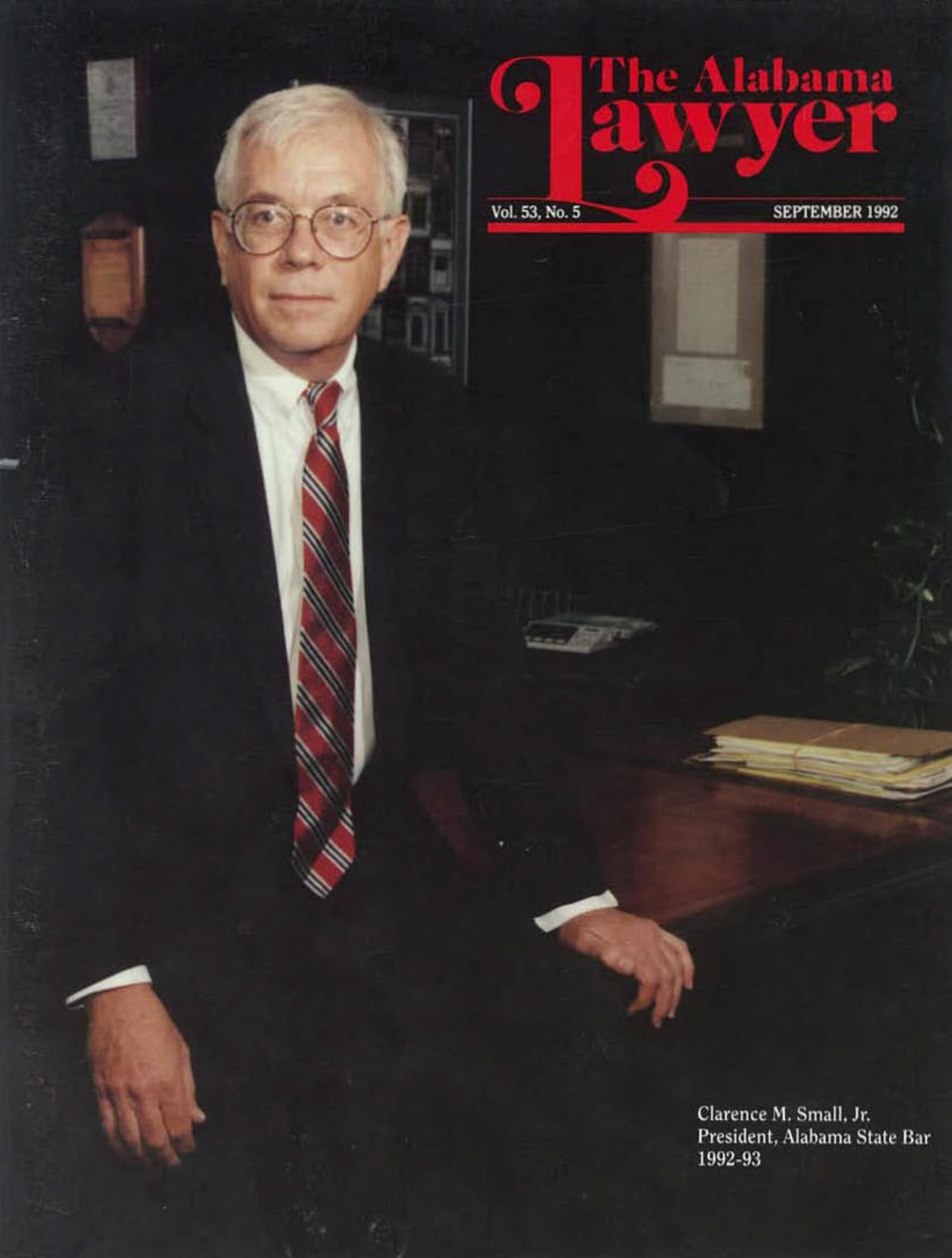
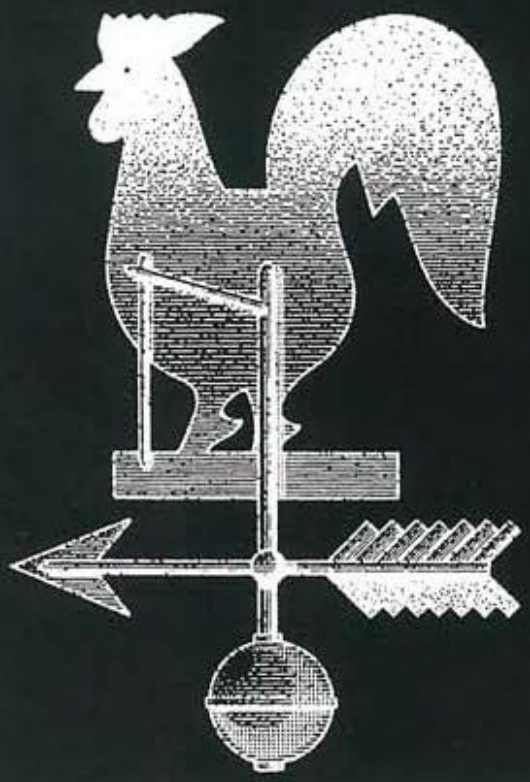
The Alabama Lawyer

Vol. 53, No. 5 SEPTEMBER 1992



Clarence M. Small, Jr.
President, Alabama State Bar
1992-93



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***CHARTER MEMBER: NATIONAL ASSOCIATION OF BAR-RELATED INSURANCE COMPANIES**

IN BRIEF

September 1992 Volume 53, Number 4

ON THE COVER: Clarence M. Small, Jr. is shown in his law office in Birmingham, Alabama. He was installed in July as the 1992-93 president of the Alabama State Bar.

INSIDE THIS ISSUE:

ALABAMA STATE BAR HEADQUARTERS STAFF
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The Alabama Lawyer

Published seven times a year (the seventh issue is a bar directory edition) by the Alabama State Bar, P.O. Box 4156, Montgomery, Alabama 36101. Phone (205) 269-1515.

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The Alabama Lawyer is published seven times a year for $15 per year in the United States and $20 per year outside the United States by the Alabama State Bar, 415 Dexter Avenue, Montgomery, Alabama 36104. Single issues are $3, plus first-class postage, for the journal and $25/$40 for the directory. Second-class postage paid at Montgomery, Alabama.

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


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PRESIDENT'S PAGE

At the American Bar Association meeting in Atlanta, when Vice-president Quayle kicked off the present administration's program of lawyer-bashing, he picked what was perceived in political circles as a marvelous target. Since, in most disputes resolved by our legal system, there are winners and losers, zeroing in on the lawyers seemed to make good sense. Odds are that at least half the disputants will agree. It probably makes no political difference that the statistics cited by the vice-president to support his claims that an excessive lawyer population in the United States, a multiplicity of tort suits and capricious jury awards have resulted in the inability of the U.S. to compete in foreign markets have proven false. (*Legal Times*, February 17, 1992). The presentation of statistics to refute false but dramatic generalizations often bores the listener and is lost in the sound bytes of today's method of communication. Does anyone outside the legal profession really care to debate the validity of a 1990 federal study of products liability suits which concluded that plaintiffs won fewer than 50 percent of the cases, the sizes of jury awards were neither erratic nor excessive, and punitive damages were highly correlated to economic loss? Probably not. It is far easier to prove the system bad with aberrational exceptions, such as the California woman who received a favorable jury verdict on her claim that an accident made her sexually active.

Clarence M. Small, Jr.

The truth of the matter, however, is that lawyers ably perform functions essential to our society. Lawyers police the marketplace by drafting and enforcing contracts that make a six trillion dollar economy function and provoking standards that increase the safety of the workplace. Lawyers are constantly involved in improving the administration of justice. Examples: Marshall Timberlake's Task Force on Alternative Dispute Resolution is, at this moment, working closely with Judge Joe Phelps' Committee on Bench/Bar Relations to educate judges, lawyers and litigants on alternative methods of reducing caseloads in an overburdened and underfunded court system. IOLTA funds generated by Alabama's lawyers' trust accounts have, since 1989, poured more than 1.4 million dollars into legal aid for the poor. The July 1992 issue of *The Alabama Lawyer* lists the names of 792 lawyers in this state who devoted thousands of pro bono hours to making access to justice a reality for hundreds of disadvantaged Alabamians. An article by Richard Allen in that same issue describes how members of the Alabama State Bar have volunteered legal assistance to victims of natural or manmade disasters on a non-discriminatory, non-fee-generating basis. How many other professions can claim such public service? These activities are rarely the subject of media attention and probably never will be.

The citizens of other nations are not so fortunate. In an editorial cartoon which recently appeared in *The Birmingham News*, the cartoonist depicted the U.S. and Japan as runners in a footrace. The Japanese runner sprinted freely, while the American labored to leap hurdles labeled "U.S. Legal System." Coincidentally, a few days before, an article on the front page of *The Wall Street Journal* described the price paid by the Japanese public for the system free of legal "impediments." That article began:

When Shigeru Kamogawa retired from a career in medical research two years ago, he dreamed of using his 50 million yen retirement payment — about $385,000 — to set up his own consulting company. Ten weeks after he entrusted it to Ark Securities Co., he says, his retirement money was almost all gone.

Today, Mr. Kamogawa, 67 years old, has a part-time job at low pay with few benefits, his dream a thing of the past. Ark salesmen, he asserts, recklessly traded his account for commission income. Ark officials deny his charge, but there is no denying his newly straitened circumstances.

Complaints of stockbroker "churning" of client accounts is a fact of life wherever there are financial markets, but in Japan the plight of the victims is especially severe. In many countries, investors can recover all or most of their losses by taking legal action. In Japan, mores and legal roadblocks discourage victims from going to court and prevent them from recovering much if they do.

It is rare for Japanese even to engage a lawyer, as Mr. Kamogawa did.

This is the downside of Japan's conflict-avoidance society, which favors harmony over individual rights. Many foreigners, particularly Americans, admire Japan for avoiding a U.S.-style litigation explosion. Rarely mentioned is the difficulty Japanese have gaining redress for even blatant wrongdoing.

Long ago, the framers of our legal system concluded that the adversarial system was the best method of ascertaining the truth in resolving disputes. No tool has ever been found to equal a skillful cross-examination in testing the validity of an asserted position. When capable adversaries perform their required function, the loser is rarely pleased. It is human nature to blame others for our own mistakes. The obvious scapegoat in this situation is the opposing lawyer. Thus, the grim paradox is that lawyers are condemned, not for doing their job too poorly, but, rather, for doing it too well. ■

FACTS/FAX POLL

Are you interested in participating in a very unscientific poll? It is painless, anonymous and not time-consuming. It could be fun, and it may provide some insight into various issues confronting our profession. Take a moment to complete the following questionnaire and then fax it to the state bar headquarters at (205) 261-6310. The results will be published in our November 1992 issue.

How Hard Do Alabama Lawyers Work?

1. On the average, I work:
   a. _____Less than 40 hours per week
   b. _____Between 40 and 50 hours per week
   c. _____Over 50 hours per week

2. I take at least a full week of vacation:
   a. _____Never
   b. _____Infrequently
   c. _____Every year

3. I work on weekends:
   a. _____Never
   b. _____Infrequently
   c. _____Frequently

4. I work at night:
   a. _____Never
   b. _____Infrequently
   c. _____Frequently

5. My workload/hours of work has, in the past five years,:
   a. _____Increased
   b. _____Decreased
   c. _____Stayed about the same

6. I consider my law practice:
   a. _____Very stressful
   b. _____Sometimes stressful
   c. _____Almost never stressful

7. I work:
   a. _____ As a sole practitioner
   b. _____With a firm of five or less
   c. _____With a firm of six-15
   d. _____With a firm of over 15

8. I am:
   a. _____ A partner
   b. _____ An associate
   c. _____Of counsel

9. I would characterize my practice as:
   a. _____Rural
   b. _____Small-town
   c. _____Metropolitan

ADDRESS CHANGES

Complete the form below ONLY if there are any changes to your listing in the current *Alabama Bar Directory*.

Due to changes in the statute governing election of bar commissioners, we now are required to use members' office addresses, unless none is available or a member is prohibited from receiving state bar mail at the office. Additionally, the *Alabama Bar Directory* is compiled from our mailing list and it is important to use business addresses for that reason.

NOTE: If we do not know of a change in address, we cannot make the necessary changes on our records, so please notify us when your address changes.

_____ - _____ - _____ Member Identification (Social Security) Number

Choose one: ☐ Mr. ☐ Mrs. ☐ Hon. ☐ Miss ☐ Ms. ☐ Other _____

Full Name _____

Business Phone Number _____

Race _____ Sex _____ Birthdate _____

Year of Admission _____

Firm _____

Office Mailing Address _____

City _____ State _____ ZIP Code _____ County _____

Office Street Address (if different from mailing address) _____

_____

City _____ State _____ ZIP Code _____ County _____

EXECUTIVE DIRECTOR'S REPORT

New licensing statute

Lawyers required to obtain the annual state license under §40-12-49, *Code of Alabama*, 1975, will *no longer* purchase same at the county courthouse from the probate judge or license commissioner. Effective October 1, 1992 this license must be obtained through the state bar.

I am now the issuing authority and am required pursuant to the statute to compile a list of properly licensed lawyers after October 31. I will provide such a list to the revenue department, the presiding circuit judges and the clerks of the appellate courts within the first week of November.

Every lawyer engaging in private practice must purchase the state license. *No lawyer is required* to pay a license fee to the county. It is my understanding some counties have tried — and others may be actually collecting — an additional fee. Section 40-12-49 prohibits this additional county fee.

Municipalities do have occupational taxes, usually levied under a gross receipts formula. This fee is payable only in the city where your office is located. The new legislation (Act 92-600, Acts of Alabama, 1992) does not affect any municipal fees.

Every lawyer admitted in Alabama will be receiving our annual license/special membership dues invoice in September 1992. This will be the *only* bill you will receive. Payment without penalty is due October 31, 1992.

It is hoped this centralization will assist bar members in maintaining a current license. In recent years, delinquencies have run 20-25 percent because of an early inability to establish a valid license list immediately following the October 31 deadline. This new procedure will make possible an accurate list from which certificates of good standing can be issued.

Watch your mail for your 1992-93 licensing invoice and alert your office, mainly the bookkeeper, of the October 1 due date and October 31 delinquency date.

Reginald T. Hamner

Savings for you!

In less than a year, Alabama lawyers are saving 42.9 percent on the cost of overnight shipments via our group rate Airborne Express Discount Program. Year to date (June 30, 1992), our members have shipped 6,655 pieces. Gross charges without our discount totalled $132,668.08. Our discounts equalled $56,952.09, with net charges totalling $75,715.99. This is one of your bar services that can decrease your office operating costs.

You read this

How do I know? Put "Tom Dooley" on the MTA instead of "Charlie" and your friends call and write to point out your "lack of lyric memory." "I am hanging down my own head", but thanks for reading the column. I was initially troubled with correctly determining the fate ("unknown" or "unlearned"?) of our lost rider. All of my musical advisors agreed on "unlearned", but even they did not realize we had the wrong passenger lost beneath the streets of Boston. Apologies to the Kingston Trio. ■

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COMPLETE SOLUTIONS FOR GROWING LEGAL BUSINESSES.

Because no two legal businesses are exactly alike, no single computing solution fits perfectly for all. One common thread that does tie all growing legal businesses together is the need to work with people who truly understand their business.

That's why Digital has teamed up with top Computer Resellers who are experts in legal services computing. Our Resellers offer you the strength of an expandable line of hardware systems from Digital, plus specialized software and expertise. They are expert in tailoring, installing and supporting computing solutions to keep your law firm running smoothly.

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If you want the computing solution that's right for your legal business, it'll take a team effort — the Digital/ Reseller team and you. For more information give us a call at:

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LEGISLATIVE WRAP-UP

By ROBERT L. McCURLEY, JR.

Alabama Law Institute 25 years old

The Alabama Law Institute was created by an Act of the Legislature on August 24, 1967 as the official advisory law revision and law reform agency for the State of Alabama. The Institute was funded and commenced operations in 1969. It is housed in the law center on the University of Alabama campus so as to have available the research facilities of a good law library which is essential to major law revision. It also enables the Institute to have experts in various fields under study as readily available consultants. The Institute also calls upon the professors of Cumberland School of Law and practicing lawyers and judges throughout Alabama.

Purpose

The Institute acts in an advisory capacity with the general purpose "to promote and encourage the clarification and simplification of the law of Alabama to secure the better administration of justice and to carry on scholarly research and scientific legal work." *Alabama Code* §29-8-4 (1975).

Duty

The Alabama Law Institute considers needed improvements in both substantive and adjective law and makes recommended needed changes as it deems necessary to eliminate antiquated rules of law, thereby bringing the state law, both civil and criminal, into harmony with modern conditions.

The Institute works closely with the Legislative Reference Service in ensuring the proper placement and codification within the *Code of Alabama* of Acts passed by the Legislature. The Legislative Reference Service prepares the vast majority of bills for each session of the Legislature, however, major code revisions, such as revision of an entire section of law, as Alabama's business corporation law, banking law, etc., are handled by the Alabama Law Institute.

Functions

The Institute, while being a disinterested source, is a great strength in drafting revision proposals. It is not a "lobbying" organization to promote legislative

proposals through the Alabama Legislature. It is an agency of the Legislature dependent upon some other group or legislator to promote the proposed legislation within the Alabama Legislature.

Presidents

The Institute has had the service of four presidents:

Representative Hugh Merrill, 1967-78 — During his years, the Institute conducted inquiries from lawyers, judges and legislators to determine the areas of law most needed for revision. It was determined that the Business Corporation Act and Criminal Code were areas in the most pressing need of revision. Funding was first made by the Legislature in 1969 from the state General Fund and Special Education Trust Fund.

Senator Finis E. St. John, III, 1978-84 — During his term as president, until his untimely death, the Legislature considered and passed the following major pieces of legislation: Criminal Code, first revision in 160 years; Business Corporation Act, first revision in 25 years; Probate Code, first revision in 160 years; Banking Code, first revision since 1915; Rules of the Road, first revision since 1926; Administrative Procedures Act, Alabama became the 50th state to adopt such a law; and revised Article 9, UCC, first revision in 18 years. Additionally, the Nonprofit Act, the Revised Limited Partnership Act and the Professional Corporation Act all became law during this period.

Honorable Oakley Melton, Jr. 1984-91 — The Legislature considered and adopted the following revisions: Eminent Domain Code, Uniform Transfers to Minors, Trade Secrets, Uniform Guardianship Protective Proceedings Act, Alabama Fraudulent Transfers Act, Alabama Securities Act, Adoption Law, Alabama Condominium Act and 12 other acts. Additionally, the Alabama Supreme Court adopted the Alabama Rules of Criminal Procedure.

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.

Hugh Merrill
President, 1967 – 78

Finis E. St. John
President, 1978 – 84

Oakley Melton
President, 1984 – 91

James M. Campbell
President, 1991 – present

Representative James M. Campbell, 1991-present — Currently the Institute has revised UCC Article 2A, "Leases" and UCC Article 4A, "Funds Transfers". It has revised the personal representative powers for probate procedure, and has under study Rules of Evidence, Business Corporation Act and Limited Liability Companies.

Membership

The Alabama Law Institute membership is limited to the maximum of 150 practicing lawyers, who serve on rotating six-year terms with 50 lawyers being elected every other year. In addition, membership includes judges of the Alabama Supreme Court, court of appeals and circuit courts, federal judges in Alabama, full-time law faculty members of Cumberland and the University of Alabama School of Law, and all lawyer-members of the Legislature.

Council

The governing body of the Institute is the Institute Council, composed of six practicing lawyers from each congressional district, as well as representatives from the appellate courts, attorney general's office, state bar, law schools, Legislature, and the Governor's office.

Advisory committees

For each major project, a special advisory committee is appointed to review and provide criticisms of the draft submitted by the reporter for approval. The advisory committee is composed of practicing lawyers, judges and experts in the area of law under revision. These committees often spend three to five years considering a major revision of law.

Procedure for new projects

The Institute, through the director, receives and considers suggestions from legislators, judges, public officials, the practicing bar, and the general public to discover inequities and inconsistencies in the law and possibilities for its improvement and expansion.

The director of the Institute submits to the Institute council the suggestions for revision or clarification of the law which he has received.

The council selects a limited number of suggestions as its projects.

The council, through the director, selects an advisory committee composed of experts on the subject who are responsible for drafting the act or revision.

Usually, the director and advisory committee select a reporter from one of the Alabama law schools to prepare the initial draft.

The reporter prepares a draft of the proposed legislation and presents a draft with commentary to the advisory committee for comments and criticism.

The advisory committee makes such changes as it deems appropriate before approving the draft.

The advisory committee then submits to the Institute council the proposed act for their consideration and approval.

Once approved by the Law Institute council, the recommended law revision is presented to the Alabama Legislature for its consideration. The time required for preparation and approval of such revisions varies from a matter of months to several years.

Staff

The Alabama Law Institute is basically a volunteer organization with a director, associate director and secretaries who organize volunteer efforts.

Bob McCurley, the current director, has served in this capacity since 1975; Penny Davis, associate director, has been with the Institute since 1979; and secretaries Jackie Sartain and Linda Wilson have been with the Institute 18 and 19 years, respectively.

The Institute has had the services of four directors. The first director, Vastine Stabler, 1967-69, is now a partner in the firm of Walton & Stabler, Birmingham; Professor Jerry Gibbons was director from 1969-72; and Dean Tom Jones was acting director from 1972-75. Both of these continue as professors at the University of Alabama School of Law. McCurley was in practice in Gadsden with the firm of Rains, Rains, McCurley & Wilson until 1975 when he accepted the directorship.

Anyone wishing to obtain further information about the Law Institute or any of its projects or reports may do so by writing the Alabama Law Institute, P.O. Box 1425, Tuscaloosa, Alabama 35486. ■

BAR BRIEFS

Judge Colquitt received Herbert Harley award

The Honorable Joseph A. Colquitt, former presiding judge of Alabama's Sixth Judicial Circuit, received the American Judicature Society's Herbert Harley Award in recognition of his contributions to improving the administration of justice in Alabama. He was presented the award during the Alabama State Bar's Bench and Bar Luncheon at the 1992 Annual Meeting in Birmingham.

He is the author of *Alabama Evidence*, and has served on a committee of the supreme court on the state's rules of evidence. He has also been actively involved in the drafting of new trial time standards in Alabama.

Judge Colquitt has served on the faculties of the National Judicial College and the Alabama Judicial College.

He resigned his judgeship last year to assume a permanent position on the faculty of the University of Alabama School of Law. He is a graduate of the University and its School of Law, and he received a master's of judicial studies from the University of Nevada-Reno.

Waters authors text

Michael D. Waters, a partner in the Montgomery firm of Miller, Hamilton, Snider & Odom, has written a new text, *Proxy Regulation*. Published by the Practising Law Institute, the book provides corporate and securities practitioners with a comprehensive start-to-finish approach to the proxy solicitation process from the basic policy of full disclosure to the details of how to prepare the proxy statement, file it with the SEC and distribute it to security holders. The book also contains a chapter on emerging issues in the solicitation of proxies under state law.

One of a series of books published by the Institute on corporate and securities law, *Proxy Regulation* appears at a time when the SEC's proxy rules have been the subject of extensive debate nationwide.

Waters is a 1972 *cum laude* graduate of Duke University. In 1975, he received a master's degree from Oxford University, where he was a Rhodes Scholar. Waters graduated from the University of Alabama School of Law in 1977, where he was editor of the "Journal of the Legal Profession."

Prior to joining Miller, Hamilton, he was with the Birmingham firm of Bradley, Arant, Rose & White and then served as legal advisor to Governor Fob James.

He is a member of the American Bar Association's Federal Regulation of Securities Committee and a member of the subcommittee on Proxy Solicitations and Tender Offers. Waters is the chairperson of the board of bar examiners of the Alabama State Bar. He is also a member of the District of Columbia Bar.

Friend named to national board

Edward M. Friend, III, the managing partner of the firm of Sirote & Permutt, has been named to the board of directors of the National Health Lawyers Association. The association is a legal educational society dedicated to the dissemination of timely and accurate law-related information on the health field.

Friend has served as chairperson of the Southern Institute of Health Law.

Fees increased for vital records

Effective July 1, 1992 the fees for vital records in Alabama increased. The following list provides the new costs for requested records:

1. Fee for a search of the records, to include one certified copy, if located, of: Birth, death, marriage, divorce – $12.00
2. Fee for each additional copy of a record ordered at the same time: Birth, death, marriage, divorce, amendment, etc. – $4.00
3. Fee for an exemplified copy of a record: Birth, death, marriage, divorce – $20.00
4. Fee for an amendment to a vital record, to include one certified copy: Birth, death, marriage, divorce – $15.00
5. Fee for preparation of a new certificate of birth after adoption or legitimation, to include one certified copy: $20.00
6. Fee for preparation of a delayed certificate, to include one certified copy: Birth, death – $20.00
7. Fee for forwarding legal documents of an adoption granted in this state for a person born in another state to that state: $10.00
8. Additional fee for any non-routine or expedited service: $10.00

Requests for vital records should be mailed to the following address:

Center for Health Statistics
P.O. Box 5625
Montgomery, Alabama 36103

Phone for customer service and expedited service: (205) 242-5033.

Kilpatrick to head Georgia State Bar

Columbus, Georgia attorney Paul Kilpatrick, Jr. became president of the 23,481-member State Bar of Georgia for 1992-93 at the bar's annual meeting in June.

Kilpatrick is a native of North Carolina. He received his law degree from the University of Georgia and is currently a partner in the firm of Pope, McGlamry, Kilpatrick & Morrison.

He has served on numerous committees of the State Bar of Georgia and was in the Judge Advocate General's Corps, U.S. Army, from 1965-68.

He was admitted to the Alabama State Bar in 1987.

Announcements from WEST

Alabama Rules of Court now available

West Publishing Company's *Alabama Rules of Court, State and Federal, 1992* provides attorneys with access to the latest court rules governing state and federal practice in Alabama. This two-volume set replaces the 1991 edition and includes amendments received through April 15, 1992.

New to the state volume are the Alabama Civil Court Mediation Rules, effective August 1, 1992, and the Regulations of the Continuing Legal Education Commission. Also included are amendments to the Alabama Rules of Civil, Criminal and Appellate Procedure; Alabama Rules of Judicial Administration; Alabama Rules for Using Videotape Equipment to Record Court Proceedings; Alabama Rules of Professional Conduct; Alabama Rules of Disciplinary Procedure (Interim); and Rules Governing Admission to the Alabama State Bar.

The federal volume contains amendments to the Local Rules of the United States District Court for the Northern District of Alabama, Local Civil and Criminal Rules of the United States District Court for the Middle District of Alabama and Orders of the United States District Court for the Southern District of Alabama.

For more information, call (800) 328-9352.

FAX printing option available to WESTLAW users

A new offline print destination, known as FAX, is now available to WESTLAW users. The new FAX destination allows users to send their offline print requests to any facsimile machine.

West Customer Service can enter one or more fax numbers in a subscriber's Options Directory or subscribers can access the Options Directory themselves and manually enter the desired fax number(s). The system will automatically verify that the area code and format of the telephone number(s) entered are valid.

Print requests for case law documents can be sent to a fax destination in either normal width or dual-column format. By default, print requests for case law documents will be delivered in dual-column format. Dual-column printing can be turned on or off in the Options Directory. WESTLAW users printing in dual-column format can also select the highlighted terms feature. When this feature is selected, search terms are printed in boldfaced type so that the researcher can quickly see where and in what context the terms appear.

For more information, call (800) 937-8529.

New from the American Bar Association

Directory of lawyer assistance programs available

The ABA's Commission on Impaired Attorneys has published the "1992 Directory: State and Local Lawyer Assistance Programs."

The directory lists the names, addresses, telephone and fax numbers of approximately 100 chairs and program managers of bar association alcohol and drug-related committees and lawyer assistance programs.

There is also a special listing of lawyer assistance hotlines, many of which are toll-free within the various states. The directory lists national resources such as the National Institute on Alcohol and Alcoholism, National Council on Alcoholism, International Lawyers in AA, Alcoholics Anonymous, Cocaine Anonymous and Narcotics Anonymous.

For price and ordering information contact the ABA Order Fulfillment, 750 N. Lake Shore Drive, Chicago, Illinois 60611. Phone (312) 988-5500. The product code number is 319-0013.

Updated version of mental disability law primer available

A new and updated version of the ABA's "Mental Disability Law Primer" is available from the ABA's Commission on Mental and Physical Disability Law.

First published in 1984, the primer provides an overview of mental disability law. It focuses on the leading mental disability law issues, the major topics within each of those areas, and principal constitutional, statutory and judicial developments, and provides resources for lawyers, law students and graduate students.

To order copies or for more information, contact the ABA Commission on Mental and Physical Disability Law, 1800 M Street, NW, Washington, D.C. 20036. Phone (202) 331-2240. ■

NOTICE

Disciplinary Proceedings

Sallie M. McConnell, attorney at law, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of Sept. 1, 1992 or, thereafter, the charges contained therein shall be imposed against her in ASB No. 91-330 before the Disciplinary Board of the Alabama State Bar.

Disciplinary Board
Alabama State Bar

BUILDING ALABAMA'S COURTHOUSES

BIBB 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.*

Bibb County

Bibb County is one of only a handful of Alabama counties to have had a name change. The county was originally established as Cahawba County by the Alabama Territorial Legislature on February 7, 1818. It was created the same day as its neighbor, Shelby County. The original name is derived from the Choctaw Indian language and means the "water above." This is also the name of the river which traverses the center of the county from north to south, dividing it into an eastern and western part. The name of the county was changed less than three years later to honor Alabama's first governor.

When the Alabama Territory was created from the eastern lands of the Mississippi Territory in 1817, President James Monroe appointed William Wyatt Bibb as the first and only governor of the territory. Bibb was a native of Virginia whose family had moved to Georgia. He attended William and Mary College and graduated from the Medical College of the University of Pennsylvania. He began practicing medicine in his new home at Petersburg, Georgia in 1801. By 1802, at the age of 21, Doctor Bibb was elected to the Georgia House of Representatives. He next was elected to the Georgia State Senate. After four years in the Georgia Legislature, the young doctor was elected to Congress where he served from 1806 to 1813. When Senator William H. Crawford resigned his seat in the United States Senate, Bibb was selected to complete the unexpired term until 1816. In that year, he ran for a full Senate term, but was defeated.

Bibb County Courthouse

Bibb was quite unhappy after his first political defeat. He promptly resigned before his Senate appointment expired. However, as often happens, when one door closed another one opened. By April 1817, only a few months after the defeat, President Monroe appointed Bibb the governor of the newly created Alabama Territory. Bibb worked hard to prepare the Alabama Territory for statehood which came in 1819. In the gubernatorial election that year, William Wyatt Bibb became the first governor of the State of Alabama.

Governor Bibb presided over the state for a few short months. He was injured in a freak accident when he fell from his horse and died in July 1820. He had not yet reached his 39th birthday. On December 4, 1820, the state Legislature officially changed the name of Cahawba County to Bibb in his honor.

According to the Constitution of

Alabama at that time, in the event of a vacancy in the office of Governor, the president of the Alabama Senate automatically became Governor. Ironically, the president of the Alabama Senate was Governor Bibb's younger brother, Thomas, who had followed his brother's example and embarked on his own political career. Thomas Bibb was a college educated farmer and businessman who, as a state senator from Limestone County, had been selected by his peers to be presiding officer that body. He completed the unexpired term of his deceased brother.

The Act which created Cahawba County in 1818 designated that courts for the time being would be held at the Falls of the Cahawba, the site of present-day Centreville. The community was located along both the eastern and western banks of the Cahawba River, but the log courthouse stood on the western side. The first courts were held in May 1818.

On December 17, 1819, the Legislature passed an Act to establish a permanent seat of justice in Cahawba County. This Act called for an election on the first Monday of March 1820 for the purpose of electing five commissioners who, by a majority vote, would select a suitable site for the permanent county seat. The Act further provided that the commissioners could select a temporary seat of justice so long as it was within four miles of the center of the county. There was no such restriction for the permanent county seat. Also, the Act kept the seat of justice at the Falls of the Cahawba until the commissioners selected either a temporary or permanent site.

Apparently, the commissioners did not act swiftly enough in making their choice, or they simply could not agree on a site. Another Act concerning the county seat passed December 20, 1820. This Act authorized the sheriff to hold a new election for commissioners if a suitable site for a courthouse was not selected by December 25, 1821.

Another Legislative Act, this one passed on November 27, 1821, preempted the previous law, and appointed three commissioners who were to pick a temporary seat of justice within two miles of the center of the county by April 1, 1822. Including the Act which originally created the county, this was the fourth law passed concerning the county seat location in less than four years, and still no decision was made.

Finally, these last commissioners made a decision, locating the temporary county seat approximately nine miles east of Centreville at the intersection of the Pleasant Valley (or "Elyton to Selma") Road and the Fort Jackson (or "Tuscaloosa to Montgomery") Road. This location is approximately midway between present-day Centreville and Randolph, in what is now known as the Antioch community.

A frame structure had been built at these crossroads by Thomas Coker and his son, Noah. It was originally used as a home, tavern and inn. Once the county government moved into the building, the community became known as Bibb Court House. Later, after the county seat moved, it became known as Bibb Old Court House.

The first circuit court met at Bibb Court House in September 1822. The original size of the building is not known, but eventually it consisted of two stories and contained at least nine rooms and a wide hallway. Parts of this structure remained intact until the 1970s. It was then dismantled and the building materials were used on various pioneer homes which had been relocated to Tannehill State Park. Nothing remains today of the old courthouse at its crossroads location.

On December 15, 1824, three commissioners were appointed by the state Legislature to select a quarter section of land that was to be sold to raise funds for the construction of public buildings. They chose a quarter section near the temporary county seat. They laid out lots but, unfortunately, none were sold. One possible reason for the failure of this project was an inadequate supply of water in the area. Many wells were attempted but water was scarce.

Finally, after much discontent over the site of the temporary courthouse, on December 27, 1827 the Legislature authorized an election on the first Monday in February 1828 to determine the permanent seat of justice. The Legislature limited the choices to "Bibb Court House" and the "Falls of Cahawba" (Centreville). The latter location won. Courts continued to be held at Bibb Court House until May 1829.

Meanwhile, a committee of three prominent citizens was appointed by the Legislature in 1828 to select the specific location for a new courthouse. They chose a site at the falls on a hilltop above the eastern side of the river rather than at the previous location on the western side. They laid out lots around a large courthouse square. Bibb County's third courthouse was soon completed and the county seat of Centreville was incorporated January 21, 1832.

There are no surviving pictures of the third Bibb Courthouse. However, one noted feature of the court square was

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chinaberry trees planted in the 1830s that provided welcomed shade. These trees survived until a hard freeze and snowfall came in 1899. The courthouse itself was dismantled and rebuilt as a residence at another location in 1858, when it was decided that the county had outgrown its old courthouse and plans were begun for a new one.

It was also in 1858 that the last serious attempt to relocate the courthouse took place. The town of Randolph had recently grown because of the coming of the first railroad. Boosters from eastern Bibb County called for a countywide referendum on courthouse relocation. On May 3, 1858, voters chose between Centreville and Randolph. Centreville won and the issue was never raised again.

After the old frame courthouse was removed, construction began on a new brick courthouse. The new courthouse was constructed by C.A. Shelby and Son of Talladega. It cost $13,000. The two-story structure had a large second floor porch under a gabled roof which was supported by four Ionic columns. This courthouse served the county until it was razed in 1902.

The present Bibb County Courthouse was constructed on the site of its two immediate predecessors in 1902. William S. Hull was architect for the project. He later designed the Choctaw County Courthouse at Butler, Alabama in 1906. F.M. Dobson served as contractor. The total cost of the building was $34,000.

The architectural style of the courthouse is Victorian Eclectic with a strong Romanesque influence. It is a two-story brick structure with a corner clock tower. It has stone lintels and sills, a dentilled cornice and pediment, both square-headed and arched windows, and corner domes. The courthouse square and its surrounding historic district were named to the National Register of Historic Places on October 19, 1978.

On Friday, February 13, 1903, a disastrous fire struck the business district of Centreville. Only the newer brick buildings of the district survived, including the courthouse. The older frame structures were lost, but soon were replaced by modern brick buildings.

The present courthouse is over 90 years old, and age has taken its toll. The structure has suffered from deterioration, a leaky roof and inadequate funding for maintenance. The citizens of Bibb County have created several organizations to assist in preserving their courthouse. Among these have been the Bibb County Heritage Association, the Bibb County Restoration Society and the Bibb County Courthouse Preservation Society. Estimates of the cost of a restoration approach one million dollars.

Recent efforts have been taken to secure funding for the Bibb County Courthouse. A two mill ad valorem tax earmarked for the courthouse passed November 8, 1988. A multi-phased program of restoration and maintenance soon began. The first phase included the installation of a new roof and the restoration of the clock and clock tower. PH&J Architects, Inc. of Montgomery supervised this project, and the contractor was Residential and Commercial Improvements, Inc. of Tuscaloosa. As funds become available, additional work is planned. Though it had fallen on hard times, the Bibb County Courthouse is a structure of architectural character which the citizens of Bibb County will preserve. ■

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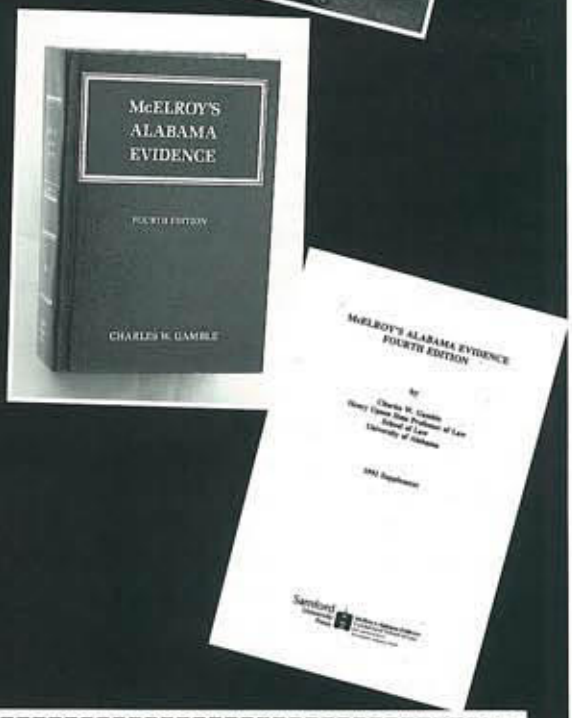

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EX PARTE INTERVIEWS WITH CORPORATE PARTY EMPLOYEES: AN OVERVIEW

by SCOTT DONALDSON

Every lawyer knows that ex parte[1] contact with a represented party during litigation is generally forbidden. To what extent, however, does this prohibition apply to the corporate adverse party? In other words, can the lawyer contact and interview a represented corporate party's employees without the opposing lawyer's consent or presence? (Assuming, of course, that the individual employee is not separately represented by counsel.)

On one hand, depositions and formal discovery procedures are costly and time-consuming.[2] Employees might be more willing to discuss certain matters without the presence of counsel for the corporate entity, thus enhancing the fact-finding process of discovery.[3] On the other hand, corporate parties should have the same legitimate protection against overreaching, and should enjoy the same protection of counsel in the adversarial nature of our legal system.[4]

ALABAMA ETHICS OPINIONS

The current applicable Opinions of the Alabama State Bar General Counsel are based upon former *Code of Professional Responsibility* DR 7-104(A)(1)[5], which provided:

> During the course of his representation of a client a lawyer shall not:
>
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.[6]

These opinions have allowed interviews or contact with employee witnesses to a tort, but only if they are low-level with no power to bind the corporation;[7] municipal employees with some managerial functions, but only if they cannot commit the city;[8] co-workers in a sex discrimination suit, but only if they cannot bind or speak for the corporation and are not officials or managers;[9] and a secretary for the defendant corporation, but only if she is not an agent of and cannot bind the corporation.[10]

The General Counsel has been careful to emphasize that the opinions are fact-specific ...

The General Counsel has been careful to emphasize that the opinions are fact-specific, and that the status of the interviewee most often involves a question of law unanswerable by the Office.[11] In RO-90-79[12], a lawyer representing the plaintiff wanted to interview an employee of the defendant corporation who possibly had relevant information, and possibly committed the tortious act which led to the suit. The lawyer asked the General Counsel to classify, by job title, those persons who fell into the prohibited categories. The opinion summarized the previous holdings, and concisely addressed the issue:

> The determination of whether an employee of a corporation is in a position to bind that corporation is a legal determination and is beyond the scope of this opinion or the authority of the Commission to decide. Accordingly, we can do no more in response to your query than to state, as we have in the past, that is ethically permissible for you to speak with the employee of a defendant corporation, without the knowledge or consent of the attorney for that corporation, if the person with whom you speak is not in a position to bind that corporation and is not the alleged tortfeasor or person whose actions have predicated the lawsuit. You should also be mindful that additional investigation is indicated, on these facts, as to the issue of whether this employee is the actual tortfeasor since contact, in that event, would be improper.
>
> We believe it would be appropriate at this time to indicate that by so holding we are not flashing a green light at Alabama lawyers and endorsing this practice. ...
>
> [W]hile contact with such an employee may be permissible, it is not recommended and should be undertaken with a clear view of the ethical mandate of Rules 4.3 and 4.4.[13]

THE NEW RULE

Effective January 1, 1991, DR 7-104 was replaced with Rule of Professional Conduct 4.2.[14] This new rule is said to be "substantially identical" to the former,[15] and provides:

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

Of course, the critical issue is the definition of "party".

Reference must be made to Rule 1.13, which states:

> (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.[16]

The comment to 1.13 defines "constituents" as officers, directors, *employees* and shareholders. It further provides that communications from a constituent are protected by the "confidentiality" of Rule 1.6, but:

> This does not mean, however, that the constituents of an organizational client are the clients of a lawyer.

Therefore, the corporation is the client of the lawyer, yet the corporation can only be contacted through "constituents". To determine whether constituents can be interviewed, you must return to 4.2. The opinion in RO 90-79, while applying DR 7-104, expressly adopted the comments to 4.2, which list three categories of persons with whom contact is prohibited:

> 1. persons having a managerial responsibility on behalf of the organization.

In Black's Law Dictionary, 5th ed. 1979, a manager includes a person "...vested with a certain amount of discretion and independent judgment". What is "managerial responsibility", and which employees are managers? One approach would be those employees who could be subject to leading questions under ARCP 43(b) as "managing agents". In *Stauffer Chemical Co. v. Buckalew*, 456 So.2d 778 (Ala. 1984), and *Whitworth v. Utilities Board*, 382 So.2d 557 (Ala. 1980), the determination of who is a managing agent appears to depend on title, job function, and whether the agent could have been named as a defendant.[17]

In one ethics opinion, persons who served in some managerial capacity were not automatically barred as long as they could not "commit" the corporation in the particular case.[18]

> 2. any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability.

In Alabama, an employee who acts within the scope of his employment may subject the corporation to liability.[19] Note that the imputed liability can arise from *any* employee. Therefore, every person who is to be interviewed could fall into the second category if he or she acted in the scope of employment.

> 3. [a person] whose statement may constitute an admission on the part of the organization.

The Supreme Court has held:

> . . . generally, to be admissible against a principal, declarations of an agent must be made within the scope of the authority conferred upon the agent and must be made while the agent is in exercise of his authority.[20]

The analysis under this prong presents additional problems in federal court litigation.[21] Federal Rule of Evidence 801(d)(2)(D) creates a hearsay exception for statements made by:

> . . . the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.

The federal rule appears to admit statements made *concerning* a matter within the scope of employment, while in Alabama the *authority* to make the statement itself must be within the scope of employment. The combination of the second and third prongs would appear to place all employees off-limits in federal court cases.

Therefore, if you can be assured that the corporate employee (1) has no managerial responsibility, (2) has not performed any act or omission which could subject the entity to liability, and (3) cannot make an admission, the employee may be interviewed. But since the legitimate purpose of the interview is to obtain relevant information not otherwise known, the status of the employee will rarely be clear in advance of the contact. Proceeding with the ex parte interview could be a violation of the rule, exposing the lawyer to sanctions.

DISCIPLINARY SANCTIONS

The risks associated with violating the rule may be severe. The most likely reference point is found in Section II, 6.3, of the Alabama Standards for Imposing Lawyer Discipline[22] which includes the following:

> Public reprimand is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and causes injury or potential injury to a party or interference or potential interference with the outcome of the legal proceeding.[23]
>
> Private reprimand is generally appropriate when a lawyer engages in an isolated instance of negligence in improperly communicating with an individual in the legal system, and causes little or no actual or potential injury to a party, or causes little or no actual or

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potential interference with the outcome of the legal proceeding.[24]

The commentary to the American Bar Association Standards[25] states that "[m]ost courts impose reprimands on lawyers who engage in improper communications".[26] The ABA notes one case, not involving a corporate client, in which a lawyer was reprimanded for communicating with a represented party *unknowingly*, as the rule is designed to prohibit the conduct regardless of the intent or lack thereof by the lawyer.[27] Another court held:

> The purpose of this prohibition is to prevent a person from being deprived of the advice of retained counsel by the bypassing of such counsel, and it is immaterial whether direct contact is an intentional or negligent violation of the rule.[28]

Thus, a risk associated with the ex parte interview is disciplinary action.[29] Seeking an opinion from the General Counsel and Disciplinary Commission in advance may shield the lawyer from ethical sanction,[30] but the opinion will not answer the fundamental question - is the employee a prohibited person within the scope of 4.2? [31]

PROCEDURE

So how do you determine if the interview is appropriate before the contact? Not surprisingly, what begins as an ethical problem often ends, or at least continues, before the court in which the action is pending. Sometimes, the lawyer seeking the interview has asked for relief, while in other cases, it is the corporation's counsel who turns to the trial court. Jurisdiction over the issue in civil[32] cases has been attempted through various procedures, including:

- motion under Civil Procedure Rule 26 seeking "protective orders" relating to discovery;[33]
- motion to strike pleadings that contain information gained through the ex parte contact;[34]
- motion to disqualify attorneys for conducting interviews;[35]
- motion to hold attorney in contempt of court;[36] or
- motion to invoke the "inherent" authority of the court. Most decisions at least mention this jurisdictional vehicle,[37] and some courts have expressly rejected any other approach.[38]

The results in cases arising in other jurisdictions have been varied, with no clear consensus. Some decisions center on whether the comments to 4.2 are even applicable. If the comments are found to inhibit the litigation process, they are rejected.[39] In Alabama, the Comments "...are intended as guides to interpretation, but the text of each Rule is authoritative".[40]

The holdings are uniform, however, that all permission to interview stops at attorney privileged information.[41] The comment to Rule 1.13, states:

> When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6.

Communication has been defined in Alabama as "...not only words uttered, but information conveyed by other means. Acts as well as words fall within that privilege."[42]

If the lawyer interviews an employee who has privileged information, he or she could be found to be overreaching.[43]

WHAT ABOUT ALABAMA ?

Alabama courts would likely follow the inherent power approach as a jurisdictional basis. In *Ex Parte Taylor Coal Co., Inc.*, 401 So.2d 1,3 (Ala. 1981), the Supreme Court held:

> [The jurisdiction of the Court over attorneys] is inherent, continuing, and plenary, and exists independently of statute or rules of equity, and ought to be assumed and exercised as the exigencies and necessity of the case require, not only to maintain and protect the integrity and dignity of the court, to secure obedience to its rules and process, and to rebuke interference with the conduct of its business, but also to control and protect its officers, including attorneys.[44]

Therefore, the trial court should have jurisdictional authority to act upon a request from a party, prior to or after the contact, to determine who can be interviewed ex parte.

Once in court, the scope and extent of the applicable ethics rule is often balanced against competing policy interests. A good example of how completely conflicting results can be obtained is found in a comparison of *Niesig v. Team I*, 76 N.Y.2d 363, 559 N.Y.S.2d 493, 558 N.E.2d 1030 (1990), and *Public Service Electric and Gas Company v. Associated Electric and Gas Insurance Services, Ltd.*, 745 F. Supp. 1037 (D.N.J. 1990). Both of these cases involve ex parte communications with former employees[45], but could be applicable to current employees of a corporation. The *Niesig* court dealt only with DR 7-104, and specifically rejected the definition of "party" as contained in the comments to 4.2. The court further held that employees who are mere witnesses to an incident should always be accessible to either side through ex parte contact, and a blanket rule of exclusion of all employees would frustrate legitimate informal interviews which often uncover additional facts. In rejecting an all encompassing prohibition, the court held:

> The single indisputable advantage of a blanket preclusion — as with every absolute rule — is that it is clear. No lawyer need ever risk disqualification or discipline because of uncertainty as to which employees are covered by the rule and which not. The problem, however, is that a ban of this nature exacts a high price in terms of other values, and is unnecessary to achieve the objectives of DR 7-104(a)(1).[46]

The New York court rejected a "control group" test, as well as a case-by-case analysis, and held "party" to only include:

> . . . corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect the corporations "alter ego") or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel. All other employees may be interviewed informally.[47]

Although claiming to have provided clear guidance, the court then noted that the opinion was limited to the facts presented, and ". . . there are undoubtedly questions not raised by the parties that will yet have to be answered." [48]

Public Service reached the opposite conclusion. This New Jersey federal court held that the *Niesig* test would do nothing but produce additional pre-trial litigation, and that the value of the ex-parte interview is "greatly exaggerated".[49] The court found that the second prong of 4.2 could not be avoided, as each employee's act could be imputed to the employer. In adopting a complete and total blanket exclusion for all employees, the court held:

> By prohibiting contact with the represented former employee, the opportunity for overreaching by the investigating party is nullified. The organization's interest in the act, omission or transaction is, therefore, also protected. Most importantly, the conclusion reached today has the decided benefit of simplicity. It thus serves the overall objective of the ethical rules by providing clear guidance to the bar concerning what conduct is prohibited and what conduct is not. This litigation, and numerous others like it, illustrate the bar's clear need for such an understandable bright line test. Adopting an alter ego test, as delineated by the New York Court of Appeals in *Niesig*, does nothing to further this objective. Indeed, that court's test serves only to further muddy this already clouded ethical area.[50]

What remedy will apply if the contact is found to be prohibited? The Supreme Court has recognized disqualification in conflict of interest cases,[51] but is reluctant to resort to this drastic measure.[52] In addition, conflict cases *necessarily* involve the remedy of disqualification, as the disciplinary rules in question contemplate withdrawal of representation.[53] Note, however, that the 11th Circuit has recognized the inherent authority of a district court to disqualify and fine counsel for improper contacts, although in a different procedural setting.[54]

In many federal jurisdictions, information obtained through prohibited ex parte interviews cannot be used as an admission under F.R.E. 801.[55] In *Stringer v. State*, 372 So.2d 378 (Ala. Crim. App. 1979), the district attorney contacted the represented defendant directly and obtained an "admission". While the opinion addressed other grounds, a troubling aspect is the holding that the disciplinary rules ". . . play no part . . ." in determining the admissibility of evidence in court.[56] On this basis, an ex-parte interview which resulted in an "admission" under the third prong could conceivably be used in state court, leaving disciplinary action or disqualification as the corporate party's sole recourse.[57]

A practical problem with any "after the fact" remedy is ascertaining exactly what information was obtained in violation, and what was obtained through legitimate sources. Any system which provides only this relief would seem to foster pre-trial litigation, including testimony from the interviewing lawyer.[58]

According to the leading commentators, the best approach is to consult counsel for the corporation in all but the most clear cases.[59] The corporation's lawyer, however, apparently may properly advise employees not to speak to the opposing counsel on an informal ex parte basis. Rule 3.4(d), which has no real counterpart in the former Code, states:

> A lawyer shall not:
>
> request a person other than a client to refrain from voluntarily giving relevant information to another party, unless:
>
> (1) the person is . . . an employee or other agent of a client and the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

The comment states that it ". . . permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees

may identify their interests with those of the client."[60]

The caveat contained in RO 90-79 suggests that a reasonable investigation of the facts must be undertaken prior to approaching any employee. In the event an interview is necessary, there seems to be no real impediment in sending interrogatories to the corporation, asking if certain named employees are shielded by 4.2. In the event the requesting party questions the response, the trial court should have the power to resolve the dispute just as in any discovery proceeding.[61] Note, however, that an interrogatory which broadly requests the corporation to divulge the names of all employees who would be prohibited shifts the burden away from the requesting party, and fails to recognize that the ex parte interview is an unusual and extraordinary discovery technique.[62]

CONCLUSION

Proceeding with an ex parte contact may be permissible, but is fraught with danger of disciplinary commission and/or trial court sanction. Absent an agreement from the corporate counsel, advance permission from the trial court (if appropriate) appears to be the only safe approach. ■

Footnotes

1. "Ex parte" generally refers to direct contact without the opposing lawyer's presence or consent. *See Annot.*, "Right of Attorney to Conduct Ex Parte Interviews with Corporate Party's Nonmanagement Employees," 50 A.L.R. 4th 652, §1 (1986).
2. *See Bouge v. Smith's Management Corp.*, 132 F.R.D. 560 (D. Utah 1990) for a list of 12 factors this court used evaluating the competing interests.
3. 132 F.R.D. at 565.
4. 132 F.R.D. at 565.
5. Found in 293 Ala. LXXVIII.
6. This article is concerned only with contacts initiated after litigation begins. Contact with a potential *defendant* prior to suit may even be permissible if the lawyer identifies himself and advises the defendant of his representation of the potential plaintiff. *See Ethics Opinion* RO-86-125. A somewhat contrary position is taken in *Hazard & Hodes, The Law of Lawyering*, 2d ed., 4.2:105 (Supp. 19990). Of course, once representation by counsel attaches, the prohibition should apply regardless of pending litigation.
7. RO-88-34. (June 30, 1988).
8. RO-84-160. (November 8, 1984).
9. RO-83-81. (May 19, 1983).
10. RO-88-27. (May 3, 1988). This opinion notes the previous holdings that *witnesses* may generally be contacted by either side. In RO-87-74 (June 2, 1987), an individual's physician may be contacted, but note that the physician would not be an "employee" of the individual. In RO-321 (April 21, 1980), criminal defendants can contact the state's witnesses, but the opinion recognizes that the witnesses are not the clients of the State.
11. *See* "Opinions of the General Counsel," *The Alabama Lawyer*, Vol. 47, No. 2 (March, 1986).
12. November 15, 1990.
13. RO 90-79, p. 2.
14. Published in 562-564 So.2d, *Alabama Reported*, and in *The Alabama Lawyer*, Vol. 56, No. 1.
15. Alabama comments to Rule 4.2.
16. Although this article deals with corporations, it could likewise apply by analogy to partnerships or other organizational entities. *See* comments to 1.13.
17. See also *Newark Insurance v. Sartain*, 20 F.R.D. 583 (N.D. Cal. 1957) for a "managing agent" definition.
18. See footnote 8.
19. *Southern Life and health Insurance Co. v. Turner*, 571 So.2d 1018 (Ala. 1990).
20. *Slade v. City of Montgomery*, 577 So.2d 887, 891 (Ala. 1991). See also *Gamble, McElroy's Alabama Evidence*, 4th ed., 195.01(7) (1991); *Colquitt, Alabama Law of Evidence*, 8.3q (1990).
21. All federal courts in Alabama appear to apply the existing Alabama ethics rules. Local Rule 7, Northern District; 1(4), Middle District; and 1(4), Southern District.
22. Adopted by Order of Supreme Court 6-7-90, effective 1-1-91. Published in 562-564 So.2d, *Alabama Reporter*, and in *The Alabama Lawyer*, Vol. 56, No. 1.
23. Section 6.33.
24. Section 6.34.
25. Reprinted in Section III, "Alabama Standards for Imposing Lawyer Discipline." See footnote 22.
26. ABA Standard 6.33 commentary. These standards are to be used only for reference purposes in Alabama. Order of Supreme Court, 6-7-90.
27. In Re: McCaffrey, 275 Or. 23, 549 P.2d (Or. 1976).
28. *Carter v. Kamaras*, 430 A.2d 1058, 1059 (R.I. 1981); *See also In Re: Lewelling*, 296 Or. 702, 678 P.2d 1229 (Or. 1984); Annot., "Communication With Party Represented By Counsel As Grounds For Disciplining Attorney," 26 A.L.R. 4th 102 (1983).
29. Note also that Rule 8.4(a) would operate to prohibit the lawyer from collateral involvement in the ex parte contact. *See also Massa v. Eaton Corp.*, 109 F.R.D. 312 (W.D. Mich. 1985).
30. *Alabama Rules of Disciplinary Procedure*, Rule 18.
31. *See* RO 90-79, where the request to classify employees was refused.
32. For the criminal context, see In Re FMC Corporation, 430 F. Supp. 1108 (S.D.W.Va. 1977); *United States v. King*, 536 F. Supp. 253 (D. Cal. 1982); *United States v. Ryans*, 903 F.2d 731 (10th Cir. 1990); *United States v. Lopez*, 89-0687, N.D. Cal. 1991; *Triple A Machine Shop v. State of California*, 213 Cal. App. 3d 131, 261 Cal. Rptr. 493 (Cal. Ct. App. 1989).
33. *Porter v. ARCO Metals Co.*, 642 F. Supp. 1116 (D.Mont 1986); *Wright v. Group Health Hospital*, 103 Wash.2d 192, 691 (N.D. Ill. 1989); *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621 (S.D.N.Y. 1990); *Amarin Plastics, Inc. v. Maryland Cup Corp.*, 116 F.R.D. 36 (D. Mass 1987); *Frey v. Department of Health and Human Services*, 106 F.R.D. 32 (E.D.N.Y. 1985).
34. *Ceramco, Inc. v. Lee Pharmaceutical*, 510 F.2d 268 (2nd Cir. 1975). *Fair Automotive Repair, Inc. v Car-X Service Systems, Inc.*, 128 Ill. App. 3d 763, 471 N.E. 2d 554 (1984).
35. *Ceramco, Inc. v. Lee Pharmaceutical*, 510 F.2d 268 (2nd Cir. 1975); *Meat Price Investigator's Association v. Spencer Foods, Inc.*, 572 F.2d 163 (8th Cir. 1978); In Re: Coordinated Pretrials Proceedings, 658 F.2d 1355 (9th Cir. 1981); In Re Korea Shipping Corp., 621 F. Supp. 164 (D. Alaska 1985).
36. *Massa v. Eaton Corp.*, 109 F.R.D. 312 (W.D. Mich. 1985).
37. *Chancellor v. Boeing Co.*, 678 F. Supp. 250 (D. Kan. 1988); *Bouge v. Smith's Management Corp.*, 132 F.R.D. 560 (D. Utah 1990); In Re: FMC Corporation, 430 F. Supp. 1108 (S.D.W.Va. 1977).
38. *Amarin Plastics, Inc. v. Maryland Cup Corp.*, 116 F.R.D. 36 (D. Mass 1987).
39. *B. H. v. Johnson*, 128 F.R.D. 659 (N.D. Ill. 1989); *Bouge v. Smith's Management Corp.*, 132 F.R.D. 560 (D. Utah 1990); *Morrison v. Brandeis University*, 125 F.R.D. 14 (D. Mass 1989).
40. "Preamble," *Rules of Professional Conduct.*
41. *See Porter v. ARCO Metals Co.; Polycast Technology Corp. v. Uniroyal, Inc.; Amarin Plastics, Inc. v. Maryland Cup Corp.; Frey v. Department of Health and Human Services*; In Re: "Coordinated Pretrial Proceedings"; footnote 33. *See generally Upjohn Co. v. United States*, 449 U.S. 383 (1981), discussed in "Zell, Scope and Application of the Attorney-Client Privilege - an Overview," 47 *Ala. Law.* 100, 103 (March 1986).
42. *Richards v. Lennox Industries, Inc.*, 574 So.2d 736, 739 (Ala. 1990).

43. *See* RO-86-125, December 23, 1986.

44. Quoting from *Jones v. Alabama State Bar*, 353 So.2d 508, 509 (Ala. 1977).

45. For further discussion of "former" employees, see *Porter v. ARCO Metals Co.*; *Polycast Technology Corp. v. Uniroyal, Inc.*; *Amarin Plastics, Inc. v. Maryland Cup Corp.*, footnote 33. *See generally Hazard and Hodes, the Law of Lawyering*, 2d ed., 4.2: 107 (Supp. 1990); "ABA Standing on Ethics and Professional Responsibility" Formal Opinion 91-359 (1991), discussed in the *ABA Journal*, Vol. 77, August 1991, p. 98.

46. 76 N.Y.2d at 372, 558 N.E.2d at 1034.

47. 76 N.Y.2d at 374, 558 N.E.2d at 1035. The Niesig court also claimed it was adopting a test similar to the one found in Alabama in RO-83-81 (1983).

48. 76 N.Y.2d at 376, 558 N.E.2d at 1036. The court also refused to consider what type of interviews could be conducted, and the content thereof. Niesig is analyzed in "Stewart, Ground Rules Shift for Ex Parte Interviews," *The National Law Journal*, March 11, 1991, S6.

49. 745 F. Supp. at 1043.

50. 745 F. Supp. at 1042-1043.

51. Ex Parte America's First Credit Union, 519 So.2d 1325 (Ala. 1988); *Roberts v. Hutchins*, 572 So.2d 1231 (Ala. 1990).

52. *See* Ex Parte Taylor Coal Co., Inc., 401 So.2d 1 (Ala. 1981); Ex Parte State Farm Mutual Automobile Insurance Co., 469 So.2d 574 (Ala. 1985).

53. DR 5-101, 105; "Rule of Professional Conduct" 1.7-12.

54. *Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193 (11th Cir. 1985).

55. *B.H. v. Johnson*, 128 F.R.D. 659 (N.D. Ill. 1989); *Chancellor v. Boeing Co.*, 678 F. Supp. 250 (D. Kan. 1988); *Frey v. Department of Health & Human Services*, 106 F.R.D. 32 (E.D.N.Y. 1985).

56. 372 So.2d at 382-383.

57. *See* In Re: Korea Shipping Corp., 621 F. Supp. 164. 170 (D. Alaska 1985).

58. *See* Public Service, supra.

59. *Hazard and Hodes, The Law of Lawyering*, 2d ed. 4.2:106 (Supp. 1990).

60. For other cases construing the right of counsel to advise employees not to talk on an ex parte basis, see *Porter v. ARCO Metals Co.*, 642 F. Supp. 1116 (D. Mont 1986); *Wright v. Group Health Hospital*, 103 Wash.2d 192, 691 P.2d 564 (1984); *B.H. by Monahan v. Johnson*, 128 F.R.D. 659 (N.D. Ill. 1989); *Niesig v. Team I*, 76 N.Y.2d 363, 559 N.Y.S.2d 493, 558 N.E.2d 1030 (1990).

61. *See Richards v. Lennox Industries*, footnote 42; Ex Parte Great American Surplus Lines Insurance Co., 540 So.2d 1357 (Ala. 1989).

62. *See* Public Service, supra.

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The primary purpose of the Bankruptcy and Commercial Law Section is to facilitate communication among its members concerning bankruptcy and commercial law matters and legal decisions, with a view toward promoting consistent application of these laws in the various districts and circuits of Alabama. The section has four standing committees: bankruptcy practice; commercial practice; CLE/annual meeting; and communications/newsletter. Additional committees are appointed on an *ad hoc* basis. The section sponsors CLE programs and a law school writing competition, and also is involved in promoting legislation needed in the commercial law practice.

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Attorneys who might be interested in joining this section include those who have an interest in radio, television, cable, newspaper, magazine/book publications, public utility or common carrier issues (including cellular telephone service) and related subjects such as defamation, privacy and public access law. Not only attorneys who represent businesses of this nature, but also attorneys representing municipalities on these issues would likely be interested in this section.

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This section is involved in projects of interest to every member of the bar. The section works with the Alabama Law Institute, revising the corporate laws of Alabama, and publishes a newsletter for section members.

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Criminal Law

The Criminal Law Section is comprised of bar members having an interest in matters relating to the criminal justice system of our state and federal courts. The area of criminal law constantly is changing and provides many opportunities for active discussion and input. Involvement in this section will provide members with contacts throughout the state.

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Services and activities of the Environmental Law Section are professional improvement in the field of environmental law, analysis and reporting to members of developments in the field, and communication with other lawyers practicing in the environmental law area.

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Family Law

The Family Law Section of the Alabama State Bar was established in 1984. It publishes a newsletter for the benefit of family law practitioners. It also has a legislation subcommittee whose function is to consider state and federal legislation in the area of family law and the law of domestic relations and to suggest needed reforms. The section has a legal education subsection which presents programs for the members.

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This section is open to members of the plaintiffs and defense bar who are interested or involved in the ever-broadening interface between law and health care, including but not limited to various state and federal issues such as Medicare fraud and abuse, payment problems, merger and acquisition of health care entities, antitrust, fiscal management, peer review, provider malpractice, individual rights, and supreme court actions.

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This section includes lawyers from throughout the state whose practice involves work in the areas of labor law, fair employment law, employee benefits law and occupational safety and health law. In addition to providing a forum for the exchange of information and ideas, the section sponsors an annual two-day labor law seminar and, with the labor law sections of various other state bars, co-sponsors an annual multistate labor and employment law seminar.

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Litigation

The Litigation Section seeks to (1) provide a forum where all trial attorneys may meet and discuss common problems; (2) provide an extensive educational program to improve the

competency of the trial bar; and (3) improve the efficiency, uniformity and economy of litigation and work to curb abuses of the judicial process.

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Oil, Gas and Mineral Law

The Oil, Gas and Mineral Law Section was established in 1976 and consists of an oil and gas division and a hard minerals division. The primary purpose of the section is to keep its members apprised of developments in the law, and this is accomplished by co-sponsoring with ABICLE an annual seminar on oil, gas and mineral law, as well as sponsoring a "mini-seminar" at the section meeting during the annual meeting of the state bar. Currently, the section is preparing a handbook on oil, gas and mineral law in Alabama.

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Real Property, Probate and Trust Law

This section cooperates with and assists the Cumberland Institute for Continuing Legal Education in preparing and presenting programs relating to real property, trust and probate matters for members of the Alabama State Bar. The section, also in cooperation with the Cumberland School of Law, publishes a periodic newsletter reviewing recent court decisions dealing with real property, trust and probate matters and reports other matters of current interest relating to these topics. An annual seminar is held in conjunction with the annual meeting of the state bar.

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Taxation

Membership in this section is primarily composed of tax practitioners. The section gives special emphasis to Alabama tax matters and has been involved in changing Alabama law and assisting the Department of Revenue in writing tax regulations. A program is held each year during the annual meeting of the state bar.

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Young Lawyers' Section

The Young Lawyers' Section of the Alabama State Bar is composed of all lawyers who are 36 years of age and under or who have been admitted to the bar for three years or less. The section conducts various seminars throughout the year for lawyers and other professionals. It also sponsors service projects designed to aid the public in their understanding of the law and assist in solving legal problems. There are no dues since persons who are members of the Alabama State Bar and fulfill the age or admission requirements automatically are members.

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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

17 Thursday
KEY ISSUES IN WETLANDS REGULATION IN ALABAMA
Montgomery
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-7909

17-18
THE ADA & ITS EFFECT ON WORKERS' COMPENSATION
Birmingham, Wynfrey Hotel
Alabama Committee on Workers' Compensation
Credits: 6.3 Cost: $75
(205) 521-8304

18 Friday
MOTIONS PRACTICE
Birmingham, Civic Center
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

BASIC ISSUES IN CONSUMER BANKRUPTCY
Birmingham, Wynfrey Hotel
Cumberland Institute for CLE
Credits: 6.0
(800) 888-7454

BASIC ISSUES IN BUSINESS BANKRUPTCY
Birmingham, Wynfrey Hotel
Cumberland Institute for CLE
Credits: 6.0
(800) 888-7454

23 Wednesday
ADVANCED REAL ESTATE LAW IN ALABAMA
Birmingham
National Business Institute, Inc.
Credits: 6.0
(715) 835-7909

24 Thursday
MOTIONS PRACTICE (video replay)
Sheffield, Ramada Inn
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

MOTIONS PRACTICE (video replay)
Dothan, Ramada Inn
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Credits: 6.0
(800) 627-6514

ADVANCED REAL ESTATE LAW IN ALABAMA
Huntsville
National Business Institute, Inc.
Credits: 6.0
(715) 835-7909

25 Friday
SMALL ESTATES: PLANNING & ADMINISTERING
Birmingham, Civic Center
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

KEY ISSUES IN ADVISING ELDERLY CLIENTS
Birmingham, Wynfrey Hotel
Cumberland Institute for CLE
Credits: 6.0
(800) 888-7454

29 Tuesday
IMPACT OF THE CIVIL RIGHTS ACT OF 1991
Mobile
National Business Institute, Inc.
Credits: 6.0
(715) 835-7909

30 Wednesday
IMPACT OF THE CIVIL RIGHTS ACT OF 1991
Montgomery
National Business Institute, Inc.
Credits: 6.0
(715) 835-7909

OCTOBER

2 Friday
COLLECTIONS
Birmingham, Harbert Center
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

COMPLYING WITH THE AMERICANS WITH DISABILITIES ACT
Birmingham, Wynfrey Hotel
Cumberland Institute for CLE
Credits: 3.0
(800) 888-7454

8 Thursday
REAL ESTATE
Montgomery, Madison Hotel
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

9 Friday
REAL ESTATE
Birmingham, Civic Center
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

HOW TO TRY AUTOMOBILE TORTS LITIGATION
Birmingham, Wynfrey Hotel
Cumberland Institute for CLE
Credits: 6.0
(800) 888-7454

14 Wednesday
BASIC BANKRUPTCY IN ALABAMA
Birmingham
National Business Institute, Inc.
Credits: 6.0
(715) 835-7909

15 Thursday
BASIC BANKRUPTCY IN ALABAMA
Huntsville
National Business Institute, Inc.
Credits: 6.0
(715) 835-7909

16 Friday
THE BASICS OF PRACTICE IN PROBATE COURT
Mobile, Admiral Semmes
Cumberland Institute for CLE
Credits: 6.0
(800) 888-7454

22 Thursday
TORTS
Mobile, Ramada Inn
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

23 Friday
TORTS
Montgomery, Civic Center
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

WORKING SMARTER NOT HARDER
Birmingham, Carraway Convention Center
Alabama Bar Institute for CLE
Credits: 3.3
(800) 627-6514

DEVELOPMENTS IN CIVIL PROCEDURE: STATE AND FEDERAL
Birmingham, Hoover Complex
Cumberland Institute for CLE
Credits: 6.0
(800) 888-7454

27 Tuesday
OSHA COMPLIANCE UPDATE IN ALABAMA
Birmingham
National Business Institute, Inc.
Credits: 6.0
(715) 835-7909

28 Wednesday
OSHA COMPLIANCE UPDATE IN ALABAMA
Huntsville
National Business Institute for CLE
Credits: 6.0
(715) 835-7909

29 Thursday
TORTS
Huntsville, Civic Center
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

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

REPRESENTING SMALL BUSINESSES IN ALABAMA
Birmingham, Wynfrey Hotel
Cumberland Institute for CLE
Credits: 6.0
(800) 888-7454

NOVEMBER

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

BUSINESS TORTS & ANTITRUST
Birmingham, Tutwiler Hotel
Cumberland Institute for CLE
Credits: 6.0
(800) 888-7454

12 Thursday
DAMAGES
Birmingham, Civic Center
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

BASICS OF BANKRUPTCY
Birmingham, Civic Center
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

FRAUD LITIGATION IN ALABAMA
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National Business Institute, Inc.
Credits: 6.0
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13 Friday
DAMAGES
Montgomery, Civic Center
Alabama Bar Institute for CLE
Credits: 6.0
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BANKRUPTCY
Birmingham, Civic Center
Alabama Bar Institute for CLE
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WRITING FOR LAWYERS
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Commercial Litigation in the United States Supreme Court

by ERIC G. BRUGGINK

Introduction

By this article I hope to furnish something of a Cook's tour of commercial claims against the federal government. Litigation against the government can generate some of the most stimulating and challenging litigation in the federal courts. The issues are often complex and frequently have far-reaching impact. The subject is sufficiently broad and fraught with controversies that the presentation has to be in outline form, with highlights on some of the hazards and recurring themes.

At a trial level, commercial claims against the federal government are scattered across five fora — the United States Claims Court, the district courts, the various boards of contract appeals, the Tax Court, and the Court of International Trade. My focus will be the United States Claims Court, however. That is partly because it is what I know most about, and partly because virtually all commercial claims against the federal government either take place in the Claims Court or could be litigated in some form in the Claims Court.[1]

The discussion begins with the principle of sovereign immunity. The balance will set out the sources and the limits of Claims Court jurisdiction over various subject matters, and explain parallel or similar litigation in other jurisdictions. The article will conclude with a brief discussion of some peculiarities and common pitfalls.

I. OVERVIEW: WHAT IS A COMMERCIAL CLAIM?

There are several fracture points dividing litigation against the government into natural cleavage planes. It can be approached by subject matter, by forum, by statutes, by type of relief sought, or even by underlying themes. The trouble with striking all these planes is that they intersect, and the result tends to look like a pile of rubble.

> *It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals.*
>
> *Abraham Lincoln*

The simplest way to get into the subject is to describe what I mean by a commercial claim. That, in turn, is done most quickly, if perhaps superficially, by listing the types of cases our court can and cannot hear. About forty percent of the Claims Court docket[2] consists of contract cases. The vast majority of that contract jurisdiction is limited to claims for money that is presently due, i.e., not for declaratory relief. A small fraction of contract claims are for pre-contract award injunctive relief, for example, to have a bidder reinstated into competition for a contract award.

About 25 percent of the cases are tax refund claims. In addition there are a small number of declaratory judgment actions brought by organizations claiming to be tax exempt under I.R.C. § 501(c)(3).

The court also hears certain types of civilian and military pay claims. The simplest example of a civilian pay claim[3] would be one brought under the Fair Labor Standards Act against a federal agency employer, typically for a group of workers seeking overtime wages. Military cases typically involve claims that a serviceman was illegally separated or denied disability retirement.

Another part of the court's jurisdiction, and perhaps one of the most important ones in terms of impact or dollars, if not in terms of numbers of cases, is takings claims under the United States Constitution. This is particularly true in view of the increasing number of claims made for regulatory takings, or "inverse condemnations." The balance of the court's cases are primarily made up of Indian claims, claims of patent infringement by the government, and claims under a statutory entitlement scheme, such as a grant-in-aid or agricultural subsidy program.

What I mean to exclude from the definition of commercial suits are tort claims, declaratory or injunctive relief sought under the Administrative Procedures Act, Social Security Act claims, most claims by civilian employees, and other suits of similar character.

Although such cases can have direct or indirect monetary fallout, most people would not consider them commercial claims, and they cannot be brought in the Claims Court. They have historically been within the jurisdiction of the district courts, or more recently, in the case of personnel claims, of the Merit Systems Protection Board.

II. THE ESSENTIAL INQUIRY: HAS SOVEREIGN IMMUNITY BEEN WAIVED?

The beginning and ending point of any discussion about commercial claims against the federal government has to be sovereign immunity. As a principle it may be under assault and out of vogue in various quarters, but it nonetheless forms the backdrop for all suits in the Claims Court. Despite the overwhelming impact of the administrative state, and the fact that the government is constantly involved in lawsuits, all the basic underpinnings of sovereign immunity still exist, particularly when it comes to recovering money damages. Even though the principle is arguably pre-constitutional, it clearly has its plainest manifestation in Article I § 9, clause 7 of the Constitution: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

There are at least three — for lack of a better word — "elements" of a waiver of sovereign immunity that have to be considered. Arguably only the last element — creation of a forum for hearing a certain type of claim against the government — truly constitutes a waiver of sovereign immunity. The Supreme Court has taught, however, that the primary jurisdictional statute applicable to the Claims Court, the Tucker Act, 28 U.S.C. § 1491(a)(1) (1988), discussed below, creates no substantive right to relief. Having a forum with no substantive right is small consolation, so I prefer to think of these three elements as necessary to "perfect" a waiver of immunity.

The first element is best illustrated by a 1990 decision of the Supreme Court, *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990). Richmond was a federal annuitant. He was concerned about the amount of outside income he could earn before jeopardizing his annuity. He called his former agency and spoke with a personnel specialist, who gave him a figure. Richmond, in reliance on the specialist's representation, earned up to that amount. It turned out, however, that the statement was wrong. He had exceeded the statutory limit and his annuity was reduced. Richmond sued for the withheld amount, pointing to a classic case of estoppel. Result? The Supreme Court held that he could not recover. A federal employee, even one acting within the scope of her employment, cannot waive the government's right to insist on compliance with the statute. Why? Because Congress only waived sovereign immunity to the extent set out in the statute. To go beyond that would mean that a single government employee, and not Congress, had access to the Treasury. One step, therefore, in circumventing sovereign immunity is that your client must be linked to an appropriation of funds. In other words, Congress has to have intended that your client, under the particular circumstances, falls into a class of persons or entities that could get money out of the Treasury.

The second element has to do with authority of the government employee with whom your client deals. In the *Richmond* example, the personnel officer had authority to act. The advice was just wrong. Suppose the following. Congress has appropriated monies that the Air Force may use to build new runways. Your client gets the contract. In the midst of performance, one of the government engineers, who acts like he knows what he's doing, tells the contractor to use a higher quality of concrete. Unknown to the contractor, the engineer has not been instructed by the Contracting Officer to make such a change. The engineer has no independent authority to act. The Contracting Officer, who has been delegated authority to make amendments to the contract, is unaware of the instructions. Your client's request for extra compensation would probably be turned down, unless the Contracting Officer ratified the instructions. The reason is that there is no such thing as apparent authority when you deal with the government. The client assumes the risk of making certain that the person it deals with has actual authority to obligate the government. In other words, only someone within the chain of delegated authority from Congress through the Executive branch can obligate federal funds.

The third element of waiver is for Congress to create a forum for suits. For decades after the country's founding, there was no general waiver of sovereign immunity. For example, if someone had a contract with the government on which he was not paid the full amount, the only recourse was to get a private bill through Congress. That circumstance has changed dramatically. The district courts, the Claims Court, the Tax Court, and various boards and administrative agencies have been given jurisdiction to hear suits against the government. These delegations will be examined below in the context of the various types of claims against the government.

The point is, when suing the government, a litigator has to address all three concerns: 1) Is there some legislation (or a constitutional provision) that links my client to an appropriation of funds?[4] 2) Were the government actions on which the litigator is relying taken by persons authorized to act? 3) Is there a forum that has been authorized to hear claims of this type?

Eric Bruggink

Judge Bruggink was nominated by President Reagan and confirmed as a judge of the United States Claims Court on April 15, 1986. He is a *cum laude* graduate of Auburn University, receiving his bachelor's degree in 1971, and master's degree in 1972. Judge Bruggink received his J.D. in 1975 from University of Alabama School of Law, where he was note and comments editor of the Law Review.

He was appointed director, Office of Appeals Counsel of the U.S. Merit Systems Protection Board, in November 1982, and served there until his appointment at the Claims Court. He served as law clerk to Chief Judge Frank McFadden of the Northern District of Alabama, and then was an associate at the Dothan firm of Hardwick, Hause & Segrest. From 1977-79, he was assistant director of the Alabama Law Institute, and from 1979-82 was an associate with the Montgomery firm of Steiner, Crum & Baker.

Born in Kalidjati, Indonesia of Dutch parents, he became a naturalized citizen of the United States in 1960.

These concerns are not trivial. Although many of the paths through the Claims Court are well-worn, they are narrow. Small deviations can lead to unexpected and costly results. To use an analogy from the ring toss booth at the carnival: You don't get credit for leaners. Similarly, in the Claims Court (and the same point is true for other jurisdictions that handle money claims), you have to precisely ring the bottle. Anything else drops into that black abyss called sovereign immunity. With that long introduction, I want to focus on the types of cases the Claims Court handles.

III. JURISDICTION OF THE CLAIMS COURT; CONTRAST WITH OTHER FORA

The Court of Claims, our predecessor court, was established in 1855.[5] Its initial role was to issue advisory opinions to Congress about disposition of what were, effectively, equitable claims against the government. It eventually was made a real court, whose decisions did not have to be approved by Congress. It had both appellate and trial functions. Those functions were split in 1982, with passage of the Federal Courts Improvement Act.[6] The old Court of Claims ceased to exist[7], and two new courts were formed: the United States Court of Appeals for the Federal Circuit and the United States Claims Court.

The Federal Circuit is an Article III appellate court. It has exclusive jurisdiction to hear appeals from the Claims Court, the Merit Systems Protection Board, the Court of Veterans Appeals, the Court of International Trade, and the various boards of contract appeals.[8] It is also the only circuit court that hears appeals from all the district courts in cases involving patents or cases arising under the Little Tucker Act, to be discussed below.

The Claims Court is an Article I trial court. Its jurisdiction is geographically broad (nationwide), but substantively narrow. Fundamentally, it hears commercial money claims against the federal government. All filings are done in Washington, D.C., but trials are held anywhere in the country. For courtroom activities short of trial, out-of-town counsel are normally allowed to appear by telephone. There is no right to a jury. In the absence of a specialized statute, the limitations period applicable to actions brought in the Claims Court is six years.[9] The court has its own set of procedural rules, but they are largely patterned after the Federal Rules of Civil Procedure. The Federal Rules of Evidence are applied. The court has 16 active judges, who are appointed by the President, with the advice and consent of the Senate.[10] The judges sit separately, and their decisions are not binding on each other.

The United States is always the named defendant in the Claims Court. It is represented by the Department of Justice. Although the government cannot initiate claims in the Claims Court, as a defense, it can assert any set-off or counterclaim it has.[11] Claims Court rules permit third-party practice, although no recovery can be directly obtained against a third-party defendant. Instead, if an entity has been properly joined as a third-party, the results of the Claims Court litigation may be asserted against it elsewhere. This does not run afoul of the seventh amendment. *Maryland Casualty Co. v. United States*, 135 Ct. Cl. 428, 141 F. Supp. 900 (1956).

The single most important piece of jurisdictional legislation with respect to the Claims Court is the Tucker Act. It is found at 28 U.S.C. § 1491(a)(1). This statute was passed in basically its present form in 1887. It gives the Claims Court trial jurisdiction over three classes of claims: express or implied-in-fact contracts;[13] claims based on the fifth amendment to the Constitution; and claims founded upon any act of Congress or regulation of an executive department that can fairly be construed to mandate the payment of money. What these types of cases have in common is that the government has in effect made a promise to pay money to someone. By judicial gloss, it is clear that the money at issue has to be due. In other words, the court does not, at least under the Tucker Act, have authority to award declaratory relief.[14] There is a comparable provision, called the Little Tucker Act, that gives the district courts jurisdiction over identical types of cases, so long as the amount in controversy is not more than $10,000.[15] The Tucker

Act specifically excludes jurisdiction over tort claims.

It is worth emphasizing that the Supreme Court has held that the Tucker Act does not create a substantive right to collect money damages from the government.[16] Those substantive rights have to be elsewhere found in contracts, the Constitution, statutes, or executive regulations.

There are other jurisdictional statutes relating to commercial claims. For sake of brevity, they will be considered in the larger context created by the more pervasive Tucker Act.

A. Contract claims

Virtually all contract litigation against the federal government is now governed by the Contract Disputes Act of 1978. 41 U.S.C. §§ 601-613 (1988) ("CDA"). The CDA has revolutionized how most contract actions against the government are litigated. The act sets up a compulsory administrative dispute resolution process for most types of contracts. It creates the role of a Contracting Officer ("CO"). The contractor must get its operating instructions through the CO, and all claims must be submitted to the CO. Although the administrative process is compulsory, final decisions on administrative claims are not, however, entitled to a presumption of correctness if they are appealed.[17]

Appeals of a final decision can go to either the Claims Court or to one of the numerous agency boards of contract appeals. The limitations period is different, however. The contractor has 90 days from a final decision to appeal to a board,[18] or one year to go to the Claims Court. It cannot do both.[20] The district courts have no jurisdiction under the CDA. The balance of what I will say about the CDA is set out in Part IV, dealing with some common pitfalls. With respect to the CDA, there are many.

Those contract cases that are still brought directly under the Tucker Act, as opposed to the CDA, typically involve implied-in-fact contracts,[22] or contracts largely controlled by regulations, such as price-support or grant-in-aid programs,[23] contracts in which the government is selling, rather than buying, goods or services,[24] or other unique circumstances.[25] Tucker Act contract claims are subject to the general six-year limitations period.

Historically, the Claims Court has not had jurisdiction to grant injunctive or declaratory relief in the absence of a particular legislative grant. The claim, in other words, must be for money presently due. This limitation has also been applied in the context of Claims Court CDA claims. Thus, if a contractor has been default terminated by the government, it cannot challenge that action unless it has "monetized" the controversy either by submitting a claim to the CO for termination damages, or by appealing a final decision on a government demand for return of monies.[26] In this respect, the boards of contract appeal have broader jurisdiction. The Federal Circuit has held that the boards may hear "naked" appeals of a default termination.[27]

Pre-contract award injunctive relief

There is one area in which the Claims Court, as well as other fora, has been given purely injunctive powers in dealing with contract disputes. The Federal Courts Improvement Act gave the Claims Court authority to grant pre-contract award injunctive relief to a bidder, if the complaint is filed before the contract is awarded. 28 U.S.C. § 1491(a)(3). There are comparable procedures available before the General Services Board of Contract Appeals ("GSBCA"), and the General Accounting Office ("GAO"). The GSBCA handles claims involving solicitations for purchase of automatic data processing equipment. 40 U.S.C. § 759 (1988). The GAO (Comptroller General) can hear all other pre-award claims. 31 U.S.C. § 3552 (1988). Most bid protests go to either of these two entities.

If the contract has already been awarded, a suit for injunctive relief has to be brought in district court.[28] So long as the complaint is filed prior to award, however, subsequent issuance of the contract will not divest the Claims Court of jurisdiction.[29]

The standard of review in bid disputes is much narrower than it is with respect to disputes arising out of performance of awarded contracts. The issue is whether the implied contract of "fair and honest" consideration of the bid was breached. This has been construed in a way similar to the standard of review applied by district courts under the Administrative Procedures Act.[30] The CO's decision is only reversed if it is found to be arbitrary, capricious, an abuse of discretion, without rational basis, or violative of law or regulation in a prejudicial fashion.[31]

B. Constitutional takings claims

The only constitutional provision that has been construed as allowing a money recovery under the Tucker Act[32] is the fifth amendment takings clause, which obligates the government to pay for the value of private property it takes for public use. These cases, which are referred to as "inverse condemnation" proceedings, tend to fall into two types: physical invasion or destruction cases, and claims based on regulatory or legislative takings. What they have in common is that some official action[33] of the United States government has deprived the plaintiff of the possession, use or value of property. They are thus distinct from formal condemnation proceedings, which are initiated by the government itself and have to be brought in the district courts. The issue in the latter proceeding is not whether the government has taken the property, but only what it is worth. In an inverse condemnation suit, the plaintiff first has to establish that the government action constituted a taking, although valuation can also become a major issue.

The types of cases adjudicated under the takings clause can be illustrated by listing some of the judgments entered in the Claims Court within the last two years. The figure in parentheses is the amount recovered: denial of dredge and fill permit under Clean Water Act, *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990) ($2,650,000); *Florida Rock Industries, Inc. v. United States*, 21 Cl. Ct. 161 (1990) ($1,029,000); almond orchard destroyed by lowered water table resulting from federal irrigation project, *Clyde Baker, et al. v. United States*, No. 83-675C (Cl. Ct. Oct. 22, 1990) ($1,250,000); legislative designation of private lands as an "addition" to national park, *Perch Assoc., Ltd. v. United States*, No. 89CV-610 (Cl. Ct. Dec. 18, 1990) ($80,884,995); effect of Surface Mining Control and Recla-

mation Act's[34] prohibition on surface mining of property, *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir. 1991) ($60,296,000); *BHP-Utah Int'l, Inc. v. United States*, No. 86CV-565, (Cl. Ct. Dec. 20, 1990) ($7,500,000); failure to take all property rights associated with condemnation of land for White Sands Missile Range, *McDonald v. United States*, No. 84CV-403 (Cl. Ct. Mar. 21, 1991) ($650,000); destruction of land by recurrent flooding, caused by federal channelization project, *Turner v. United States*, 23 Cl. Ct. 447 (1991) ($224,920).

C. Tax claims

There are three types of tax cases heard in the Claims Court. In 1915, the Supreme Court held that the Tucker Act gives the Claims Court jurisdiction over tax refund claims.[35] A prerequisite is a timely administrative refund claim, I.R.C. § 7422(a), and full payment of the disputed amount.[36] By statute, district courts are given similar jurisdiction.[37] Full payment in advance is what distinguishes tax refund claims in either the Claims Court or a district court from deficiency cases brought in the Tax Court. *See* I.R.C. § 6213.

The second type of tax case is one for a declaratory judgment that an organization is tax exempt under section 501(c)(3) of the revenue code. The Claims Court, the Tax Court, and the District Court for the District of Columbia share concurrent jurisdiction to hear such cases.[38] These are *de novo* determinations, but they are based on the record assembled before the Commissioner of the IRS.[39] As to the reasons stated in the Commissioner's decision, the plaintiff bears the burden of proving them to be wrong.[40]

A third type of tax case heard in the Claims Court is one for review of administrative adjustment requests by partnerships.[41] This jurisdiction is shared with the Tax Court, and any appropriate district court.

As to the strategy involved in practitioners picking between the three fora typically available in tax litigation, I can only pass along the factors I have heard mentioned by attorneys. One obvious consideration as between a deficiency suit on the one hand (Tax Court) and a refund claim on the other (district court or Claims Court), is whether the client wants to pay the deficiency up front, and if successful, collect back interest. Also, as in the district courts, the range of discovery available in the Claims Court is broader than that typically employed in the Tax Court. Because appellate review of Tax Court decisions and decisions of local district courts is to the regional circuit court, attorneys sometimes have the option of picking a more favorable forum. They may prefer the decisional law in the Claims Court, with its appellate review in the Federal Circuit. Whatever the reasons, the number of refund claims in the Claims Court is much smaller than the number of deficiency suits in the Tax Court, although the average size of the claim in the Claims Court is many times larger than in either of the other two fora.

D. Statutory and regulatory claims

As to claims based on a statute or executive regulation — the only limit is a lawyer's imagination. Some easy examples are the Fair Labor Standards

NOTICE

All Alabama Attorneys

Changes regarding Licensing/Special Membership Dues 1992-93

Act #92-600 was passed by the Alabama Legislature and amends Section 40-12-49, *Code of Alabama*, 1975, effective **October 1, 1992.**

This act involves important changes as follows:

1. License fees increase from $150 to $200. Special membership dues increase from $75 to $100.
2. Attorneys no longer purchase, from a county probate judge or license commissioner, annual occupational licenses to practice but, instead, purchase these from the Alabama State Bar.

All licenses to practice law, as well as payment of special membership dues, will be sold through the Alabama State Bar Headquarters. Licenses must be purchased between October 1 and October 31 or be subject to an automatic 15 percent penalty. **Second notices will not be sent!**

In mid-September, a dual invoice to be used by both annual license holders and special members will be mailed to every lawyer admitted to practice law in Alabama. Upon receipt of payment,those who purchase the license will be mailed a license and wallet-sized license for identification purposes.

Those electing special membership will be sent a wallet-sized ID card for identification purposes and also to serve as a receipt.

If you do not receive an invoice, please notify Alice Jo Hendrix, membership services director, at 1-800-354-6154 (in-state WATS) or (205) 269-1515 **immediately!**

Act, or other military[42] or civilian pay statutes.[43] The test that is always applied is whether the statute or regulation, fairly construed, mandates the payment of money.[44] The statute can either affirmatively direct the payment of money, as in the case of pay statutes, or it can do so by implication, as when the government has allegedly improperly exacted the plaintiff's money under color of a statute which the plaintiff claims has been misapplied.[45] The latter is the real basis of the Claims Court's tax refund jurisdiction.[46]

E. Congressional reference cases

Sometimes litigants have no legal right to relief, but they may have a strong equitable claim. For example, the statute of limitations may have run on an otherwise valid claim. If the claimant can get Congress to pass a piece of special legislation referring the case to the Claims Court, those legal defenses will not be a bar.[47] Instead, the court will look primarily at the equities of the situation, and will make a recommendation to Congress to either pay the claim or not. Since this involves an advisory opinion rather than a judgment, this jurisdiction would otherwise run afoul of the "case or controversy" clause of Article III, if the Claims Court were not an Article I court. For the same reason, there is no appellate review of a Claims Court recommendation. Instead, the initial decision is made by a single judge, and it is then reviewed by a three-judge panel of Claims Court judges. It is the only substantive occasion on which judges of the court sit in panels. Perhaps this is one reason the judges of the court are so collegial.

F. Miscellaneous jurisdiction

The court hears claims that the federal government (or one of its contractors) infringed a private patent. Although the theoretical basis of this jurisdiction is the fifth amendment takings clause, there is now also a special statute that gives the court jurisdiction to hear such claims. 28 U.S.C. § 1498. Indian claims for money proceed under both specialized statutes and the Tucker Act. Although small in numbers, both patent and Indian claims tend to be some of the most complex and time-consuming ones. Indian claims, for example, sometimes involve millions of acres of land, tens of thousands of documents, and accountings going back to the nineteenth century.

In 1987, Congress enacted the National Vaccine Injury Compensation Program[48] to compensate persons injured by childhood vaccinations. Those claims are tried by Special Masters and then appealed to the Claims Court. There are other specialized jurisdictional statutes, but they are infrequently invoked and not worthy of space in a brief summary.

IV. COMMON PITFALLS

It is hard to know which peculiarities of suing the federal government to discuss. By way of general comment, let me say that because of sovereign immunity, jurisdiction is a constant issue. Problems with the statute of limitations, or lack of authority, or statutory prerequisites to perfecting a claim are frequently addressed, not as affirmative defenses, i.e., waiveable, but as failures of subject matter jurisdiction. It might be more accurate to view these defenses as implicating the authority of the court to grant relief, but in any event, since they are generally treated as undercutting jurisdiction, they are sometimes brought up on the court's own initiative, even on appeal.[49]

A. Issues under the Contract Disputes Act

A number of problems arise in connection with application of the Contract Disputes Act. For example, the act requires that claims of over $50,000 must be certified. 41 U.S.C. § 605(c)(1). Regulations[50] have strictly limited who can sign. In *United States v. Grumman Aerospace Corp.*, 927 F.2d 575, 579 (Fed. Cir.), *cert. denied*, 112 S. Ct. 330 (1991), the Federal Circuit upheld those regulations. Suppose a case goes up on appeal of an award to the contractor. Can the Federal Circuit raise a problem with certification on its own? Yes. Why? Because Congress has only waived sovereign immunity to the extent expressed in the CDA.[51]

The Federal Circuit recently held in *Dawco Construction, Inc. v. United States*, 930 F.2d 872, 877 (Fed. Cir. 1991), that a claim does not arise in the absence of a dispute. In other words, if the parties are still negotiating, the plaintiff cannot simply break off, treat the last written response from the CO as a final decision, and go to court. Moreover, even if the CO has issued what purports to be a final decision, if in fact there is a defect in the claim, the final decision is a nullity. *W. M. Schlosser Co. v. United States*, 705 F.2d 1336, 1338 (Fed. Cir. 1983). The court has also been strict in enforcing the elements of what constitutes an administrative claim. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387 (Fed. Cir. 1987); *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586 (Fed. Cir. 1987). In sum, make certain your client has carefully complied with the procedural requirements of the CDA.

B. Other contract peculiarities

Consider a related peculiarity of government contract law that sometimes catches contractors by surprise. Suppose the government agency neglects to put into the contract a clause that is required by the applicable regulations. Are the parties bound by that clause even though it was omitted from the contract? Yes, under the "Christian" doctrine.[52]

Virtually all government contracts now come with termination for convenience clauses, which give the government broad powers to terminate a contract. There are some good faith limitations on the government's right simply to walk away from a contract, but, by and large, it can, and it will be liable only for incidental expenses.[53] If applicable, the termination clause precludes typical breach damages, such as lost profits, for example. In addition, when the government improperly terminates for default, it is typically viewed as having invoked the termination for convenience clause.[54]

Under the "Severin" doctrine, a subcontractor may not sue on the general contract in the Claims Court because it is not in privity with the government.[55] Such claims may be prosecuted in the name of the prime contractor, but only if the prime has either paid the subcontractor, or remains liable to it.[56]

As has already been mentioned, there

is no such thing as apparent authority in dealing with the federal government. For the same reason, the government cannot be estopped from challenging the legality of its employees' conduct.

C. Section 1500

One additional peculiarity is particularly dangerous to the unwary. That is 28 U.S.C. § 1500. Section 1500 prevents a litigant from suing in the Claims Court if it has pending in another federal court a suit or process with respect to that same claim. This statute, adopted in 1868, was a response to multiple claims arising out of cotton seizures during the Civil War. Owners were suing in both the Court of Claims and district courts. Although a number of judicially-created exceptions had developed over the last 100 years, they were all swept aside in April of this year in a case called *UNR Industries, Inc. v. United States*, No. 89-1638 (Fed. Cir. Apr. 23, 1992), which involved a series of related asbestos indemnity claims. The Federal Circuit held that section 1500 means precisely what it says. It bars a Claims Court proceeding if there is a claim pending in district court, on whatever theory, if it arises from the same operative facts.

The difficulty comes, of course, in the coincidence of two phenomena: uncertainty about whether the case should be in district court or Claims Court, coupled with a lapsing limitations period. Sometimes it is difficult to determine whether a claim sounds in tort or contract, tort or taking, or taking or quiet title. On other occasions, monetary relief might only be available in the Claims Court, whereas declaratory relief could only be obtained, on the identical facts, in a district court. Several of the litigants in the *UNR Industries* litigation had their Claims Court cases dismissed, even though their tort suits in district court had also been dismissed for lack of jurisdiction. It would appear, after *UNR Industries*, that a litigant may have to choose whether to pursue money relief in the Claims Court, or declaratory relief in the district court, even if both courts would otherwise have jurisdiction.[57]

One ameliorative procedural device to bear in mind is created by 28 U.S.C. § 1631 (1988). That section permits transfers between the district courts and Claims Court to cure jurisdictional problems, assuming a filing in only *one* forum, and proper jurisdiction in the other.

V. CONCLUSION

This summary cannot substitute for an indepth examination of a complex jurisprudence that is occasionally quixotic. The subject is not, however, arcane. Although many practitioners make it a specialty, with a knowledge of a few basics, it is fully accessible to any general litigator. ■

ADDRESS CHANGES

Complete the form below ONLY if there are any changes to your listing in the current *Alabama Bar Directory.*

Due to changes in the statute governing election of bar commissioners, we now are required to use members' office addresses, unless none is available or a member is prohibited from receiving state bar mail at the office. Additionally, the *Alabama Bar Directory* is compiled from our mailing list and it is important to use business addresses for that reason.

NOTE: If we do not know of a change in address, we cannot make the necessary changes on our records, so please notify us when your address changes.

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City _____ State _____ ZIP Code _____ County _____

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_____

City _____ State _____ ZIP Code _____ County _____

Footnotes

1. A clear exception is litigation in the Court of International Trade, which has exclusive jurisdiction to hear contests to the denial of protests under section 515 or 516 of the Tariff Act of 1930, and over actions to review decisions made under the Trade Act of 1974, the Tariff Act of 1980, and the Trade Agreements Act of 1979. *See* 23 U.S.C. § 1581 (1988).
2. The "docket" for this purpose excludes claims brought under the National Vaccine Injury Compensation Program. *See infra* p. 21. Thousands of claims have been brought recently under that act. The vaccine cases are, however, a temporary phenomenon, and including them would confuse the statistics.
3. Claims Court jurisdiction over civilian pay claims is limited by the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 111, which created the Merit Systems Protection Board to hear appeals from adverse personnel actions. *United States v. Fausto*, 484 U.S. 439 (1988).
4. One consequence is that, absent some specific waiver, "government" entities whose budgets come from non-appropriated funds cannot be held liable for breach of contract under the Tucker Act. *See United States v. Hopkins*, 427 U.S. 123, 125 (1976). Congress specifically amended the Tucker Act in 190 to make contracts with military base exchanges enforceable against the Treasury. Pub. L. No. 91-350, 84 Stat. 449.
5. Another name change may be in the offing. Pending legislation would make it the Court of Federal Claims.
6. Pub. L. No. 97-164, 96 Stat. 25 (Apr. 2, 1982), codified at various places throughout the United States Code.
7. Along with the Court of Customs and Patent Appeals.
8. 28 U.S.C. § 1295 (1988).
9. 28 U.S.C. ¶ 2501 (1988). Most contract actions are now brought under the Contract Disputes Act, discussed in the text following, which has a one year jlimitations period. *See* 41 U.S.C. § 609(a)(3) (1988).
10. Appointments are for fifteen-year terms. Recent tenure protection legislation gives judges who unsuccessfully seek reappointment the option of continuing as senior judges. The salary is that of a district judge.
11. *Compare* 28 U.S.C. § 1491(a)(1) *with* U.S.C. § 2508 (1988). Such counterclaims may have the effect of nullifying a right to a jury trial. This was held to be consistent with the Constitution in *McElrath v. United States*, 102 U.S. 426, 440 (1880).
12. Rules of the United States Claims Court 14(c)(1); *see RSH Constructors, Inc., v. United States*, 20 Cl. Ct. 1 (1990).
13. But not over implied-in-law contracts. *United States v. Mitchell*, 463 U.S. 206, 218 (1983).
14. *United States v. Testan*, 424 U.S. 392 (1976) (money already due); *United States v. King*, 395 U.S. 1 (1969) (no declaratory relief).
15. 28 U.S.C. § 1346(a)(2) (1988).
16. *United States v. Testan*, 424 U.S. 392, 398 (1976).
17. 41 U.S.C. § 609(a)(3); *see* 41 U.S.C. § 605(b).
18. 41 U.S.C. § 606.
19. *Id.* § 609(a)(3).
20. *Santa Fe Engineers, Inc. v. United States*, 230 Ct. Cl. 512, 677 F.2d 876 (1982).
21. 28 U.S.C. § 1346(a)(2).
22. For example, when the government is soliciting bids from contractors, the relationship between a bidder and the government is said to be one of implied contract. The government impliedly promises to fairly and honestly consider the bod. *United States v. John C. Grimberg Co.*, 702 F.2d 1362 (Fed. Cir. 1983).
23. For example, oil and gas lease contracts, *Marathon Oil Co. v. United States*, 17 Cl. Ct. 116 (1989); or price support contracts, *Simons v. United States*, No. 317-88C (Cl. Ct. Mar. 23, 1992); or grant-in-aid agreements, *Town of Fallsburg v. United States*, 22 Cl. Ct. 633, 641 (1991).
24. For example, the court has recently construed agreements for the sale of savings and loan institutions by the FDIC, *Winstar Corp. v. United States*, No. 90-8C (Cl. Ct. Apr. 21, 1992); and the sale by NASA of launch services aboard the Shuttle, *Hughes Communications Galaxy, Inc. v. United States*, No.91-1032C (Cl. Ct. Apr. 13, 1992); *American Satellite Co. v. United States*, No. 525-89C (Cl. Ct. Apr. 13, 1992); to constitute contracts. Those cases have not proceeded under the CDA.
25. *See generally Institut Pasteur v. United States*, 814 F.2d 624 (Fed. Cir. 1987) (negotiated contract to so AIDS research).
26. *Overall Roofing Co. v. United States*, 929 F.2d 687 (Fed. Cir. 1991).
27. *Malone v. United States*, 849 F.2d 1441 (Fed. Cir. 1988).
28. *United States v. John C. Grimberg Co.*, 702 F.2d 1362 (Fed. Cir. 1983). As to whether the district courts have concurrent jurisdiction with the Claims Court to award pre-contract relief, the circuits are split. The only cases I have been able to locate with respect to the Eleventh Circuit suggest that the district courts do not have such jurisdiction. *Metric Sys. Corp. v. United States*, 673 F. Supp. 439 (N.D. Fla. 1987); *Caddell Constr. Co. v. Lehman*, 599 F. Supp. 1542 (S.D. Ga. 1985).
29. *F. Alderete General Contractors, Inc. v. United States*, 715 F. 2d 1476 (Fed. Cir. 1983).
30. *See* 5 U.S.C. §§ 701(a)(1), 701(a)(2), 706(2)(A), 706(2)(D) (1988).
31. *See KECO Indus., Inc. v. United States*, 203 Ct. Cl. 566, 574, 492 F.2d 1200, 1203 (1974); *Logicon Inc. v. United States*, 22 Cl. Ct. 776, 782 (1991).
32. At least until this year. In *Hatter v. United States*, 953 F.2d 626 (Fed. Cir. 1992), the Federal Circuit held that Article III judges are given a substantive right to undiminished salary and can thus bring a claim alleging diminution of salary in the Claims Court.
33. Unauthorized action by a government employee would probably be treated as a tort.
34. 30 U.S.C. §§ 1201-1328 (1988).
35. *United States v. Emery, Bird, Thayer Realty Co.*, 237 U.S. 28 (1915).
36. *Rocovich v. United States*, 933 F.2d 991 (Fed. Cir. 1991).
37. 28 U.S.C. § 1340.
38. 26 U.S.C. § 7538(b)(2).
39. *Church of Spiritual technology v. United States*, 18 CL. Ct. 247, 249 (1989).
40. *Easter House v. United States*, 12 Cl. Ct. 476. 482 (1987), *aff'd mem.*, 846 F.2d 78 (Fed. Cir.), *cert denied*, 488 U.S. 907 (1988).
41. I.R.C. §§ 6226-6228.
42. *Voge v. United States*, 844 F.2d 776, 779 (Fed. Cir.), *cert denied*, 488 U.S. 941 (1988).
43. *See Dismuke v. United States*, 297 U.S. 167, 169 (1936).
44. *Eastport Steamship Corp. v. United States*, 178 Ct. Cl. 599, 605, 372 F.2d 1002, 1007 (1967).
45. *Eastport Steamship Corp. v. United States*, 178 Ct. Cl. 599, 605-06, 372 F.2d 1002, 1007-08 (1967).
46. *United States v. Emery, Bird, Thayer Realty Co.*, 237 U.S. 28 (1915).
47. *See* 28 U.S.C. ¶ 2509 (1988).
48. Pub. L. No. 99-660, 100 Stat. 3756. The initial act has been frequently amended. The program is presently codified at 42 U.S.C.A. §§ 300aa-10-34 (1992).
49. Some retrenchment from this position is evident. In *Borough of Alpine v. United States*, 923 F.2d 170 (Fed. Cir. 1991), the court held that lack of timeliness was not a jurisdictional defect. In any event, in situations other than the lapse of the limitations period, a dismissal for failure to state a claim would nevertheless not be prejudicial to perfecting a claim (if possible) and refiling.
50. 48 C.F.R. § 33.207 (1988).
51. *Ball, Ball * Brosamer, Inc. v. United States*, 878 F.2d 1426 (Fed. Cir. 1989). There is legislation pending that would make certification issues non-jurisdictional, i.e., waiveable. S. 2521, 102d Cong., 2d Sess. (1992) (introduced by Sen. Howell Heflin). In addition, there are many proposals circulating to clarify the regulations.
52. This doctrine is not named for an ethical verity, but gets its name from *G. L. Christian & Assoc. v. United States*, 160 Ct. Cl. 1, 11-17, *cert denied*, 375 U.S. 954 (1963).
53. *See generally Torncello v. United States*, 231 Ct. Cl. 20, 681 F.2d 756 (1982).
54. *See generally id.*
55. *Severin v. United States*, 99 Ct. Cl. 435 (1943), *cert denied*, 322 U.S. 733 (1944).
56. *J. L. Simmons Co. v. United States*, 158 Ct. Cl. 393, 397, 304 F.2d 886, 888 (1962).
57. S. 2521, *see supra* note 51, would repeal section 1500. In any event, as a practical matter, the Justice Department would typically apply a Claims Court decisions favorable to the plaintiff prospectively, as well.

SUMMARIES OF GENERAL LAWS ENACTED AND CONSTITUTIONAL AMENDMENTS PROPOSED BY THE LEGISLATURE OF ALABAMA AT THE REGULAR SESSION, 1992

**Provided through the courtesy of the Legislative Reference Service*

Act No. 92-63, S. 73, amends Section 17-20-1, *Code of Alabama* 1975, relating to the division of the state into congressional districts, to redistrict the congressional districts based on the 1990 census.

Act No. 92-108, S. 80, amends Sections 2-3-24, 2-19-130, 2-26-71, 2-27-6, 2-27-30, 9-8A-3, and 41-9-243, *Code of Alabama* 1975, relating to the membership of certain committees, organizations, and commissions pertaining to farmers and agriculture, to reflect the change in name of Alabama Farm Bureau Federation to Alabama Farmers Federation. It will also ratify and confirm actions taken by Alabama Farmers Federation.

Act No. 92-116, S. 36, continues the existence and functioning of the State Pilotage Commission.

Act No. 92-117, S. 37, continues the existence and functioning of the Board of Examiners of Mine Personnel.

Act No. 92-118, S. 42, continues the existence and functioning of the Public Service Commission.

Act No. 92-119, S. 47, continues the existence and functioning of the Board of Auctioneers. It also amends Sections 34-4-21, 34-4-29, and 34-4-50, *Code of Alabama* 1975, to provide further for the board.

Act No. 92-120, S. 48, continues the existence and functioning of the Alcoholic Beverage Control Board.

Act No. 92-121, S. 38, continues the existence and functioning of the Alabama Board of Social Work Examiners. It also amends Sections 34-30-4, 34-30-22, 34-30-50, and 34-30-52, *Code of Alabama* 1975, to provide further for the board.

Act No. 92-122, S. 39, terminates the existence and functioning of the Examining Board for Professional Entomologists, Plant Pathologists, Horticulturists, Floriculturists, and Tree Surgeons. It transfers the duties of the board to the Commissioner of Agriculture and Industries and amends Sections 2-28-1 to 2-28-5, inclusive, and 2-28-8, *Code of Alabama* 1975, to transfer the duties.

Act No. 92-123, S. 40, continues the existence and functioning of the Alabama Liquefied Petroleum Gas Board. It also amends Sections 9-17-101, 9-17-104, 9-17-105, and 9-17-107, *Code of Alabama* 1975, to provide further for the board.

Act No. 92-124, S. 44, continues the existence and functioning of the Alabama Securities Commission. It also amends Sections 8-6-53, 8-6-110, 8-6-111, 8-6-113, 8-6-115, 8-6-116, 8-6-118, and 8-6-119, *Code of Alabama* 1975, to provide further for the commission; and it repeals Section 8-6-114, *Code of Alabama* 1975, relating to the State Industrial Revenue Bond Advisory Council.

Act No. 92-125, S. 46, continues the existence and functioning of the Board of Examiners in Psychology. It also amends Section 34-26-21, *Code of Alabama* 1975, to provide further for the board.

Act No. 92-126, S. 49, continues the existence and functioning of the Department of Insurance.

Act No. 92-127, S. 50, continues the existence and functioning of the Alabama Real Estate Appraisers Board. It also amends Sections 34-27A-13, 34-27A-15, and 34-27A-20, *Code of Alabama* 1975, to provide further for the board.

Act No. 92-128, S. 51, continues the existence and functioning of the Alabama Board of Funeral Service.

Act No. 92-134, S. 53, continues the existence and functioning of the Alabama Indian Affairs Commission. It also amends Sections 41-9-708, 41-9-712, 41-9-713, 41-9-715, and 41-9-716, *Code of Alabama* 1975, to provide further for the commission.

Act No. 92-152, H. 253, amends Sections 17-10-12, 17-16-11, and 17-7-1, *Code of Alabama* 1975, relating to primary elections and absentee balloting, to shorten the time period for delivery of absentee ballots for the 1992 elections, for the filing of declarations of candidacy, and for certification of candidates for the 1992 congressional election.

Act No. 92-154, S. 116, makes supplemental appropriations from the Special Educational Trust Fund to the Butler County Board of Education and the Dale County Board of Education for the fiscal year ending September 30, 1992, for repairs to any school damaged by windstorm or fire in the counties.

Act No. 92-155, H. 631, proposes an amendment to the Constitution of Alabama of 1901 relating to volunteer fire departments, fire protection, and emergency services in Cal-

houn County and the levy and collection of additional ad valorem taxes for the fire protection and emergency services.

Act No. 92-169, S. 194, amends Section 41-14-30, *Code of Alabama* 1975, relating to the investment of state funds, to provide further for the authority of the State Treasurer to deposit funds in state depositories and when funds may be invested in obligations of the United States or its agencies. It also makes appropriations from the General Fund to the State Treasurer to implement the act.

Act No. 92-173, H. 468, amends Section 25-4-72, *Code of Alabama* 1975, relating to the unemployment compensation weekly benefit, to increase the maximum benefit.

Act No. 92-174, H. 287, is the "Employment Security Enhancement Act." It amends Sections 25-4-31, 25-4-32, 25-4-54, and 25-4-143, *Code of Alabama* 1975, relating to unemployment compensation, to provide further for the rates of unemployment compensation contributions. It also establishes the Employment Security Enhancement Fund in the State Treasury.

Act No. 92-175, S. 296, makes a supplemental appropriation from the Alcohol and Drug Abuse Court Referral Officer Trust Fund to the Mandatory Drug Treatment Program for the fiscal year ending September 30, 1992.

Act No. 92-177, S. 35, continues the existence and functioning of the Alabama Real Estate Commission. It also amends Sections 34-27-2, 34-27-4, 34-27-7, 34-27-8, and 34-27-31 to 34-27-36, inclusive, *Code of Alabama* 1975, to provide further for the commission.

Act No. 92-178, S. 41, continues the existence and functioning of the Telecommunications Division of the Department of Finance. It also amends Section 41-4-284, *Code of Alabama* 1975, to provide for the destruction of telephone records six months after payment of the bill.

Act No. 92-179, S. 43, continues the existence and functioning of the Board of Public Accountancy. It also amends Sections 34-1-4, 34-1-11, and 34-1-12, *Code of Alabama* 1975, to provide further for the board.

Act No. 92-180, S. 45, continues the existence and functioning of the Board of Heating and Air Conditioning Contractors. It also amends Sections 34-31-18, 34-31-21, 34-31-25, 34-31-26, 34-31-28, 34-31-29, and 34-31-32, *Code of Alabama* 1975, to provide further for the board.

Act No. 92-181, S. 52, continues the existence and functioning of the Alabama Board of Cosmetology. It also amends Sections 34-7-19 and 34-7-21, *Code of Alabama* 1975, to provide further for the board.

Act No. 92-182, S. 100, continues the existence and functioning of the Plumbers and Gas Fitters Examining Board. It also amends Sections 34-37-6, 34-37-8, 34-37-9, and 34-37-15, *Code of Alabama* 1975, to provide further for the board.

Act No. 92-183, H. 224, amends Sections 12-2-2, 12-2-7, and 12-3-10, *Code of Alabama* 1975, relating to decisions affecting the tenure of employees of public schools, to give the Alabama Court of Civil Appeals exclusive and final jurisdiction of appeals of such decisions. This act would have become effective upon the ratification of the constitutional amendment proposed by House Bill 252 of the 1992 Regular Session which failed to pass.

Act No. 92-184, H. 230, repeals Section 40-1-32.1, *Code of Alabama* 1975, entitled the "Proration Prevention Act of 1988." It would have been implemented only if the constitutional amendment proposed by House Bill 252 of the 1992 Regular Session had been ratified. House Bill 252 did not pass.

Act No. 92-185, H. 236, amends Section 41-19-3, *Code of Alabama* 1975, relating to state budgeting and financial management, to provide further for effective management of state governmental operations. It is the "Budget Management Improvement Act of 1992."

Act No. 92-186, H. 254, is the "Alabama Taxpayers' Bill of Rights and Uniform Revenue Procedures Act." It amends numerous sections of Titles 11, 22, 32, 35, and 40 and repeals numerous sections of Titles 9, 22, 32, and 40, *Code of Alabama* 1975, relating to specific procedures for specific taxes, to standardize procedures for administering the revenue laws.

Act No. 92-203, H. 666, amends Sections 40-17-31, 40-17-70, 40-17-81, 40-17-102, 40-17-103, and 40-17-122, *Code of Alabama* 1975, relating to gasoline and other motor fuels, to increase the excise tax for gasoline by five cents a gallon.

Act No. 92-204, H. 665, amends Sections 23-1-300, 23-1-301, 23-1-306, 23-1-307, 23-1-313, 23-1-314, and 23-1-317, *Code of Alabama* 1975, relating to the Federal Aid Highway Finance Authority, to provide further for the issuance of obligations by the Alabama Federal Aid Highway Finance Authority and for the use of proceeds of obligations of the authority for the purpose of anticipating and providing for the federal share of the cost of constructing federal aid projects on the state highway system.

Act No. 92-205, H. 669, amends Section 40-17-2, *Code of Alabama* 1975, relating to motor fuels, to levy an additional excise tax of five cents per gallon on motor fuel used in the operation of any motor vehicle on the highways.

Act No. 92-206, S. 107, amends Sections 37-6-3, 37-6-8, 37-6-9, 37-6-10, 37-6-12, 37-6-18, 37-6-22, and 37-6-30 and repeals Section 37-6-17, *Code of Alabama* 1975, relating to cooperatives organized for the purpose of supplying electric service, water and sewer service, and television reception service, to provide further for the organization, operation, and powers of the cooperatives and to the right of cooperatives and certain municipal gas districts to terminate or decline service to customers under certain conditions.

Act No. 92-207, H. 555, proposes an amendment to the Constitution of Alabama of 1901 to provide for the election of the Pell City Board of Education.

Act No. 92-208, H. 359, proposes an amendment to the Constitution of Alabama of 1901 relating to the compensation of the Judge of Probate of Pickens County.

Act No. 92-209, H. 164, amends Section 36-27-49.3, *Code of Alabama* 1975, relating to the purchase of military service in the Employees' or Teachers' Retirement System, to add appellate judges of the Judicial Retirement System and to allow certain members of the retirement systems to purchase credit for active military duty.

Act No. 92-216, S. 274, amends Section 36-1-4.3, *Code of Alabama* 1975, relating to deductions from the salaries of state employees, to require that a certain number of state employees request a specific salary deduction before the deduction can be made by the State Comptroller.

Act No. 92-222, H. 52, amends Sections 40-1-33, 40-12-190, 40-12-192, 40-12-196, 40-12-198, and 40-12-200, *Code of Alabama* 1975, relating to the licensing of distributors of motor fuels, to provide further for the licensing.

Act No. 92-223, H. 154, amends Section 17-4-150, *Code of Alabama* 1975, relating to boards of registrars, to provide for the appointment of additional members to the board of registrars in any county which has two courthouses.

Act No. 92-227, H. 605, amends Sections 12-19-71, 12-19-72, 12-19-171, 12-19-172, 12-19-174, 12-19-175, 12-19-176, 12-19-178, and 12-19-179, *Code of Alabama* 1975, relating to court costs, to temporarily increase the fees and costs in circuit and district courts. It also makes supplemental appropriations for the fiscal year ending September 30, 1992, and appropriations for the fiscal year ending September 30, 1993.

Act No. 92-245, H. 131, requires a commercial party boat license issued by the Division of Marine Resources of the Department of Conservation and Natural Resources for certain boats.

Act No. 92-252, S. 464, proposes an amendment to the Constitution of Alabama of 1901 consolidating under one county public authority or corporation any public authorities or corporations created by Lawrence County for economic development in the county pursuant to Constitutional Amendment No. 190.

Act No. 92-253, S. 229, makes supplemental appropriations from the Special Educational Trust Fund and the General Fund to the Department of Finance, Telephone Revolving Fund for the fiscal year ending September 30, 1992.

Act No. 92-259, H. 612, proposes an amendment to the Constitution of Alabama of 1901 to authorize the Covington County Commission to establish fire protection districts in the county and levy and collect additional property taxes for fire protection and rescue squads in the county.

Act No. 92-274, S. 530, proposes an amendment to the Constitution of Alabama of 1901 to establish an education accountability team in Mobile County and to provide for the levy of additional ad valorem tax to finance schools in the county.

Act No. 92-276, H. 565, proposes an amendment to the Constitution of Alabama of 1901 to levy a sales and use tax in Limestone County for the Athens City Board of Education and the Limestone County Board of Education.

Act No. 92-277, H. 799, proposes an amendment to the Constitution of Alabama of 1901 to provide for the election of the Talladega City Board of Education.

Act No. 92-278, H. 841, proposes an amendment to the Constitution of Alabama of 1901 to authorize the Geneva County Commission to levy and collect additional ad valorem tax for the maintenance of the jail and courthouse.

Act No. 92-303, S. 131, amends Section 36-29-14, *Code of Alabama* 1975, relating to the procedure for officers, employees, and retirees of certain municipalities, fire districts, water and fire authority districts, and the League of Municipalities to be covered under the State Employees' Health Insurance Plan, to authorize certain additional state, county, and municipal agencies and regional planning and development commissions to participate in the plan.

Act No. 92-342, H. 475, amends Section 36-25-9, *Code of Alabama* 1975, relating to the code of ethics for public officers and employees, to allow real estate brokers, agents, developers, appraisers, and mortgage bankers to serve on state, county, or municipal regulatory boards or commissions.

Act No. 92-343, H. 508, amends Sections 40-23-1 and 40-23-4, *Code of Alabama* 1975, relating to sales and use tax, to provide for certain tax exemptions retroactive to January 1, 1984.

Act No. 92-344, H. 392, amends Section 9-53, *Code of Alabama* 1975, relating to a freshwater fishing license, to increase its cost and describe further where it is required. It also requires a saltwater fishing license for certain persons and in certain areas.

Act No. 92-418, H. 614, provides for the funding and operation of the Medicaid Program by requiring the transfer of moneys from publicly-owned hospitals to the Alabama Mothers and Babies Indigent Care Trust Fund. The act will remain

effective only as long as adequate federal financial participation in the Medicaid Program is available and will expire September 30, 1995.

Act No. 92-435, S. 526, amends Section 39-7-14, *Code of Alabama* 1975, relating to boards of trustees of municipal improvement authorities, to provide that the boards shall consist of five members that are qualified electors residing in the area serviced by the authority.

Act No. 92-438, H. 79, amends Section 36-21-70, *Code of Alabama* 1975, relating to the Peace Officers' Annuity and Benefit Fund, to increase the benefits payable to members of the fund, retroactive to October 1, 1991.

Act No. 92-439, H. 454, prohibits any college or university from spending public funds or using public facilities to sanction, recognize, or support any group that promotes a lifestyle or actions prohibited by the sodomy and sexual misconduct laws. It also prohibits any group from permitting or encouraging its members or others to engage in or provide materials on how to engage in the lifestyle or actions.

Act No. 92-440, H. 615, amends Sections 40-26B-20, 40-26B-21, 40-26B-25, 40-26B-40, 40-26B-41, 40-26B-43, and 40-26B-45, *Code of Alabama* 1975, relating to the privilege tax on nursing facilities and hospitals, to provide further for the tax.

Act No. 92-443, H. 438, amends Sections 2, 3, and 5 of Act No. 91-667, S. 432, 1991 Regular Session (now appearing in Chapter 2A, Title 4, *Code of Alabama* 1975), relating to the Alabama International Airport Authority, to provide further for the incorporation and members of the authority.

Act No. 92-444, H. 153, amends Section 36-27-50, *Code of Alabama* 1975, relating to temporary legislative employees being covered by the State Employees' Retirement System and State Employees' Health Insurance Plan, to make coverage optional at the discretion of the employee.

Act No. 92-445, H. 189, makes an appropriation from the General Fund to the Alabama's Young Woman of the Year Program for the fiscal year ending September 30, 1993.

Act No. 92-446, H. 190, makes an appropriation from the General Fund to the America's Young Woman of the Year Program for the fiscal year ending September 30, 1993.

Act No. 92-447, H. 192, makes an appropriation from the General Fund to the Beacon House-Jasper for the fiscal year ending September 30, 1993.

Act No. 92-448, H. 205, makes an appropriation from the General Fund to the Elyton Recovery Center for the fiscal year ending September 30, 1993.

Act No. 92-449, H. 210, makes an appropriation from the General Fund to the Lighthouse Counseling Center for the fiscal year ending September 30, 1993.

Act No. 92-450, H. 215, makes an appropriation from the General Fund to the Council for Parenting and Protecting Children for the fiscal year ending September 30, 1993.

Act No. 92-451, H. 216, makes an appropriation from the General Fund to the Retired Senior Volunteer Program for the Foster Grandparent and Senior Companions Programs for the fiscal year ending September 30, 1993.

Act No. 92-452, H. 220, makes an appropriation from the General Fund to the Shoals Entrepreneural Center for the fiscal year ending September 30, 1993.

Act No. 92-453, H. 195, makes an appropriation from the General Fund to the Commission on Aging for the Care Assurance System for the Aging and Homebound for the fiscal year ending September 30, 1993.

Act No. 92-467, S. 595, makes a supplemental appropriation from the Public Road and Bridge Fund to the State Highway Department for the fiscal year 1991-92 for federal aid matching and state maintenance.

Act No. 92-471, S. 606, provides for the authority of any Class 2 municipality to prescribe standards for the continued use and occupancy of buildings.

Act No. 92-476, S. 110, provides for the employment of additional legislative security personnel.

Act No. 92-520, H. 179, makes an appropriation from the Special Educational Trust Fund to the Department of Public Health for the fiscal year ending September 30, 1993.

Act No. 92-521, H. 180, makes an appropriation from the Special Educational Trust Fund to the Governor's Commission on Physical Fitness for the fiscal year ending September 30, 1993.

Act No. 92-523, H. 286, makes an appropriation from the Special Educational Trust Fund to the AIDS Task Force of Alabama, Inc., for the fiscal year ending September 30, 1993.

Act No. 92-524, H. 594, amends Sections 8-6-10 and 8-6-16, *Code of Alabama* 1975, relating to securities, to require filing of notice of issuance for certain securities exempt from registration; to provide further for exemptions of certain exchange listed securities; to provide certain authority to the Securities Commission; and to provide remedies for violations of the Alabama Securities Act.

Act No. 92-525, H. 181, makes an appropriation from the Special Educational Trust Fund to the Space Science Exhibit Commission for the fiscal year ending September 30, 1993.

Act No. 92-526, H. 350, proposes an amendment to the Constitution of Alabama of 1901 legalizing the operation of bingo games for prizes or money by certain nonprofit organizations for charitable, educational, or other lawful purposes in Walker County outside the corporate limits of Jasper.

Act No. 92-527, H. 351, proposes an amendment to the Constitution of Alabama of 1901 legalizing the operation of bingo games for prizes or money by certain nonprofit organizations for charitable, educational, or other lawful purposes in the City of Jasper.

Act No. 92-531, H. 340, creates and establishes the Alabama School of Fine Arts to be governed by a board of trustees.

Act No. 92-532, H. 82, defines and provides for the establishment of community development districts and prescribes the method by which alcoholic beverages may be sold within the districts.

Act No. 92-533, H. 115, makes an appropriation from the General Fund to the Legislative Reference Service for the fiscal year ending September 30, 1992.

Act No. 92-535, H. 798, is the "Alabama Brewpub Act." It further regulates the manufacture and sale of beer in wet counties and wet municipalities by providing for the licensing of brewpubs to brew and sell beer on the same premises for on-premises consumption only.

Act No. 92-537, S. 122, amends Articles 1, 3, and 4 of Chapter 5 of Title 25, *Code of Alabama* 1975, to revise the Alabama Workmen's Compensation Law. It also repeals Sections 25-5-16, 25-5-70 to 25-5-75, inclusive, and Sections 25-5-140 to 25-5-180, inclusive, *Code of Alabama* 1975. It changes the name Workmen's Compensation Law to Workers' Compensation Law.

Act No. 92-543, H. 588, amends Section 40-17-11, *Code of Alabama* 1975, relating to tax liability for the sales and use of motor fuels, to provide further for the tax liability.

Act No. 92-544, H. 191, makes an appropriation from the Special Educational Trust Fund to Camp ASCCA in Jackson Gap for the fiscal year ending September 30, 1993.

Act No. 92-545, H. 193, makes an appropriation from the Special Educational Trust Fund to the Bevill Center for Advanced Manufacturing Technology and to the Bevill Advanced Electronics Center at Sparks Technical College for the fiscal year ending September 30, 1993.

Act No. 92-546, H. 194, makes an appropriation from the Special Educational Trust Fund to the Black Belt Human Resource Development Center for the fiscal year ending September 30, 1993.

Act No. 92-547, H. 197, makes an appropriation from the Special Educational Trust Fund to the Children's Hospital in Birmingham for the fiscal year ending September 30, 1993.

Act No. 92-548, H. 198, makes an appropriation from the Special Educational Trust Fund to the Children's and Women's Hospital in Mobile for the fiscal year ending September 30, 1993.

Act No. 92-549, H. 202, makes an appropriation from the Special Educational Trust Fund to the Exploreum Museum of Discovery for the fiscal year ending September 30, 1993.

Act No. 92-550, H. 203, makes an appropriation from the Special Educational Trust Fund to the Kate Duncan Smith DAR School for the fiscal year ending September 30, 1993.

Act No. 92-551, H. 208, makes an appropriation from the Special Educational Trust Fund to the Alabama Humanities Foundation for the fiscal year ending September 30, 1993.

Act No. 92-552, H. 209, makes an appropriation from the Special Educational Trust Fund to the Alabama League for the Advancement of Education for the fiscal year ending September 30, 1993.

Act No. 92-553, H. 211, makes an appropriation from the Special Educational Trust Fund to the Central Alabama Opportunities Industrialization Center for the fiscal year ending September 30, 1993.

Act No. 92-554, H. 204, makes an appropriation from the Special Educational Trust Fund to the East Alabama Child Development Center for the fiscal year ending September 30, 1993.

Act No. 92-555, H. 207, makes an appropriation from the Special Educational Trust Fund to the Helen Keller Eye Research Foundation for the fiscal year ending September 30, 1993.

Act No. 92-556, H. 292, makes an appropriation from the Special Educational Trust Fund to the Macon County Arts Manifesto for the fiscal year ending September 30, 1993.

Act No. 92-557, H. 218, makes an appropriation from the Special Educational Trust Fund to the Alabama YMCA Youth and Government for the fiscal year ending September 30, 1993.

Act No. 92-558, H. 446, establishes standards for membership in the Alabama Network of Children's Advocacy Centers, Inc.

Act No. 92-559, H. 511, makes an appropriation from the Special Educational Trust Fund to Educational Resources,

Incorporated (commonly known as the Freedom Forum), for the fiscal year ending September 30, 1993.

Act No. 92-560, H. 214, makes an appropriation from the Special Educational Trust Fund to the Cleveland Avenue YMCA for the fiscal year ending September 30, 1993.

Act No. 92-561, S. 305, makes an appropriation from the General Fund to the Department of Agriculture and Industries, Agricultural Development Services Program to be allocated to the Boll Weevil Eradication Foundation for boll weevil eradication for the fiscal year ending September 30, 1992.

Act No. 92-562, S. 211, amends Sections 11-98-1, 11-98-2, 11-98-4, 11-98-5, and 11-98-6, *Code of Alabama* 1975, relating to emergency telephone service and communication districts, to provide further for the service areas, the structure and powers of the board of commissioners of a district, and the type of emergency service.

Act No. 92-563, S. 437, authorizes the Supreme Court and the Courts of Appeal to employ certain personnel. It repeals Sections 12-2-150 to 12-2-156, inclusive, Section 12-2-158, and Sections 12-4-1 to 12-4-4, inclusive, *Code of Alabama* 1975, relating to the Marshal and Librarian of the Alabama Supreme Court and the Reporter of Decisions of the Supreme Court and Courts of Appeals.

Act No. 92-564, S. 375, empowers the State Oil and Gas Board to authorize and regulate the storage of gas in underground reservoirs, strata, or formations in conjunction with condemnation rights and eminent domain procedures.

Act No. 92-572, H. 575, allows any Class 5 municipality to adopt an ordinance creating a housing code abatement board to remove structures that are unsafe to the extent of creating a public nuisance.

Act No. 92-577, H. 638, amends Section 1 of Act No. 80-573, S. 513, 1980 Regular Session, relating to the compensation of the circuit judges in the 16th Judicial Circuit, to prohibit an increase in the compensation unless the increase is provided by local law.

Act No. 92-578, H. 201, makes an appropriation from the Special Educational Trust Fund to the Project DARE and DON'T Drug Education Programs for the fiscal year ending September 30, 1993.

Act No. 92-580, H. 200, makes an appropriation from the Special Educational Trust Fund to Constitution Hall Village at Huntsville for the fiscal year ending September 30, 1993.

Act No. 92-581, H. 213, makes an appropriation from the Special Educational Trust Fund to the Special Schools for Special Education for the fiscal year ending September 30, 1993.

Act No. 92-582, H. 217, makes an appropriation from the General Fund to the Alabama Travel Council for the fiscal year ending September 30, 1993.

Act No. 92-583, H. 222, makes an appropriation from the General Fund to the Child Advocacy Centers for the fiscal year ending September 30, 1993.

Act No. 92-584, H. 199, makes an appropriation from the General Fund to the Coalition Against Domestic Violence for the fiscal year ending September 30, 1993.

Act No. 92-585, S. 308, amends Section 9-14-29, *Code of Alabama* 1975, relating to state parks, to exempt from certain laws concession operations at state parks that receive annual gross receipts of $100,000 or less.

Act No. 92-586, S. 23, creates the Impaired Drivers Trust Fund in the State Treasury to provide rehabilitative services to residents of the state with certain types of injuries.

Act No. 92-587, S. 74, amends Sections 14-2-12 and 14-2-16, *Code of Alabama* 1975, relating to the Alabama Corrections Institution Finance Authority, to authorize the issuance of additional bonds and to allow the bonds to be sold at public or private sale. This act will become effective after the Easterling Facility has been reopened and all terminated employees reemployed.

Act No. 92-588, S. 246, amends Section 11-45-9.1, *Code of Alabama* 1975, relating to the issuance of a summons and complaint by municipalities for violations of certain ordinances, to provide further for the violations.

Act No. 92-589, S. 525, permits certain governmental entities to hedge against interest rate, investment, payment, and similar risks in connection with their activities by entering into "swap agreements." It also provides the conditions, requirements, and definitions for "swap agreements."

Act No. 92-590, S. 72, requires public schools to emphasize responsible sexual behavior and prevention of illegal drug use in those programs and curriculums that include instruction on the subjects.

Act No. 92-591, S. 195, makes a conditional appropriation to the Department of Agriculture and Industries for the fiscal year ending September 30, 1993 to indemnify owners of swine ordered condemned and destroyed for the prevention and eradication of the diseases of hog cholera, African swine fever, and other swine diseases.

Act No. 92-592, H. 584, places a moratorium until January 1, 1995 on the permitting, construction, or expansion of cer-

tain new or existing sanitary landfills in any county which contains coastal areas.

Act No. 92-593, H. 449, makes an appropriation from the Agricultural Fund for the use of the Department of Agriculture and Industries for the fiscal year ending September 30, 1992.

Act No. 92-594, H. 318, makes supplemental appropriations to the Alabama Department of Economic and Community Affairs for the fiscal year ending September 30, 1992.

Act No. 92-595, H. 69, makes a supplemental appropriation from the Alcoholic Beverage Control Fund to the Alcoholic Beverage Control Board for the fiscal year ending September 30, 1993.

Act No. 92-596, H. 71, makes a supplemental appropriation from the Alcoholic Beverage Control Fund to the Alcoholic Beverage Control Board for the fiscal year ending September 30, 1992.

Act No. 92-597, H. 34, is the "Alabama Pawnshop Act." It provides for the regulation and licensing of pawnbrokers and repeals Sections 8-1-80 to 8-1-84, inclusive, *Code of Alabama* 1975. It also makes an appropriation to the State Banking Department from the Banking Assessments Fees Fund for the 1992 fiscal year for the implementation and administration of this act.

Act No. 92-598, H. 247, requires the lessee of tax exempt property to report certain information relative to the property to the tax assessor who is required to report to the Department of Revenue which then reports to the Legislature.

Act No. 92-599, H. 246, is the "Tax Incentive Reform Act of 1992." It authorizes the abatement of ad valorem taxes other than those imposed for public school purposes and for public education and mortgage and recording taxes incurred in establishing or expanding industries in the state. It also amends Section 40-7-35, *Code of Alabama* 1975, and repeals Sections 40-9-40 to 40-9-49, inclusive, *Code of Alabama* 1975.

Act No. 92-600, S. 324, amends Section 40-12-49, *Code of Alabama* 1975, relating to attorney business license taxes, to increase the taxes and to provide further for the collection of the taxes.

Act No. 92-601, S. 365, amends Section 13A-5-40, *Code of Alabama* 1975, relating to capital offenses, to include within the list of crimes punishable as capital offenses: murder when the victim is under 14; murder in which the victim is killed while in a dwelling from a deadly weapon fired outside the dwelling; murder in which the victim is killed in a motor vehicle by a deadly weapon fired from outside that motor vehicle; and murder in which the victim is killed by a deadly weapon fired from a motor vehicle.

Act No. 92-602, S. 19, provides for mandatory errors and omissions insurance coverage for all active real estate licensees.

Act No. 92-603, S. 248, exempts all property owned by Community Health Systems, Inc., and the Walker Regional Medical Center from any state, county, and local ad valorem taxes.

Act No. 92-604, S. 452, authorizes and provides for the payroll deductions for state employees for the Foster Care Trust Fund.

Act No. 92-605, S. 457, provides for a voluntary checkoff designation on state income tax returns for contributions to the Foster Care Trust Fund.

Act No. 92-606, S. 260, amends Section 26-16-30, *Code of Alabama* 1975, relating to the Children's Trust Fund, to provide for the investment of trust fund money.

Act No. 92-607, S. 321, revises and supplements the existing system for registering certain vital records and statistical data. It also specifically repeals Sections 22-9-1 to 22-9-79, inclusive, *Code of Alabama* 1975, relating to vital statistics.

Act No. 92-608, S. 109, provides for examinations and the issuance of licenses to persons in the home building industry; provides for the adoption by counties of residential housing building codes; and creates the Home Builders Licensure Board. This act is required to be advertised in each county in a newspaper of general circulation once a week for three consecutive weeks prior to implementation.

Act No. 92-609, S. 59, amends Sections 16-13-52 and 16-13-52.1, *Code of Alabama* 1975, relating to the number of teacher units allowed, to provide an alternative method for determining the number of current teacher units earned by a particular school system.

Act No. 92-610, H. 186, makes an appropriation from the Special Educational Trust Fund to Talladega College for the fiscal year ending September 30, 1993.

Act No. 92-611, H. 185, makes an appropriation from the Special Educational Trust Fund to the Coosa Valley Medical Center School of Nursing for the fiscal year ending September 30, 1993.

Act No. 92-612, H. 184, makes an appropriation from the Special Educational Trust Fund to Marion Military Institute for the fiscal year ending September 30, 1993.

Act No. 92-613, H. 182, makes an appropriation from the Special Educational Trust Fund to the Department of Youth Services for the fiscal year ending September 30, 1993.

Act No. 92-614, H. 183, makes an appropriation from the Special Educational Trust Fund to the Lyman Ward Military Academy for the fiscal year ending September 30, 1993.

Act No. 92-615, H. 187, makes an appropriation from the Special Educational Trust Fund to Tuskegee University for the fiscal year ending September 30, 1993.

Act No. 92-616, H. 196, makes an appropriation from the Special Educatlonal Trust Fund to United Cerebral Palsy of Alabama, Inc., United Cerebral Palsy Development Center for East Central Alabama, Simpson-May Cerebral Palsy Center, Cerebral Palsy Housing Foundation, United Cerebral Palsy of Mobile, and United Cerebral Palsy of Huntsville for the fiscal year ending September 30, 1993.

Act No. 92-617, H. 178, makes an appropriation from the Special Educational Trust Fund to the Department of Education for the fiscal year ending September 30, 1993.

Act No. 92-618, H. 188, makes an appropriation from the Special Educational Trust Fund to Walker County Junior College for the fiscal year ending September 30, 1993.

Act No. 92-620, H. 176, is the education budget. It makes appropriations for the support, maintenance, and development of public education and for debt service and capital improvements for the fiscal year ending September 30, 1993.

Act No. 92-621, H. 177, is the general fund budget. It makes appropriations for the ordinary expenses of the executive, legislative, and judicial agencies of the state.

Act No. 92-622, H. 470, amends Section 32-6-150, *Code of Alabama* 1975, relating to personalized and distinctive commemorative license plates, to provide for the Atomic Veterans NUKED Commemorative Tag Program, Veteran Commemorative Tag Program, and the Environmental Commemorative Tag Program.

Act No. 92-623, H. 616, amends Sections 40-1-31, 40-21-64, 40-21-80 to 40-21-84, inclusive, 40-21-86, 40-21-87, 40-21-100 to 40-21-104, inclusive, and 40-21-121, *Code of Alabama* 1975, relating to the utility gross receipts tax, to increase the tax and the utility service use tax on intrastate telegraph and telephone services and provide further for distribution of utility gross receipts tax receipts. It also repeals Sections 40-21-58 and 40-21-59, *Code of Alabama* 1975, to repeal certain telephone and telegraph license taxes.

Act No. 92-624, H. 445, makes an appropriation from the Shipping Point Inspection Fund to the Department of Agriculture and Industries for the fiscal year ending September 30, 1992.

Act No. 92-625, S. 214, amends Section 41-5-21, *Code of Alabama* 1975, relating to audit reports by the Office of Examiners of Public Accounts, to provide for confidentiality of the working papers used in the preparation of audit reports.

Act No. 92-626, S. 93, includes in the definition of "minority" for purposes of affirmative action programs, American Indians or Alaskan Natives or persons having origins in any of the original peoples of North America. ■

DISCIPLINARY REPORT

Reinstatement

• **Michael Lee Allsup** was reinstated to the practice by order of the Supreme Court of Alabama, effective June 23, 1992. (Pet. No. 91-09)

• **Jackson William Stokes**, an Elba, Alabama attorney, was reinstated to the practice of law by order of the Supreme Court of Alabama, effective July 21, 1992. (Pet. No. 92-05)

Disbarment

• On April 28, 1992 Eufaula lawyer **Samuel Angus LeMaistre, Jr.** was disbarred from the practice of law by the Supreme Court of Alabama, said disbarment to become effective as of February 21, 1991. LeMaistre had been found guilty of mail fraud which is a violation of Rule 22(a)(2), Alabama Rules of Disciplinary Procedure (Interim). (Rule 22(a)(2) Pet. No. 91-07)

Suspensions

• On June 11, 1992 **Jim Clay Fincher** was suspended from the practice of law for three years to become effective February 28, 1992. In November 1991, a notice was placed in *The Alabama Lawyer*, advising Fincher that he had 28 days from November 15, 1991 to file an answer to disciplinary charges; otherwise the charges would be deemed admitted and appropriate discipline would be imposed against him. A hearing on the application for default judgment and to determine discipline was held February 18, 1992. The application for default judgment was granted February 28, 1992 and the Disciplinary Board chair signed an order suspending Fincher for a period of three years. (ASB Nos. 89-166, 89-177 and 89-235)

• Montgomery lawyer **Richard J. Grassgreen** was suspended from the practice of law by order of the Supreme Court of Alabama for a period of four years, effective July 22, 1992.

Grassgreen was convicted of two counts of securities fraud, involving misappropriation of commitment fees, in violation of 15 U.S.C. 78j(b) and 78ff(a). Grassgreen was sentenced to be imprisoned for three months on each count, to run concurrently. (Rule 22(a)(2) [Pet. #92-01]).

Public Reprimands

• Huntsville attorney **Hilary Coleman Burton** was publicly reprimanded in two separate cases.

ASB No. 90-735 — Burton was retained to file a civil action for a client arising out of the purchase of a commercial business by the client. Burton stated he would have the case filed by the end of December 1989, but did not do so until March 1990. By April 1990, the client approached Burton about filing a Chapter 13 Bankruptcy and to defend a collection action brought by AmSouth Bank. Within the next three months, Burton continued to represent that he was protecting the client's interests in all these matters. In fact, he did absolutely nothing on them. The client had a default judgment taken against him by AmSouth. His original lawsuit was dismissed, and the seller of the business sued him for non-payment. Burton never filed the bankruptcy, but the client only learned this by contacting the bankruptcy court himself. Throughout the client's relationship with Burton, he had to endure continual avoidance and intentional misrepresentations about the status of his cases. Burton repeatedly failed to respond to any of the client's allegations when asked to do so by the Madison County Bar Association.

ASB No. 91-46(A) — Burton was publicly reprimanded for engaging in conduct which reflected adversely on his fitness to practice. On September 5, 1991 Burton was duly noticed to appear before the board of bar commissioners for the administration of a public reprimand (unrelated to ASB #90-735). Burton willfully failed to appear at the designated time without having been personally excused by the president of the state bar.

• **Joe James Estep** of Anniston was retained by a client to pursue a divorce modification. The client advanced to Estep his attorney's fee. However, the client was unable to communicate with Estep about the status of her case. She then filed a complaint against Estep with the bar. The Office of General Counsel forwarded the complaint to Estep requesting a written response thereto. Having received no such response, the Office of General Counsel had the sheriff personally serve a written request for a response to the complaint on Estep. Estep has never replied to the complaint. A review of the court records failed to disclose any pleadings filed by Estep on behalf of his client. The Disciplinary Commission ordered that Estep be publicly reprimanded for willfully neglecting a legal matter entrusted to him, for failing to keep a client reasonably informed about the status of a matter, for engaging in conduct involving dishonesty, fraud, deceit, misrepresentation or willful misconduct, and for engaging in conduct prejudicial to the administration of justice and conduct which adversely reflects on his fitness to practice law. (ASB No. 91-708)

• **Talmadge H. Fambrough** of Pell City was hired by an individual concerning that individual's attempts to recover certain antique automobiles which had been wrongfully converted by others. The client provided Fambrough with the needed documentation to proceed on the client's behalf, and also paid to Fambrough a fee of $750, inclusive of the filing fee. The client's case was scheduled for two separate hearings. One hearing was continued, and Fambrough failed to appear at the second hearing. Having been unable to contact Fambrough to discuss the matter, the client checked with the clerk's office and discovered that his case had been dismissed by the trial court's granting of a summary judgment in favor of the defendants.

Fambrough took no further action on behalf of the client, and provided no explanation to the client for his malfeasance. The Disciplinary Commission ordered that Fambrough be publicly reprimanded for willfully neglecting a legal matter entrusted to him, for failing to keep his client reasonably informed about the status of his case, and for failing to explain a matter to the

extent reasonably necessary to permit the client to make informed decisions regarding the representation. (ASB No. 91-670)

• In ASB No. 91-690, **Gary E. Davis** of Centre was retained by an individual to file a lawsuit. After not hearing from Davis for quite some time, the client called Davis. Davis told the client that he had filed a $125,000 lawsuit on the client's behalf. After experiencing further difficulty in communicating with Davis about this matter, the client checked with the circuit clerk's office and was informed that no such lawsuit had ever been filed. The client filed a complaint against Davis. Davis was less than diligent in responding to the complaint. The Disciplinary Commission ordered that Davis be publicly reprimanded for willfully neglecting a legal matter entrusted to him, for failing to seek the lawful objectives of his client, for prejudicing or damaging his client during the course of the professional relationship, for failing to keep his client reasonably informed about the status of his case, and for engaging in conduct prejudicial to the administration of justice. (ASB No. 91-690)

• Sylacauga attorney **Michael Anthony Givens** was publicly reprimanded on May 22, 1992 for failure to seek the lawful objectives of his client, for failure to carry out a contract of employment, and for engaging in conduct which reflects adversely on his fitness to practice law.

In April 1988, Givens filed suit for a client, but took no action whatsoever thereafter. On at least two occasions, he misrepresented the status of the case to the client.

After the grievance was filed, Givens failed to cooperate with either the Talladega County Bar or the Office of General Counsel in their investigation and processing of the complaint. (ASB No. 89-283)

• Birmingham attorney **Willie L. Williams** was publicly reprimanded on May 22, 1992 for violating Rule 3.3(a)(3) of the Rules of Professional Conduct which provides that a lawyer shall not offer evidence known to be false, and Rule 4.1(a) which provides that a lawyer shall not knowingly make a false statement of a material fact to a third person.

Williams represented his client in a

NOTICE

All Alabama Attorneys

Changes regarding Licensing/Special Membership Dues 1992-93

Act #92-600 was passed by the Alabama Legislature and amends Section 40-12-49, *Code of Alabama*, 1975, effective **October 1, 1992.**

This act involves important changes as follows:

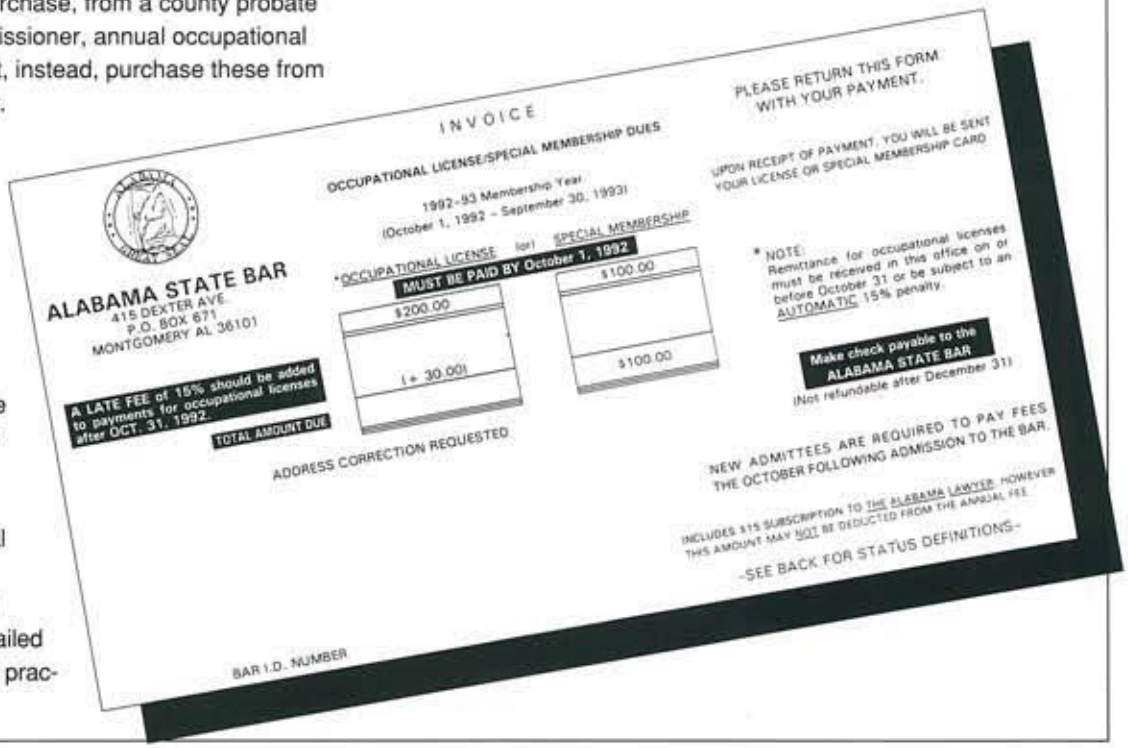
1. License fees increase from $150 to $200. Special membership dues increase from $75 to $100.
2. Attorneys no longer purchase, from a county probate judge or license commissioner, annual occupational licenses to practice but, instead, purchase these from the Alabama State Bar.

All licenses to practice law, as well as payment of special membership dues, will be sold through the Alabama State Bar Headquarters. Licenses must be purchased between October 1 and October 31 or be subject to an automatic 15 percent penalty. **Second notices will not be sent!**

In mid-September, a dual invoice to be used by both annual license holders and special members will be mailed to every lawyer admitted to practice law in Alabama. Upon receipt of payment,those who purchase the license will be mailed a license and wallet-sized license for identification purposes.

Those electing special membership will be sent a wallet-sized ID card for identification purposes and also to serve as a receipt.

If you do not receive an invoice, please notify Alice Jo Hendrix, membership services director, at 1-800-354-6154 (in-state WATS) or (205) 269-1515 **immediately!**


INVOICE

OCCUPATIONAL LICENSE/SPECIAL MEMBERSHIP DUES

1992-93 Membership Year
(October 1, 1992 – September 30, 1993)

PLEASE RETURN THIS FORM WITH YOUR PAYMENT.

UPON RECEIPT OF PAYMENT, YOU WILL BE SENT YOUR LICENSE OR SPECIAL MEMBERSHIP CARD

ALABAMA STATE BAR
415 DEXTER AVE
P.O. BOX 671
MONTGOMERY AL 36101

*OCCUPATIONAL LICENSE (or) SPECIAL MEMBERSHIP

MUST BE PAID BY October 1, 1992

$200.00

$100.00

(+ 30.00)

$100.00

* NOTE:
Remittance for occupational licenses must be received in this office on or before October 31 or be subject to an AUTOMATIC 15% penalty.

A LATE FEE of 15% should be added to payments for occupational licenses after OCT. 31, 1992.

Make check payable to the ALABAMA STATE BAR
(Not refundable after December 31)

TOTAL AMOUNT DUE

ADDRESS CORRECTION REQUESTED

NEW ADMITTEES ARE REQUIRED TO PAY FEES THE OCTOBER FOLLOWING ADMISSION TO THE BAR.

INCLUDES $15 SUBSCRIPTION TO THE ALABAMA LAWYER. HOWEVER THIS AMOUNT MAY NOT BE DEDUCTED FROM THE ANNUAL FEE.

-SEE BACK FOR STATUS DEFINITIONS-

BAR I.D. NUMBER

domestic dispute in which child custody was awarded to his client's ex-husband. Thereafter, the client notified Williams that she did not want to appeal the award of custody or to pursue the matter further. However, the client's present husband felt that his wife should pursue an attempt to have the decision reversed. The client's husband was also a client of Williams, as well as a personal friend. The client's husband authorized Williams to proceed with the case. On the basis of his conversation with the client's husband, Williams forged the client's name to an affidavit in support of a Motion to Alter, Amend or Vacate Judgment and notarized the forged signature in his capacity as a Notary Public. When the client discovered that the Motion had been filed, she contacted the court and had the Motion dismissed. The Disciplinary Commission determined that, as discipline for the above-described conduct, Williams should receive a public reprimand without general publication. (ASB No. 91-645)

• Boaz attorney **Phillip Louis Green** was publicly reprimanded for violating Rule 1.5(a)(1) which prohibits an attorney from charging or collecting a fee in a domestic relations matter which is contingent upon the amount of alimony, support or property settlement. Green charged a divorce client $250 dollars for a divorce with the provision that the fee would be higher if a trial was necessary. There was a trial and by then the client had paid $400 dollars, plus the filing fee of $97 dollars. When the client went to Green's office to pick up the divorce papers, he charged her an additional $500 dollars based on the result obtained at trial. Green tried to justify the additional charge by stating it only amounted to 3 percent of the value of real property awarded her at trial. (ASB No. 91-865)

• Gadsden attorney **John Cunningham** was publicly reprimanded July 15, 1992 in connection with his handling of a personal injury matter. He failed to cooperate in the bar's investigation of the grievance that ensued from the case. On May 30, 1990, Cunningham was retained to represent a minor who was injured in an accident. The case was ultimately settled in October 1991. The minor's mother filed a grievance against Cunningham after the settlement of the case. She alleged that he convinced them to accept the settlement on incomplete information, failed to communicate and keep her informed, and was not truthful about certain matters associated with the case.

Cunningham never responded to the allegations of the complaint, in spite of several written requests that he do so. Rule 8.1(b) of the Rules of Professional Conduct provides that a lawyer shall not fail to respond to a lawful demand for information from a disciplinary authority. (ASB No. 91-727)

• **Donald T. Trawick** undertook to represent the interests of the president of a paint contracting company for the purpose of recovering some $27,000 in retainage and other monies the president felt were owed to his company by a construction company. Another paint contractor brought an action against the bonding company of Trawick's client's company. In turn, the bonding company sued Trawick's client and the officers of his company. Trawick's client delivered to Trawick all pleadings and documents and engaged Trawick's services for defense of all litigation involving the client and his company.

The investigation into the facts of the formal grievance against Trawick revealed that Trawick never filed suit on behalf of the client or his company against the construction company which allegedly owed retainage and other monies to the client and/or his company. The client's home was subsequently levied upon by the bonding company based on the fact that the case had proceeded to a final judgment against the client and his company, without the client ever having been advised by Trawick of any such judgment.

Trawick's client filed a grievance which was investigated by the Birmingham Bar Association Grievance Committee. The investigator for that body wrote Trawick requesting a written response to the grievance. Having received no response, the investigator again wrote to Trawick and placed several telephone calls to him concerning same. In a telephone conversation with the investigator, Trawick advised the investigator that his response was "in the mail." However, the investigator never received any such response. Finally, after numerous telephone calls to Trawick by the investigator, the investigator received a response from Trawick. However, Trawick had disclosed in a telephone conversation with the investigator that he could neither admit nor deny the allegations of the complaint and that he had no means of providing any documentation which would challenge the allegations of the complaint.

The investigation disclosed that Trawick failed to file any action on behalf of his client. Further, it appears that consent judgments were entered against Trawick's client without the client's consent.

The Disciplinary Commission of the Alabama State Bar ordered, pursuant to

Rule 8(e)(2), Alabama Rules of Disciplinary Procedure (Interim), that Trawick be publicly reprimanded for violating Rule 1.3 (lawyer's willfully neglecting a legal matter entrusted to him), Rule 1.4(a) (requiring a lawyer to keep a client reasonably informed about the status of a matter and promptly complying with reasonable requests for information), and Rule 1.4(b) (requiring a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation), Alabama Rules of Professional Conduct. (ASB No. 91-301)

• Montgomery attorney **John A. Tabor** was publicly reprimanded by the Alabama State Bar on July 15, 1992 for violating DR 1-102(A)(6) of the *Code of Professional Responsibility* by engaging in conduct that reflects adversely on his fitness to practice law. The Disciplinary Board found that Tabor was retained by parents of a deceased child to represent them in a medical malpractice claim. Approximately one year after being retained, Tabor moved his practice from Greenville, Alabama to Birmingham without notifying his clients. In 1990, Tabor moved his practice from Birmingham to Montgomery, but again failed to notify his clients. When summary judgment was granted in the case, Tabor neglected to notify his clients of this fact. The Disciplinary Board further found that throughout his representation Tabor consistently failed to respond to telephone calls and letters from his clients or to otherwise communicate with them concerning their case. (ASB No. 90-831)

• Montgomery attorney **John A. Tabor** was publicly reprimanded by the Alabama State Bar on July 15, 1992 for failure to comply with an order of the Disciplinary Commission in violation of Rule 2(d) of the Rules of Disciplinary Procedure (Interim). The Disciplinary Board found that Tabor was given a public reprimand without general publication in ASB No. 90-403(A) but failed to appear for administration of the public reprimand as scheduled.

Administration of the public reprimand was rescheduled a second time, but again Tabor failed or refused to appear. Tabor was given a public reprimand for his failure or refusal to appear in compliance with the Commission's order in addition to the public reprimand imposed on him in ASB No. 90-403(A). (ASB No. 91-433) ■

NOTICE

Disciplinary Proceedings

Sallie M. McConnell, attorney at law, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of Sept. 1, 1992 or, thereafter, the charges contained therein shall be imposed against her in ASB No. 91-330 before the Disciplinary Board of the Alabama State Bar.

Disciplinary Board
Alabama State Bar

About Members, Among Firms

ABOUT MEMBERS

Craig R. Izard announces the relocation of his office to 308 Frank Nelson Building. The mailing address is P.O. Box 130277, Birmingham, Alabama 35213. Phone (205) 323-3241.

Dr. Jim Vickrey, formerly with Copeland, Franco, Screws & Gill, is now professor of speech communication at **Troy State University**, where he teaches courses in oral communication and in the criminal justice program.

Sarah Jane Lindsay, former judicial clerk for United States District Court Chief Judge Alex T. Howard, Jr. and Judge Charles R. Butler, Jr., Southern District of Alabama, announces that she has joined the **Tennessee Valley Authority's Office of the General Counsel.** Her new mailing address is TVA/OGC, 400 West Summit Hill Drive, Knoxville, Tennessee 37902. Phone (615) 632-4109.

John Maddox announces the opening of his office in the law offices of **Johnson, Etheredge & Dowling** at 131 North Oates Street, Dothan, Alabama 36303. The mailing address is P.O. Box 1193, Dothan 36302. Phone (205) 793-2155.

Dwight M. Jett, Jr., formerly associated with the firm of Baker & Jett, announces that he has located his office at 402 Gordon Drive, SW, Decatur, Alabama 35601. Phone (205) 351-1303.

Don O. White announces the relocation of his office to 4325-A Midmost Drive, Mobile, Alabama 36609. The new mailing address is P.O. Box 91185, Mobile 36691-1185. Phone (205) 344-7511.

Frederick M. Garfield announces the relocation of his office to 2420 Arlington Avenue, Birmingham, Alabama 35205. Phone (205) 933-2900.

W.I. Mathews announces the opening of his offices at 118 East Moulton Street, Suite 1, Decatur, Alabama 35601. Phone (205) 355-6070.

M. Clay Ragsdale, formerly a partner with Starnes & Atchison, announces the opening of his office at Farley Building, 1929 3rd Avenue, North, Suite 550, Birmingham, Alabama 35203. Phone (205) 251-4775.

Thomas T. Reynolds announces that he has accepted a position as general counsel of **Association Risk Management Service Company**. Offices are located at 244 East Park Avenue, Lake Wales, Florida 33853. Phone (813) 676-1681.

AMONG FIRMS

Parsons & Eberhardt announces that **Clyde Alan Blankenship**, formerly city attorney for the City of Huntsville, has become a member of the firm, which will be known as **Parsons, Eberhardt & Blankenship**. Offices are located at AmSouth Center, 200 W. Clinton Avenue, Suite 703, Huntsville, Alabama 35801. Phone (205) 533-2172.

Haygood, Cleveland & Pierce announces that **Michael Sharp Speakman** has become an associate. Offices are located at 120 S. Ross Street, and the mailing address is P.O. Box 3310, Auburn, Alabama 36831. Phone (205) 821-3892.

Porterfield, Harper & Mills announces the relocation of its offices to 22 Inverness Center Parkway, Suite 600, Birmingham, Alabama 35242-4821. Phone (205) 980-5000.

Lucas, Alvis & Kirby announces that **J. Steven Clem** and **Leigh Ann King** have joined the firm as associates. Offices are located at 250 Park Place Tower, 2001 Park Place, North, Birmingham, Alabama 35203. Phone (205) 251-8448.

Cabaniss, Johnston, Gardner, Dumas & O'Neal announces that **Richard Eldon Davis** and **Cathryn A. Berryman** have become associates of the firm. Offices are located in Birmingham and Mobile, Alabama.

Gardberg & Knopf announces the relocation of its Mobile office to 1015 Montlimar Drive, Suite B-4, Mobile, Alabama 36609. Phone (205) 343-1111.

Beasley, Wilson, Allen, Main & Crow announces that **Julia Anne Beasley** has become an associate of the firm. Offices are located at 207 Montgomery Street, 10th Floor, Bell Building, Montgomery, Alabama. The mailing address is P.O. Box 4160, 36103-4160. Phone (205) 269-2343.

Hubbard, Reynolds, McIlwain & Brakefield announces that **Michael D. Smith** has joined the firm, and the firm name will be **Hubbard, Reynolds, Smith, McIlwain & Brakefield.** Offices are located at 808 Lurleen Wallace Boulevard, North, Tuscaloosa, Alabama 35403. Phone (205) 345-6789.

Barry C. Leavell announces that **Robert E. Lee** has become associated with the firm and that the firm has relocated to 205 Madison Avenue, Suite A, Montgomery, Alabama 36104. Phone (205) 834-8663.

Phelps, Owens, Jenkins, Gibson & Fowler announces that **Susie T. Carver** has become a partner in the firm, **C. Barton Adcox** has joined the firm as a partner, and **Karen C. Welborn** has become associated with the

firm. Offices are located at 1201 Greensboro Avenue, Tuscaloosa, Alabama 35401. Phone (205) 345-5100.

Harris & Harris announces that **Alice H. Martin**, formerly of Almon, McAlister, Ashe, Baccus & Tanner and formerly an assistant U.S. attorney, Western District of Tennessee, Department of Justice, has joined the firm as a partner. The firm name has been changed to **Harris, Harris & Martin**. Offices are located at 407 South Court Street, Florence, Alabama 35630. Phone (205) 764-1358.

Byrd & Spencer announces the relocation of its offices to 203-A W. Main Street, Dothan, Alabama 36301. Phone (205) 794-0759.

Rosen, Cook, Sledge, Davis, Carroll & Jones announces that **Sheree Martin** has become associated with the firm. Offices are located at 1020 Lurleen Wallace Boulevard, North, Tuscaloosa, Alabama. The mailing address is P.O. Box 2727, Tuscaloosa, 35403.

Azar & Azar announces that **William D. Azar** has become associated with the firm. Offices are located at 260 Washington Avenue, Montgomery, Alabama 36104. Phone (205) 265-8551.

Najjar Denaburg announces that **Rachel J. Moore** has become associated with the firm. Offices are located at 2125 Morris Avenue, Birmingham, Alabama 35203. Phone (205) 250-8400.

Ramsey, Baxley, McDougle & Collier announces the relocation of its offices to 212 W. Troy Street, Dothan, Alabama 36303. The new mailing address is P.O. Drawer 1486, Dothan, 36302.

Sirote & Permutt announces that **Thomas A. Ansley** and **Brent L. Crumpton** have joined the firm's Birmingham office and **Jeff Kohn** has joined the Montgomery office. The Birmingham office is located at 2222 Arlington Avenue, South; the mailing address is P.O. Box 55727, Birmingham 35255-5727. Phone (205) 933-7111. The Montgomery office is located at One Commerce Street, Suite 600, Montgomery 36104. Phone (205) 263-1022.

Penick & Brooks announces the firm's relocation to 319 17th Street, North, Suite 200, Birmingham, Alabama 35203, and that **Danita Haskins, James Love, Debra Bennett Parker** and **Malera Traylor-Wright** have become members of the firm.

Trimmier, Atchison & Hayley announces that **Winston R. Grow** has joined the firm. Offices are located at 2737 Highland Avenue, Birmingham, Alabama 35205. The mailing address is P.O. Box 1885, Birmingham 35201-1885. Phone (205) 251-3151.

Bond & Botes announces the consolidation of its Riverchase office and downtown Birmingham office . . The Daniel Building, 15 South 20th Street, Suite 1325, Birmingham, Alabama 35233. The firm's Huntsville office has been relocated to the AmSouth Center, Suite 705, 200 Clinton Avenue, NW, Huntsville, Alabama 35801. The firm also announces that **Ron C. Sykstus** has become an associate with the firm.

Sitlinger, McGlincy, Steiner & Theiler announces that **Silver B. Eberly** has become associated with the firm, with offices located at 3450 First National Tower, Louisville, Kentucky 40202. Phone (502) 589-2627.

Edgar C. Gentle, III announces that **Lisa F. Grumbles**, formerly an associate with Coggin & Duke, has joined him as a partner, under the name of **Gentle & Grumbles**. Offices are located at 1928 First Avenue, North, Suite 1501, Colonial Bank Building, Birmingham, Alabama 35203. Phone (205) 325-1530.

Gardner, Middlebrooks & Fleming announces that **Christopher E. Krafchak** and **William H. Reece** have become associates of the firm. Offices are located at 64 N. Royal Street, Mobile, Alabama 36602. Phone (205) 433-8100.

Mark B. Polson and **John C. Robbins** announce they have withdrawn from Polson, Jones, Bowron & Robbins and are now practicing as **Polson & Robbins** at 2001 Park Place, North,

Suite 200, Birmingham, Alabama 35203. Phone (205) 252-1388.

T. Roe Frazer, II announces the relocation of his firm, **Langston & Frazer**, to the Langston-Frazer Building, 201 N. President Street, Jackson, Mississsippi 39201. Phone (601) 969-1356.

Yearout, Myers & Traylor announces that **David F. Miceli** has become an associate of the firm. Offices are located at 2700 SouthTrust Tower, 420 N. 20th Street, Birmingham, Alabama 35203. Phone (205) 326-6111.

Cecily L. Kaffer and **Harry S. Pond, IV** announce the formation of **Kaffer & Pond**. Offices are located at 150 Government Street, Suite 3003, Mobile, Alabama 36602. Phone (205) 438-1308.

Wallace, Jordan, Ratliff, Byers & Brandt announces that **B. Glenn Murdock,** formerly senior attorney with Vulcan Materials Company, has joined the firm as a partner. The firm also announces that **James E. Ferguson, III** and **Melissa M. Jones** have joined the firm as associates. Offices are located at 2000 SouthBridge Parkway, Suite 525, Birmingham, Alabama 35209. Phone (205) 870-0555.

Richard E. Dick and **Michael K. Wisner** announce the formation of **Dick & Wisner**. Offices are located at 100 Washington Street, Suite 200, Huntsville, Alabama 35801. Phone (205) 533-1445.

Dominick, Fletcher, Yeilding, Wood & Lloyd announces that **B. Boozer Downs, Jr.** and **J. Mitchell Frost, Jr.** have become members of the firm, and **Victoria VanValkenburgh Norris** has become an associate of the firm. Offices are located at 2121 Highland Avenue, Birmingham, Alabama. The mailing address is P.O. Box 1387, Birmingham 35201. Phone (205) 939-0033.

Scholl & Turner announces that **Peter A. deSarro, III**, formerly in private practice in Tuscumbia and formerly a law clerk to Jefferson County Circuit Judge Josh Mullins, has become associated with the firm. Offices are located at #4 Office Park Circle, Suite 315, Birmingham, Alabama 35223. Phone (205) 871-6004.

Terry L. Mock announces that **Sheila J. Fisher** has become associated with the firm. Offices are located at 401 N. Main Street, Tuscumbia, Alabama. The mailing address is P.O. Box 740, Tuscumbia 35674. Phone (205) 386-7090.

Barre C. Dumas, Michael T. Murphy and **John T. Bender** announce the formation of **Dumas, Murphy & Bender**, 209 N. Joachim Street, Mobile, Alabama 36603. Phone (205) 431-6000.

Pierce, Carr & Alford announce that **H. William Wasden**, formerly with the Office of the Governor and the Attorney General's Office of the State of Alabama, has joined the firm. The mailing address is P.O. Box 16046, Mobile, Alabama 36616.

Harris, Caddell & Shanks announces that **Arthur W. Orr** has become associated with the firm. Offices are located at 214 Johnston Street, S.E., and the mailing address is P.O. Box 2688, Decatur, Alabama 35602. Phone (205) 340-8000.

Gorham & Waldrep announces that **Karen Brown Evans** has become an associate. Offices are located at 2101 6th Avenue, North, Suite 700, Birmingham, Alabama 35203. Phone (205) 254-3216. ■

A Helping Hand

TUSCALOOSA COUNTY

by ALYCE MANLEY SPRUELL

(This is the first in a series highlighting those who have benefited from the Alabama Law Foundation's IOLTA program.)

as*sis*tance: the act of giving aid or support
see synonyms at help

During the 1992 annual meeting of the Alabama State Bar, I had the wonderful responsibility of delivering the most recent version of *The Handbook for Older Alabamians* to the board of the Alabama Law Foundation. The foundation, in conjunction with the Tuscaloosa County Bar Association, had provided $6,500 of funding to allow 5,000 newly revised copies to be printed for the Legal Counsel for the Elderly (a division of the University of Alabama Law School Clinical Program). These handbooks are provided through nutrition centers, nursing homes and other locations in the western corridor of Alabama.

This was not the first time that the foundation (which is funded by our IOLTA funds) had provided significant assistance to this office. With a second year of proration looming, the Legal Counsel for the Elderly could not replace a staff attorney for the summer of 1991. The foundation provided funding for three public interest law internships in this office. These third-year students provided invaluable assistance to the indigent and elderly throughout west Alabama while gaining personal knowledge of our state's need for volunteer lawyers. The students were asked to provide summaries of their experiences at the end of the summer; to describe these narratives as moving and inspirational would be a gross understatement.

Funding public interest law internships is not unusual for IOLTA funds. The North Carolina Bar, for example, has provided assistance for students from five different North Carolina law schools for over five years. These funds have enabled numerous first- and second-year students to experience public interest law service.

Three University of Alabama Law School students were recipients of Alabama Law Foundation grants for the summer of 1992. Two students are working at the Alabama Capital Representation Resource Center while the third won a summer internship with the Southern Environmental Law Center. None of these students could have pursued this dream without the IOLTA fund assistance.

An an active member of our bar, the benefits from the foundation grants to the over 37 county law libraries and to the various Law Day and adult literacy projects are obvious. However, the benefits from grants to entities such as the Tuscaloosa Children's Center, which provides outreach and counseling for abused children in our area, may never be known. Such assistance is the key to the success and survival of these types of projects throughout the state.

As the immediate past chair of the Tuscaloosa County Legal Aid Committee, I can also attest to the assistance received by our bar from the Alabama Law Foundation. These grants have been crucial to the operation of our free legal clinics that occur twice monthly. Our bar has also received funding for our domestic arbitration project which has been an immense help to our domestic relations court and bar.

The most unique assistance our bar has received from the foundation was a grant to our Children's Hands On Museum (CHOM). CHOM developed an exhibit for the elementary age children that allowed their participation in actual court proceedings. With bar association members acting as judges and/or as attorneys, well-known storybook characters like Alice in Wonderland and Jack in the Beanstalk were charged and subjected to trial for unlawful trespass and burglary. The exhibit was popular and very beneficial to our area school children.

Assistance, according to several sources I checked, is synonymous with the concept of help. Through the Alabama Law Foundation grants received by the Tuscaloosa County area, true assistance has been given to the elderly, the indigent, the children and the future lawyers of our state, who will, it is hoped, continue our bar's dedication to support our state and our communities.

The helping hand of assistance from the Alabama Law Foundation has been firmly grasped by our area — and greeted with much appreciation and continued gratitude. ■

Alyce Manley Spruell
Alyce Manley Spruell holds a bachelor's degree from Vanderbilt University and a law degree from the University of Alabama School of Law. She currently serves as director of law development for the University's School of Law.

RIDING THE CIRCUITS

The **Russell County Bar Association** elected new officers at its June monthly meeting. The new officers are:

President: Patrick F. Loftin, Phenix City

Vice-president: Michael J. Bellamy, Phenix City

Secretary/Treasurer: Charles E. Floyd, III, Phenix City

The **Tuscaloosa County Bar Association** recently held its annual meeting and the following officers were elected for 1992-93:

President: Dan M. Gibson, Tuscaloosa

Vice-president: Kathryn McC. Harwood, Tuscaloosa

Secretary/Treasurer: Robert H. Shaw, Jr., Tuscaloosa

NOTICE

All Alabama Attorneys

Changes regarding Licensing/Special Membership Dues 1992-93

Act #92-600 was passed by the Alabama Legislature and amends Section 40-12-49, *Code of Alabama*, 1975, effective October 1, 1992.

This act involves important changes as follows:

1. License fees increase from $150 to $200. Special membership dues increase from $75 to $100.
2. Attorneys no longer purchase, from a county probate judge or license commissioner, annual occupational licenses to practice but, instead, purchase these from the Alabama State Bar.

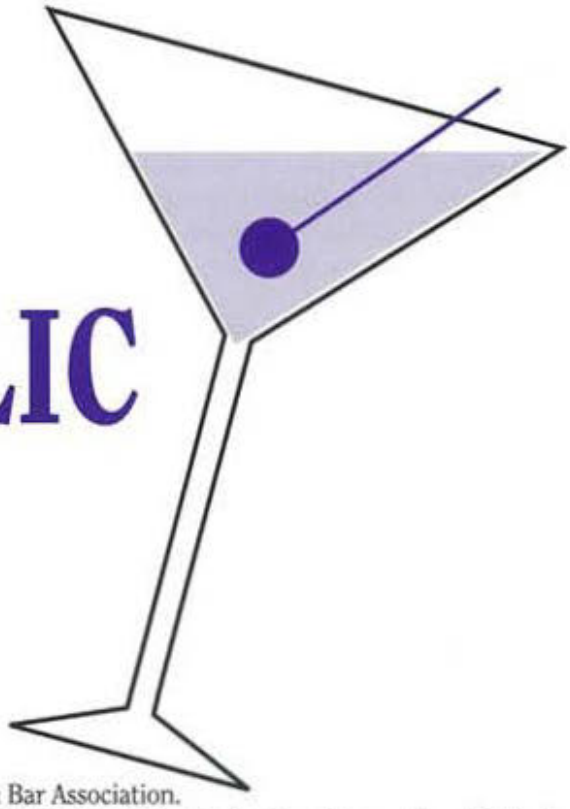
All licenses to practice law, as well as payment of special membership dues, will be sold through the Alabama State Bar Headquarters. Licenses must be purchased between October 1 and October 31 or be subject to an automatic 15 percent penalty. **Second notices will not be sent!**

In mid-September, a dual invoice to be used by both annual license holders and special members will be mailed to every lawyer admitted to practice law in Alabama. Upon receipt of payment, those who purchase the license will be mailed a license and wallet-sized license for identification purposes.

Those electing special membership will be sent a wallet-sized ID card for identification purposes and also to serve as a receipt.

If you do not receive an invoice, please notify Alice Jo Hendrix, membership services director, at 1-800-354-6154 (in-state WATS) or (205) 269-1515 **immediately!**

HELPING THE ALCOHOLIC COLLEAGUE



by BETTY REDDY and RUTH WOODRUFF

(The article originally appeared in the May 1992 issue of *The Professional Lawyer*, Vol. 3, No. 3. *The Professional Lawyer* is published by the Special Coordinating Committee on Professionalism of the American Bar Association Center for Professional Responsibility.)

Remember that eager, bright young associate you hired a few years back? Who could have guessed he would turn out to be a problem for the firm? He's missing appointments, coming to work late and isolating himself from co-workers. People around the office are starting to talk about him. Even a few clients have called to voice concerns about his competence. You can tell that a downward spiral has begun for him and evidence has started to appear that he may be drinking excessively, but is it really any of your business? What could you do about his problem anyway?

For many lawyers, watching a colleague suffer from chemical dependency is a frustrating and confusing experience. Often it is tempting to do nothing and hope that the problem solves itself. Unfortunately, alcohol dependency is a progressive disease that will only worsen if ignored. Alcoholism is a chronic illness and can be fatal if untreated. In 1986, alcoholism was the ninth leading cause of death in the United States, causing over 26,000 deaths that year. (*Alcohol and Health*, 1990).

Even in situations that are not yet life-threatening, the price for ignoring the problem is incredibly high. First, there is the alcoholic's personal and professional devastation. Second, in the context of an alcoholic lawyer, members of the lawyer's firm must share responsibility for mistakes or misdeeds of the addicted lawyer, either through malpractice suits or professional discipline for failure to assure that all members of the firm conform to the ethics rules. (See Model Rule 5.1 on responsibilities of a partner or supervisory lawyer.) More importantly, the unchecked advance of alcohol dependency in lawyers can adversely affect competent representation of clients' legal matters and ultimately destroy public trust in the legal profession.

Lawyers, like the rest of the population, are not immune from the ravages of alcohol dependency. A new study by the National Center for Health Statistics reports that nearly 43 percent of adult Americans, about 76 million people, have a problem drinker in the family. Approximately 75 percent of adults drink at least once or twice a year during celebrations or special occasions. Many drink moderately, some drink heavily with no serious problems, and about 10 percent drink in a way that causes problems for themselves and others.

In the legal community, the statistics are even more startling. A study sponsored by the Washington State Bar Association found that over 18 percent of their lawyers were alcohol dependent. Between 50 percent and 75 percent of all disciplinary cases nationwide involve chemical dependency and approximately 60 percent of discipline cases in California involve chemical dependence or emotional distress. (State Bar of California Lawyer Personal Assistance Program). Fortunately, there is help available for impaired lawyers. There are steps colleagues can take to help addicted lawyers before they cause irreparable damage and become lawyer discipline statistics.

Identifying the problem

The first step is to know the signs of impairment. It may be difficult to recognize the difference between social and problem drinking because alcohol is a fact of daily life for many. Also, people often feel uncomfortable about invading the privacy of others. However, alcoholism indicators are recognizable. It is not necessary to be an expert on the symptoms and progression of

the disease to become part of the solution. Early intervention provides the best chance of helping the alcoholic.

An alcoholic predictably exhibits identifiable characteristics of emotional disruption, destructive conduct, interpersonal difficulty and responsibility avoidance. (See box.) If several indicators are present and the person continues to drink inappropriately despite continuing problems related to the drinking, it may be time to give serious consideration to an intervention.

The intervention

Alcoholism is not an insoluble problem. It can be treated. One proven method of addressing the problem of addiction and motivating the problem drinker to seek help is a formal intervention.

Intervention is a well-established process that interrupts the course of alcoholism. It provides the afflicted person with facts about their symptoms that others have seen. It also brings forth expressions of love, caring and support for getting help to combat the addiction.

Well-planned formal interventions have about a 90 percent success rate in getting individuals to a place where they can be evaluated and given assistance or treatment as necessary. Also, interventions are 100 percent successful in giving the immediate circle of family and friends an understanding of the illness and a recovery plan for themselves. It is never necessary to wait for someone with a drinking problem to "hit bottom!"

One individual in the drinker's circle can review the indicators of alcoholism and reflect upon personal feelings and reactions in deciding to investigate the use of an intervention. Fortunately, for those in the legal profession, help is not far away. Lawyer assistance programs are developing throughout the nation. The ABA has lists of contacts for lawyers' assistance programs in every state. (See box, page 361.) These programs operate hotlines that can refer people to appropriate resources for assistance by professional interventionists. In some states the programs have their own trained, certified volunteer intervenors who form teams that follow the same process of education, training and planning that a professional does before conducting an intervention.

The intervenor, whether professional or volunteer, will explore the feasibility of planning an intervention by asking the caller questions such as:

- Are there enough indicators of alcoholism?
- What are the caller's goals?
- Is there real care and concern?
- Are there other participants to be included?
- Will the caller contact potential participants and bring them together for training?
- What are the participants' goals? Do they care or just want to "get even?" (Those who want to punish or get even with the problem drinker will not be accepted as participants.)

The intervenor will also explain that the major goals are to show the alcoholic the reality of the disease and to provide trained assistance in dealing

ALCOHOLISM INDICATORS

A colleague may have a drinking problem if he or she:

- Frequently drinks to drunkenness.
- Avoids non-drinking friends or occasions.
- Manipulates others.
- Drives when drunk.
- Has received one or more DUIs.
- Fails to follow through on responsibilities or commitments.
- Deflects with anger and blame all attempts to discuss drinking.
- Promises to cut down on drinking and seems to try to do so.
- Frequently embarrasses family and friends.
- Always has an alibi for drinking-related behavior.
- Seems to have memory blocks at times.
- Has asked another lawyer to cover for him/her in court several times in the past few months.
- Has been noticeably drunk at several recent social affairs.
- Fails to appear at scheduled meetings with clients.
- Shows a deterioration in quality of work.
- Has started to avoid having lunch with the normal group.
- Frequently takes long lunches.
- Appears noticeably drunk or different after lunch.
- Has often been ill on Mondays or Fridays.

Betty Reddy
Betty Reddy, C.E.A.P., is an occupational services consultant at Parkside Medical Services in Park Ridge, Illinois.

Ruth Woodruff
Ruth Woodruff is the assistant editor for the ABA/BNA Lawyers' Manual on Professional Conduct.

ARE YOU CONTRIBUTING TO THE PROBLEM?

Colleagues of an impaired lawyer may feel embarrassed, confused, angry, resentful, anxious, guilty, or helpless to address the situation. These reactions can result in behavior that masks the problem. A colleague may, for example,

- Cover for the drinker by assuming or shifting responsibilities within the firm or making excuses for the lawyer's failure to perform.
- Try to control the lawyer's drinking.
- Angrily lash out at the lawyer.
- Lose confidence and trust in the lawyer.
- Avoid the lawyer.
- Deny the lawyer's drinking problem.

When colleagues react in these ways, they are contributing to the course of the alcoholism by softening or removing the pain the alcoholic would otherwise normally experience from his drinking. That involvement allows or enables the impaired lawyer to be deluded into believing that the problems can be corrected with everyone's help. It also deludes family and friends into believing that there must be something they could do differently to stop the drinking, or, alternatively, that the situation is beyond hope and the alcoholic cannot be helped.

with that reality. The intervention will also help participants replace their own enabling behavior with responsible actions. (See box.) Participants learn how to become part of the solution rather than the problem.

The intervenor may advise putting a temporary hold on plans while some or all members of the group attend support meetings for friends and families of alcoholics. These meetings can be an important transition to the powerful and emotionally charged atmosphere of an intervention. Those involved need to care enough about the problem drinker to calmly and courageously state the facts about their experiences with the alcoholic's drinking, setting aside any anger or resentment. They need to be able to say "I care about you" and mean it. They may also need to prepare to state and stand by one or two realistic changes they will make in how they interact with the alcoholic. For example, a partner may have to say, "You were a valued member of this firm, but have become a liability. If you continue to drink, we will have to let you go."

During the training phase, the intervenor educates the group about the dynamics of alcoholism as they affect the alcoholic and those close to him or her. Participants are coached on their individual roles and write down specific details about recent personal incidents with the alcoholic, including their own feelings about these events, and statements of their concern and desire to help.

The intervenor will also help the group prepare for getting the alcoholic to the meeting and for conducting the meeting itself. The specialist will control the meeting, assuring the alcoholic that everyone is there because they care and want to help, asking the alcoholic to listen to everyone before responding and ensuring that the meeting follows the agreed-upon plan. Usually, arrangements for an evaluation appointment or a treatment bed are made before the intervention and, with the impaired lawyer's consent, an appointment for an assessment and appropriate treatment follows the meeting.

There may be ambivalence about participating in an intervention, but the willingness of individuals to bring an intervention into the life of someone they know and care about is an important step on that person's road to health. It can also be the entry into a recovery path for each of the concerned participants. ■

ADDITIONAL RESOURCES

Law firms, law schools, bar associations, disciplinary agencies and lawyer assistance programs across the country can now rent or purchase a videotape depicting the steps of an intervention. For information about lawyers, alcoholism and the intervention process, contact Arthur Garwin, assistant professionalism counsel, ABA Center for Professional Responsibility, 541 North Fairbanks Court, Chicago, Illinois 60611-3314, (312) 988-5294.

For information about other resources related to lawyers' substance abuse, including directories of state and local lawyer assistance programs and national workshop materials, contact Donna Spilis, staff director, ABA Commission on Impaired Attorneys, 541 North Fairbanks Court, Chicago, Illinois 60611-3314. Phone (312) 988-5359.

ALABAMA STATE BAR
TELEPHONE 205-269-1515
P.O. BOX 671
MONTGOMERY, ALABAMA 36101

Dear Alabama Lawyer:

We are pleased to tell you the Alabama State Bar, through its Lawyers Helping Lawyers Committee, has implemented a comprehensive program to assist those in the legal community with substance abuse problems.

The ALA-PALS (Positive Action for Lawyers) is a group of lawyers who desire to assist substance-abusing members of the legal community and their families. We are not part of the disciplinary process and have been granted an attorney-client privilege by the board of bar commissioners to protect disclosures made in order to assist a substance-abusing lawyer. See Ala. Rule of Professional Conduct 8.3 (c).

ALA-PALS has three missions: (1) Identification and investigation of substance abuse problems of lawyers; (2) treatment and rehabilitation; and (3) follow-up and recovery. We recognize that addiction to alcohol or other drugs is a primary chronic illness and is not a moral defect or character deficiency. There is no known cure for chemical dependency and the ability to handle any quantity of drugs will get progressively worse. Chemical dependency is, however, treatable and the course may be arrested by total abstinence from mood-altering substances.

ALA-PALS has drafted guidelines which implement a program of intervention for lawyers with substance abuse problems which affect their professional conduct. We receive, in confidence, information from any source concerning any lawyer thought to have a problem. A discreet and confidential investigation follows along with a careful evaluation of the facts. The committee then makes recommendations to the lawyer concerning sources of help. All investigations are conducted by volunteers with the knowledge and authorization of the chairman.

The rehabilitation portion generally starts with a review by the chairman with the volunteers of their results. If the attorney is believed to have a problem, the decision is made as to whether to approach the lawyer privately, or, with full consideration of the privileged and confidential nature of the matter, enlist others in an attempt to persuade him to seek help. These, most commonly, would include partners or family members. The choices for rehabilitation are in- or out-patient treatment and Alcoholics Anonymous.

ALA-PALS will continue with a follow-up and recovery program to monitor and assist the recovering attorney and to keep the ALA-PALS project advised so that the program can certify to the state bar that it is performing its task. The volunteers are drawn from lawyers, judges and laymen in Alabama who are recovering chemically dependent persons or whose personal life or professional experience have prompted in them a sincere interest and concern in helping chemically dependent lawyers.

The goals of ALA-PALS are as follows:

- To educate the legal community in Alabama concerning the disease of alcoholism and chemical dependency, particularly as the disease affects them.
- To identify chemically dependent lawyers in Alabama.
- To determine the possible chemical dependency of any lawyer in Alabama who is thus identified.
- To arrange interventions in the lives of practicing chemically dependent lawyers, using all the resources available and appropriate in each case, including family, friends, law partners, other lawyers, judges, and chemical dependency counselors.

We feel sure that when these goals are met, the public will be protected and those members of the legal community who desire help will remain as productive members of the bar and our society.

Many efforts and much expenditure of time has brought us to this point of being able to offer the ALA-PALS program to help our peers. Please know there is confidential help if you or someone in the legal community you know needs this program. Please call me at (205) 328-5330 for referral to ALA-PALS or answers to questions.

Cordially,
Terrell Wynn, chair
Lawyers Helping Lawyers Committee
Alabama State Bar
Keith Norman, Alabama State Bar liaison

THE UNAUTHORIZED PRACTICE OF LAW?

by DAVID B. CAUTHEN and L. BRUCE ABLES

The unauthorized practice of law is indirectly defined by *Alabama Code* §34-3-6 (1975) wherein it states who may practice law in Alabama.

"(a) Only such persons as are regularly licensed have authority to practice law.

(b) For the purposes of this chapter, the practice of law is defined as follows:

Whoever,

(1) In a representative capacity appears as an advocate or draws papers, pleadings or documents, or performs any act in connection with proceedings pending or prospective before a court or a body, board, committee, commission or officer constituted by law or having authority to take evidence in or settle or determine controversies in the exercise of the judicial power of the state or any subdivision thereof; or

(2) For a consideration, reward or pecuniary benefit, present or anticipated, direct or indirect, advises or counsels another as to secular law, or draws or procures or assists in the drawing of a paper, document or instrument affecting or relating to secular rights; or

(3) For a consideration, reward or pecuniary benefit, present or anticipated, direct or indirect, does any act in a representative capacity in behalf of another tending to obtain or secure for such other the prevention or the redress of a wrong or the enforcement or establishment of a right; or

(4) As a vocation, enforces, secures, settles, adjusts or compromises defaulted, controverted or disputed accounts, claims or demands between persons with neither of whom he is in privity or in the relation of employer and employee in the ordinary sense;

is practicing law.

(c) Nothing in this section shall be construed to prohibit any person, firm or corporation from attending to and caring for his or its own business, claims or demands, nor from preparing abstracts of title, certifying, guaranteeing or insuring titles to property, real or personal, or an interest therein, or a lien or encumbrance thereon, but any such person, firm or corporation engaged in preparing abstracts of title, certifying, guaranteeing or insuring titles to real or personal property are prohibited from preparing or drawing or procuring or assisting in the drawing or preparation of deeds, conveyances, mortgages and any paper, document or instrument affecting or relating to secular rights, which acts are hereby defined to be an act of practicing law, unless such person, firm or corporation shall have a proprietary interest in such property; however, any such person, firm or corporation so engaged in preparing abstracts of title, certifying, guaranteeing or insuring titles shall be permitted to prepare or draw or procure or assist in the drawing or preparation of simple affidavits or statements of fact to be used by such person, firm or corporation in support of its title policies, to be retained in its files and not to be recorded."

The legislative intent by this section was to insure that laypeople would not serve others in a representative capacity in areas requiring the skill and judgment of licensed attorneys. *State Ex Rel Porter v. Alabama Association of Credit Executives*, 338 So. 2d 812 (Ala. 1976).

What about the drafting or filling in of blanks in printed forms of instruments relating to land by real estate agents, brokers, title companies or managers as constituting the practice of law? The Alabama Supreme Court in the case of *Coffee County Abstract v. State Ex Rel Norwood*, 445 So.2d 852 (Ala. 1983), basically answers this question. This decision prohibits the discussions of law or purely mechanical filling in of blanks in areas that traditionally have been the territory of attorneys. The decision also says, in an area that can be as fraught with complications and pitfalls as purchasing real estate, an attorney is the only appropriate person to give legal advice and determine exactly what type of instrument best fits the needs of the parties. This case was decided nearly ten years ago. There has been very little judicial action in this area since. The case of *Lawyer's Title Ins. Corp. v. Vella*, 577 So.2d 578 (Ala. 1990) held in part that a title company had breached its duty to disclose a known title defect, an IRS Right of Redemption. Justice Houston dissenting and concurring in part noted that

David B. Cauthen

David B. Cauthen, a Decatur attorney with the firm of Cauthen & Cauthen, is chairperson of the Alabama State Bar's Unauthorized Practice of Law Committee.

L. Bruce Ables

L. Bruce Ables is the vice-chair of the committee and practices in Huntsville with the firm of Berry, Ables, Tatum, Little & Baxter.

the *Vella* case stood in contrast to the *Coffee County* decision stating that there was no duty to disclose on the part of the title company to the purchasers, noting that *Coffee County* held title companies are forbidden to give legal advice. *Vella,* 570 So.2d 587.

Whether we are cognizant of it or not, there is a tremendous amount of unauthorized practice of law conducted in Alabama. The average layperson has no idea what the unauthorized practice of law is, or why there are statutes in every state prohibiting the unauthorized practice of law. Clearly, the purpose is to protect the general public.

Most real estate agents and bankers do not know the legal difference between a deed conveying property to parties as joint tenants with right of survivorship as opposed to tenants in common. The average banker or financial institution does not recognize the legal significance of a bank account under joint names with survivorship provisions as opposed to an account opened in the name of an individual with only the right on the part of the other party to be a signatory. Most would not realize that when an account is opened by a parent with one of the parent's five children as a joint account with survivorship arrangement, the child on the account will take the entire account upon the death of the parent. The other four children will take nothing. Obviously, this is not what the parent intended. The banker advised the account to be opened in this manner, and this is giving legal advice. The advice is very detrimental to the public.

There are many areas that need to be looked into, such as:

(a) The sale of books or forms designed to enable laymen to achieve legal results without assistance of attorneys.

(b) The practice by a credit collection agency of threatening debtors that legal action will be brought or contemplated if the debt is not paid.

Your comments on areas that you have encountered on a regular basis wherein non-lawyers are giving legal advice is solicited. ■

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NEW ALABAMA WORKERS' COMPENSATION ACT

by STEVEN FORD

(The author acknowledges with appreciation the assistance of Philip Segrest, a 1992 graduate of the University of Alabama School of Law.)

INTRODUCTION

The new Alabama Workers' Compensation Law signed by Governor Hunt on May 19, 1992, is the result of a two-year process which attempted to address the growing problems in this area. The Department of Industrial Relations initiated the reform and once its actions became known "advisors" began coming out of the woodwork. Ultimately, many individuals, groups, organizations, and coalitions attempted to direct and/or influence the course of the proceedings and the final outcome which made for a political jigsaw puzzle.

The initial reform bill was introduced in May 1991, in the regular session of the Legislature. Informal negotiations actually had begun before the bill was introduced and continued throughout the 1991 session. The bill quickly passed the House but died in the Senate without being voted on when the session ended in July. Behind-the-scene negotiations continued throughout the remainder of the summer, fall and winter until Governor Hunt called for formal negotiations immediately before the special session set January 27, 1992. These formal negotiations failed to produce a consensus, and thereafter the special session basically consisted of more intense negotiations and political lobbying. Although progress was made, the special session failed to produce a bill and the issue was introduced once again in the 1992 regular session. Continued negotiations, lobbying, and a variety of pressures eventually led to the new act.

Needless to say, no single answer could satisfy everyone. The final version of the bill represents a true compromise containing many provisions in which the line in the sand was drawn. In some limited ways the process could be likened to the labor and birth of a child. The two-year labor was at times painful, intensive and exhausting, while at the same time mixed with determination, apprehension and second-guessing. The birth of the bill brought a feeling of relief and satisfaction, yet with that feeling was a sober realization that it possessed the potential for both good and bad.

Only time will tell if the real issues facing workers' compensation have been effectively addressed or whether the act is only a band-aid placed on a lesion, or perhaps a complete misdiagnosis. The following is not a technical analysis of the new act, but simply a topical summary of the changes in the law presented from a neutral standpoint.

I. APPLICABILITY

Under prior law the workers' compensation statutes did not apply to an employer who regularly employed less than three employees. The act raises the minimum number of employees to five, except for those employers in the business of constructing single family, detached residential dwellings. Also, now under §25-5-1, an employer is anyone who "employs another to perform a service for hire and pays wages directly to the person." Employee means "every person in the service of another under any contract of hire".

Under prior law contained in §25-5-10, those attempting to evade liability by scheme or artifice are declared "employers". However, this section explicitly forbade a construction imposing such liability on contractors and subcontractors. The new act deletes this provision relieving contractors and subcontractors of liability.

Employers electing not to accept coverage must now give employees and applicants conspicuous notice of that fact. Under §25-5-50, school boards need not provide coverage until they receive adequate funds from the special education trust fund. The act also contains a special provision allowing volunteer fire fighters to receive coverage from their departments, based upon the salary they earn in their regular jobs. It does not make volunteer firemen's regular employers liable.

II. INSURANCE

A. Employers' options to secure payment of compensation

Where the employer elects to act as a self-insurer and the director rules adversely, the act expedites appeals in §25-5-8(d)(2) by providing that the presiding judge shall within ten days after notification of appeal assign a member of the court to hear the case and the matter shall be set for hearing at the earliest available time. Under prior law, trials of these issues were to be "without a jury unless the employer demands a jury trial at the time of taking such appeal". The act strikes this provision permitting a jury trial. The act raises the minimum fine for failure to secure compensation from $24 to $100 and authorizes the court to impose a $100 per day civil fine. In regard to employer's insurance policies, filings which contain aggregate industry data of classification of risks and premiums are to be public records under §25-5-8(f)(2).

B. Employer Bill of Rights — §25-5-8(g)

The employer may, by written request, require his insurance carrier to provide a list of claims made, amounts paid, details of the workers' treatment, and notice of any proposed settlement. Failure to comply subjects the insurance carrier to a fine of between $25 and $100. In addition, if a court finds that an employee made a fraudulent claim, the employer may fire the worker without worrying about §25-5-11.1 sanctions.

C. Small Employer Incentive Plans — Section 50*

The act will permit insurance carriers to give premium discounts of 10 percent and 15 percent to small employers who do not suffer any on-the-job injuries for one and two years, respectively. Similarly, the insurance carrier may assess a 10 percent surcharge against a small employer who suffers two or more losses. The act defines "small employer" as an employer who is not experienced-rated for workers' compensation insurance purposes and whose annual workers' compensation premium is less than $5000.

III. LIABILITY FOR AND AMOUNT OF COMPENSATION

A. Definition

1. Wages — §25-5-1(6) — Wages consist of earnings subject to federal income taxation and reportable on the federal W-2 tax form, including voluntary contributions made by the employee to a tax-qualified retirement program, voluntary contributions to a §125 Cafeteria program, and "fringe benefits" as newly defined (only the employer's portion of health, life and disability premiums). Average weekly earnings shall not include fringe benefits if the employer continues the benefits during the period of time for which compensation is paid.

2. Injury — §25-5-1(g) — Under prior law, injury included diseases resulting proximately from the accident. The new definition would include "occupational diseases" and diseases resulting "naturally and unavoidably" from the accident. Additionally, the definition includes "physical injury caused by either carpal tunnel syndrome disorder or by other cumulative trauma disorder, if either disorder arises out of and in the course of employment". However, the burden of proof for such disorders has been increased to clear and convincing evidence. The act considers mental injury and mental disorder to constitute an injury only when proximately caused by some physical injury. This limitation already exists in case law.

Steven W. Ford

Steven W. Ford, a partner in the Tuscaloosa firm of McElvy & Ford, received his bachelor's degree from the University of Alabama in 1975 and his law degree from The University's School of Law in 1978.

He was chairperson of the state bar's Task Force to Establish a Workers' Compensation Law Section and now serves as the section's chairperson. He received the state bar's 1991-92 Award of Merit.

B. Compensation

1. Permanent Partial Disability — §25-5-57(3)(i) — If an employee suffering a non-scheduled injury returns to work at the same or greater wage, his disability is equal to his physical impairment and no evidence of vocational disability is allowed. If the employee loses his job within 300 weeks of the date of the injury, he has two years to ask the court to reconsider his rating and at this time may present evidence of vocational disability. The court may not reconsider the assessment if the employer establishes one of the following by clear and convincing evidence: (1) the employee is on strike, (2) the employee quit voluntarily without good cause, (3) the employee was fired for a dishonest or dangerous act in connection with his work, (4) the discharge was for misconduct after the employee received a warning, or (5) employee lost a necessary license which he was responsible for maintaining. In the new hearing, the court is to consider "accommodations" that would permit the employee to continue working.

2. Permanent Total Disability — §25-5-57(4) — What, under prior law, constitutes the sole basis of permanent total disability would under the act be prima facie evidence of permanent total disability, but is not the sole basis of the award. An employee refusing to accept "reasonable accommodations" cannot be deemed permanently totally disabled. Where permanent total disability is the result of a second injury and the first injury is not in the same employment, the employee is entitled to compensation only for the degree of injury he would have received in the latter accident if the earlier injury did not exist. This result follows from the elimination of the second injury trust fund. The employee must file an affidavit of gainful employment if he receives employment due to an accommodation.

3. Death — The act eliminates exclusivity of payment of benefits for death following disability in §25-5-57(5). In addition, §25-5-60 mandates payment of $7,500 to the estate of a worker killed in an accident when the worker has no dependents. §25-5-67 was amended to raise allowable burial expenses from $1,000 to $3,000.

4. Delay in Payment — §25-5-59(b) — Failure to pay compensation without good cause within 30 days after it becomes due results in a 15 percent penalty.

C. Medical expenses

1. Medical expenses — Employer is responsible to pay the prevailing rate, not the actual cost, of medical expenses under §25-5-77. The definition of "prevailing" is set forth in §25-5-1 and means most common in the area. The method of determining the prevailing rate for participating and non-participating hospitals is set forth in §25-5-77(a). For certain situations set forth in §25-5-77(i), the parties may seek an ombudsman review with regard to medical expenses. Disputes regarding rehabilitation may be submitted to the court.

2. Mileage — §25-5-77(f) — Employer must pay employee mileage costs to and from medical and rehabilitation providers at the same rate provided by law for official state travel.

3. Employee Liability — §25-5-77(g) — Employees are not liable for compensable medical expenses. This means the health care provider's only recourse is against the employer.

4. Delay in Payment — §25-5-77(h) — Failure to pay undisputed medical bills within 25 days results in a 10 percent late penalty. Failure to pay this penalty could result in a civil penalty of up to $500.

D. Occupational Disease — §25-5-110

The reform act combines former Articles 4, 5, and 7 on Occupational Diseases, Occupational Pneumoconiosis, and Occupational Exposure to Radiation into one unified Article 4 without changing any of the substantive law. The new Article 4 does set the statute of limitations consistently at two years. The repealer provision in §51 of the act mistakenly repeals Article 6, which deals with Occupational Pneumoconiosis of Coal Miners, and leaves in place Article 7, which deals redundantly with occupational exposure to radiation. This clerical error was in all versions of the bill and was retained in the enrolled act.

E. Limitations on Recovery

1. Drug Testing — §25-5-51 — An employee may not recover for an accident "due to the injured employee being intoxicated from the use of alcohol or impaired by illegal drugs". The employer can demand a drug test. Refusal of the employee to comply precludes compensation. A positive test is "conclusive presumption of impairment". The employer must then prove that his impairment caused the accident.

2. Misrepresentation — §25-5-51 — An employee cannot receive compensation where he misrepresents his physical condition on an employment application and the injury received aggravates that condition. The employer must put a written notice of this limitation on the application in bold type.

3. Setoffs — §25-5-57(6)(c) — The employer may deduct from compensation payments the proceeds of disability insurance when the employer provides the benefits or paid for the plan. The employer may receive a setoff in weeks against compensation owed if he continues the injured employee's salary. If the employee receives back pay for any period, he forfeits to the employer compensation paid for that period.

4. Employer Subrogation — §25-5-11 — In regard to third-party actions, the new act expands the employer's right to subrogate the disability benefits to include medical benefits and vocational benefits. It further provides that, in the event a portion of the judgment is uncollectible, the subrogation interest of the employer may be reduced.

5. Governmental Actors — §25-5-11 — An employee may pursue a collateral action against a governmental agency providing occupational safety and health services or its employee only for willful injury. Such an agency making safety inspections on behalf of self-insured employer is immune under §25-5-53 from all civil liability except for willful acts.

6. Waiting Period — §25-5-59 — Prior law imposed a 21-day waiting period to receive the first three days compensation for temporary total and temporary partial disability. The new act extends this waiting period to unscheduled permanent partial disability, permanent total disability, hernia, and death.

IV. LITIGATION

A. Statute of limitations

The new act sets the limitations period uniformly at two years from the point of accrual in §25-5-80 and §25-5-117.

B. Discovery — §25-5-81(f)

The act places limits on discovery. No more than two depositions for each side may be taken except for good cause shown. However, each party may take the deposition of every other party. No more than 25 interrogatories can be propounded by either party. Parties must exchange copies of medical records, which are authenticated as business records under Ala.R.Civ.Proc. 44(h). Each party may depose the opposing party's physician.

C. Burden of Proof — §25-5-81(c)

Except for cases of cumulative stress disorders, proof shall be by preponderance of the evidence. Here the act essentially codifies case law. The burden of proof in workers' compensation cases has been to reasonably satisfy the trier of fact of the claim. At least one case has held that this burden is no less than that in other civil actions. Apparently, there was some confusion about the "any evidence" standards used by appellate courts in reviewing findings of fact. The "any evidence" standard has been the standard of review not the standard of proof.

In cases of cumulative stress disorder, proof must be by "clear and convincing" evidence. This is a quantum of proof greater than a preponderance. The act expands on the term in §25-5-81(c).

D. Standard of Review — §25-5-81(e)

The act adopts a new standard of review. In considering the "standard of proof set forth herein and other legal issues", the legislature in §25-5-81(e) directs the court of civil appeals to act without presumption of correctness. This language invites the court to treat as a question of law the issue of whether proof was sufficient; this issue is not one of law but of fact. The act goes on to state that "pure findings of fact" may not be reversed if they are supported by "substantial evidence". This "substantial evidence" language was used in the tort reform legislation which abolished the scintilla rule. Previously, the appellate courts would not reverse the findings of the circuit court if based upon "any evidence", and if any reasonable review of that evidence supports the trial court's judgment.

E. Fees and Costs — §25-5-90

The judge fixes the attorney's fees of the employee "upon the hearing of the complaint for compensation, either by law or by settlement". The expenses of litigation and fees charged by the attorneys representing the employers must be reported to the Department of Industrial Relations.

V. THE OMBUDSMAN PROGRAM

A. Duties of the Ombudsman — Section 37*

Participation in the ombudsman program is elective. The ombudsman is a merit system employee who has demonstrated familiarity with workers' compensation law. He prepares the

claim for the Benefit Review Conference, in which capacity he (1) meets with or provides information to the claimant, (2) investigates complaints, and (3) communicates on behalf of the claimant with the employer insurance carrier, and health care providers. In doing so, he (1) mediates disputes and assists with claims, (2) informs all parties of their rights and duties (especially where a party is unrepresented), and (3) insures that the claims file contain all wage, medical, and other records and documents relevant to the disputed issues. The ombudsman may not make a formal record and may not take testimony as such, but he may ask questions of the employer, the employee, and the insurance company to supplement or clarify the claim file. He may not serve as an advocate for anyone or assist a party after the Benefit Review Conference.

B. The Benefit Review Conference — Section 38*

This is a non-adversarial, informal proceeding, available on any claim arising after January 1, 1993. It is not mandatory and is available only when the employer and the employee consent. The Benefit Review Conference has three purposes. The first purpose is to explain, both orally and in writing the rights of the parties and the procedure necessary for protecting those rights. The second purpose is: (1) to discuss the facts of the claim; (2) to review the information available for evaluating the claim; and (3) to delineate the issues of the claim. The third purpose is to mediate disputed issues by mutual agreement.

C. Dispute Resolution — Section 39*

1. Disputes Between Employer and Employee — The Benefit Review Conference may result in either a partial or a complete resolution of these disputes. If the conference results in a partial resolution, the ombudsman is to prepare a written settlement agreement. The agreement must be in writing and signed by the parties and the ombudsman. An agreement signed pursuant to this section shall be binding on all parties, unless within 60 days after the agreement is signed or approved, the court on a finding of fraud, newly discovered evidence, or other good cause, shall relieve all parties of the effect of the agreement.

If the Benefit Review Conference results in a full resolution of the dispute, the ombudsman prepares a written report. However, this report is not admissible evidence in court. It contains a statement of the issues resolved and the ombudsman's recommendations regarding payment or denial of benefits. In such matters, the circuit court will award attorney's fees just as in a regular court action. However, an attorney may represent any party before an ombudsman without first getting permission of the court.

2. Disputes Between Insurance Companies — Sometimes insurance companies will disagree as to which is liable on a claim for which compensation is clearly due. The ombudsman may enter an Interlocutory Order requiring each insurance company to pay a pro rata share of the compensation due the claimant. Upon a final determination of liability, the insurance company which is liable must reimburse the company which is not.

D. Miscellaneous Provisions — Section 37*

The Department of Industrial Relations establishes the ombudsman program. Each employer must give his employees notice of the program by posting in one or more conspicuous places. The Report of First Injury will contain a description of the services available. The ombudsman will give each claimant written notice of the assistance available in prosecuting his claim.

VI. MEDICAL SERVICES BOARD

A. Composition — Section 43*

The board will have five members. The director of the Department of Industrial Relations (hereinafter referred to as "Director") will appoint these members from a list of nominees submitted by the Medical Association of Alabama. Board members will serve five-year terms. Initial appointments will be staggered so that a new member will be appointed every year. Board members may serve two terms.

B. Renumeration — Section 43*

Board members will receive $100 per day or portion thereof spent in the performance of the duties of their office. Board members will also receive reimbursement for travel expenses. The Department of Industrial Relations is responsible for these payments, as well as providing necessary meeting and office space, and secretarial and clerical support.

C. Operation — Section 43*

The board may adopt rules governing its own proceedings.

One member is elected by the board to serve as chairman. The board meets at least quarterly at a time and place which the chairman designates. The chairman may call meetings more frequently if he deems it necessary. The board functions as a part of the State Department of Industrial Relations.

D. Powers and Duties of the Board — Section 44*

The board will study, develop and implement such guidelines as are necessary and reasonable pertaining to provision of medical services and determination of medical necessity. The board will study, design and implement uniform claims processing forms for physicians to use in reporting medical information to employers and insurance companies. The board will study, devise and develop (but not implement) a uniform system of utilization review and quality assurance for medical services provided by physicians. The board will then recommend this system to the director. The board will address and give consideration to those matters which are directed to it by the director. The board may enter into contracts with members of the health care community in order to provide the board technical expertise in discharging its own duties. The board may establish regional committees "to perform any responsibilities specified by the board and programs established for the delivery of medical services under this act". Regional committees will be composed of physicians who serve at the pleasure of the board and receive the same immunities granted the board members. The Alabama Administrative Procedure Act governs implementation of this provision.

E. Maximum Fee Schedule — Section 45*

The board will calculate a maximum fee schedule by adding 7.5 percent to the preferred provider reimbursement of the state's largest health care service plan incorporated under §10-4-100 to §10-4-115, *Ala. Code* (1975). The board may submit a revised initial schedule, but the revision amounts may not exceed the initial amounts by more than 2.5 percent. The legislature intends this schedule of fees to supplant traditional competitive market mechanisms. The employer is not liable for medical charges which exceed the maximum fee schedule. As stated above, employees are not liable for compensable medical expenses. The board may adjust the fees for three reasons: (1) to account for the cost of living increases based on U.S. Department of Labor statistics, (2) to reflect changes in technology and medical practice, (3) to reflect adoption of a tax on medical services. The tax referred to would not be a simple income or sales tax, but a general transaction tax such as that which was recently proposed before the legislature. Those paying workers' compensation claims may enter into contracts with health care providers at any mutually agreed upon price.

F. Immunities — Section 47*

The board and those working for it receive immunity from civil liability "arising out of or related to the decisions, opinions, deliberations, reports, or publications" of the board. To receive this protection, it must make such decisions (1) in good faith, (2) without malice, and (3) based upon then available information.

VII. ADMINISTRATIVE PROVISION

A. Duties of the Director — §25-5-2; §25-5-3; Section 40*

The director is responsible for continuing education of those working in the area of workers' compensation, for filing an annual report, for appointing certain advisory committees, and for gathering data appropriate for making decisions required under the act. The director is to find, but not establish, the prevailing rate of compensation. The act considers the prevailing rate to be self-determining. The act also grants for those acting on behalf of the director, immunity from civil liability for decisions made in good faith, without malice, and based on then available information.

B. Trust Funds — Section 48*

The bill eliminates the Second Injury Trust Fund. It creates an Administrative Trust Fund. The Administrative Trust Fund would be supported by an assessment levied upon insurance carriers, self-insured employers, and group funds. The bill provides for the initial assessment not to exceed $4.5 million, and also an annual assessment not to exceed $5 million. This fund would pay for costs of programs under the act. This fund would also pay for any claims which are already vested against the Second Injury Trust Fund. There can be no recovery of lump sum attorney's fees from the Administrative Trust Fund.

C. Safety — Section 31*

The legislature states an intent to promote safety. The director is authorized to establish a safety program under which safety engineers would consult with industry, and advise industry in ways to make working conditions safer.

D. Effective Dates — Section 53* and Section 55*

Most of the act's provisions became effective upon passage and approval by the Governor on May 19, 1992. Certain specific provisions changing prior law go into effect August 1, 1992. These provisions include: the new definition of wages; subrogation for vocational and medical expenses; drug testing and impairment; misrepresentation of physical condition and prior injuries; comparable wage section dealing with vocational disability; setoff provisions; statute of limitations; standard of proof; and standard of review. The Ombudsman Program will go into effect January 1, 1993.

Regarding applicability of the new act to existing cases, the Department of Industrial Relations has issued a memorandum which states that "the law which is in effect at the date of the injury applies to that injury".

CONCLUSION

Not all legislation is beneficial and certainly this act contains its share of questionable provisions. Many of the reforms provided for in the bill will require an administrative framework in order to determine exactly how they will operate to achieve the goals set out in the new statutes. I believe the success or failure of these reforms will be determined by the credibility and integrity of the administrative framework used to initiate them. As to the other provisions, only time and appellate construction will answer the tough questions raised by the new law. ■

* *This section is new and there is no corresponding section under prior law.*

RECENT DECISIONS

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

SUPREME COURT OF THE UNITED STATES

Jurors must be "life-qualified" in capital cases

Morgan v. Illinois, Case No. 91-5118 (June 15, 1992). May a prospective juror in a capital trial who states that he or she would automatically vote for death if the defendant were convicted be disqualified for cause? The Supreme Court answered yes by a six-to-three margin.

In an opinion authored by Justice White, the Court ruled that a capital defendant has an absolute right under the Due Process Clause of the Fourteenth Amendment to have questions posed to potential jurors to determine whether they would automatically vote for the death penalty upon convicting the defendant of a capital offense. The Supreme Court ruled that an Illinois trial judge's refusal to permit such questioning after a specific request from the defense was reversible error.

The *Morgan* decision is important for three reasons. First, it reaffirmed the Sixth Amendment guarantee that a capital sentencing jury must be a fair and impartial body. "If a jury is to be provided the defendant, regardless of whether the Sixth Amendment requires it, the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment."

Second, the Supreme Court declared that a juror who will automatically vote for the death penalty in every capital case should be excused for cause. "Even if one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence."

Third, the Court held that a capital defendant, upon request, is entitled to have "reverse-*Witherspoon*" questions posed to prospective jurors in order to ensure the right to an impartial jury and to guarantee the removal of excludable jurors.

Justice Scalia wrote a strongly worded dissent, joined by Chief Justice Rehnquist and Justice Thomas which read in pertinent part:

"Not only must mercy be allowed, but now only the merciful may be permitted to sit in judgment."

Mental illness and the criminal process

Foucha v. Louisana, Case No. 90-5844 (May 18, 1992). May a state keep people previously acquitted of crime by reason by insanity confined to mental hospitals after they regain their sanity just because they still might be dangerous to others? The Supreme Court said no in a five-to-four decision.

The opinion, authored by Justice White, held that state officials violated the defendant's due process rights by keeping him institutionalized after psychiatrists said he was sane. Some of the doctors were unwilling to say that he no longer posed a threat to himself or others.

Justice O'Connor wrote a separate concurring opinion in which she emphasized how narrow she considered the Court's holding. Justice O'Connor said that states may be able to detain a person who regains sanity "if, unlike the situation in this case, the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquittee's continuing dangerousness."

State's right to mask symptoms of mental illness

Riggins v. Nevada, Case No. 90-8466 (May 18, 1992). Did state authorities violate a mentally unstable defendant's fair trial rights under the Sixth and Fourteenth amendments when they forced him to take anti-psychotic drugs during a trial in which he was pleading insanity?

In *Riggins*, a seven-to-two majority, led by Justice O'Connor, held that the forced administration of the anti-psychotic drug, mellaril, to Riggins during his capital murder trial violated his Sixth and Fourteenth amendments rights. Justice O'Connor, citing the American Psychiatric Association's description of the drug's side effects, found that the medication created the strong possibility that Riggins' ability to consult with his lawyer, to testify at trial and to understand the trial proceedings were "impaired."

Once a defendant moves to terminate treatment, the Court said, due process requires the State to show that treatment is medically appropriate and, considering less intrusive alternatives, essential to the defendant's safety or the safety of others.

Speedy trial

Doggett v. United States, Case No. 90-857 (June 1992). Did the federal government violate a defendant's constitutional right to a speedy trial by waiting more than eight years after his indictment to try him, even though the delay was caused by negligence and not deliberate procrastination? The Supreme Court said yes by a five-to-four margin.

In an opinion authored by Justice Souter, the Court held that Doggett's conviction must be overturned. "Where bad faith delay would make relief virtually automatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him."

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This is a significant decision because it departs from prior precedent which required actual demonstration of prejudice to the accused resulting from delay in all cases. In *Doggett*, the Supreme Court held that there comes a time when delay constitutes a denial of justice without the necessity of requiring the defendant to prove demonstrable prejudice.

Batson extended to defense use of peremptory strikes

Georgia v. McCollum, Case No. 91-372 (June 18, 1992). Do criminal defendants violate the Constitution when they use race as a basis for excluding, through peremptory challenges, prospective jurors from their trials? The Court answered yes by a seven-to-two margin.

In an opinion by Justice Blackmun, the Supreme Court held that the Constitution prohibits a criminal defendant from engaging in purposeful racial discrimination in the exercise of peremptory challenges against racial minorities. The Court's holding in *McCollum* further extends the decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), which limited racially biased use of peremptory strikes against racial minorities by the state.

In *McCollum*, three white defendants were charged with assault upon two African Americans. Before jury selection began, the trial judge denied a motion filed by the State to prohibit the defendants from exercising peremptory strikes in a racially biased manner to exclude black venire members. The State appealed the Court's ruling and the Georgia Supreme Court held that the Constitution did not limit defense use of peremptory strikes. In reversing the decision of the Georgia Supreme Court, the United States Supreme Court made several findings about a defendant's right in the context of criminal trial.

Justice Blackmun reasoned as follows:

Be it at the hands of the state or the defense, if a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice — our citizens' confidence in it.

As a practical matter, the Supreme Court's decision in *McCollum* is of little precedential consequence in Alabama. The Alabama appellate courts have already ruled that peremptory strikes by defense lawyers are subject to *Batson's* teaching. *See Lemley v. State*, 6 Div. 25 (Ala.Crim.App., January 17, 1992).

Based upon the substantial body of case law following *Batson*, *McCollum* will require defense counsel, who excludes a minority group member from jury service, to be prepared to give an explanation of the strike that it is not racially biased, i.e., a race-neutral reason, if the State objects.

Incompetency to stand trial — who has burden?

Medina v. California, Case No. 91-8378 (June 18, 1992). May states require defendants to bear the burden of proving they are incompetent to stand trial? The Supreme Court answered yes in a seven-to-two decision.

Justice Kennedy reasoned that such a requirement would not violate a defendant's due process rights. "It is enough that a state affords the criminal defendant on whose behalf a plea of incompetence is asserted a reasonable opportunity to demonstrate that he is not competent to stand trial."

It is the writer's opinion that this decision has a substantial impact on the question of who has the burden of going forward as opposed to the ultimate burden of persuading the Court that the defendant does not understand the nature of the charges and is unable to effectively cooperate with counsel in the defense.

BANKRUPTCY

Eleventh Circuit nixes cross-collateralization in Chapter 11 case

In the Matter of Saybrook Manufacturing Company, Inc., 1992 WL. 124355, (11th Cir., June 25, 1992). The United States Bankruptcy Court for the Middle District of Georgia approved an emergency financing order in which Manufacturers Hanover Bank, holding a $34,000,000 claim, agreed to lend the debtors an additional $3,000,000 to facilitate the reorganization. In doing so, Manufacturers Hanover received a security interest in all debtor's property, both pre- and post-petition, which security interest was to protect not only the $3,000,000 lent post-petition, but also the pre-petition $34,000,000. At the time of the filing, the $34,000,000 pre-petition debt was undersecured by approximately $24,000,000, but by reason of the financing order this pre-petition debt became fully secured by all of the debtor's assets. The Bankruptcy Court overruled creditors' objections to its original financing order, appeal was taken, request for stay denied, and the District Court, on appeal, then not only denied the request for a stay but also denied the motion and dismissed the appeal as moot under §364(e) which provides that the reversal or modification on appeal of granting authorization to obtain credit does not affect the validity of the lien unless a stay was obtained. The Eleventh Circuit, in a disagreement with other circuits, stated that the appeal was not moot, that cross-collateralization was not authorized by §364(e), and, further, that the Bankruptcy Court under §105 does not have the right to deviate from rules of

priority and distribution in the interest of justice and equity, as *"it is an impermissible means of obtaining post-petition financing."* (emphasis supplied).

COMMENT: Undoubtedly, this case is going to put a damper on bank financing within the Eleventh Circuit jurisdictional borders, and probably in other areas where the circuit courts have not ruled.

U.S. Supreme Court says holdings in pension plans under ERISA excluded from bankruptcy estates

Patterson v. Schumate, __U.S. __, __S.Ct.__ (1992 LW 127069) (June 5, 1992). The Supreme Court has finally settled this question which occasioned a split among the various circuits. The debtor, Schumate, had an interest of $250,000 in a pension plan which was ERISA-qualified. Mr. Justice Blackmun authored the opinion, which stated that §541(c)(2) allows a debtor to exclude from the property of the estate the debtor's interest in a plan or trust which contains a transfer restriction enforceable under any relevant non-bankruptcy law. The Fifth, Eighth, Ninth and Eleventh circuits had interpreted this as applying to restrictions that would qualify only under spendthrift trust laws of the state. Justice Blackmun, in refuting this interpretation, said that there is nothing in §541 suggesting that a reference to non-bankruptcy law pertains exclusively to the law of a state, and that if Congress wished to restrict it to state law, it would have said so.

COMMENT: The State of Alabama has a special statute which provides that the ERISA and IRA interests are exempt. In view of the above holding, it would seem to make no difference if the funds are considered not to have become a part of the estate. Even if an IRA fund is held not to be bound by *Schumate*, the Alabama Exemption Law, unless unconstitutional, would take it out of the hands of the trustee. It is assumed, but not a foregone conclusion, that this decision also will apply to IRA as the legislation which provides for setting up the individual retirement accounts and prohibiting alienation is similar to that of the employment benefit plans.

Supreme Court gives absolute effect to bar date for objections to claim of exemptions

In *Taylor v. Freeland & Kronz*, __U.S.__, __S.Ct.__(1992 WL 77247) (April 21, 1992) the United States Supreme Court held that a trustee who failed to object to the debtor's claim of exemptions within the time prescribed by Rule 4003 of the Bankruptcy Rules was barred from objecting to a debtor's claim of exemption even where the debtor had no colorable claim to the exemption under the Bankruptcy Code. In *Taylor*, the debtor was the plaintiff in an employment discrimination claim at the time of the filing of her bankruptcy petition. The pendency of the discrimination suit was disclosed to the trustee and creditors on the debtor's schedules. At the first meeting of creditors, debtor's attorneys disclosed to the trustee (Taylor) that they estimated the debtor would recover $90,000 in her suit. The trustee failed to object to the debtor's claim of exemption within the time specified in Rule 4003(b) (30 days after the meeting of creditors).

Thereafter, debtor recovered $110,000. The trustee sought to recover the portion which had been paid to respondents as attorney's fees on the ground that the debtor had no statutory basis for claiming the proceeds of the lawsuit as exempt. The Bankruptcy Court ordered a return of the amount necessary to pay off the debtor's unpaid creditors. The Third Circuit reversed because the trustee had failed to timely object to the claimed exemption.

The Supreme Court affirmed this ruling, holding that the Bankruptcy Rule 4003(b) bar date to claims was absolute. The Supreme Court rejected the trustee's argument that the debtor lacked good faith in asserting her claim of exemption. The trustee further argued that the Court's holding would create improper incentives for debtors to claim property exempt on the chance that the trustee and creditors would fail to object to the exemption on time. In response to these arguments, the court noted that debtors and their attorneys face penalties and sanctions for improper conduct which would limit bad-faith claims of exemptions by debtors. The court further stated that Congress could enact legislation to remedy any difficulties caused by the Supreme Court's reading of the Bankruptcy Rule.

In a very strong dissent, Justice Stevens stated that he would hold under the facts of this case that the time for filing objections to the debtor's claim of exemptions should be equitably tolled. Justice Stevens would hold that the filing of a frivolous claim for exemption is tantamount to fraud for the purposes of deciding when the 30-day period begins to run.

COMMENT: Despite the trustee's failure to timely object to the debtor's claim of exemption, the court's ruling seems inconsistent with the equitable principals governing bankruptcy. The creditors should not be punished by the trustee's failure to file a timely objection, particularly where the claim of exemption had no basis in law. The court specifically found that the claim of exemption had no basis under the Bankruptcy Code and mentioned the availability of sanctions for bad-faith claims of exemption. Clearly, the court could have granted the requested relief, as a sanction against the debtor in this case.

A quick pat, peck or kiss

Walker v. Mather, 10th C.C.A., ____F.2d____, (March 26, 1992), 22 B.C.D. 1284, state exemption statute creating exemption in IRA and KEOGH was valid.

Best Products, Inc., 22 B.C.D. 1288 (Bankr. S.D.N.Y. March 27, 1992), secured creditor is entitled to adequate protection only from date of its motion for relief from stay.

Novelty v. Palons, 8th C.C.A. 958 F.2d 243 (March 30, 1992). Fee enhancement — Lodestar amount is not sufficient if services of attorney are extraordinary. In such case, enhancement should be allowed.

In re Club Assoc., 11th C.C.A., 956 F.2d 1065 (March 30, 1992). In a case involving "substantial consummation", the Eleventh Circuit held that even if there had been "substantial consummation" on appeal of a secured creditor's motion for "relief" from stay, for the appellate court to reject the appeal for mootness, it must determine that it cannot grant effective relief. Here it did deny the appeal, stating that the case had proceeded to a point where effective relief was not possible. ■

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Larry Clarence Black
Becky Allen Black
Charles Walter Balkeney
Bradley William Brian Bodmer
David Brechemin Briggs
Rita Maria Briles
Carl Stanley Burkhalter
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Joseph Francis Cirelli, Jr.
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Caroline Roberts Darby
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Thomas Bryan Denham
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Kelly Leigh Dickinson
Donald Duane Doerr, Jr.
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Sheila Jan Fisher
Charles Eddie Floyd, III
Jon Mitchell Folmar
Michael Louis Fondren
Peter Sean Fruin
Ralph Bernard Germany, Jr.
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Lars Thomas Granade
Andrew Robert Greene
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Michelle Sparrow Helms
Gaynor Lee Hemlein
Doreen Mary Herman
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Jon Martin Sepchalske
Myra Beth Staggs
Evan Lee Stapler
LaDonna Baker Stewart
William Kennith Stewart
Sue Ellen Summers
Carlton Lee Teel
Steven Lamar Terry
Stephen Mitchell Tunstall
Charles Carter Turner
Victory Dawn Walker
John William Waters, Jr.
Thomas Ellis Wheeler, Jr.
Carl Daniel White
Richie Allan Whitten
Gregory O'Dell Wiggins
Pamela Marie Wilson
Lee David Winston
Shirley Ann Zeigler-Osborne

SPRING 1992 BAR EXAM
Statistics of Interest

Number sitting for exam	202
Number certified to Alabama Supreme Court	134
Certification rate	66 percent
Certification percentages:	
• University of Alabama	74 percent
• Cumberland School of Law	70 percent
• Birmingham School of Law	42 percent
• Jones Law Institute	76 percent
• Miles College of Law	0 percent

SPRING 1992 ADMITTEES

LAWYERS IN THE FAMILY

Eldon Daine Sharpe (1992) and **Eldon Sharpe** (1989)
(admittee, father)

Carl Daniel White (1992) and **Earnest Ray White** (1980)
(admittee, brother)

J. Shoemaker (1992) and **Richard Shoemaker** (1983)
(admittee, father)

Becky Allen Blake (1992) and **D. Owen Blake, Jr.** (1979)
(admittee, husband)

Corinne Tatum Hurst (1992) and **James R. Hurst** (1974)
(admittee, father-in-law)

Julia Ann Beasley (1992) and **Jere L. Beasley** (1962)
(admittee, father)

Daco S. Auffenorde (1992) and **Michael E. Auffenorde** (1987)
(admittee, husband)

LaDonna B. Stewart (1992) and **W. Ken Stewart** (1992)
(co-admittees)

Carlton Teel (1992), **Frank S. Teel** (1975), **Judge Robert J. Teel, Jr.** (1976) and **Robert J. Teel, Sr.** (1949)
(admittee, brother, brother, father)

Jon Mitchell Folmar (1992) and **Joel M. Folmar** (1967)
(admittee, father)

Robert Aderholt (1992) and **Bobby Aderholt** (1959)
(admittee, father)

Larry L. Johnson (1992) and **Sandra L. Johnson** (1986)
(admittee, wife)

William D. Azar (1992), **George B. Azar** (1956), **Zack M. Azar** (1989), **Edward J. Azar** (1947), **Douglas McElvy** (1971), and **Richard C. Dean** (1985)
(admittee, father, brother, uncle, cousin, cousin)

Kenneth Shelton, Jr. (1992), **Kenneth Shelton, Sr.** (1962) and **Greg Shelton** (1989)
(admittee, father, brother)

Elizabeth Ragsdale (1992) and **Howard Edgar Howard** (1991)
(admittee, fiance)

Elaine Lubel Raymon (1992), **Edward B. Raymon** (1973) and **Glenn H. Lubel** (1988)
(admittee, husband, brother)

The Use of Depositions at Trial and Preserving Objections:

Is An Objection To The Form Enough?

by ROBERT S. McANNALLY

Over the past four years a number of decisions by the Alabama Supreme Court have addressed the admissibility of deposition testimony at trial. Considered in light of the Alabama Rules of Civil Procedure, these decisions have an impact on the common practice of objecting solely to the form of a question at deposition. This article will review both the recent decisions and the applicable Alabama Rules, as well as discussing the emerging need for more specific objections at the deposition level.

Admissibility of depositions at trial

ARCP Rule 32 controls the use of depositions in court proceedings. While this article will focus on trial proceedings, it should be noted that the restrictions placed on the admissibility and use of deposition testimony apply to motion practice as well as trial proceedings. As a result, where an objection is preserved at deposition, a party may object at the summary judgment stage to the use of inadmissible evidence to create an issue of fact.

Rule 32 provides that (1) any deposition may be used as impeachment against the deponent, and (2) the deposition of a party or designated representative may be used for any purpose. These two uses of deposition testimony at trial are well known and commonly utilized, as is the use of deposition testimony of a doctor or dentist under 32(a)(3). However, 32(a)(3) references other circumstances under which non-party depositions are admissible as evidence. They are:

(a) the witness is dead;

(b) the witness is more than 100 miles from the location of the trial or in a state different than the location of the trial (where the witnesse's absence was not procured by the party offering the deposition);

(c) the witness is unable to attend due to age, illness, infirmity or imprisonment;

(d) the witness is a licensed physician or dentist (see above);

(f) the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(g) exceptional circumstances exist making it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of a witness orally in open court, to allow the deposition to be used.

Death of "discovery" deposition

For many years litigators recognized a distinction between depositions that were taken for the purposes of discovery and those taken to be admitted as evidence at trial. This distinction is encouraged by the Rules of Civil Procedure, which specifically allow inquiry into matters that are inadmissible under Rule 26, and provide for a relaxation of the Rules of Evidence with regard to testimony taken subject to objections under Rule 32. Prior to 1970, Federal Rule 26(a) stated that depositions could be taken for "the purpose of discovery or for use as evidence in the action or for both purposes". Although any distinction that existed under the Rules was deleted when the Rules were amended in 1970, in practice the distinction remained, often resulting in the parties taking a "discovery deposition" initially to be followed by a "trial" deposition at a later date.

The issue was not specifically addressed by the Alabama Courts until *Ex Parte Coots*, 527 So.2d 1292 (Ala 1988), where one of the defendants in a medical malpractice action noticed the deposition of the plaintiff's physician expert witness. Prior to questioning, but on the record, the defendant attempted to limit the scope of the deposition by designating it a "discovery" deposition, thereby disallowing its use at trial. The plaintiff refused, stating that it was his intention to elicit admissible testimony on cross-examination. After proceeding with the deposition, the defendant filed a motion seeking an order from the Court prohibiting the use of the deposition at trial, arguing that "[T]o permit [the expert's] testimony in its present form to be read to the jury deprives these defendants of the right to effective cross-examination." *Id.* at 1293. The trial judge granted the motion, stating that had the plaintiff intended to elicit

trial testimony from the witness, notice should have been provided to the opposition.

On appeal, the Alabama Supreme Court reversed the trial court, rejecting the distinction between discovery and trial depositions. Initially the court pointed to the defendant's deposition notice which stated that the deposition was being taken for "the purpose of discovery or for use as evidence in this cause, or for both purposes, in accordance with the Alabama Rules of Civil Procedure". The court then cited Rule 32(a)(3) which allows the deposition of a witness, whether or not a party, to be used under specific circumstances (in this case, if the court finds that the witness is a physician or dentist). The court went on to note that both the 6th and 11th circuit courts of appeal had specifically disallowed the distinction between depositions taken for discovery and those to be used at trial. Responding to the defendant's "lack of effective cross-examination" argument, the court suggested that interrogatories, not a preliminary "discovery" deposition, are the proper vehicle for discovery of opinion testimony in order to prepare for deposition.[1]

One year later, the *Coots* decision was cited in *Ex Parte Hatton*, 547 So.2d 450 (Ala. 1989), where the trial court granted the defendant's motion for summary judgment based on the plaintiff's failure to submit expert testimony against one of two treating physicians in a medical malpractice case. The plaintiff appealed, pointing to the testimony of an expert who, although he had been retained to testify against only one defendant, had offered opinions against both defendants in his deposition. On appeal, the court held that as the plaintiff's expert witness fell within one of the exceptions listed in ARCP 32(a)(3), his deposition could be used for *any* purpose, including establishing a breach of the standard of care.

Robert S. McAnnally
Robert S. McAnnally, an associate with the Mobile firm of Lyons, Pipes & Cook, P.C., is a graduate of Auburn University and the University of Alabama School of Law.

To hold differently would "impermissibly limit the use of depositions under Rule 32(a) . . . "(it should be noted that *Hatton* was a scintilla case).

Standing alone the *Coots* and *Hatton* decisions have a significant impact on attorneys attending depositions. While both decisions arise in the context of medical malpractice litigation, and as such may appear narrow in scope, a review of the exceptions allowing the use of non-party deposition testimony at trial demonstrates that, for the most part, they encompass circumstances that are not predictable. If the application of the exceptions were made at the time that the deposition was taken there would be some notice to the participating attorneys that the deposition could be used as trial testimony. However:

"The existence of one of the conditions set forth in Rule 32(a)(3) is to be determined *at the time the deposition in offered into evidence*, and if any one of those conditions is satisfied then the deposition is freely admissible and may be used by any party for any purpose".

Coots, 627 So.2d at 1295. (Emphasis added). As a result, attorneys appearing at a deposition are forced to assume that with very few exceptions, it is possible that every deposition will be read into evidence at trial.

Objections at deposition

Rule 32(d)(A) and (B) provide that:

"(A) Objections as to the competency of a witness or to the competence, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of a deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time;

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of the parties, and errors of any kind which might be obviated, removed or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition."

Most practitioners are familiar with these rules to the extent that (1) objections as to competency, relevancy and materiality are reserved and (2) objections as to the form are waived if not made at the time of the deposition. The potential danger to the attorney attending a deposition lies in the exceptions contained in both, which specifically state that objections are *waived* if the grounds are such that they might have been obviated had the objection been made at the time of deposition. It should also be noted that this waiver applies not only to objections as to the form of the question, but also to objections concerning:

1. Competency of a witness;
2. Relevancy;
3. Materiality;
4. The oath or affirmation;
5. The conduct of the parties; and
6. Errors of *any* kind

As a result, the failure to pose a *specific* objection may serve as a waiver of the right to object *at trial* if the trial court feels that the defect was curable.

In an attempt to avoid waiver, parties generally enter into a stipulation which tracks the language of Rule 32(A) and (B) with regard to preserving objections other than as to the form of the question. As this stipulation may vary with different court reporters, it is advisable to obtain a copy of the stipulation being used prior to entering into a stipulation on the record. However, as shown below, the Alabama courts will not allow the parties to rely on stipulations to escape the exceptions contained in 32 (A) and (B).

Preserving objections

Faced with the expanded potential for admissibility of deposition testimony under the *Coots* decision, the preservation of objections at the time of deposition becomes critical. The issue then becomes what type of objections must be made specifically in order to avoid waiver under the exceptions contained in Rule 32(A and (B). Citing the "usual stipulation" discussed above, many litigators have relied almost exclusively on objections "to the form" of a question to preserve objections.

In *McKelvy v. Darnell*, 587 So.2d 980

(Ala. 1991), the plaintiff sued the defendant based on damages allegedly received in an automobile accident. The plaintiff noticed the deposition of the plaintiff's treating physician which was taken under the stipulation that all objections other than those to the form of leading questions were reserved until trial. When eliciting the witness's opinion testimony, the plaintiff apparently failed to lay the necessary predicate. At trial the plaintiff introduced the deposition, and when the opinion questions were read the defendant made an objection based on the insufficient predicate which the trial court sustained.

On appeal, the Alabama Supreme Court recognized that a stipulation had been entered into, but held that the stipulation "effectively" incorporated the provisions of Rule 32(b) discussed above. Citing Rule 32 (d)(3)(B), the court held that the defendant had waived his right to object to the deposition testimony at trial by failing to object at the time of deposition: "[T]he Rule requires that, if a timely objection would enable the questioner to remedy the problem so that the *same testimony* could be received in accordance with the law, the objection must be made at the time the deposition is taken". *Id.* at 984.

The *McKelvy* decision marks the first recognition by the Alabama courts of the broad exception to reserved objections under the Rules. Although commentators have long recognized the potential for waiver of the right to object at trial (the *McKelvy* opinion cites both Moore's Federal Practice and McElroys' Alabama Evidence), there had previously been no discussion of the exception as applied to a specific fact situation. While *McKelvy* fails to provide a benchmark by which the practitioner can judge whether or not a specific deficit is one that "might be obviated, removed or cured if promptly presented", the court's willingness to modify the parties' stipulation and the broad language of the opinion suggest that every objection should be made with some degree of specificity, and argues against objections "to the form" without further explanation or basis.

Objection "abuse"

All litigators have been present at a deposition when an attorney used objections as an opportunity to editorialize or coach the deponent using "speaking objections". Given the necessity to pose specific objections in order to avoid waiver, where do proper objections end and improper objections begin?

One federal magistrate issued a standing order for use where speaking objections became an issue. Note that here, the court places the burden of obtaining a specific objection on the questioning party:

4. **Objections** Unless the interrogating lawyer requests further explanation, no lawyer may object to a question in any manner except to say "I object," and to state the following *additional* items:

a. **Rule Number** The *number* of Federal Rule of Civil Procedure or of Evidence, or citation to a statute;

b. **Privilege** The name and source of a privilege;

c. **Form** The words "to the form of the question." If and only if the interrogating lawyer asks for a further explanation, the objecting party may state only one or more of the following:

ambiguous
argumentative
asked and answered
assumes a fact not in evidence
compound
confusing or unintelligible
hypothetical question misused
leading
misquotes a witness or exhibit
narrative answer requested
overly broad or general

"The objecting lawyer shall make no further objection unless the interrogating lawyer so requests."

It is also noteworthy that the list of objections allowed does not include materiality, relevancy or competency as discussed in Rule 32 (d).

This new posture is not entirely defensive. Another common scenario finds one attorney objecting to the form, but refusing to identify the basis for his or her objection when requested to do so by the questioning party. In light of *McKelvy*, such a refusal will provide additional grounds for waiver as the policy of that decision seems to be the opportunity for cure allowing the admissibility of evidence at all.

Conclusion

In light of the potential admissibility of most depositions at trial and the potential waiver of objections if the objection could arguably be curative, new rules have emerged for those who intend to protect their right to object at trial to the admissibility of deposition testimony. Under *Coots*, it cannot be assumed that only the depositions of the parties and medical experts will be admissible (although this will certainly remain the norm). There is no longer any doubt that every deposition must serve the cross-purposes of discovery and potential trial testimony.

With regard to objections, the parties may stipulate to specific conduct during the taking of a deposition, but where that conduct is contrary to the Rules the courts will opt for the specific language of the Rule. No longer will "objections to the form of the question" serve as a panacea. Although *McKelvy* arose in a deposition where the parties had stipulated that *all* objections except as to the form of leading questions were ostensibly reserved, it is conceivable that an objection to the form alone would be deemed insufficient by the court to put the opposing party on notice of the specific error which might be "obviated, removed or cured". It will be in the judge's discretion to make a determination as to whether an objection was sufficient so as to put the opposing party on notice of a defect, using as a guideline the broad language of Rule 32 and the *McKelvy* decision. As such, to avoid waiver, it will be necessary to state a specific objection in terms that, at a minimum, direct the opposition to the defect, allowing an opportunity for cure. ■

Footnotes

1 For a more thorough discussion of the *Coots* decision and its impact, see Steve Whitehead's Note, "Ex Parte *Coots*: Death of the 'Discovery Deposition' in Alabama – Have Good Intentions Gone Awry? 41 Ala. L. Rev. 206 (1989).

ALABAMA STATE BAR VOLUNTEER LAWYERS PROGRAM

HELPING OTHERS HELPS US ALL

Judge Learned Hand once said,
"If we are to keep our democracy, there must be one commandment:
Thou shalt not ration justice."

As attorneys, we recognize this "commandment" of equality under the law as a cornerstone of our judicial system. We understand that all citizens have rights and liberties under law and that the ability of persons to secure such rights and liberties, or to resolve conflicts, depends upon access to the legal system. Too often, persons cannot afford legal representation in matters vital to their well-being and, consequently, suffer violations of their rights.

It is part of our nature as attorneys to want to remedy such wrongs and solve problems for those less fortunate than ourselves through advocacy. Organized pro bono programs not only help guarantee equal access to the law, but also provide opportunities for attorneys to do just that, i.e., participate in the process of making our legal system work for all people.

By getting involved in pro bono activities, a lawyer can see an immediate, positive effect on another human being's life. Volunteering your skills and expertise to another person in crisis provides a level of personal satisfaction often different from the day-to-day practice of law. As has been said by attorneys who regularly include such work in their practice, pro bono is "good for the professional soul," and in a time of increasing career dissatisfaction among attorneys, it may be a way back to the essence of what being a lawyer and a professional is all about.

If you, your firm or your local bar association is interested in sponsoring a pro bono program for civil cases in your area, contact Melinda Waters, director of the Alabama State Bar Volunteer Lawyers Program, at (205) 269-1515 in Montgomery, or write for informational materials at P.O. Box 671, Montgomery 36101.

Pro bono honor roll update

Alabama attorneys participating in *organized* pro bono projects for civil cases were recognized for this commitment to providing legal services to the poor in the first annual "Pro Bono Honor Roll" published in the July edition of *The Alabama Lawyer*. The following attorneys were mistakenly overlooked and we thank them now for their dedication to making access to justice a reality for all citizens in their communities, regardless of ability to pay:

Paul W. Brock, Mobile

Jonathan Alexander Brown, Vernon

M. Jill Ganus, Mobile

G. William Gill, Montgomery

Willie Julius Huntley, Jr., Mobile

Roy M. Johnson, III, Columbiana

Kelso Jones, Birmingham

Daniel R. Klasing, Mobile

Stephen Brian Levinson, Anniston

Floyd L. Likins, Jr., Opelika

Julian L. McPhillips, Jr., Montgomery

Robert H. Turner, Marion

If you would like to participate in pro bono activities through the Volunteer Lawyers Program, please write for information and enrollment forms. ■

. M.E.M.O.R.I.A.L.S .

James Lee Teague

Whereas, James Lee Teague was born in Birmingham, Alabama on February 15, 1948 where he received his early education. He received his bachelor's degree in accounting in 1971, master's degree in vocational rehabilitation counseling in 1972 and juris doctor degree in 1980 from the University of Alabama. He was a member of the Bench and Bar Legal Honor Society and the Farrah Law Society. Jim was with the State Vocational Rehabilitation Service from 1972-77.

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 James Lee Teague departed this life on May 18, 1992.

Jim became associated with Lee Hale in 1981 and was a partner in the firm of Hale, Hughes & Teague at the time of his death. He had been a clerk with the Alabama Court of Criminal Appeals and was honored in 1983 by being named as one of the Outstanding Young Men in America by the United States Jaycees.

Jim was a member of the baptist church and loved to play tennis and golf.

Jim 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 wife, Wanda Sandy Teague; two sons, James L. Teague, Jr. and Ryne J. Teague; two daughters, Ashley D. Teague and Brynn M. Teague, all of Fairhope, Alabama, and his mother, Norma F. Teague of Hueytown, Alabama.

– Jerry A. McDowell, President
Mobile Bar Association

George C. Hawkins

On the 9th day of August 1991, George C. Hawkins departed this life. George Hawkins is truly missed by the citizens of Etowah County and of the state of Alabama. George was known in the legal community as a consummate trial lawyer. He served as president of the Alabama Trial Lawyers Association (then known as Alabama Plaintiff's Lawyers Association), assistant attorney general, legal advisor to the Governor, and president of the Etowah County Bar Association, and was one of the very few lawyers from Alabama ever to be inducted into the International Academy of Trial Lawyers. He practiced law in Gadsden, Alabama for 49 years, maintaining an active practice until his death.

George was no stranger to the people of Alabama. He was known for his aggressive leadership and adherence to deep and paramount convictions when he served in the Alabama Legislature. George served two terms in the House of Representatives from Etowah County and also served as Speaker Pro Tem, floor leader and chair of the House Ways and Means Committee. The press recognized his qualities when they voted him the outstanding orator of the state Legislature, outstanding member of the Legislature and the best debater in the Legislature. George served the Alabama Senate as the second in command. As the senator from Etowah County, he was elected by his colleagues to serve as president pro tem during the term 1963-67. He was well respected over the state for the many worthwhile legislative achievements in which he had been a promoter or a leader. He co-sponsored the competitive bid law for the state. He was a sponsor of legislative reapportionment. He sponsored bills for jury service for women. He was the flag-bearer for all veteran legislation passed during his terms. George earned a solid reputation as a hard-working senator for all the people.

He served in five different administrations, as well as attorney for the State Department of Revenue under Governor Frank Dixon, as assistant attorney general during the administration of Governor Chauncey Sparks and as legal advisor during the first administration of Governor James E. Folsom.

After he left politics and returned to Gadsden to practice law, he continued to distinguish himself in his professional and civic endeavors. He organized and operated Hawkins Mortgage Company, as well as serving as a member of the board of directors of the Merchant and Farmers Bank and Exchange Bank of Attalla. He also served as director of a life insurance company and many other companies.

George Hawkins was born in Elora, Tennessee on the 4th day of December 1918. He graduated from Etowah High School and attended the University of Alabama. He received his law degree from the University's School of Law in 1942.

George Hawkins contributed in a meaningful way to his profession, the state of Alabama, his family and his church. He adhered to the highest standards and was uniformly revered and admired.

He is survived by his wife, Jean T. Hawkins; his children, George C. Hawkins, III, Laura Browder, David H. Hawkins, John Hawkins, and Carol Simmons; and grandchildren.

– Gregory S. Cusimano
Gadsden, Alabama

. M.E.M.O.R.I.A.L.S .

INGRAM BEASLEY
Birmingham
Admitted: 1930
Died: June 29, 1992

CHRISTOPHER HARTWELL DAVIS
Montgomery
Admitted: 1931
Died: March 18, 1992

JAMES EDWARD HART, JR.
Brewton
Admitted: 1970
Died: June 24, 1992

FRANK JACKSON MARTIN
Gadsden
Admitted: 1927
Died: April 30, 1992

ALFRED M. NAFF
Birmingham
Admitted: 1950
Died: June 22, 1992

JAMES A. PLYLAR
Birmingham
Admitted: 1953
Died: May 20, 1992

CHARLES A. POELLNITZ, JR.
Florence
Admitted: 1933
Died: July 20, 1992

ROY LEE SMITH
Phenix City
Admitted: 1924
Died: June 11, 1992

ROBERT FRANK SPLITT
Fort Myers, Florida
Admitted: 1976
Died: July 5, 1992

JAMES LEE TEAGUE
Mobile
Admitted: 1980
Died: May 18, 1992

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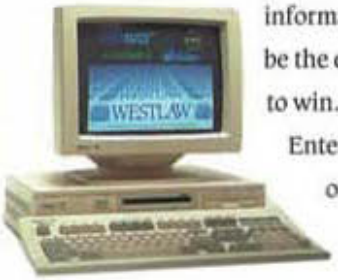

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