, and member of the administrative board.

He was preceded in death by his beloved wife, Annie Irwin Proctor. Born to their marriage were two children, a son, probate judge Richard I. Proctor, and a daughter, Virginia Proctor Johnson. He leaves two grandsons and three granddaughters.

*Harold Speake, Moulton*

## Edmund Rasha Cannon

*Whereas*, Edmund Rasha Cannon was born in Mobile, Alabama on December 17, 1926, and moved to Vredenburgh, Alabama during his early youth; and

*Whereas*, the Mobile Bar Association desires to remember his name and to recognize his contributions to our profession and to this community;

Now, therefore, be it known, that Edmund Rasha Cannon departed this life on April 10, 1991. His father was a country doctor. He attended the University of Alabama undergraduate school where he was a member of Phi Delta Theta social fraternity. He graduated from the University of Alabama School of Law in 1952, where he was a member of Phi Delta Phi legal fraternity and a member of the board of editors of the *Alabama Law Review*.

Ed became associated with the Hand, Arendall firm on January 1, 1956, where his first assignment was to clear the title to the property in Brewton, Alabama where the plant of Container Corporation of America is located. He later became a partner in Hand, Arendall where he specialized and was a recognized expert in matters of real property and oil and gas law.

Ed retired from the active practice of law in October 1984 and moved to Camden, Alabama where he purchased an antebellum home which was open to the public and which he was continuing to refurbish at the time of his death. He had many friends and law partners who visited him in Camden from time to time.

Ed loved the woods and outdoors and believed in proper forestry methods and conservation of our woodland resources and wildlife. People collect different things, and Ed liked to collect 40-acre tracts contiguous to his other properties in south central Alabama.

Ed will be long remembered for his steadfast friendships among his fellow lawyers and as an aggressive, determined advocate of the rights of his clients. He is survived by his son, Edmund R. Cannon, Jr. and two brothers and a sister. He was a member of the First Presbyterian Church of Camden, Alabama.

*Champ Lyons, president*
*Mobile Bar Association*

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Belser, Richard C.
*Montgomery*
*Admitted:* 1952
*Died:* June 13, 1991

Boykin, Walter Maxwell, Jr.
*Metairie, LA*
*Admitted:* 1931
*Died:* April 28, 1991

Leslie, Thomas B.
*St. Louis, MO*
*Admitted:* 1951
*Died:* July 20, 1991

McFall, Margaret
*Montgomery*
*Admitted:* 1938
*Died:* July 14, 1991

Proctor, Richard Earle
*Moulton*
*Admitted:* 1938
*Died:* June 19, 1991

Rains, Albert M.
*Gadsden*
*Admitted:* 1928
*Died:* April 22, 1991

Smith, Gary Poole
*Florence*
*Admitted:* 1960
*Died:* July 8, 1991

Tavel, Ezelee Leftich
*Metairie, LA*
*Admitted:* 1934
*Died:* June 23, 1991

# Consultant's Corner

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

*This is the 20th article in our "Consultant's Corner" series. We would like to hear from you, both in critique of the article written and suggestions of topics for future articles.*

### The growing corporate legal department

For many years, large (and not so large) firms had a legal department composed of a general counsel and a secretary. The "general" acted more as a controller than a counsel. He farmed out all the firm's legal work, either to the firm's outside counsel or to one of several specialty firms. Additionally, he often had a number of litigators on retainer in the company's market area to act as defense counsel in any matters brought against it. All that is changing, and changing rapidly.

### Change in philosophy

The image of the "general" controlling invoices from outside law firms and remembering to renew the retainers of his field litigators is quickly passing. Corporate legal departments are rapidly becoming small (and not so small) law firms, with a single client. Corporations still farm out most of their litigation and some of their corporate work, but the corporate legal department is taking on many of the characteristics of a private law firm — they do legal work!



The philosophy is simple: "After many years of watching private counsel do much of our routine work, we realize that we can do it just as well, and at a significantly lower cost."

### Change in organization

Along with the philosophical change has come a change in organization. In addition to a general counsel, there is a legal department, a group of lawyers who are now executing many of the tasks formerly performed by outside counsel. What tasks, for example? Corporate legal departments are now executing the majority of executive employment agreements, property leases, real estate deals, and even some securities work. In short, they are *taking back* much of the routine work formerly handled by their outside counsel.

They have departments (just like private law firms), department heads, paralegals, couriers and even administrators. Associate counsel are measured in much the same way as associates are tracked in private firms. Specialized software is utilized to follow associate performance as well as to follow the performance of outside and field litigators.

### Change in oversight

As corporations become more cost conscious, and the liability of corporate directors increases, boards of directors are looking at such matters as the corporation's general counsel much more critically. They are beginning to ask such questions as, "Can't we do this as well as outside counsel, and at a much lower cost?" The answer often is "yes" and the reason has a great deal to do with two factors that amount to societal changes:

— the oversupply of well-educated law school graduates and

— the changing expectations of many law school graduates.

### Changes in societal factors

First, we (Alabama and Georgia for sure) are graduating about 20 percent more law students than the private sector can absorb at this time. The prospects for significant growth in the private sector are dim for the remainder of the decade. A number of factors, declining birth rate, a populist disenchantment with "litigation", legislative limitations on damage awards, concerns about insurance premiums, etc., are all involved.

The makeup of the typical law school graduating class is changing dramatically. In 1990, 42 percent of all law school students were women. Many of them are eager and disposed to seek careers in private practice. Some, however, and the number seems to be on the rise, are just as dedicated to the profession but not as committed to the private sector. They have concerns about family and the quality of life, not readily reconciled with the first few years of private practice. For them, and others, corporate law practice is an attractive compromise.

### Summary

The corporate law *department* has changed dramatically. It is now a law *firm* that works exclusively for the company. Compensation is improving and the environment seems to suit an increasing number of lawyers who have opted for a lifestyle more in keeping with their aspirations. ■

# Request for Consulting Services

## Office Automation Consulting Program

**SCHEDULE OF FEES, TERMS AND CONDITIONS**

| Firm Size* | Duration** | Fee | Avg. Cost/lawyer |
|---|---|---|---|
| 1 | 1 day | $ 500.00 | $500.00 |
| 2-3 | 2 days | $1,000.00 | $400.00 |
| 4-5 | 3 days | $1,500.00 | $333.00 |
| 6-7 | 4 days | $2,000.00 | $307.00 |
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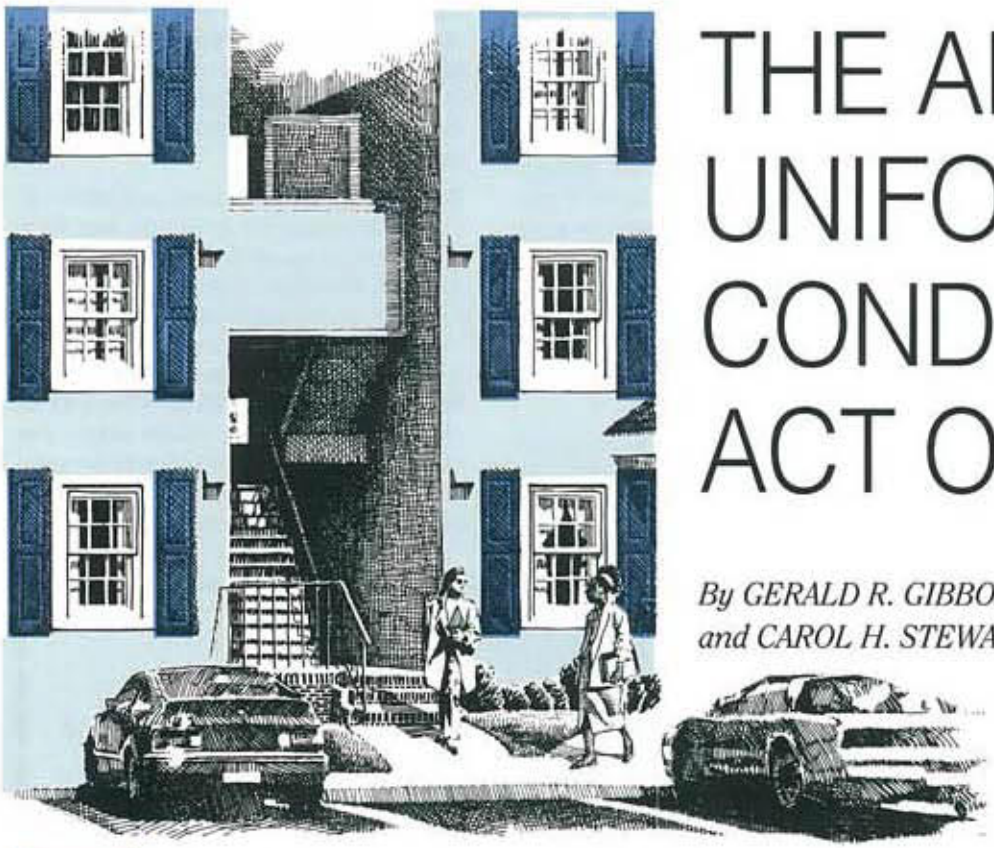

# THE ALABAMA UNIFORM CONDOMINIUM ACT OF 1991

*By GERALD R. GIBBONS and CAROL H. STEWART*

On January 1, 1991 the Alabama Uniform Condominium Act became effective. It was the third condominium statute to be adopted in the state's history. The first act, passed in 1966, was a model act drafted by the FHA and was adopted by all states. Only one condominium was formed in Alabama under the first act. Deficiencies in the model act soon caused the various state legislatures to begin to make significant amendments to it. This resulted in a variety of condominium acts across the country. In Alabama the legislation was rewritten in the Condominium Act of 1972 [the "old law"].

The old law provided a basic framework within which condominiums could be formed and exist. However, it was inadequate to answer many specific questions regarding the development and operation of condominiums. In 1980, the Commissioners on Uniform State Laws drafted a new and much enlarged uniform act, the Uniform Condominium Act [the "UCA"]. The director of the Alabama Law Institute, Robert McCurley, appointed an advisory committee to study the UCA. Chaired by Albert Tully, and later by E.B. Peoples, both of Mobile, the committee in 1987, after four years of consideration, recommended a version of the UCA to be adopted in Alabama. The proposed act was passed by the legislature in 1990 (the "Act). (*Ala. Code* § § 35-8A-101 *et seq.* (Supp. 1990), citations are hereafter referenced only by code section number).

The Act is long (77 sections and 120 pages), technical and somewhat complicated. The Official Commentary of the drafters of the UCA is included in the code after each section, along with an additional Alabama Commentary. The Act provides substance and strict guidelines for the development and operation of condominiums, while at the same time providing flexibility for developers of condominiums. Many of the provisions of the Act are identical to the guidelines for FNMA/FHLMC approval of condominium projects, and accordingly, the Act presents relatively few new concepts for lawyers who routinely prepare their condominium documents to be FNMA/FHLMC approvable. The purpose of this article is to discuss the most significant changes effected by the Act. Due to the limited space available, however, many topics are omitted.

## I. Applicability of the Act

A condominium is created by the recordation of a "Declaration of Condominium" executed in the same manner as a deed applicable to the realty legally described in the Declaration. (§ 201(a)). The Act applies to all condominiums whose Declarations are recorded or amended in the State of Alabama after January 1, 1991 unless the condominium contains fewer than four units and reserves unto the developer no special rights, discussed *infra*. (§ 102). Also, a dozen sections of the Act are automatically applicable to old law condominiums, which sections include important matters such as the powers granted to boards of directors of condominium associations, the association's liens for assessments, tort and contract liability, and obligations of sellers on the resale of units.

While most condominiums in Alabama are intended for residential purposes, an increasing number are developed for commercial, office and even industrial purposes. Mixed-use condominiums are also being considered by real estate developers whose properties might include suitable ground level office or commercial space, with the upper floors available for residential use. The buyers of nonresidential units are frequently few in number and are generally considered to be more sophisticated and better positioned to obtain legal advice and contract protection. Often the purchasers of nonresidential units are even participants in the original development who seek an alternative to the traditional partnership or joint venture form of ownership. For these and other reasons, many provisions of the Act which are intended to protect public buyers of residential units can be avoided where units are restricted for nonresidential use by inserting exemption provisions in the Declaration. (§ 401(a)). Most of the provisions of the Act, however, cannot be varied by agreement or waived in the Declaration for residential condominiums.(§ 104). The following discussion relates to the Act as it applies to residential condominiums.

## II. Title and control of common property

The distinguishing real property concept of a condominium is that the realty and improvements designated as common property (usually this includes everything but the airspace and the interior walls of the condominium unit, excluding the support columns or bearing walls) is *owned*, not by the condominium association of unit owners, but rather by all the unit owners in a form of cotenancy without the right of partition. (§ § 103(8); 207 [e]). The exclusive right to *control* the common property, however, is vested in the association, even though it has no title interest. (§ 302).

Under the Act the association must be organized as a profit or not-for-profit corporation before the first unit is conveyed. Each unit owner is automatically a voting member of the association. (§301). The management of the association is delegated to a board of directors elected by members of the association, (§303[a]), which board has the power to make rules, adjudicate violations of the rules, assess fines for violations, enter into contracts and litigation on behalf of the association, and formulate and prepare an annual budget. Some important matters are not delegated to the board of directors, however, but are left to a vote of the unit owners. Certain matters such as amendment of the Declaration or termination of the condominium require a high percentage of the votes of all unit owners. (§ § 303(b), 217, 218). Other matters, such as the approval of an annual budget and election of members to the board of directors, require only a majority vote of unit owners present, in person or by proxy, at an annual meeting. (§303[b], [c] & [f]).

The board of directors has broad authority under the Act in a combination of legislative, judicial, executive and fiscal powers. The board acts, in effect, as a small government. While the old law granted limited powers to the association, the focus of Article III of the Act is to clarify and elaborate on the creation and operation of the association and the extent of powers given to the board. The authority afforded the board under the Act includes all powers necessary to operate the association as a business or government.

Notwithstanding the broad authority extended under the Act, the board's authority to make and interpret rules and regulations governing the day-to-day activities of the board is subject to limitations. For example, the board cannot regulate the use, occupancy, leasing or alienation of units unless the power is expressly delegated in the Declaration. This provision is not significantly different from the old law, except that in the Act the term "leasing and alienation" was substituted for the term "transfer" in the old law to clarify that any restriction on leasing, as well as a transfer by unit owners, requires a clear expression in the Declaration. (§ 205(a)(12); Ala. Commentary 2 to § 302). The purpose of this limitation is to provide original and resale purchasers of units a measure of protection to prevent a board from later adopting a rule forbidding occupancy by children or pets, or preventing the leasing of the unit to the public without knowledge of such prohibition prior to the purchase of the unit. Such limitations, of course, can be created later in the Declaration, but only by the difficult process of amendment. (§ 217).

Even when acting within the authority of the Act and Declaration in adopting, applying and enforcing rules, boards of associations are subject to judicial review. While some commentators argue that the quasi-governmental powers of the boards should invoke the limitations of the 14th Amendment, courts have held that these powers do not constitute "state action" for constitutional purposes. However, one of the most significant aspects of constitutional protection of individual unit owners, a standard of "reasonableness" in the exercise of power by boards and directors, has been adopted by most courts as a matter of common law in interpretation of condominium documents. This standard was expressly adopted in the Act with regards to the board's rule-making authority. (§ 205(a)(12); Ala. Commentary 2 to § 302). Similarly, the authority to impose a fine for a rule violation is limited to a "reasonable"

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amount, and only after giving the violating unit owner notice and an opportunity to be heard. (§ 302(a)[11]). If properly levied, a fine is given the same status for lien protection as an assessment for common expenses, except as against first mortgagees, discussed *infra*. (§ 316[a]).

## III. Declarant rights and developer control

The developer of a condominium, referred to in the Act as the "declarant", must be the owner or long-term lessee of the property sought to be converted to the condominium form of ownership. Upon substantial completion of all structural components and mechanical systems, as certified by an engineer or architect, the developer files a Declaration of Condominium, which in legal effect subdivides the property into the various units. (§ § 201; 205; 209).

Under the Act, the need for flexibility of the developer in its construction schedule and marketing plan is recognized. The Act allows the developer to reserve in the Declaration certain special "declarant rights". These rights might include the right to (1) control the board of directors of the association for an extended period of time; (2) phase develop the condominium property; (3) maintain sales, marketing and managing activities on the property; (4) add, withdraw or subdivide real estate which is part of the condominium property and other enumerated rights.

### 1. DEVELOPER CONTROL

The developer begins by owning all the units in the condominium and appoints all the members of the board of directors, who are not required to be unit owners. Under the old law, unless the developer attempted to reserve rights of control, when one-half of the units were sold, the developer theoretically lost control over election of members of the board. The board thereafter might adopt rules hampering the developer's marketing of the remaining units or preventing the developer from creating additional units according to its plan of development. More often, however, under the old law the developer would attempt to reserve unto itself excessive developer rights, sometimes maintaining control over the association for extended periods, even until the developer no longer owned any units in the condominium.

The Act strikes a balance between the two extremes and permits the developer to reserve to itself the right to control

*. . . one of the most significant aspects of constitutional protection of individual unit owners, a standard of "reasonableness" in the exercise of power by boards and directors, has been adopted by most courts as a matter of common law in interpretation of condominium documents.*

membership on the board of directors even after one-half of the units are sold. A formula was devised in the Act based on the percentage of units sold to public buyers whereby the developer may appoint members to the board of directors until 75 percent of the units are sold. Unit-owner representation is required on the board, however, after 25 percent of the units are sold. After 25 percent of the units are sold, the nondeveloper-related owners are entitled to elect at least one board member or 25 percent of the number of directors. After 50 percent of the units are sold the unit owners other than the developer are entitled to elect not less than 33 percent of the board. (§ 303[e]). In no event, however, may the period of developer control be extended beyond the time 75 percent of the units are sold to unit owners other than the developer, two years after the developer ceases to offer units for sale or two years after developer's right to add new units was last exercised, whichever occurs first. (§ 303[d]).

The formula created by the Act is different than FNMA guidelines in this regard. Under FNMA guidelines the developer relinquishes control of the association upon the sale of 75 percent of the units or three years after conveyance of the first unit in a single phase project or five years in a multi-phase project, whichever occurs first. There is no requirement of unit owner representation on the developer-controlled board prior to this. Control does not extend, however, beyond a five-year period under FNMA guidelines, which the Act allows. (§ 303[d] & [e]).

Under the Act, after 75 percent of the units are sold to public buyers all the directors must be members of the association, i.e., record unit owners and are elected by the owners. (§ 303[f]). While the developer can vote the unsold units which have been substantially completed (§ 417), control over the board is no longer assured. The election of all board members by the unit owners is the official point of "turnover" of board control to the unit owners other than the developer.

Experience has demonstrated that during the period of developer control there is a significant risk of the developer entering into self-serving or so-called "sweetheart" deals on behalf of the association, which transactions often are of long-term advantage to the developer and long-term disadvantage to the public unit buyers. For example, a developer or developer affiliate will often enter into a long-term lucrative management contract with the association or will retain ownership of recreational facilitates and enter into long-term leases with the association for use of the facilities.

The Act remedies this problem in a comprehensive fashion. After turnover of board control by the developer, the association, under new board management, is entitled to terminate, without penalty, certain agreements upon 90 days' notice to the other party. These agreements include: (a) any management or employment contract or lease of recreational or parking facilities; (b) any type of continuing contract or lease between the association and the developer or its affiliates; and (c) any contract which was not bona fide or was unconscionable when made, such as an unfair

settlement between the developer and the association regarding damages for construction defects. (§ 305).

The Act also attempts to discourage "sweetheart deals" by imposing restraint on the board members appointed by the developer during the period of developer control. Board members elected by the unit owners other than the developer are personally liable to the association in tort for failure to exercise ordinary and reasonable care in the execution of their powers. (§ 303[a]). On the other hand, board members appointed by the developer, who typically are not unit owners, are held to the higher standard of care of fiduciaries for the unit owners other than developer in the performance of their duties. (§ 303[a]).

### 2. PHASE DEVELOPMENT

In Alabama condominium development has proved to involve a high degree of financial risk. To test the market a developer might wish to construct only a portion of the property, with the option to add additional units later if the first phase is successful. A difficulty with the old law was its lack of flexibility for expansion of the number of condominium units in a project. The problem was that, while amendment to the Declaration was permitted without unanimity among the unit owners, the earlier legislation, here and elsewhere, required unanimity for changes in the percentage of title interest in the common property, and addition of units would change those percentages. Some developers attempted to make provision for phase development in pre-Act Declarations, but the authority for doing so was less than clear. Section 35-8-6 of the old law provided that the undivided interest in the common elements "or the method for determining such interest" would be as set forth in the Declaration, not to be changed unless the other unit owners agreed. The developer thus would set forth in the Declaration the percentage of common element ownership for the initial phase and how it would be affected by each phase thereafter. Upon completion of a phase, the Declaration would be amended to add the property pursuant to the plan of phase development and to effect the common element ownership change. Acceptance by unit buyers of the Declaration with its plan of phase development arguably constituted an advance agreement by the unit owners required for the change in percentage ownership of the common elements. Another technique was to require each buyer to sign a power of attorney authorizing the developer to vote for an amendment changing the common property percentage interest.

The Act clarifies the developer's rights by giving the developer a unilateral power to change fractional common ownership interests by amending the Declaration to add new units. (§ 210[a]). The plan of phase development must be set forth in the Declaration, however, and must specify the outside number of new units which may be added under the plan and the formula to be used to reallocate the common element ownership interests. (§ § 205[a]; 207[b]). Also, the location of the additional units must be shown on the plat of the property labeled "Need Not Be Built" .(§ 209[b](12)[c]).

## IV. Liens for assessments

Under the old law, if a unit owner failed to pay his share of the common expenses of the association, the association had a statutory lien against such unit. The lien became effective upon the filing of a claim of lien in the public records of the county where the unit was located. The claim of lien only applied to amounts due at the time of the filing of the claim of lien. The lien created under the old law was subordinate to any lien for taxes, the lien of any mortgage of record and any other lien recorded prior to the time of recording the claim of the association's lien.

The association could foreclose on its lien in the same manner as a foreclosure of a mortgage in real property under the old law, but this remedy was rarely enforced due to the subordinate position of the association's lien. Additionally, it was not economically feasible for the association to file suit against the defaulting unit owner on the debt, as the cost of the litigation would often be more than the past due assessment. In sum, under the old law the failure of a unit owner to pay his portion of the common expenses generally meant a practical loss of the association's rights. Thus, the association would be forced to operate under budget or impose a special assessment against the other owners.

One of the dozen provisions of the Act applicable to pre-1991 condominiums, (§316[a]), gives the association a statutory lien on a unit for any assessment, late fee, fine, interest, or other charge on the date that the amount "comes due". Generally, the Declaration makes provisions for an annual assessment, payable in monthly installments. There is usually an acceleration clause if a unit owner is delinquent on any installment. Thus, in this manner the association would have a lien on the unit for the remainder of the assessment for that year. There is no requirement for a filing of a claim of lien, but rather the lien is automatic. (§316).

As in the old law, the Act provides that the lien for assessments may be foreclosed in the same manner as a mortgage. The Alabama Commentary clarifies, however, that this is "intended to mean a mortgage that includes a power of sale". (Ala. Commentary 1 to § 316). The Act further provides that the association must give "reasonable advance notice" of the foreclosure to the unit owner and all lienholders of record, requirements not imposed in all mortgages. (§ 316[a]).

A unit owner's failure to pay assessments often coincides with his failure to make mortgage payments on the unit, and as discussed above, in the past a foreclosure sale of the unit by the mortgagee would wipe out the claim for assessment by the association. Under the Act, however, the association's lien is given a limited priority over other liens, except liens created prior to the recording of the Declaration of Condominium and liens for taxes and governmental assessments and charges. (§ 316[b]). Most important, the association's lien is given a statutory priority over the first mortgage to the extent of six months' of assessments preceding the enforcement of the lien. (§ 316[b]). This amount is paid to the association by the mortgagee at the time of the foreclosure sale. Any remaining amount due to the association may be obtained by having a judgment entered against the defaulting unit owner and attempting to file a lien against and execute on other property or

income. The lien provisions of the Act are a major accomplishment in establishing the financial viability of the association and is a compromise of interests of the association and mortgagees.

## V. Protection of condominium purchasers

### 1. ORIGINAL PURCHASERS

Because the buyer of a condominium unit becomes a member of a type of private government, it is important that he have a general understanding of the complex bundle of rights and obligations he obtains by becoming a unit owner. Neither the common law nor prior legislation in this field required that any information be given to purchasers of condominium units as a condition of a sale.

The Act requires that the developer deliver to original purchasers of condominium units a document called an "offering statement" . The offering statement must contain a copy of (1) the Declaration; (2) the bylaws of the association; (3) the rules and regulations adopted by the association; (4) any contracts or leases that are subject to cancellation by the association at the termination of the period of developer control; (5) any current balance sheet, projected budget and a list of assessments of the association; (6) a description of any financing for the balance of the purchase price offered by the developer or arranged with another party, e.g., a local bank; (7) a description of any express warranties provided by the developer to buyers regarding the quality of land, structures or equipment; and (8) a list of all liens and known defects or encumbrances, as well as several other items of information. (§ 403[a]). The offering statement also must provide a statement that the purchaser has seven days after receipt of the offering statement to cancel any contract for purchase of a condominium unit. (§ 403[a][11a]).

If a condominium is subject to development rights much more detailed information must be provided in addition to the above. (§ 404). However, if a condominium consists of fewer than 12 units and is not subject to any development rights or phasing, the requirements of the offering statement are less complex. (§ 304[b]). Additionally, an offering statement in not required for a gratuitous disposition of a unit; a transfer pursuant to court order by a governmental agency or foreclosure; a deposition to a person in the business of selling real estate; or a sale or transfer that may be cancelled at any time for any reason without penalty. Finally, in nonresidential condominiums, the purchaser and seller may waive by agreement the requirements of an offering statement. (§ 401).

The disclosure of the detailed information set forth above enables the purchaser to make a more informed decision with regard to the purchase of the unit. With the assurance that the buyer has had an opportunity to learn of his obligations and rights, courts should be more comfortable in enforcing those obligations.

The Act provides that the developer must give a copy of the offering statement to the purchaser before the conveyance and not later than the date of any contract for sale. (§ 408[a]). Unless the buyer is given a copy of the offering statement more than seven days prior to the execution of a purchase contract or conveyance of the unit, the buyer may cancel the contract or rescind the sale within seven days after receipt of the offering statement for any reason by delivering a written notice of cancellation to the developer. (§ 408[a]). An additional penalty for failure to deliver the offering statement to the purchaser prior to the sale of the unit is a statutory penalty of 5 percent of the purchase price at purchaser's option in lieu of any other remedies. (§ 408[c]). Five percent of the sales price is a significant portion of the developer's profit and is adequate to ensure the developer's best efforts to comply with the offering statement requirements.

In the past, undercapitalized developers often used earnest and deposit money from sales contracts on units yet to be built for construction expenses. In the event of default on the construction loan, bankruptcy or abandonment of the project by developer, these sums were lost if the mortgagee refused to recognize the claims of contract buyers. The Act resolved this problem by requiring that any deposits given to a developer in connection with the purchase or reservation of a unit be placed in an interest-bearing escrow account controlled by an independent third party. The deposits cannot be released to the developer until either conveyance of the unit to the purchaser or purchaser's default on the sales contract. (§ 410).

### 2. RESALES OF UNITS

The concerns of informing purchasers of the obligations involved in being a member of a condominium association include not only original purchasers from the developer, but also later purchasers on the resale of those units. Although the UCA requires specific documentation to be given in a resale transaction, the Alabama version of the Act makes performance optional with the buyer. (§ 409).

The Act requires the seller of a unit who is not the developer to supply the purchaser, upon written request, with a copy of the declaration as amended, the bylaws of the association, current rules and regulations of the association, and a "resale certificate" containing (1) a statement of the current monthly assessment against the unit; (2) any unpaid amount of the common or any special assessment on the unit; (3) the most recent balance sheet of the association; (4) the

current operating budget of the association; (5) a statement concerning any judgments or pending suits against the association; (6) a description of any insurance provided for the benefit of unit owners; and (7) a statement concerning any leasehold interest of the association, or any restrictions affecting the amount an owner may receive upon sale or other disposition of the property. (§ 409[a]). All of these items can be obtained by the seller from the association. The Act requires the association to furnish the resale certificate to the seller within ten days after a request(§ 409[b]), and provides that "the purchase contract is voidable by the purchaser until the certificate has been provided and for five (5) days thereafter or until conveyance, whichever occurs first". (§ 409[c]).

The changes implemented by the Act will considerably modify typical real estate sales involving condominium units. First, the standard sales contract will most likely be modified to invoke the request for the resale certificate and condominium documents. Additionally, since all associations now have a lien for unpaid assessments without public recordation, clear title in the buyer and the issuance of the title insurance policy will require certification from the association regarding the status of the seller's account with the association. This request for a certification of the status of the seller's account to the title company should not be construed as a request by the buyer for the full documentation required by the Act, thereby triggering the five-day cancellation privilege. In any event, however, in the case of a resale transaction, the purchaser's cancellation privilege terminates upon conveyance of the unit to the buyer and the buyer's right to investigate will be lost.

The section of the Act concerning resales disclosures is applicable to residential condominiums created prior to 1991. To the extent that it is utilized by purchasers, the requirements relating to resales impose an extra burden upon sellers to acquire such information from the association but, more importantly, impose a burden on the association to keep current financial records, to maintain a supply of copies of the condominium documents (declaration, bylaws, rules, insurance description), and to promptly (within ten days) supply such materials to owners who request them. (§ 409[b]). Such is the trade-off for the association's new, superior lien status.

## VI. Condominium tort and contract liability

A unit owner is individually liable to a person who is injured by a negligent condition within his unit. A unit owner may obtain insurance against such risk of liability.

Under the condominium form of ownership, although the association has no title to the condominium property, it has the exclusive right of control over the common elements, which generally includes all property outside the units. When an injury occurs, whether to a unit owner or an outside guest or invitee, due to a negligent condition on the common grounds, courts in the past have not hesitated to conclude that the association is a proper party defendant, even though it owns no title to the common areas.

Although the Act requires that new associations be incorporated (§ 301), many existing associations are not incorporated entities. The general common law in most states imposes full liability on any member of an unincorporated association for the association's torts as in a general partnership or a joint venture. Applying that rule to a condominium association would have the devastating and unfair result of allowing an injured party to sue any member of the association for the full amount of the damages. The Act forbids this, making the association the exclusive party defendant: "[A]n action alleging an act done by the association shall be brought against the association and not against any unit owner." (§ 311).

Regarding an association's standing to sue, because title to the common areas is owned by the unit owners in common, some early cases elsewhere held that the association was not the "real party in interest" but that the unit owners were the proper parties to initiate proceedings against persons who might be liable in damages for injury to the common areas. Traditional legislation did not address this issue, but the Act expressly authorizes suits by the association, which may "institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium." (§302(a)[4]). This section applies to all existing condominiums.

Even though the language of the Act does not expressly give the association exclusive standing to sue, it should be interpreted to have that intent, except where the developer would be the defendant. Otherwise, a tortfeasor who settles a claim with the association must obtain the signatures of all the unit owners on a settlement agreement to ensure that the defendant will not be sued again by an individual unit owner, certainly an undesirable rule.

Where the developer would be the defendant, for example regarding construction defects, and the developer then controls the association, the Act preserves the standing of individual unit owners. It also tolls the statute of limitations on the cause of action in favor of the association until termination of the period of developer control and assigns court costs and attorneys' fees to a later successful suit by the association. (§311). If the developer settles the claim with the association during the period of developer control, another provision of the Act (§ 305[iii]) permits the association to later set aside the settlement agreement if it is regarded as "unconscionable".

## VII. Zoning and subdivision regulations

The Act prohibits discrimination against the condominium form of ownership by local lawmaking authorities through zoning ordinances, subdivision regulations and building codes. The Act provides that such laws "may not impose any requirement on a condominium which it would not impose on a physically identical development under a different form of ownership". (§ 106). Thus, although there is a division of title in the sale of units in a high rise condominium building, subdivision regulations should not apply to the development because they would not be applicable to an identical building in single ownership by a

landlord. Subdivision regulations for condominiums do exist in some municipalities, however, such as Birmingham. These regulations should be examined closely if there is some problem with compliance to ensure they do not impose any more of a burden on a condominium development than if the same structures were an apartment project.

As to zoning, a residential condominium cannot be excluded from a multiple dwelling district. Zoning authority extends to the use of structures, as well as to types of structures and a condominium may be excluded because of its use. For example, where the Declaration provides that units may be marketed on a time-share basis, the development might properly be excluded from any district not permitting hotels because the occupants, though owning a realty interest, are more like transients than long-term occupants.

The Act also prohibits laws from delaying or imposing conditions on conversion of apartments into condominiums units, as occurred in some cities in the early 1980s. The Act provides that residential tenants shall be given notice of any conversion and may not be required to vacate for 60 days thereafter, even if, during that period, their leases are terminable for non-renewal or pursuant to a sale-by-landlord lease provision. (§ 412). Conversion, of course, does not permit termination of the lease in violation of its terms. (§ 412[c]). The provisions of the UCA were substantially more onerous for conversion projects than the Alabama Act.

## VIII. Time-share condominiums

Many so-called "time-sharing" property arrangements are in the condominium form of ownership. When in condominium form, the Act applies to their creation and management. Also, where the developer reserves the right to market some, but not all, units on a time-share basis, there is a special provision in the Act requiring these units to be identified in the Declaration. (§ 405). Regulation of the marketing of time-share units, however, is left to a separate statutory regime. *Ala. Code* § § 34-27-50 to -69 (Supp. 1990).

## IX. Uniform Common Interest Ownership Act

One of the most important accomplishments of the Act was to clarify the law of condominium associations and strengthen the powers of the boards of associations. Similar homeowners' associations for planned communities or planned unit developments are usually created when there are substantial areas of common grounds or expensive service or recreational facilities developed in a subdivision of property. Unlike a condominium association, however, in a planned community, traditionally, the common grounds and facilities are owned by the association rather than in a cotenancy with other property owners. These property owners associations whose membership is mandatory are usually created in the declaration of protective and restrictive covenants of subdivisions and under this scheme all lot owners are assessed for their portion of common expenses (realty taxes, mortgage installments on common buildings and maintenance costs). However, there exists no applicable statutory guidelines for this type of association other than the corporation statutes.

Statutory law specifically addressing homeowners associations is desirable for many reasons. In 1980, the commissioners on Uniform State Laws drafted an act called the Uniform Common Interest Ownership Act ("UCIOA"), applicable to subdivision associations described above which have substantial annual common expense assessments. The UCIOA is, in effect, the Uniform Condominium Act with additional provisions tailored for the special problems associated with planned communities. States which have adopted a version of the UCA could, by enacting a few additional provisions, convert it to the UCIOA.

Upon completion of the condominium Act, the Alabama Law Institute formed a separate advisory committee to consider modifying the Act to include the provisions of the UCIOA. After study, the Committee recommended against the larger project at that time. The preference was to enact the new condominium legislation first and test its performance before embarking on legislation covering an additional broad subject. It is hoped the new Act will be well received and will make enforcement of condominium laws less complex so that confidence will be gained, and supporters attracted, for consideration of the UCIOA in the future.

### Conclusion

The Act was a major overhaul of existing condominium legislation. It is triple the size of the earlier statute, and clarifies and identifies numerous issues not addressed in the old law. There were several underlying policy considerations the Act sought to address and they can be viewed as triangular in direction.

First, developers were expressly given greater flexibility in the creation of condominiums, especially in the area of phased development of projects. Developers were also given a definitive period of control over the association, protecting them from interference by the association during the construction and marketing phases.

Next, the association was given clearer and greater authority to manage effectively and to enforce rules against and collect assessments owed by unit owners. The association's interests typically run parallel to those of the mortgagees who invest in the project. In the case of lien priority, however, the interests of the mortgagees were balanced against the association's by giving the association a limited priority (six months) over the first lien mortgage interest.

Finally, the unit owners as purchasers are afforded a comprehensive consumer protection plan requiring developers to provide disclosures in the offering statement and a contract cancellation privilege. Additionally, protection of earnest money deposits was ensured by the Act as well as a mechanism to avoid self-serving arrangements between the developer and the association while under developer control.

The drafters and sponsors of the Act believe it to be a balanced readjustment of the authority of the developer, the association and the unit owners in the condominium regime. ■

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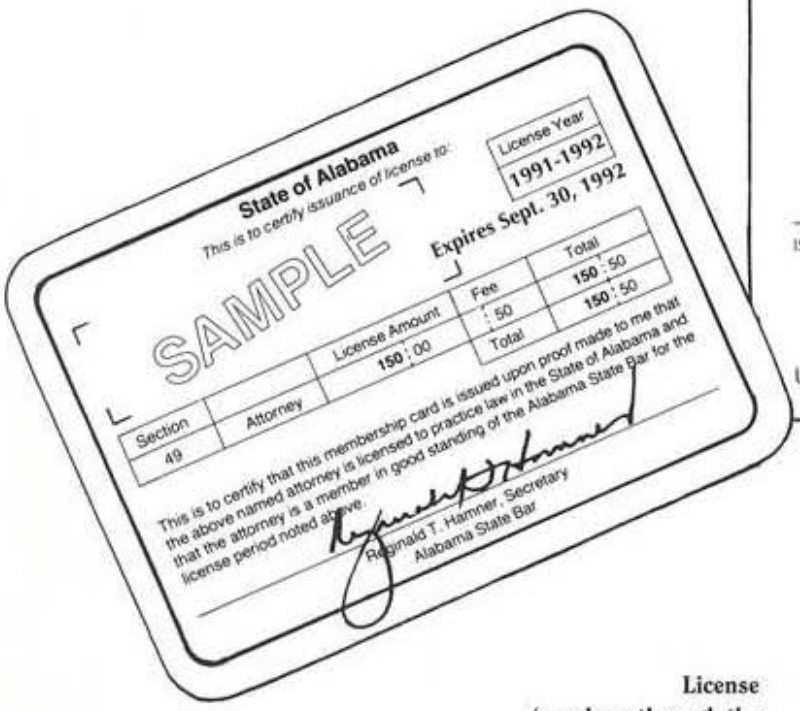


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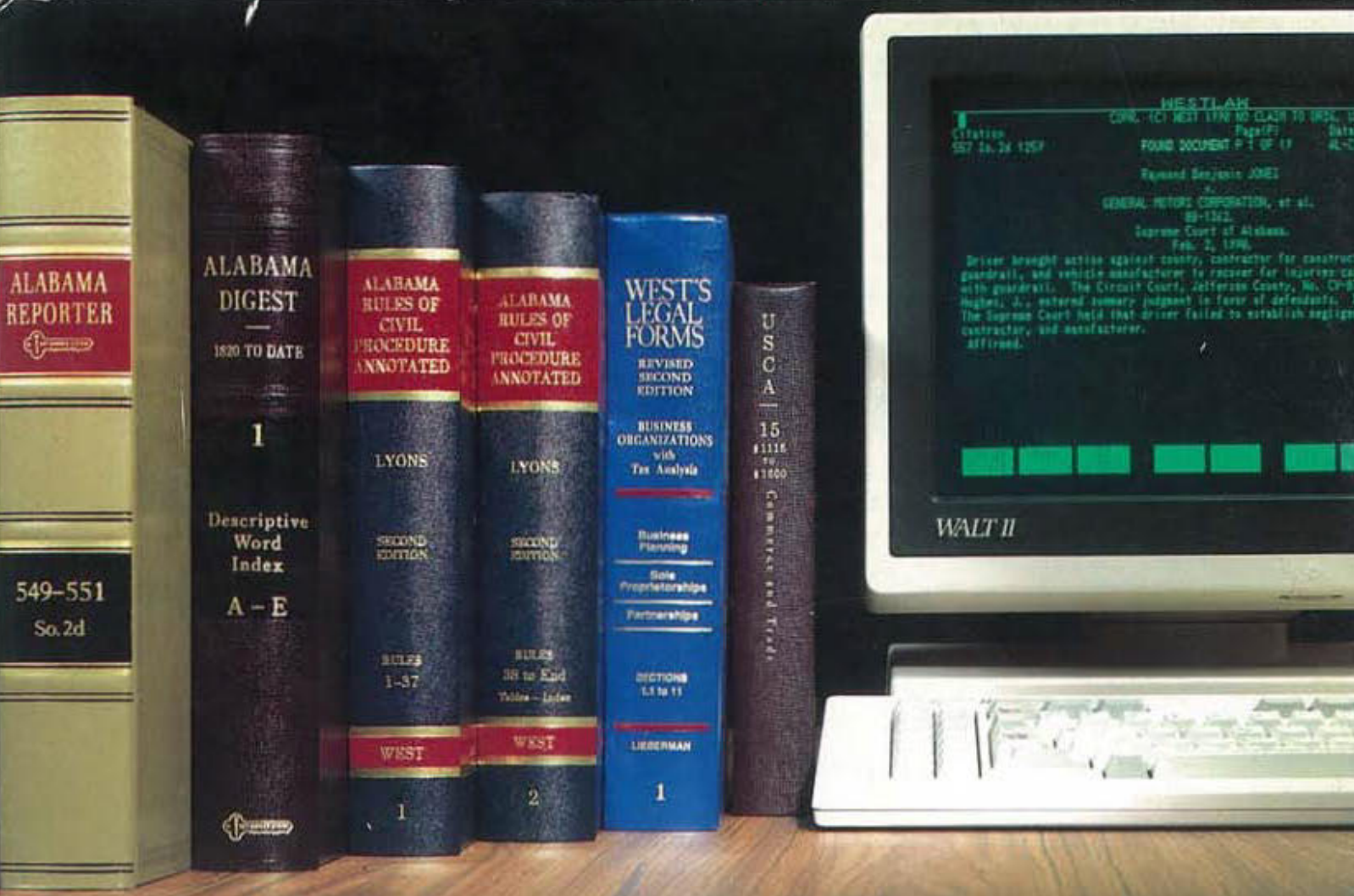


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