

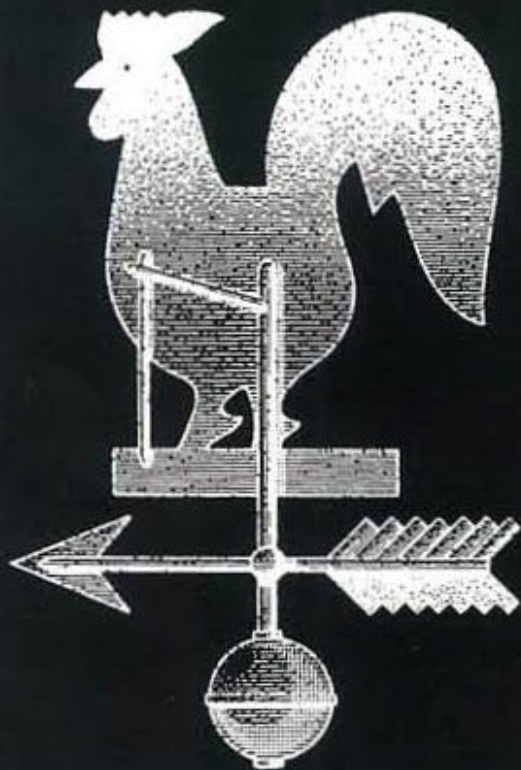
The Alabama Lawyer

Vol. 54, No. 3

SEPTEMBER 1994



James R. "Spud" Seale
President, Alabama State Bar
1993-1994



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IN BRIEF

September 1993

Volume 54, Number 5

ON THE COVER:

James R. "Spud" Seale, the newly-installed president of the Alabama State Bar, is shown with his family in the Patrons' Room of the Alabama Shakespeare Festival in Montgomery. First lady Nancy is to the left of Spud. Their children, seated left to right, are Shelby, 23, Margaret, 14, and Brooks, 21. — *Photo by Gittings of Atlanta*

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PRESIDENT'S PAGE

I take this opportunity in this first "President's Page" to thank you, the members of the Alabama State Bar, for giving me the privilege to serve as your president. I look forward to an exciting year and, with your help, I am sure it will be successful.

The "President's Page" of *The Alabama Lawyer* has been used by my predecessors to comment on matters of interest to the bar in general and the president. I will continue this precedent, but I also want to use this space to tell you some facts and history about our state bar association I hope you will find interesting. In subsequent articles I will discuss the formation of our state bar, its operations and our state convention.

Our state bar association serves all lawyers in this state. If I could convince the lawyers of our state of this one fact, and that was the only thing I accomplished in my year as your president, then I would consider my term as president to have been successful. I was a member of the bar commission for six years before assuming this office, and I can unequivocally say that the lawyers elected to serve as bar commissioners, when sitting as bar commissioners, have uniformly acted in the best interest of all lawyers in the state of Alabama. I realize I sound like the proverbial broken record, but I want to emphasize that this bar association represents all lawyers in the state of Alabama. The Alabama State Bar must not become embroiled in the policies of any special interest group. Such action would be divisive and injurious to our association. I think our association has done an outstanding job of avoiding special interest politics and we must continue to do so.

I hope there is no issue, irrespective of the magnitude, which you feel ought to be brought to the attention of the state bar that you cannot call and discuss with me. This is your bar association and I encourage both your participation and input regarding our activities. Please feel free to call me to discuss your concerns and make suggestions regarding our association. My telephone number in Montgomery is 834-7000 and if I happen to be out, please ask for my secretary, **Wynn Warren**, and leave your message with her.

I cannot discuss our state bar association without telling you how exceedingly fortunate we are to have the staff we have. As your president-elect, I have had the opportunity to visit with many of the executive directors and staff members of other bar associations and to discuss with officers in other

state bar associations pressing issues confronting their bars. The number of bar associations facing problems with their executive director and staff are too numerous to mention and I cannot tell you how blessed we are to have the professional staff we have. **Reggie Hamner**, **Bob Norris** and **Keith Norman**, just to mention a few, are among the finest, if not the finest, in the nation. The entire staff works diligently to serve and meet the needs of our lawyers and, in my opinion, they perform in an outstanding manner. I encourage you to call upon the state bar headquarters for advice and assistance in matters relating to bar activities, and more importantly, let them know how much we appreciate what they do for us. Serving the needs and demands of 10,000 lawyers is a prodigious undertaking and our state bar staff performs this undertaking exceedingly well.

The Alabama State Bar has a most exciting year ahead of it and I will highlight a few of the important issues which some of the committees and task forces will be dealing with this year. One of the task forces that I am most excited about is the **Long-Range Planning Task Force**. In discussing my thoughts and ideas for the year with Reggie, I was advised that the Alabama State Bar has never had a true long-range planning committee. The bar has addressed various special needs and areas through task forces dealing with a specific issue and it is a tribute to both our bar association and its leadership that the bar has functioned as well as it has without a long-range plan. I felt that it would be both beneficial and informative if we had a task force to take a long, hard look at where we have been in the past and where we want to be in future. This task force will use the reports generated by other task forces and committees, as well as input from current

committees, in formulating a report and possible recommendations to the Board of Bar Commissioners. I have not limited the scope of review of this task force and I solicit your input and recommendations as to matters you think that this task force should consider.

I consider myself, and in particular the bar, most fortunate to have **Camille Wright Cook** of Tuscaloosa serving as the chair of the Long-Range Planning Task Force. I knew that to chair this task force would be a prodigious undertaking and that we would need a person known and respected by the vast majority of lawyers in the state. Camille Cook is the personification of such a person and along with the committee, will begin the development of a long-range plan which will take



Spud Seale

our bar association to the next century. I view the work of this task force as being one of the most important matters presently confronting our bar association. I again encourage you to write either Camille or me in care of state bar headquarters with any recommendations and suggestions you think should be considered by the Long-Range Planning Task Force.

Another task force I bring to your attention is my **Sole Practitioner and Small Firm Task Force**. Although the sole practitioner and small firm members (firms of less than five attorneys) comprise approximately 70 percent of our bar association, the Alabama State Bar has never had a committee or task force to specifically address the needs of this group. I have asked this task force, which will be chaired by Commissioner **Rick Manley**, to look into how the state bar can better serve the needs of this group and determine if a recommendation should be made to the Board of Bar Commissioners to make the task force a permanent, standing committee of the bar. I have also asked this task force to consider the issue of disciplinary problems facing the sole practitioner and small firm members and make a recommendation as to what, if anything, can be done to prevent the increasing number of disciplinary infractions among this group. I certainly do not mean these comments to be disparaging of the fine men and women practicing as either sole practitioners or in small firms, but it is a documented fact that a disproportionate percentage of disciplinary complaints and, in particular, punishment, involve members of this group. As a former member of the Disciplinary Commission and past chair of a Disciplinary Panel, I hope this task force will be able to shed some light on how the state can assist sole practitioners and small firm members in this regard.

I am continuing the **Minority Participation Task Force** which was started several years ago in the presidency of **Judge Harold Albritton**. This most important task force has been capably chaired in the past by **Judge Charles Price** and **Gene Verin**, with **Rodney Max** serving as its vice-chair. To continue the work of this task force and advise me regarding how the state bar can better serve the needs of the minority lawyer, I have asked my friend, **Walter McGowan** of Tuskegee, to serve as chair of this task force. Minority lawyers presently comprise 3.3 percent of our state bar membership and, although various individuals are highly visible and serve with distinction on several of our committees and task forces, it is my goal and commitment to encourage and achieve greater participation of minority lawyers in all facets of this association. I sincerely hope that all lawyers within the state of Alabama share my sentiments on the importance of this committee to both our association and state.

The final task force that I mention is the **Alabama First Task Force** which is a continuation of the task force started by **Clarence Small**. The main purpose of this task force is to raise the level of awareness of the lawyers throughout the state to the many problems confronting the state of Alabama, and to encourage participation by association members in the groups and programs which are addressing these problems in an effort to improve our state. At the initial meeting of the Alabama First Task Force, it was unanimously agreed that the most pressing problem facing the citizens of Alabama is our lack of

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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. The form will be somewhat different in appearance from last year, however.

*If you are actively practicing or anticipate practicing law in Alabama between October 1, 1993 and November 1, 1994, please be sure that you have the required occupational license. Licenses are \$250 for the 1993-94 bar year and must be purchased between October 1 and October 31 or be subject to an automatic 15 percent penalty (\$37.50). **Second notices will not be sent!***

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a quality educational system and the failure of the system to keep young men and women of our state in school and provide them with a quality education with which they can compete in the job market.

I am sure that you are as tired as I am of our state's being near the bottom or at the bottom in areas which bring industry and jobs to our communities. A few salient statistics vividly demonstrate the problems facing our state. These statistics are as follows:



In Alabama, 19.1 percent of our citizens live below the poverty line versus 13.5 percent for the United States as a whole. Thus, Alabama has a poverty line rate roughly 40 percent higher than the national average.



Alabama has the lowest percentage in the nation of students completing high school, 63.2 percent in Alabama versus 76.9 percent for the U.S. as a whole.



Alabama has the lowest percentage of persons completing college, 11.6 percent for Alabama versus 21.2 percent for the U.S. as a whole.



Alabama ranks 46th in per capita expenditures per pupil with an average expenditure of \$3,362 and 43rd in average teacher salaries, with an average salary of \$26,954 (not including benefits). The average per capita expenditure per pupil in the U.S. is \$6,070 and the average teacher's salary in the U.S. is \$34,148.



Alabama spends an average of approximately \$14,000 to incarcerate someone in our penal system and it is estimated that 85 percent of the prisoner population in Alabama does not have a high school degree.



In 1992, Alabama ranked sixth highest in the nation in unemployment with a rate of 7 percent and ranked 33rd in population growth between 1980-1990 with a growth rate of 3.8 percent versus 9.8 percent growth rate for the U.S.

I am certain that these statistics are as frightening to you as they are to me. It does not take a rocket scientist to realize that any chance to change the deplorable situation in which we find ourselves, out of necessity, must come from within as opposed to without. Alabama has, for far too long, relied on the federal government to solve many of our problems. This fact is sadly, but clearly, demonstrated by the fact that in the fiscal year ending September 30, 1992, the State of Alabama ranked 18th among states in total federal spending and, more importantly, 14th in average spending per person.

With the budget crises facing the federal government and spending cuts an almost certainty at all levels, it seems abundantly clear to me that we can no longer look to Washington for help. We must look within the state of Alabama for aggressive, effective leaders who will make the tough and probably unpopular decisions necessary to effectuate the change from within our state.

Economic growth is absolutely essential for the growth and

development of this state and your practice. If our cities and state do not continue to experience growth and prosperity, I think all of us as practicing attorneys will see our practices suffer.

I believe that the leadership needed to effectuate change and bring Alabama from the bottom of the heap to near the top can be found among the members of this bar association. As a profession, we have been too cautious, too timid and, sadly, too uninvolved. We, both as individuals and as a profession, must be willing to give something back to our communities and state.

Fellow lawyers, I urge and challenge you to become involved in the affairs and activities of your community and state and, in particular, in the educational reform movement. This is not something that can wait until next year. If there has ever been an issue which is time sensitive, this is it. If something is not done and done immediately to ensure educational reform in this state so that every citizen is guaranteed a quality public education, then our state will continue to wallow in the mud of mediocrity or, worse, will be unable to compete with our sister sunbelt states and the progressive movements alive and well in each of them.

It has long been too convenient for us to say we do not have time for various matters that we readily recognize are worthy. I suggest to you that we can no longer afford to say we do not have time. In fact, if we continue to say we do not have time, the reality and magnitude of the education crisis and its potential ramifications may give us more time than we ever wanted.

It is my fervent hope and prayer that all members of this association will readily recognize the magnitude of the problems facing our state and make a commitment to actively participate in the solutions to the same. Let us work together to make Alabama first in those categories which will bring jobs and economic growth to our state, and ensure a bright future for our beloved state and its residents.

In my next article, I will discuss the **Volunteer Lawyers Program** run by **Melinda Waters** and the continuing debate over whether pro bono work should be mandatory or voluntary. Again, my thanks for the opportunity to serve as your president. ■



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FACTS/FAX POLL

FACTS/FAX POLL: The Annual Meeting

With this year's annual meeting just completed, we have received many favorable comments regarding the convention. But, in an effort to serve you better, we want more information, from those who did not attend the annual meeting, as well as those who did. These suggestions, criticisms and opinions will help us plan for and improve future meetings.

1. The annual meeting in 1994 will be held in Orange Beach at the Perdido Beach Resort. Do you think it should be held there every year from now on or continue to rotate it between Birmingham, Mobile and Orange Beach?

Orange Beach

Rotated among the three cities

Other (please specify) _____

2. Is July the best month for you to attend the annual meeting?

Yes

No (If no, which summer month is best?) _____

3. The 1994 annual meeting will be Monday through Thursday instead of the usual Thursday through Saturday. Does this make you more likely or less likely to attend, or does it make no difference in your decision to attend?

More likely

Less likely

No difference

4. Please rank the following programs based on what you prefer or would prefer to attend at an annual meeting. (Please rate them 1-6, with 1 being the least preferred and 6 as the most preferred.)

Social events

Family-oriented events

CLE sessions Any specific kind of CLE? _____

Headline keynote speakers at luncheons and dinners

Entertaining programs for children

Other (please list) _____

5. Did you attend the 1993 annual meeting in Mobile?

Yes

No

If no, why not?

Too expensive to attend

Nothing offered of interest to law practice

Currently in trial or had other business conflicts

Other (please explain) _____

6. Do you usually attend the annual meeting?

Yes

No

If no, why not? _____

7. If you did attend the 1993 annual meeting, what did you enjoy most or benefit from most? (Please rank 1-6.)

Section Meetings

Grande Convocation/Business Meeting

Update '93

Committee Breakfast

Social Events

Expo '93

8. What suggestions do you have for improving future annual meetings?

(Please attach a separate sheet if necessary.)

EXECUTIVE DIRECTOR'S REPORT

NEW YORK, NEW YORK

The deadline for this column immediately precedes my departure for the 1993 Annual Meeting of the American Bar Association in New York. A number of important issues will be discussed in the ABA's governing body, the House of Delegates.

The House is frequently criticized for acting on issues which appear to many lawyers as not germane to the practice of law. In recent years, the members of the National Conference of Bar Presidents have sought to influence the agenda in such a way that "lawyer issues", as opposed to what are often denominated as "social issues", are the matters upon which the House speaks for the ABA—and because of its 400,000+ membership, the legal profession as a whole.

A proposal by the Section Officers' Council (SOC) has been submitted that, in effect, would dilute to a minority the number of delegates in the House who represent state and local bar associations. The proposed changes in governance would likewise diminish, if not eliminate, the current control state and local bars exercise in the election process of the association.

There have been two counter measures to the SOC initiative. One is a coalition of bar leaders from the memberships of the National Conference of Bar Presidents, National Association of Bar Executives and the ABA Standing Committee on Bar Activities and Services. The other is the proposed creation of a Caucus of State Bar Associations. There is already a Metropolitan Bar Leaders Caucus within the ABA.

The forthcoming debate and actions on this issue could have a far-reaching impact on the "vote of the organized bar" as the ABA is generally perceived. Actually this should be a non-issue since the state and local bars currently have the number of needed votes to defeat the issue in the House; however, this initiative has spilled over into the ABA Assembly which is composed of those persons who register at the New York meeting. Should the Assembly and House take opposite positions, the Assembly could overrule the House in a second vote in the Assembly and an association-wide referendum would then be conducted.

The Alabama State Bar delegates in the House have been instructed by its board of commissioners to oppose any effort

that would dilute the current strength of state and local bars. It is going to be an interesting debate, and has the potential of reshaping ABA policy and proceedings.

This return to New York for an annual meeting prompted my friend, Richard Thies, chair of The Fellows of the American Bar Foundation, to remind us that it was at the last New York Annual Meeting in 1986 where the Stanley Commission Report on Professionalism was presented. That report's recommendations pertaining to the bar generally provided that:

"All segments of this Bar should:

(1) preserve and develop within the profession, integrity, competence, fairness, independence, courage, and a devotion to the public interest;

(2) resolve to abide by higher standards of conduct that the minimum required by the Code of Professional Responsibility and the Model Rules of Professional Conduct;

(3) increase the participation of lawyers in pro bono activities and help lawyers recognize their obligation to participate;

(4) resist the temptation to make the acquisition of wealth a primary goal of law practice;

(5) encourage innovative methods which simplify and make less expensive the rendering of legal services;

(6) educate the public about legal processes and the legal system; and

(7) resolve to employ all of the organizational resources necessary in order to assure that the legal profession is effectively self regulating."

Upon reflection, I think our own bar has moved in the direction of achieving

these professional ideals in the interim. Our own bar's Task Force on Professionalism, chaired by former Alabama State Bar President Bill Scruggs, has submitted its report to the board of commissioners which has forwarded recommendations to the Supreme Court of Alabama to advance our own professionalism. I believe our's has been far more than a symbolic challenge for our times to improve our profession and the essential roles lawyers play in our society.

New York has been very special to me. I married Anne there almost 24 years ago and I assumed the presidency of the National Association of Bar Executives there in 1979. ■



Reginald T. Hamner

BAR BRIEFS

Fourteen attorneys with **Balch & Bingham** have been named to the 1993-1994 edition of *The Best Lawyers in America*. Balch & Bingham, currently the state's largest law firm, has offices in Birmingham, Montgomery and Huntsville, Alabama and Washington, D.C. Attorneys from the Birmingham office include **Michael L. Edwards, James F. Hughey, Jr., William H. Satterfield, John J. Coleman, III, S. Eason Balch, Sr., Robert A. Buettner, Rodney O. Mundy, H. Hampton Boles, Randolph H. Lanier, and Harold Williams**. In the Montgomery office, attorneys named include **Charles M. Crook, M. Roland Nachman, Jr., Maury D. Smith, and Sterling G. Culpepper, Jr.** Attorneys listed in *The Best Lawyers in America* are selected by their peers in various categories of expertise.

The committee to select the 1993 **Edward J. Devitt Distinguished Service to Justice Award** is comprised of Justice Antonin Scalia of the United States Supreme Court, Chief Judge William J. Bauer of the Seventh Circuit Court of Appeals, and United States District Judge Oliver Gasch of the District of Columbia. The award, established to recognize extraordinary service by members of the federal judiciary, is made available by West Publishing Company in the name of the late Edward J. Devitt, long-time Chief Judge for the District of Minnesota. The honor includes an award of \$15,000 and is symbolized by an inscribed crystal obelisk.

Previous winners are: United States Circuit Judge Albert B. Maris of Pennsylvania (1982); United States District Judge Walter E. Hoffman of Virginia (1983); Chief Justice Warren E. Burger (special award, 1983); **United States Circuit Judge Frank M. Johnson, Jr. of Alabama** (1984); United States District Judge William J. Campbell of Illinois (1985); United States Circuit Judge Edward A. Tamm of the District of Columbia (special award, 1985); United States District Judge Edward T. Gignoux of Maine (1986); United States District

Judge Elmo B. Hunter of Missouri (1987); joint recipients United States Circuit Judge Elbert Parr Tuttle of Georgia and United States Circuit Judge John Minor Wisdom of Louisiana (1988); United States District Judge Gerhard A. Gesell of the District of Columbia (1989); United States Circuit Judge James R. Browning of California (1990); United States District Judge Hubert L. Will of Illinois (1991); and United States Circuit Judge Joseph F. Weis, Jr. (1992).

Nominations are now open for the 1993 award and should be submitted to Devitt Distinguished Service to Justice Award, P.O. Box 64810, St. Paul, Minnesota 55164-08110 by December 31, 1993.



Johnson

The American Bar Association announced recently that **Frank Minis Johnson, Jr.**, senior judge, United States Court of Appeals for the 11th Circuit in Montgomery, has been selected

to receive the ABA's 1993 Thurgood Marshall award.

The award, established in 1992 by the ABA Section of Individual Rights and Responsibilities, recognizes individuals' long-term contributions to the advancement of civil rights, civil liberties and human rights in the U.S. Former U.S. Supreme Court Justice Thurgood Marshall was the first recipient of the award.

Judge Johnson was nominated to the federal bench by President Eisenhower in 1955, on the eve of the civil rights revolution. Once called "the most hated man in the South" because of his landmark civil rights decisions invalidating the poll tax, desegregating transportation, and permitting non-violent demonstrations such as Martin Luther

King, Jr.'s march to Selma, Judge Johnson is now recognized as one of the "most courageous and foremost judges of the land."

In addition to the above decisions, Judge Johnson also decided landmark cases setting national standards for the treatment of the mentally ill and care of prison inmates, as well as cases involving first amendment rights of college newspaper editors, gender-based discrimination, and rights of the accused.

The award was presented at the Thurgood Marshall Award Dinner Saturday, August 7, during the ABA Annual Meeting in New York City. The ABA is dedicating the annual meeting to the memory of Justice Marshall.

Jeff Sessions, who has served as **United States Attorney** for the past 12 years, has received the highest award of the U.S. Secret Service—The Honor Award—at his recent retirement where more than 30 local, state and federal organizations made presentations to Sessions.

Assistant U.S. Attorney Richard Moore told Sessions, "In this room are Assistant U.S. Attorneys who would march through Hell for you."

William T. Stephens, general counsel for the Retirement Systems of Alabama, was elected president of the **National Association of Public Pension** attorneys at the association's recent conference in Portland, Oregon. Membership of the association consists of both in-house counsel and private practitioners who represent public pension plans in the United States and its territories. Members represent pension plans with assets in excess of \$500 billion.

The **Birmingham Bar Association** recently initiated a minority recruitment program in an attempt to attract minority lawyers to the Birmingham areas. Nine area law firms participated in the first program with more than 16 first-year law schools students vying for the firms' summer clerkships.

Nick Gaede, chairman of the Increased Minority Participation Committee for the BBA and one of the architects of the program, said, "The bar acted as a matchmaker between the participating law firms and the law school candidates. Based on the firms' hiring criteria, we selected the candidates and set up the interview arrangements."

Boyd Campbell of Montgomery has been appointed advocacy vice-chair of the Immigration Law Committee in the **General Practice Section** of the American Bar Association.

The General Practice Section represents approximately 14,000 lawyers throughout the nation. The Immigration Law Committee serves the members of the section in the area of immigration law.

Campbell was appointed to this position for a period of one year beginning at the conclusion of the annual meeting of the American Bar Association in New York City in August 1993, and ending at the conclusion of the annual meeting of the American Bar Association in New Orleans in August 1994.

Birmingham attorney **Rodney A. Max**, a member of the firm of Najjar Denaburg, was recently honored as the 1993 recipient of the **Peggy Spain McDonald Award** for community service. Max was nominated for the award by the Camp Birmingham Advisory Council for his continued, active support of Camp Birmingham. Camp Birmingham was created six years ago by the efforts of Max and Peggy Sparks, director of Community Education. The camp provides summer recreational, educational and employment activities for city youth who might not have opportunities to attend or work at a traditional summer camp away from home.

This year, Max has been instrumental in establishing a conflict resolution student council for Camp Birmingham, which will instruct and advise camp participants on alternative dispute resolution mechanisms.

Pensacola attorney **Carl Johnson** was sworn in as First Circuit representative of the **Young Lawyers' Division** of the Board of Governors of **The Florida Bar**. The First Circuit includes the

counties of Escambia, Santa Rosa, Okaloosa and Walton. Johnson is a shareholder in the Pensacola firm of Smith, Sauer, DeMaria, Pugh & Johnson, and is a 1986 admittee to the Alabama State Bar.

Appalachian Research and Defense Fund of Kentucky, Inc. has recently published the 1992 Supplement to its earlier publication, *"Black Lung Claims Before the Department of Labor—a Manual of Substantive Law."* The supplement is 36 pages long and covers most of the major case developments since 1988 when the earlier manual was published, as well as a section on the process for reopening and/or modifying claims.

The cost of the manual is \$25, including mailing. A limited number of copies of the original manual is available at \$25 each. Orders should be sent to: Diane Fish, Administrative Assistant, Appalachian Research and Defense Fund of Kentucky, Inc., 205 Front Street, Prestonsburg, Kentucky 41653. Make your check to ARDF of KY, Inc.

Wilbur G. Silberman of the Birmingham firm of Gordon, Silberman, Wiggins & Childs is among only 45 attorneys from across the United States to earn certification as a business bankruptcy law specialist from the **Commercial Law League of America (CLLA) Academy of Commercial and Bankruptcy Law Specialists**.

Silberman is a graduate of the University of Alabama where he also received his law degree.

Founded in 1895, the CLLA is the nation's oldest commercial litigation and bankruptcy organization. Members include 5,000 attorneys and other experts in credit and financial activity actively engaged in the fields of commercial law, bankruptcy and reorganization.

James R. Pratt, III of Birmingham was recently elected treasurer of the **Alabama Trial Lawyers Association** and a member of the **American Board of Trial Advocates**.

Pratt is a graduate of Auburn University and Cumberland School of Law, Samford University. He is with the firm of Hogan, Smith, Alspaugh, Samples & Pratt.

NEW SAVINGS PROGRAM ON OFFICE SUPPLIES FOR MEMBERS OF THE ALABAMA STATE BAR

The Alabama State Bar has made arrangements with **PennyWise**, a major office supplier, that will give law firms an opportunity to save money on office supplies.

PennyWise offers a large selection of office supplies in addition to low prices and fast, free delivery. The state bar program will enable members to save an additional 4 to 11 percent off the PennyWise already discounted prices.

Brands like 3M, IBM, Rolodex, Bic, and hundreds more are offered at a fraction of their regular selling price. If a member purchases an item from PennyWise, sees it advertised for 99

cents or less and sends the ad to PennyWise within 30 days, PennyWise will send the member a check for the difference or credit the account.

PennyWise also offers the largest office product network in the nation. The electronic catalog allows members to order 24 hours a day, seven days a week. Members can also order by mail, toll-free phone or fax.

As a special introduction, PennyWise is offering Alabama State Bar members \$10 off their first order. For more information on the program and a full color catalog, call 1-800-942-3311. ■

John D. Saxon, a partner with the Birmingham firm of Cooper, Mitch, Crawford, Kuykendall & Whatley, has been named by President Clinton to the **President's Commission on White House Fellowships**.

The White House Fellows Program was begun in 1965 by President Lyndon Johnson as a means of enabling young men and women early in their careers who showed outstanding leadership potential an opportunity to spend a year in Washington as special assistant to the Vice-president, a senior member of the White House Staff, or a Cabinet Secretary.

The President's Commission on White House Fellowships sets policy for the White House Fellows Program and selects each incoming class of Fellows.

Saxon was the first White House Fellow ever selected from Alabama. He served as a Fellow in 1978-79 as a special assistant to Vice-president Walter F. Mondale. In 1992, he chaired the Clinton presidential campaign in Alabama.

Massey Bedsole of Mobile has been named distinguished alumnus by the National Alumni Association of the **University of Alabama**.

Bedsole received both his bachelor's and law degrees at Alabama, and he was a member of the University's Board of Trustees for ten years.

Two years ago Bedsole received the Distinguished Law School Alumnus Award for his service to the University's Law School.

Marshall Timberlake, a partner in the Birmingham office of Balch & Bingham, was one of three representatives from Alabama invited to attend the **Southern Regional Conference on State Court Dispute Resolution Programs** recently held in Richmond, Virginia. The conference was sponsored by the National Institute for Dispute Resolution. Timberlake represented the Alabama State Bar and spoke on the progress of Alternative Dispute Resolution in Alabama and the status of the current state dispute resolution program. Timberlake serves as chair of the Alabama State Bar Task Force on Alternative Dispute Resolution.

Bruce P. Ely, a member of the Tuscaloosa firm of Tanner & Guin, has

been elected to the board of directors of the **Public Affairs Research Council of Alabama (PARCA)**. Ely has served since 1986 as vice-chair of the Tax & Fiscal Affairs Committee of the Business Council of Alabama and has been active for a number of years in efforts to update and streamline Alabama's patchwork tax laws. He is also past chair of the Alabama State Bar Tax Section.

Founded in 1988, PARCA is a non-profit organization headquartered at

Samford University in Birmingham. Its purpose is to provide research, policy reports and recommendations dealing with significant state and local government, education, finance, and tax-related issues affecting Alabamians. The organization is headed by former Governor Albert Brewer and is presently involved in providing research and recommendations on tax and education reform measures designed to address Montgomery Circuit Judge Eugene Reese's recent equity funding ruling. ■

Thanks!

I deeply appreciate the many expressions of congratulations upon the occasion of my retirement, through telephone calls, letters and personal contact. I especially thank those members of present and past boards of bar examiners and character and fitness committees for their contributions to my retirement gift, which I can assure you was put to good use and greatly enjoyed. You are a special group of people. It was my joy to work for you and with you during these past years. Again, a heartfelt "thank you."

Norma Jean Robbins

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CAMPOS & STRATIS

ABOUT MEMBERS, AMONG FIRMS

ABOUT MEMBERS

William E. Case announces the opening of his office at One Office Park, Suite 413, Mobile, Alabama 36609. Phone (205) 304-0468.

Robert P. Bynon, Jr., formerly in partnership as Baker & Bynon, announces the opening of his office at 2213 Forestdale Boulevard, Birmingham, Alabama 35214. Phone (205) 791-0028.

Mark A. Baker announces the opening of his office at Two Professional Plaza, 1739 Cheshire Bridge Road, N.E., Atlanta, Georgia 30324. Phone (404) 876-9181.

Lenora W. Pate announces her new address as director, State of Alabama, Department of Industrial Relations, 649 Monroe Street, Montgomery, Alabama 36131. She was formerly with Sirote & Permutt.

John C. Calhoun announces the relocation of his office to Suite 950, Financial Center, 505 20th Street, North, Birmingham, Alabama 35203. Phone (205) 251-4300.

Tamera K. Erskin announces the relocation of her office to Civic Center Executive Suites, 1117 21st Street, North, Suite 400, Birmingham, Alabama 35234. Phone (205) 322-5800.

Michael J. Gamble announces the opening of his firm at 140 N. Foster Street, Suite 104, Dothan, Alabama 36303. Phone (205) 677-6171. He was formerly with Cherry, Givens, Peters, Lockett & Diaz.

Sarah B. Stewart, a former staff attorney with the Office of Hearings and Appeals, Social Security Administration, in Birmingham, Alabama and Columbia, South Carolina, announces the opening of her office at Suite 336, Pavilion Executive Center, 5000 Thurmond Mall Boulevard, Columbia, South Carolina 29201. Phone (803) 765-0444.

Phillip Ted Colquett announces the location of his office at Chase Corporate Center, One Chase Corporate Drive,

Suite 205, Birmingham, Alabama 35244. Phone (205) 987-1223.

Larry Morgan announces the relocation of his office to 200 West Court Square, Suite 204, Huntsville, Alabama 35801. Phone (205) 534-8076.

Patrick F. Smith announces the opening of his office at 1736 Oxmoor Road, Suite 201, Homewood, Alabama 35209. Phone (205) 871-8335.

L. Thomas Ryan, Jr. announces the relocation of his office to 221 East Side Square, Suite 1-A, Huntsville, Alabama 35801. Phone (205) 533-1103.

Larry Keith Anderson, formerly an assistant district attorney for the 20th Judicial Circuit and former city attorney for the City of Dothan, announces the opening of his office at 407-B North Oates Street, Dothan, Alabama 36303. Phone (205) 712-0288.

Robert E. Clute, Jr., formerly of Silver & Voit, announces the opening of his office at Suite 2004, 150 N. Royal Street, Mobile, Alabama 36602. Phone (205) 432-7800.

Terry R. Smyly announces his new office address with the Bureau of Legal Services, Department of Mental Health and Mental Retardation, P.O. Box 3710, Montgomery, Alabama 36109-0710.

Kerri Johnson Riley announces the opening of her office at Barrister's Building, 407 Franklin Street, S.E., Huntsville, Alabama 35801. Phone (205) 535-0800.

James M. Sizemore, Jr., formerly commissioner of the Alabama Department of Revenue and director of the Alabama Development Office, announces the opening of his office at 3123 Fieldcrest Drive, Montgomery, Alabama 36106-3334. Phone (205) 277-5341.

Charles Centerfit Hart announces the relocation of his office to 924 Third Avenue, Gadsden, Alabama 35901. The mailing address is P.O. Box 26, Gadsden 35902. Phone (205) 543-1701.

Elizabeth Roland Beaver announces the relocation of her office to 956 Mont-

clair Road, Suite 218, Oakmont Building, Birmingham, Alabama 35213. Phone (205) 592-0234.

Donald L. Colee, Jr. announces the relocation of his office to 604 38th Street, South, Birmingham, Alabama 35222. Phone (205) 592-4332.

Robert E. Patterson announces the relocation of his office to the Veitch Building, circa 1830, 301-A Franklin Street, Huntsville, Alabama 35801. Phone (205) 539-8686.

Brian W. Moore, formerly commissioner of the Alabama Medicaid Agency, announces the opening of his office at J.A.M. Executive Suites, 4131 Carmichael Road, Suite C-12, Montgomery, Alabama 36106. Phone (205) 277-8777.

Gail Dickinson-Shrum announces the relocation of her office to 2015 1st Avenue, North, Suite 400, Birmingham, Alabama 35203. Phone (205) 326-3600.

AMONG FIRMS

R. Larry Bradford announces the formation of **Bradford & Associates**. **J. Mark Baggett** and **Karen M. Ross** are associates. The office is located at 2100-A Southbridge Parkway, Suite 585, Birmingham, Alabama 35209. Phone (205) 871-7733.

Burns, Cunningham & Mackey announces that **Max Cassady** has become associated with the firm. Offices are located at 50 St. Emanuel Street, P.O. Box 1583, Mobile, Alabama 36633. Phone (205) 432-0612.

McPhillips, Shinbaum & Gill announces that **S. Judson Waites, II** has become associated with the firm. Offices are located at 516 S. Perry Street, Montgomery, Alabama 36104. The mailing address is P.O. Box 64, Montgomery 36101. Phone (205) 262-1911.

Yearout, Myers & Traylor announces that **Michael Wade Carroll** has joined the firm, with offices at 2700

SouthTrust Tower, 420 N. 20th Street, Birmingham, Alabama 35203. Phone (205) 326-6111.

Ball, Ball, Matthews & Novak announces that **Allison L. Alford** has become associated with the firm. Offices are located at 1100 Union Bank Tower, Montgomery, Alabama. The mailing address is P. O. Drawer 2148, Montgomery 36102-2148. Phone (205) 834-7680.

Mark Boardman announces the formation of **Boardman, Tyra & Goodbee** at 104 Inverness Center Place, Suite 325, P.O. Box 59465, Birmingham, Alabama 35259-9465. Phone (205) 980-6000.

Lloyd, Bradford, Schreiber & Gray has been changed to **Schreiber & Gray**. The location remains the same at 2 Perimeter Park South, Suite 100, Birmingham, Alabama 35243.

Bingham D. Edwards announces that **Phil D. Mitchell**, formerly of the Tuscaloosa Office of Legal Services Corporation of Alabama, has become associated with the firm. The firm is located at 211 Lee Street, N.E., Suite A, Decatur, Alabama 35601. Phone (205) 353-6323.

Henslee, Bradley & Robertson announces that **Ralph K. Strawn, Jr.** has become a member of the firm, and **Kimberly H. Skipper** has become an associate with the firm. Offices are located at 754 Chestnut Street, Gadsden, Alabama 35901. Phone (205) 543-9790.

Gentle & Grumbles announces that **Carolyn Landon**, formerly an associate of Schoel, Ogle, Benton & Centeno, has joined **Edgar C. Gentle, III** as a partner. Offices are located at Suite 1501, Colonial Bank Building, 1928 First Avenue, North, Birmingham, Alabama 35203. Phone (205) 716-3000.

Jones & Trousdale announces that **Waylon Thompson**, formerly of Boggs & Thompson in Panama City, Florida, has become a partner in the firm. The firm's new name is **Jones, Trousdale & Thompson**. The mailing address is 115 Helton Court, Suite B, P.O. Box 367, Florence, Alabama 35631. Phone (205) 767-0333.

Wallace, Jordan, Ratliff, Byers & Brandt announces that **James E. Ferguson** has become a partner and **J. Michael Cooper, Melissa M. Jones, Lily M. Arnold**, and **Jay H. Clark** have become associates. Offices are located at 2000 A Southbridge Parkway, Suite 525, Birmingham, Alabama 35209. Phone (205) 870-0555.

Calhoun, Faulk, Watkins, Clower & Cox announces that **Kenneth W. Cox** has joined **B & D Plastics, Inc.** of Troy as president. The mailing address is P.O. Drawer 1048, Troy, Alabama 36081. Phone (205) 566-2471.

Jimmy B. Pool announces **Laureen C. Binns** has become associated with the firm. The mailing address is P.O. Box 1709, Montgomery, Alabama 36102-1709. Phone (205) 262-2717.

Smith, Spires & Peddy announces that **T. Randall Lyons** has become an associate of the firm. Offices are located at 650 Financial Center, 505 N. 20th Street, Birmingham, Alabama 35203. Phone (205) 251-5885.

The Ford Law Firm announces the association of **Tim Case, Alex Yarbrough** and **Duncan Hamilton. John B. Crawley**, formerly circuit judge of the 12th Circuit, has become *of counsel* to the firm. The main office is located at 2129 12th Avenue, North, Birmingham, Alabama 35234. Phone (205) 326-3444.

Clyde E. Ellis announces that he has joined the firm of **Ellis & Ellis** as a shareholder. Offices are located at 901 Crawford Street, Vicksburg, Mississippi 39180. Phone (601) 638-0353.

Ford & Hunter announces that **H. Edgar Howard** has become associated with the firm. Offices are located at 645 Walnut Street, Suite 5, P.O. Box 388, Gadsden, Alabama 35902. Phone (205) 546-5432.

Roden & Hayes announces that **James H. Starnes**, formerly of Starnes & Atchison, has joined the firm. The firm's new name will be **Roden, Hayes, Carter & Starnes**. Offices are located at 2015 First Avenue, North, Suite 400, Birmingham, Alabama 35203. Phone (205) 328-6869.

Silver & Voit announces that **Thomas G. F. Landry**, formerly law clerk to Senior United States District Judge Daniel H. Thomas, has become associated with the firm. Offices are located

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HONOR ROLL

Between May 12,
and
July 30, 1993,
the following attorneys made
pledges to the Alabama State
Bar Building Fund.

Their names will be
included on a wall in the
portion of the building listing
all contributors.

Their pledges are
acknowledged with
grateful appreciation.

For a list of those
making pledges prior to
May 12, 1993,
please see previous issues
of *The Alabama Lawyer*.

Kenneth L. Goodwin

George B. Gordon

Hattie Engel Kaufman

Edward Joseph Kennedy, III

Norma Mungenast Lemley

Ina Branham Leonard

Charles Gary Morrow, Jr.

Stanley Jay Murphy

Clarence Glenn Powell

Robert W. Rieder, Jr.

Paul Edwin Skidmore

Michael Ivan Spearing

Haydn M. Trechsel

Cindy Stone Waid

John Fred Wood, Jr.

Robert Henry Woodrow, III

William B. Woodward, Jr.

4317-A Midmost Drive, Mobile, Alabama 36609-5589. Phone (205) 343-0800.

Kimberly O. Fehl and Phillip W. Chancey, Jr. announce the opening of **Fehl & Chancey**. Offices are located at 138 Adams Avenue, Montgomery, Alabama 36104. Phone (205) 269-1529.

Prince, McKean, McKenna & Broughton announces that **Michael P. Windom** has become associated with the firm. Offices are located at First Alabama Bank Building, 56 St. Joseph Street, 13th Floor, Mobile, Alabama 36602. The mailing address is P.O. Box 2866, Mobile, Alabama 36652. Phone (205) 433-5441.

Adams & Reese announces that **Victor H. Lott, Jr.** has joined the firm as a partner. Offices are located at 4500 One St. Louis Center, P.O. Box 1348, Mobile, Alabama 36633. Phone (205) 433-3234.

Miller, Hamilton, Snider & Odom announces that **Joseph R. Sullivan, Thomas P. Oldweiler** and **Susan Russ Walker** have become members of the firm, and **John Guandolo** and **Scott P. Crampton** have become *of counsel* in the firm's Washington, D.C. office. **M. Stephen Dampier** and **Anthony M. Hoffman** have become associated with the firm. The firm has offices in Mobile and Montgomery, Alabama and Washington, D.C.

Lange, Simpson, Robinson & Somerville announces the relocation of their offices to 417 20th Street, North, Suite 1700, Birmingham, Alabama 25203-3272. Phone (205) 250-5000.

Henry E. Lagman announces that **Gregory L. Case** has become an associate with the firm. Offices are located at 200 Cahaba Park South, Suite 102, Birmingham, Alabama 35242. Phone (205) 980-1199.

Michael Gillion, Benjamin H. Brooks, III and **David A. Hamby, Jr.** announce the formation of **Gillion, Brooks, & Hamby**. The firm also announces that **Stewart L. Howard** will be associated with the firm. Offices are located at 501 Bel Air Boulevard, Suite 240, Mobile, Alabama 36606. Phone (205) 476-4350.

Perry O. Hooper, Sr. announces that **William Cooper Thompson**, formerly assistant legal advisor to the Governor, is now associated with the firm. Offices are located at 456 S. Court Street,

Montgomery, Alabama 36104. Phone (205) 834-3200.

Edward B. Raymon and Elaine Lubel Raymon announce the formation of **Raymon & Raymon**. Offices are located at 402 N. Main Street, Tuskegee, Alabama. The new mailing address P.O. Box 668, Tuskegee 36083-0668. Phone (205) 727-6700.

F. Timothy McAbee announces that **Tommy Nail**, formerly of Parker & Nail, **Barry A. Ragsdale**, formerly of Sirote & Permutt, and **Becky A. Blake** are now associated with the firm. The firm's new name is **McAbee, Nail & Ragsdale**. Offices are located at 2100-A South-Bridge Parkway, Suite 377, Birmingham, Alabama 35209. Phone (205) 879-3737.

Frank H. Hawthorne, Jr. announces that **C. Gibson Vance** is now an associate with the firm. Offices are located 207 Montgomery Street, Bell Building, Suite 1100, Montgomery, Alabama 36104. Phone (205) 269-5010.

Barnett, Noble & Hanes announces that **Janice G. Formato** has become a member of the firm. Offices are located at 1600 City Federal Building, Birmingham, Alabama 35203. Phone (205) 322-0471.

Hardwick, Hause & Segrest announces that **Kevin Walding**, formerly staff attorney for Justice Maddox, has become an associate with the firm. Offices are located at 210 N. Lena Street, Dothan, Alabama 36302. Phone (205) 794-4144.

Watson & Harrison announces that **Ryan deGraffenried, Jr.** has joined the firm. The firm's new name is **Watson, Harrison & deGraffenried**. Offices are located at 1651 McFarland Boulevard, North, Tuscaloosa, Alabama 35406. Phone (205) 345-1577.

Sirote & Permutt announces that **John C. Falkenberg** has joined the firm. Offices are located at 2222 Arlington Avenue, South, Birmingham, Alabama 35255-5727. The mailing address P.O. Box 55727, Birmingham. Phone (205) 933-7111.

Lynn McCain and William B. Ogletree announce the formation of **McCain & Ogletree**. Offices are located at The Printup Building, 350 Locust Street, Second Floor, Gadsden, Alabama 35901. Phone (205) 547-0023. ■

YOUNG LAWYERS' SECTION

By A. Lester Hayes, III, president

"STOP AND SMELL THE ROSES"

1993-94 YLS Officers

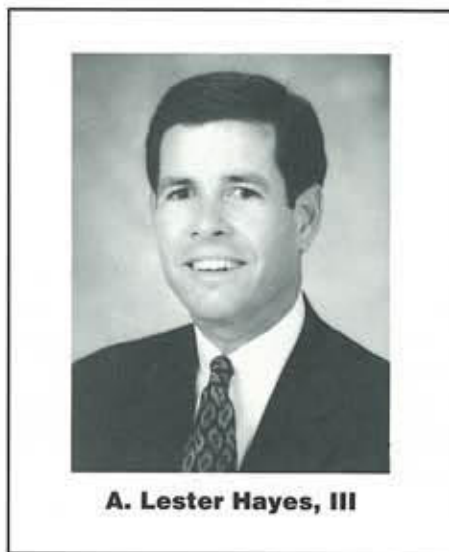
The annual meeting of the Alabama State Bar Young Lawyers' Section was held July 15, 1993 at the state bar's annual meeting in Mobile. Officers for the upcoming term are **Hal West**, president-elect; **Barry Ragsdale**, secretary; and **Alfred Smith**, treasurer. On behalf of our officers, I remind you that we welcome and encourage your input on newer and better ways the section can serve, not only Alabama's young lawyers, but the entire bar.

I take this opportunity to thank immediate past president **Sid Jackson** for all his hard work. Sid has been a member of the YLS Executive Committee for a number of years, and was involved for many years in planning and organizing our annual YLS Seminar on the Gulf at Sandestin, helping to make it a huge success. Congratulations, Sid, on a job well done.

1993 ABA YLD meeting

The 1993 annual meeting of the American Bar Association Young Lawyers' Division was August 6-9 in New York City at the New York Sheraton and Towers. The annual meeting assembly was held August 6-7, when issues of importance to lawyers throughout the country were discussed. Various resolutions were debated and voted upon by assembly members. The results were given to the ABA House of Delegates as being representative of the views expressed by young lawyers throughout the U.S. Topics debated this year include the development and implementation of alternate dispute resolution mechanisms, proposed federal legislation which places limits on the amount of punitive damages awarded in civil actions, and mandatory efforts for contraception or

sterilization relating to criminal sentencing. Alabama was well represented at the YLD assembly. Eight young lawyers from Alabama served as delegates, reviewing, debating and voting on those issues brought before the assembly. If you have any questions about the assembly, give me a call at (205) 263-6621.



A. Lester Hayes, III

Stop and smell the roses

In the recent edition of the *YLD Barrister* magazine, Caroline Ahrens, chair for the Barrister Editorial Board, talks about "finding personal satisfaction". She mentions how we should stop for a moment to consider why we made the decision to pursue careers in law and what it is about practicing law that we looked forward to with such optimism. She suggests that by focusing again on these aspirations and putting our hearts into it, we can achieve personal satisfaction from being lawyers.

Young lawyers face greater problems and tackle complex issues more than ever before. The law is constantly changing; there is no such thing as

a simple "fender bender" case. Keeping abreast of all the changes takes time. The demands and deadlines placed on attorneys by the courts are increasing. Many clients, unknowledgeable about the legal system, too often have unrealistic goals, expecting to win and to win quickly. The balancing of ethical considerations against monetary goals is a constant struggle. Many young lawyers are spouses and/or parents with responsibilities and pressures separate and apart from those in the office. All of the above factors create a situation whereby it becomes increasingly difficult to "find personal satisfaction" in one's job as an attorney. The task is not, however, impossible. It can be done and it should be done. I am sure that each of us knows at least one attorney whom we feel is not only a good attorney but also enjoys what he or she does for a living. Take time out to talk with that attorney about how he or she "finds personal satisfaction" as a lawyer, how he or she copes with problems and pressure, and how he or she has maintained a zest and enthusiasm for work. In essence, stop and smell the roses. We are indeed fortunate to be members of such a fine profession; there is no other legal system like ours in the world. The chances we have to contribute to society and help others are endless. Attorneys, more than any other profession, have a major impact on the making and shaping of laws which directly affect our daily lives. Few, if any, occupations allow such opportunities.

Ask yourself what you have done and what you can still do. Learn to enjoy your work, not only for your own benefit but the benefit of those with whom you work and serve. Don't just "find personal satisfaction"; maintain it and improve it. ■



LAW DAY ESSAY CONTEST WINNERS

This year was the first year for the Alabama State Bar Law Day Essay Contest. With the cooperation of eight local bar associations and their local school systems, winners were selected in two categories: grades 1-9 and grades 10-12.

Contestants were asked to write an essay using this year's Law Day theme, "Justice for All—All for Justice." Participating local bars selected local winners and forwarded their essays to the state bar's Law Day Essay Contest subcommittee, chaired by Steven Sears of Montevallo. These essays were judged by the subcommittee with the winning

essayist in each category receiving a \$200 savings bond, and the second and third place essayist in each category receiving a \$100 and \$50 bond, respectively.

This year's two top essayists were Lisa Ivey of Jasper and Jeremy Guthrie of Nauvoo.

The Law Day Committee hopes other local bar associations will consider making the essay contest one of their local activities to celebrate Law Day. The Alabama State Bar Law Day Committee will be contacting all local bar presidents in January to seek their participation for Law Day 1994. ■

Law Day Essay Contest Winners

Grades 10-12 Division

Jeremy Shane Guthrie,
1st place, Nauvoo
Martha Earl, 2nd place, Camp Hill
Honorable mentions:
Antonio Johnson, Anniston
Deana Kay Richardson, Anniston
Matthew N. Thomas, Bay Minette

Grades 1-9 Division

Lisa Ivey, 1st place, Jasper
Alchar Gray, 2nd place, Tuskegee
Dorian Wesley, 3rd place, Oxford
Honorable mentions:
Carter Adams, Anniston
Justin Blair, Alexander City
Angela Burris, Anniston
Veronica Burris, Anniston
Ashley Call, Bay Minette
Melanie Frizzell, Montgomery
Stacey Rhodes, Alexander City

Local Bar Associations Participating in the Law Day Essay Contest

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Calhoun County Bar Association
Cullman County Bar Association
Etowah County Bar Association
Macon County Bar Association
Montgomery County Bar Association
Tallapoosa County Bar Association
Walker County Bar Association

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BUILDING ALABAMA'S COURTHOUSES

TALLAPOOSA 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

TALLAPOOSA COUNTY

The Alabama Legislature created Tallapoosa County on December 18, 1832. It is another county formed from the Creek Indian land cession of 1832. The county's name comes from the Tallapoosa River, which flows through the county. Also, in earlier times, an Upper Creek Indian village in the vicinity was named Tallapoosa. The name is derived from two Indian words—"tali" meaning rock, and "pushi" meaning pulverized.

Besides being an important physical feature in the county, the Tallapoosa River is also a significant jurisdictional boundary. It enters the county at its northwest corner, creates Horseshoe Bend, the site of a famous Indian battle, and then flowing due south serves as the western boundary of the southwest portion of the county. It divides the county into two distinct sections, each with its own dominant population center. Dadeville is east of the river and Alexander City is west.



Courthouse in Dadeville

As early as 1889 a local act of the Legislature divided the county into eastern and western jurisdictions based on the Tallapoosa River. The act was amended in 1897, 1900, 1923, 1945, 1949, and 1966; however, to this day, Tallapoosa remains one of a handful of counties with two court sites, Dadeville and Alexander City.

Tallapoosa County was home to many Indians, particularly along the banks of the Tallapoosa River. The largest Creek Indian town was Okfuskee. This population center had seven branch villages. Its probable site is now located under Lake Martin, the impounded waters of the Tallapoosa River above Martin Dam.

As early as 1735, British traders from Charleston, South Carolina built a fort and trading post at Okfuskee in an

attempt to keep an eye on the French at Fort Toulouse, 40 miles away in present-day Elmore County, and to establish trade with the Indians. The venture was not a commercial success, but it marked the beginning of Indian contact with English-speaking pioneers in this area. A massacre of British traders took place around 1760.

French influence in the area came to an end following the French and Indian war. British influence came to an end following the American Revolution. American interests increased after the Creek Indian War, which effectively ended at the Battle of Horseshoe Bend in 1814. Once Alabama gained statehood in 1819, settlers arrived in the Tallapoosa territory.

When Tallapoosa County was formed

in 1832, Okfuskee was named the first county seat. In later years an early pioneer was asked why Okfuskee was chosen. He replied, with a touch of humor, that in 1832 it was the center of population, regardless of the fact that most of the residents were Indians. The first courthouse was a hotel built in 1832 by Willis Whatley near a spring on the east side of the river. Whatley served as hotel keeper and justice of the peace.

The first county officers were elected in August 1833, and the first official court took place November 4, 1833. Courts continued to convene periodically at Okfuskee until a permanent county seat location could be selected.

The Alabama Legislature appointed a site selection commission on January 14, 1834. Its duty was to select a seat of justice within ten miles of the center of the county. The commissioners were paid \$4 per day for each day they served. On October 3, 1836, they chose Dadeville over Okfuskee as the permanent county seat. Dadeville had been surveyed less than six months earlier. In their survey the town promoters had set aside one block in the center of the business district for a courthouse. The choice of Dadeville was approved by the state Legislature on December 14, 1837.

The county seat commissioners hired William Sentell to build a temporary log courthouse. The date it was built is not known. It was located on the southeast corner of Broadnax and Columbus streets rather than on the designated court square. It had one room and was 20' x 20' in dimensions. The courthouse had a dirt floor and there were large cracks between the round oak logs. Spectators could view the court proceedings from the outside through the cracks. Sentell was paid \$50 for the temporary structure which served the county until a permanent courthouse could be built on the designated block.

The community at Dadeville had grown up around an early trading post. The establishment was located at the junction of the old Tennessee Road which brought settlers from Tennessee, and the Georgia Road which carried pioneers from the east. The town was named for Major Francis Langhorne Dade.

Dade was born in Virginia in 1793 and he fought in the Second Seminole War



Tallapoosa County Courthouse with east wing addition, c. 1948



Tallapoosa County Courthouse, c. 1866



Pre-World War II Tallapoosa County Courthouse before east wing addition

in Florida. On December 28, 1835, his men were ambushed by the Seminole Chief Osceola and only one soldier of the 108-man American force survived. The massacre took place near present-day Bushnell, Florida and Major Dade and his men are buried in the Federal Cemetery at St. Augustine. Dade County, Florida, site of Miami, is also named for Major Dade.

The first permanent courthouse building in Tallapoosa County was completed at Dadeville in 1839. It was constructed by the same builders, Mitchell and Cameron, who built the Chambers County Courthouse in 1837. The struc-

ture was identical to the Chambers County Courthouse, and was patterned after the Troup County Courthouse in LaGrange, Georgia. The cost for this permanent courthouse and jail was \$18,000.

The building was 60 feet long by 40 feet wide. It was made of brick and constructed in the Greek Revival style. The lower story contained four rooms, one each for the County Commission, the sheriff, the county clerk and the grand jury. The second floor consisted of a courtroom and two jury rooms that were separated by a stairway. The con-



Courthouse, Alexander City (City Hall)

tract called for plastered interior walls and ornamental work of good quality. This courthouse served the county for 20 years.

On August 29, 1859 the county commission entered into a contract for a new courthouse. According to a cornerstone located in the basement of the present Tallapoosa County Courthouse, the builder was named P. Conniff. The contract called for the old courthouse to be removed and a new courthouse to be built on the same site and ready for occupancy by the spring term of court of 1861. The building was to be completely furnished by December 1861. The cost was \$12,600.

During construction, the courts convened and county business took place at the Methodist and Baptist churches in town. Also, a "brick house" on the square was used by the court. The completed courthouse was a two-story structure with a first floor entrance and two curving stairways leading up to the second floor portico and doorway.

By 1901, the county needed a larger facility. Instead of tearing down the structure, a new courthouse was built around the existing courthouse. W.C. Chamberlain and Co. was the architectural firm which drew up the plans and W.R. Harper served as builder.

The additions to the courthouse completely changed its appearance. New brick facing surrounded the building. A magnificent clock and bell tower were constructed on the east end of the

courthouse and a small tower was built on the southwest corner. Further additions were made to the courthouse in 1929, and an east wing was added in 1947. Thus, the 1861 courthouse, with its numerous alterations, served the county for nearly 100 years.

Meanwhile, on the west side of the Tallapoosa River, Alexander City was to become the

largest city in Tallapoosa County. During the 1830s, it was a trading post known as the "Georgia Store". Then the Young family from South Carolina moved into this farming area and became prominent members of the community. It soon came to be known as Youngsville.

By the 1870s the Savannah and Memphis Railway Company was completing its line through Alabama. In the link between Birmingham and Columbus, Georgia the railroad decided that the tracks should pass through Youngsville. The future growth of the town was assured. The grateful citizens of Youngsville wished to show their appreciation. They decided to rename their town in honor of General Edward Porter Alexander, president of the railroad. The town was officially renamed Alexander City on March 19, 1873.

Alexander was a native of Georgia who graduated from West Point as an engineer. At the outbreak of the Civil War he was stationed in the west in Washington Territory. He resigned from the United States Army and offered his services to the Confederacy. He rapidly rose from captain to brigadier general and distinguished himself in battle. At war's end he was only 29.

Following the war, Alexander served as a professor at the University of South Carolina. Then, in 1871, he was named superintendent of the Charlotte and August Railroad. Shortly after this he

became president of the Savannah and Memphis Railroad. In later life Alexander served as a commissioner for the United States Commission of Railroads and Canals, and as an arbitrator of the boundary dispute between Costa Rica and Nicaragua. In 1902 he became the first former Confederate Army officer to be a featured speaker at West Point. He died in 1910 in Savannah, Georgia, one month shy of his 75th birthday.

By the 1880s, Alexander City had grown tremendously. Whenever legal business was to be transacted, Alexander Citizens had to travel 15 miles and cross the Tallapoosa River to reach the county seat at Dadeville. A group of citizens under Mayor B.L. Dean met to change this inconvenient condition. They proposed to build a courthouse at the expense of local people and with no new taxes for the county. They petitioned the Legislature for permission.

On February 18, 1889 the Alabama Legislature approved a circuit court for Alexander City. The court would meet on the second Monday in February and August each year. Jurisdiction would be the territory in the county west of the Tallapoosa River. The local act would become effective on the second Monday in February 1890. However, there was the added provision that the law would not go into effect until a suitable courthouse was built in Alexander City.

The townspeople got to work and built their courthouse. It was ready for the spring term of court in 1890. It was also quite unique because it was built entirely from private subscriptions and not tax money.

The people of Alexander City are not unduly superstitious, but this first courthouse in the town lasted approximately 13 years. Then a great fire occurred on Friday the 13th of June, 1902. It started in a blacksmith shop, but a brisk wind blew the fire from building to building. Most structures were wooden and they burned quickly. By late afternoon every business in the downtown area had been destroyed, including the courthouse building. Some courthouse records were saved from the fire and a clerk's office was soon set up at the home of the local newspaper editor. After the fire, new fire codes were implemented and in the future only brick and stone buildings

could be erected in the downtown business area.

A second Alexander City courthouse was built following the fire. It was a two-story brick building that would be used for almost 40 years.

In the years 1938 to 1939, Alexander City erected a new city hall. One of the objectives for the new building was to house the circuit court and circuit clerk. T.C. Russell was mayor. Robert and Company, Inc. served as architects and engineers. Andrew and Dawson were building contractors. To this day, the Alexander City circuit court and circuit clerk occupy the second floor of City Hall. This location is recognized by the Alabama Administrative Office of Courts as a "court site".

By 1960, Tallapoosa County needed a new principal courthouse and it completed its present courthouse at Dadeville. The building is a three-story structure with a basement. It was built of red brick and contains wings extending from each side. The building was under construction from 1958 to 1960. It cost approximately \$600,000. Lynn Blair Construction Company of Alexander City served as contractor, and Martin J. Lide of Birmingham was architect. The dedication of the new Tallapoosa County Courthouse took place Saturday, June 18, 1960. ■

The author gratefully acknowledges the assistance of Dadeville attorney John Percy Oliver, II for obtaining photographs of early Tallapoosa County courthouses.

Additional sources:

A History of Tallapoosa County, William Pressley Ingram, 1951; *Tallapoosa County—A History*, The Tallapoosa Bicentennial Committee, 1976; and *Some Pioneers of Tallapoosa County Alabama*, Sandra S. Wilson, 1991.



Samuel A. Rumore, Jr.

Samuel A. Rumore, Jr. is a graduate of the University of Notre Dame and the University of Alabama School of Law. He served as founding chairperson of the Alabama State Bar's Family Law Section and is in practice in

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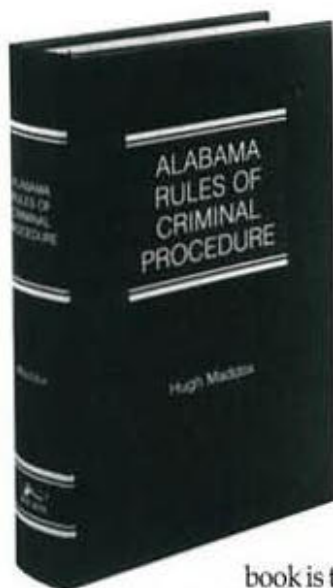
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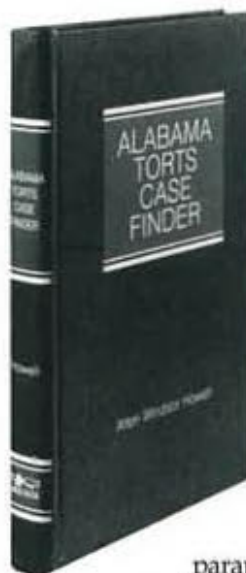
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AND THE WINNER IS...

The Alabama Lawyer again sponsored its legal writing contest for students attending law school within Alabama. The winner was Gary Howard, who is a student at the University of Alabama School of Law, for his paper entitled, "Improper Influences in the Jury Room—Attacking Verdicts with Juror Testimony."

lem. Throughout the nation over the past decade the creation of "the" problem with civil juries has spawned an industry of half-truths and misrepresentations about the result of civil jury decisions that has been passed from state to state. The same lack of information about the results of civil jury decisions that permitted this hyperbole has also thwarted any attempt at a truthful discussion of the facts.

The Forbes article was incomplete, misleading

In February of this year, *Forbes Magazine* published an article about civil jury awards in Alabama which has caused our state great harm. The information in the

article was both incomplete and misleading, yet the article was reprinted in nearly every major Alabama newspaper. I think it is interesting that *Forbes*, one of the nation's leading business magazines, never once contacted the Alabama judicial department to determine if what it reported was true and accurate. Obviously, the magazine did not want to let the facts keep it from trashing Alabama and attempting to inflict harm on her people.

I admit I was appalled when I read the *Forbes* article. I asked the Administrative Office of Courts to investigate the claims made in it and to determine for me a true picture of compensatory and

punitive damage awards by state court juries.

The AOC, in its investigation, found that much of the data *Forbes* used was inaccurate because many awards were counted twice, once at the trial level and then at the appellate level, and some awards were duplicated from year to year. The data included federal court awards which are not reviewable by the Alabama Supreme Court and also included awards under Alabama's unique wrongful death statute.

The rest of the story was not included


Forbes further misled the reader because it failed to go past the naked jury award and report the final disposition of the cases it cited. What, for example, did the trial court judge do at the *Hammond* stage? Did he or she order remittitur, a new trial or JNOV? Was there a post-trial settlement? What did the supreme court do on appeal? In short, the rest of the story wasn't told.

The magazine used three examples to portray "runaway" punitive damage awards in Alabama. Had the writer investigated he would have found that his \$5 million example was remitted by the trial judge to \$500,000 and affirmed by the supreme court; his \$2 million example was set aside by the trial court and is now on appeal; and his \$10 million example was settled for an amount under \$2 million.

Had *Forbes* bothered to complete the story it would have also investigated the individual facts in these cases and determined what so outraged 12 conservative Alabama jurors to unanimously impose these civil fines.

Forbes then made the claim that in Alabama in 1992 juries "gave away a total of more than \$123 million in punitive damages." Had the magazine investigated and told the whole truth it would have found the following:

- (1) One of the 22 cases (a \$2 million award) cannot be found, although the facts seem to fit a case also listed for 1991. Two other cases, one award for \$300,000 and the other for \$250,000, were not 1992 jury awards.
- (2) Of the \$123 million, \$56.1 million came from *federal courtrooms*



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which operate under different procedures and where appeal lies, not to the Supreme Court of Alabama, but to the federal appeals courts and to the Supreme Court of the United States.

- (3) Of the \$123 million, \$47.2 million were *wrongful death* awards under Alabama's unique statute and would not be construed as punitive damages in other states.

Alabama post-verdict review a model

The article also left the impression that the U.S. Supreme Court reversed the Alabama Supreme Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991).

To the contrary, the Alabama system of post-verdict review of punitive damage awards was held out as a model for other states to adopt. Our standards as set out in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986) and *Green Oil v. Hornsby*, 539 So.2d 218 (Ala. 1989) have been fully endorsed by the nation's highest court.

In *Haslip* the U.S. Supreme Court said:

"Procedural safeguards, including instructions to the jury on the nature and purpose of punitive damage awards, post-trial review of punitive damage awards by the trial court considering enumerated factors, and subsequent comparative analysis by the Alabama Supreme Court applying substantive standards developed for evaluating punitive damage awards, imposed a sufficiently definite and meaningful constraint on the discretion of Alabama fact-finders in awarding punitive damages to ensure that awards were not grossly disproportionate to the severity of the offense and were adequate to protect due process rights of the insurer whose agent defrauded the insured."

In the recent case of *TXO Production Corp. v. Alliance Resources Corp.* 1993 WL 220266 (U.S. W.Va.) where the U.S. Supreme Court upheld a punitive damage award 526 times the compensatory award, the court again cited Alabama's post-verdict review standards as a model. Justice O'Connor, in dissent, said:

"Two terms ago, this court, in *Haslip* upheld Alabama's punitive damage regime against constitutional challenge...It was reassured by the fact that the Alabama courts subject punitive verdicts to exacting post-verdict review at two different levels. First, Alabama trial courts must indicate on the record their reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness. Second, the Alabama Supreme Court itself provides an additional check by conducting a comparative analysis and applying detailed substantive standards, seven in all, thereby ensuring that the award does not exceed an amount that will accomplish society's goals for punishment and deterrence...."

"In *Haslip* this court concluded that the (Alabama Supreme Court's) standards impose a sufficiently definite and meaningful constraint on fact-finder discretion.

"Because the standards had a 'real effect' this court upheld Alaba-

ma's regime against constitutional challenge...."

If *Forbes* was incomplete and misleading, what then is the true picture of punitive damages in Alabama?

The facts in Alabama's trial courts

The Administrative Office of Courts collects statistical data for the entire trial court system. The data is reported by the clerk of the each court. Following the article which appeared in *Forbes*, AOC looked at its data and statistics to determine if the *Forbes* numbers were accurate. In order to comport with the *Forbes* data, AOC captured its data for calendar year 1992. A summary of that data follows:

- The AOC data identified a total of only 54 of the 730,000 dispositions in state trial courts during calendar year 1992 in which punitive damages were awarded in cases not involving a wrongful death. Twenty-eight of the cases involved awards by juries. The amount of punitive awards totaled

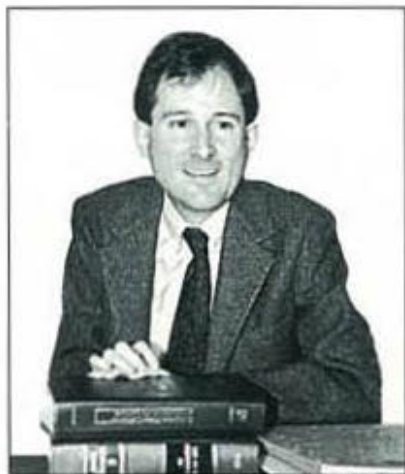
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\$27.2 million with the median award being \$39,000. AOC found five monetary awards in wrongful death cases.

- The compensatory awards in these 54 non-wrongful death cases totaled \$17.9 million which means the ratio of punitive awards to the compensatory awards was 1.51 to 1.
- The punitive damage awards were primarily in cases involving insurance and business fraud, or conversion. These cases constituted 60 percent of the punitive awards in Alabama in 1992. Of the 11 cases in which punitive awards at the trial court level exceeded a half-million dollars, eight involved fraud or conversion in business or insurance dealings.
- There were only two punitive damage awards found in personal injury/prod-

uct liability cases where there was not a wrongful death claim.

- Tort dispositions in circuit court totaled 9,178. This amounted to 21 percent of all *civil* cases disposed of in circuit court, 5 percent of all cases disposed of in circuit court, and 1 percent of the total state court caseload.
- The 54 tort cases in non-wrongful death cases where punitive damages were awarded were one-half of one 1 percent of the tort dispositions in circuit court and only one-tenth of 1 percent of all circuit court civil dispositions.

The facts in the Alabama Supreme Court

A search of all decisions released by the supreme court during the 1991-

92 court year (October 1, 1991-September 30, 1992) resulted in the identification of 21 non-wrongful death cases in which judgments of punitive damages were awarded in the trial courts. The court affirmed 66.66 percent of the awards, reversed 28.57 percent and ordered a remittitur of a portion of the punitive damage award in one, or 4.76 percent of the cases. The affirmance rate among this class of cases is no higher than the court's record as a whole.

In cases where punitive damages were at issue, the court affirmed a total of \$10.9 million in damage awards and reversed a total of \$4.7 million. The court ordered a remittitur of another \$2 million. Only three cases over \$1 million were affirmed in non-wrongful death appeals. The median award was \$75,000.

The court issued decisions in four wrongful death awards during the period. The court affirmed one, reversed one, ordered a remittitur of half the punitive damage award in one and one was a mixed decision.

The facts and not unsubstantiated opinion should dictate action

I urge you to decide whether or not we have a civil justice and civil jury system out of control and without adequate safeguards.

I suggest that if *Forbes* or others want to criticize our civil juries, our courts or our judges, that is fine. I would only ask that they do it based on accurate data and based on cases that are decided by the judges and juries in Alabama trial courts which are reviewable by the Alabama Supreme Court. The outrageous cases from which anecdotes are derived are not occurring in Alabama courts. We have searched the data base and cannot find any "haricot" or "football helmet" cases that have even been addressed by an Alabama appellate court. Alabama has the finest court system in this nation and I do not believe you would trade it for that of any other state. I believe we continue to be in the mainstream of American jurisprudence.

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OPINIONS OF THE GENERAL COUNSEL

By ROBERT W. NORRIS, general counsel

Q

Question:

"I am seeking an ethics opinion from the Alabama State Bar Association regarding the retention, storage and disposing of closed legal files.

"My law firm is quickly depleting its in-house storage capacity. I have been asked to review methods of data storage and retrieval such as microfilm, off-site storage and electronic scanning. Before exploring these options, I am requesting your assistance in formulating a reasonable plan that complies with all applicable rules and statutes.

"I am aware of the requirement to retain a client's file for six years after the case has reached its conclusion. How may the file be stored? Must the file remain in 'hard copy' form or may it be transcribed to another medium? Please identify all statutes and rules of conduct relating to this process, and any other ethics opinions.

"Once a file is closed, may certain portions of the file be returned to the client? What is an attorney's obligation regarding the portion of the file returned to the client? After the six-year interval, what is the appropriate method of disposing of a client's file?"

D

Discussion:

A lawyer does not have a general duty to preserve all his files permanently. However, clients and former clients reasonably expect from their lawyer that valuable and useful information in the client's file, and not otherwise readily available to the client, will not be prematurely and carelessly destroyed. *ABA Committee on Ethics and Professional Responsibility, in Formal Opinion 13384 (March 14, 1977).*

While there are no specific rules in the Alabama Rules of Professional Conduct regarding the length of time a lawyer is required to retain a closed file or the disposition of that file after a lapse of time, the Disciplinary Commission established the following guidelines in Formal Opinion 84-91.

The answers to the above questions depend on the specific nature of the instruments contained in the files and the particular circumstances in a given factual situation. For that reason, the files should be examined and the contents segregated in the following categories: (1) documents that are clearly the property of the client and may be of some intrinsic value, whether delivered to the lawyer by the client or prepared by the lawyer for the client, such as wills, deeds, etc.; (2) documents which have been delivered to the lawyer by the client and which the client would normally expect to be returned to him; (3) documents from any source which may be of some future value to the client because of some future development that may or may not materialize; and, (4) documents which fall in none of the above categories.

Documents which fall into category 1 should be retained for an indefinite period of time or, preferably, should be recorded

or deposited with a court. Documents falling into categories 2 and 3 should be retained for a reasonable period of time at the end of which reasonable attempts should be made to contact the client and deliver the documents to him or her. Documents which fall into category 4 could be appropriately destroyed.

With regard to time, there is no specific period that constitutes "reasonable" time. It depends on the nature of the documents in the file and the attendant circumstances. Since the file is the property of the client, theoretically it may be immediately returned to the client when the legal matter for which the client is being represented is concluded. For a variety of reasons, lawyers and law firms usually maintain client files for some period of time, ranging from a few years to permanent retention. The length of time is more a matter of the lawyer's or firm's policy than any externally generated requirement. In establishing this policy, it would not be unreasonable for the lawyer or law firm to consider that the statute of limitations under the Alabama Legal Services Liability Act is two years, and six years for the filing of formal charges in bar discipline matters. (In some cases the time period may be extended.)

At the expiration of the period of time established by the lawyer or law firm for file retention, the following minimum procedures should be followed for file disposition. First, the client should be informed of the disposal plans and given the opportunity of being provided the file or consenting to its destruction. If the client's current address or telephone number is known to the attorney, the client should be contacted directly. If this information is not available or cannot be obtained without undue burden, then a notice should be published in a local newspaper of general circulation announcing the attorney's intention to destroy all files generated during a given chronological period. It is not necessary to put the name of each client whose file is to be destroyed in the notice; it is sufficient to indicate generally the firm's intention to destroy the files of all clients who were represented by the firm prior to the date specified. The files of clients who do not respond then may be destroyed with the exception of those documents classified above as category 1. Prior to destroying any client file, the file should be screened to insure that permanent type (category 1) documents and records are not destroyed. Finally, an index should be maintained of files destroyed.

With regard to storage, files may be stored in any facility in which their confidential integrity is maintained. This may be in the lawyer's or law firm's office or at some secure off-site location. Any medium that preserves this integrity of the documents in the file, whether microfilm or by electronic scanning, is appropriate. ■

(RO-93-10)

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.

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2 Thursday

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IN ALABAMA
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10 Friday

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14 Tuesday

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22-23

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23-24

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BATSON:

From an Appellate Judge's Viewpoint

By JUSTICE HUGH MADDOX

When the Supreme Court of the United States decided *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the law relating to the use of peremptory challenges of prospective jurors was completely changed, and compliance with the requirements of *Batson* and *Ex parte Branch*, 526 So.2d 609 (Ala. 1987), the Alabama decision that adopted the *Batson* rule in Alabama, is one of the most frequently raised issues on appeal in both criminal and civil cases. Unquestionably, *Batson* has caused judges, prosecutors, defense lawyers, and parties in civil cases to completely re-evaluate the use of peremptory strikes.

The question is: Why has *Batson* caused judges and lawyers so much difficulty? It is probably because *Batson* turned the traditional method of striking jurors based on stereotypes completely on its ear.

Prior to the 1986 *Batson* decision, the law regarding the use of peremptory challenges had been set forth in *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), where the Court held that a party could exercise a peremptory challenge for a good reason, a bad reason, or for no reason at all. Under *Swain*, a party could strike jurors because of their race, their color, their religion, their sex, their national origin, their economic status, or their eye color.¹ The only way a defendant could establish a prima facie case of discrimination was to prove *systematic discrimination* on the part of the prosecutor.

Batson made at least two significant changes in the law relating to the striking of jurors. First, it clearly overruled the principle set out in *Swain* that a defendant had to prove *systematic discrimination* in order to establish a prima facie case under the Equal Protection Clause of the United States Constitution. Second, it concentrated on the right of jurors not to be

Unquestionably, *Batson* has caused judges, prosecutors, defense lawyers, and parties in civil cases to completely re-evaluate the use of peremptory strikes.

discriminated against because of their race. *Batson*, therefore, completely changed the law relating to the exercise of peremptory strikes. However, because *Batson* was a criminal case, involving a black defendant who had challenged the State's use of a peremptory challenge to remove a black juror, many lawyers and judges may not, at the time *Batson* was written, have fully appreciated its scope. But, there can be little doubt now that the principle set out in *Batson* is applicable in many other settings. For example, it is applicable to civil cases, *Edmonson v. Leesville Concrete Co.*, ___ U.S. ___, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991); to peremptory

challenges by defendants in criminal cases, *Georgia v. McCollum*, ___ U.S. ___, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992); and to the prosecution's strikes of black jurors in a criminal case involving a white defendant, *Powers v. Ohio*, ___ U.S. ___, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). The Supreme Court of the United States is now reviewing the question whether a party, in a civil case, can use peremptory challenges to remove jurors solely on the basis of the jurors' gender. *J. E. B. v. State*, 606 So.2d 156 (Ala.Civ.App. 1992), cert. granted, ___ U.S. ___, 113 S.Ct. 2330 (1993).²

Why has *Batson* caused such disagreement among judges and lawyers, and why have some judges and lawyers suggested that peremptory strikes be completely eliminated? The frustration with *Batson* probably results from what appeared to be one of the basic foundation stones of the *Batson* decision: the right of citizens to serve on a jury and not to be excluded for a reason unrelated to the case to be tried. Compliance with *Batson* was intended to ensure public confidence in the integrity of the jury system. This concept was first advanced in *Batson*, and was later alluded to in *Georgia v. McCollum*, a case in which the Supreme Court applied *Batson* to peremptory chal-

lenges exercised by the defense in criminal cases. 112 S.Ct. at 2354. In *McCullum*, the Court concluded that the state had standing to challenge the discriminatory practice by the defense on behalf of the *wronged jurors*. Id. at 2357. The Court further emphasized that *Batson* prohibits the striking of jurors based on "the race of the juror or the racial stereotypes held by the party." Id. at 2359. (Emphasis added.)

McCullum seems to spell out what the Court had said initially in *Batson*—that the use of peremptory strikes based on some *perceived stereotype* will not be permitted. *Batson* protects the right of a prospective juror to not be excluded from jury service solely because of a characteristic of the potential juror that is unrelated to the particular case to be tried. Such exclusion would destroy the integrity of the judicial system. In this respect, the holding in *Batson* parallels the public policy of Alabama as expressed in §§ 12-16-55 and 12-16-56, Ala. Code 1975. Section 12-16-55 provides as follows:

"It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity, in accordance with this article, to be considered for jury service in this state and an obligation to serve as jurors when summoned for that purpose."

Section 12-16-56 provides as follows:

"A citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin or economic status."

Branch sets out much of the history of drawing, summoning, selecting, and empaneling juries in Alabama, and that opinion specifically sets out in a footnote the history of peremptory challenges in criminal cases. 526 So.2d at 617. The Alabama Supreme Court in *Branch* also noted the public policy of the state as quoted above and set forth specific guidelines for applying *Batson*.

A close reading of §§ 12-16-55 and 12-16-56 shows that the state's policy regarding the opportunity of jurors to serve without regard to race, color, religion, sex, national origin, or economic status is not unlike the requirements in *Batson*. In fact, they are complementary.

Before the adoption by the Legislature in 1978 of this public policy relating to jury service, the jury selection procedures in several Alabama counties had been challenged in legal proceedings, and practitioners can verify that the jury rolls in many counties would not have reflected the policy set forth by the Legislature.³ During the late 1970s and early 1980s, the Administrative Office of Courts took specific steps to improve juror management in Alabama and developed specific procedures so that all Alabama counties now have their jury lists computer drawn from a master list compiled primarily from drivers license lists for the county.

Branch provides the basic roadmap for making and preserving a *Batson* challenge. *Branch* established the principle that the initial burden is on the party challenging the other party's use of peremptory challenges to make a prima facie showing that those challenges were used to discriminate against a particular juror or jurors solely because of race, and until this prima facie showing is made, there is no requirement on the other party to respond. In the near future, this principle may

be extended to include strikes based on gender.⁴ In *Branch*, the Court listed examples of conduct that could raise an inference of discrimination and said that the trial court, in determining whether a prima facie showing had been made, should consider all of the circumstances. If a prima facie showing of discrimination is made, the other party then has the burden of articulating a clear, specific, and legitimate reason for the challenge that relates to the particular case to be tried and that is nondiscriminatory.

This showing need not, of course, rise to the level of a challenge for cause. In *Branch*, the Court provided examples of reasons that could be considered as legitimate and nondiscriminatory and specifically stated, "The trial court, in exercising the duties imposed upon it, must give effect to the state policy expressed in Sections 1, 6, and 22 of the Alabama Constitution and Code 1975, § 12-16-55 and § 12-16-56." 526 So.2d at 624. (Emphasis in original.) The Court further said that "the trial judge must make a sincere and reasonable effort to evaluate the evidence and explanations based on the circumstances as he or she knows them, his or her knowledge of trial techniques, and his or her observation of the manner in which the prosecutor examined the venire and the challenged jurors." Id.

The application of the *Batson* principle, of course, has caused trial judges and trial counsel and appellate judges and justices much difficulty, and many questions have been raised, such as: At what point should a party raise a *Batson* objection? Who has standing to raise an objection? What constitutes a prima facie showing? What are valid race-neutral reasons and

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what are not? Who has the burden of proof of making a prima facie showing, and when does the burden shift to the other side? What is the scope of review when a *Batson* objection is raised? For a listing of substantially all of the cases that address these questions, see Maddox, *Alabama Rules of Criminal Procedure* (1993 Cum. Supp.), "The Effect of *Batson v. Kentucky* and *Ex Parte Branch* On Jury Selection in Criminal Cases," pp. 172-217, The Michie Company (1993).

The United States Supreme Court, the Eleventh Circuit Court of Appeals and the Alabama Supreme Court each seems committed to the application of *Batson* to eliminate discrimination in jury selection in order to preserve the integrity of the jury process.

The *Batson* requirement could probably be summed up in the following statement: In order to preserve the public's confidence in the jury system, each citizen who is not challengeable for cause must have a right to be considered for jury service without regard to race, color, or national origin, and perhaps gender. Stereotypes of jurors based on age, occupation, or place of residence are also highly suspect.

How can judges and lawyers eliminate some of the problems created by *Batson*? I have presented the *Batson* principles to lawyers and judges at several continuing legal education seminars and I have used the following illustration. Juror A is a 28-year-old female; she is single and a graduate of Auburn University at Montgomery; she likes to watch *Matlock*; and she works with the state as a data processor. Is she black, white, Hispanic, or oriental? Does it matter insofar as the particular case to be tried? Juror B is a 38-year-old teacher of high school biology, who has teenaged children, and who is married

and has never been divorced. Is the juror male or female, black or white? Does it matter in the case to be tried? The key is to select jurors based on the particular case to be tried.

One of the problems with striking based on stereotypes is that many times a juror will not fit the mold, and if the strike is challenged, it would be difficult to articulate a clear, specific and legitimate reason for the exercise of the strike. Clearly, lawyers can still have general profiles of the type of juror that they would prefer for particular cases.

In *Huntley v. State*, [Ms. 1910530, Sept. 18, 1992] ___ So.2d ___ (Ala. 1992), in a special concurrence, I set out what I thought could help prevent a lot of *Batson*-generated problems:

"I have always thought that many *Batson* problems could be eliminated in both criminal and civil cases by the following procedure:

"(1) Requiring prospective jurors, when they are summoned to appear or when they assemble, to fill out a written questionnaire that would provide substantial background information to the parties to use in exercising their peremptory strikes. In addition to a general questionnaire, the parties might have specific questions, because of the particular nature of the case to be tried, that they would want prospective jurors to answer.

"(2) Limiting the number of peremptory strikes available by limiting the size of the venire from which the parties begin striking. In a majority of civil and criminal cases, the rules of procedure only require 24 qualified jurors to be on the panel when the parties begin to exercise their peremptory challenges.

"(3) Adopting the rule used in Federal courts that prohibits so-called 'back striking; that is, placing 12 qualified prospective jurors in the jury box, and having the parties decide how many of those 12 they separately and severally want to strike. If a prospective juror was not removed from the box by either side, that juror could not be removed later."

___ So.2d at ___ (footnote omitted). I further suggested the use of a questionnaire similar to the one used in Montgomery County:

"Because the *Batson* rule now applies to strikes exercised by criminal defendants, and because I believe that it will soon apply to gender-based strikes, I think trial judges should consider permitting prospective jurors to fill out a questionnaire that would contain information helpful to the parties in exercising peremptory challenges without regard to a prospective juror's race or gender. Such a procedure would greatly assist the trial court in determining whether a party has made a prima facie case of discrimination and whether any reasons offered in support of the strikes were in fact race neutral. Furthermore, the procedure would greatly assist appellate courts in reviewing challenges made by either side.

"*Batson* and *Branch* basically prohibit stereotypical strikes. Parties should ask themselves when exercising their peremptory challenges, 'Why am I striking this particular person?' If it is because of race, which I think will later be extended to gender, then it violates the *Batson* rule."

___ So.2d at ___. The use of a questionnaire, commonly referred to as "paper voir dire," could effectively ferret out individual potential jurors who might not be desirable for the par-

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Julian Ann Chamblee
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254-1981

tical case to be tried. Properly designed questionnaires might disclose hidden prejudices that the juror might not even suspect he or she had. ■

ENDNOTES

1. There was a theory, for example, that brown-eyed people were emotional and that blue-eyed people were calculating and lawyers tried to pick who they thought would be a "bell cow" on the jury.
2. The Alabama Supreme Court is split on the issue whether *Batson* applies to gender-based strikes. A majority of the Court is of the opinion that *Batson* does not apply to gender-based strikes, but there are strong dissents. See *Fisher v. State*, 587 So.2d 1027 (Ala. Cr.App. 1990), cert. denied, 587 So.2d 1027 (Ala. 1991) (Maddox, J., dissenting); cert. denied, ___ U.S. ___ 112 S.Ct. 1486, 117 L.Ed.2d 628 (1992); *Dysart v. State*, 581 So.2d 541 (Ala. Cr.App.), cert. denied, 581 So.2d 545 (Ala. 1991) (Maddox, J., dissenting and joined by Adams, J.). Other Alabama cases in which the issue of gender-based strikes is discussed are: *Ex parte Bankhead*, [Ms. 1911141, Apr. 16, 1993], ___ So.2d ___ (Ala. 1993); *Ex parte Huntley*, [Ms. 1910530, Sept. 18, 1992], ___ So.2d ___ (Ala. 1992); *Williams v. State*, 607 So.2d 321 (Ala. Cr.App. 1992) (Montiel, J., dissenting); *J.E. B. v. State*,

606 So.2d 156 (Ala. Civ.App. 1992), cert. denied, 606 So.2d 156 (Ala. 1992), cert. granted, ___ U.S. ___, 113 S.Ct. 2330 (1993); *Ex parte Murphy*, 596 So.2d 45 (Ala. 1992) (Maddox, J., dissenting); *Mims v. State*, 591 So.2d 120 (Ala. Cr.App. 1991); and *Stariks v. State*, 572 So.2d 1301 (Ala. Cr.App. 1990).

3. For a list of the counties where actions were filed, see *Ex parte Branch*, 526 So.2d 609, 618 n.3 (Ala. 1987).



Justice Hugh Maddox

Justice Hugh Maddox received his undergraduate and law degrees from the University of Alabama. Before becoming an associate justice on the Supreme Court of Alabama in 1969, he served as legal advisor to three governors. He was chosen the Montgomery County YMCA Man of the Year in 1988.

Notice of and opportunity for comment on proposed amendments to the Rules of the United States Court of Appeals for the Eleventh Circuit

Pursuant to 28 U.S.C. §2071(b), notice is hereby given of proposed amendments to the Rules of the U.S. Court of Appeals for the Eleventh Circuit. A proposed amendment to 11th Cir. R. 46-1(a) would require attorneys to pay a "readmission fee" of \$10 every five years in order to maintain Eleventh Circuit bar membership.

Other proposed amendments highlight the commencement of operations of a new Miami satellite clerk's office; specify that government counsel are required to file Certificates of Interested Persons; clarify certain rules regarding the content and form of briefs, including limiting single-spaced text in briefs to only direct quotes; increase the requirement for filing of "Record Excerpts" from four to five copies; and provide that in cases involving multiple parties the Court may decide the appeals of one or more parties without oral argument while directing that oral argument be heard from the remaining parties.

Additional proposed amendments make other minor changes to the circuit rules or conform to changes in the Federal Rules of Appellate Procedure which took effect in December 1991 and which are scheduled to take effect in December 1993. A copy of the proposed amendments may be obtained without charge on or after September 10, 1993 from the Office of the Clerk, U.S. Court of Appeals for the Eleventh Circuit, 56 Forsyth Street, NW, Atlanta, Georgia 30303. Phone (404) 331-6187.

Comments on the proposed amendments may be submitted in writing to the Clerk at the above address by October 11, 1993.

Batson

Challenges from the Perspective of a Trial Judge – Some Practical Considerations

By HON. JOSEPH D. PHELPS

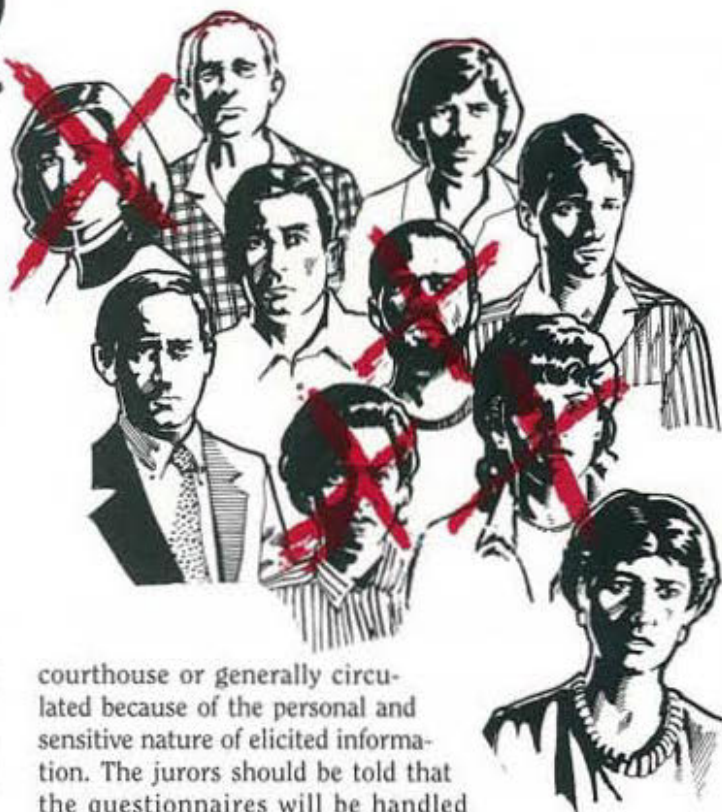
Trial judges are constantly faced with very practical applications of *Batson* [*Batson v. Kentucky*, 476 U.S. 79 (1986)]. Although the principles of *Batson* apply to both civil and criminal cases, this discussion will primarily focus on the application of *Batson* to criminal cases. *Georgia v. McCollum*, 112 S.Ct. 2348 (1992).

Some specific categories of concern for practitioners include: pre-selection considerations; determinations of whether prima facie violations are shown; the validity of explanations for exclusionary strikes; and remedial measures.

Pre-selection considerations

At the appellate level, courts have addressed the problems that can arise when lawyers do not conduct meaningful jury voir dire examination. *Williams v. State*, 601 So.2d 1062 (Ala. Crim. App. 1991). Since appellate courts place emphasis in determining *Batson* issues on the thoroughness of voir dire as well as on the nature of responses from particular jurors, including facial expressions, mannerisms, body language, etc., it is logical to permit lawyers themselves to ask questions. The Court should advise counsel that voir dire is not a time for jury argument or making statements, but a time to question potential jurors, to listen to their answers and to evaluate responses. Some judges require the specific questions to be written out and submitted to the Court for approval before the lawyer asks the questions. Lawyers should also be permitted to elicit relevant follow-up information.

The use of written questionnaires presented to the jury prior to jury selection, as is done in the 15th Judicial Circuit, can also be useful in allowing counsel to obtain relevant information sufficient to justify juror exclusion. These questionnaires are completed by the jurors themselves and can go into various aspects of the potential juror's background, predispositions, experiences, education, etc. These questionnaires can be done on an anonymous basis, i.e. by juror number rather than juror name. These numbers are tied into a strike list and can be made available only at certain designated places in the courthouse. Experience has shown in circuits where such written questionnaires are used, that it is not wise to permit the questionnaires to be removed from the



courthouse or generally circulated because of the personal and sensitive nature of elicited information. The jurors should be told that the questionnaires will be handled with care and destroyed upon the conclusion of the trial and all post-trial proceedings.

Determination of whether a prima facie Batson violation is shown

When a *Batson* motion attacking the constitutionality of the exercise of peremptory strikes is filed, the judge must first determine whether a prima facie violation is presented. If the judge determines that there is no prima facie *Batson* violation, the issue stops there and no explanation of strikes would be required. *Merriweather v. State*, [Ms. Ct. of Crim. App. No. 91-1928, May 28, 1993], _____ So.2d _____, (Ala. Crim. App. 1993).

Ex Parte Branch, 526 So.2d 609 (Ala. 1987), is still the leading post-*Batson* authority on the consideration as to whether a prima facie case of discrimination has been shown. Branch sets forth nine considerations relevant to establishing a prima facie case of discrimination:

1. that race was the only common factor among the black jurors struck;
2. the pattern of strikes against black jurors - for example, "4 of 6 strikes were used to strike black jurors";
3. the prosecutor's strike history;
4. the quality of voir dire - a searching and thorough examination is less likely than a pro forma or "desultory one" to support an inference of discrimination.
5. the quality of questions addressed to the jurors struck;
6. disparate treatment of black and white jurors with similar backgrounds or characteristics;
7. that questions seeking disqualification were only asked of black jurors;

8. disparate impact; and
9. that a disproportionate number of strikes were of black jurors.

Ex Parte Branch, 526 So.2d at 622, 623.

Once a prima facie case is shown "the state then has the burden of articulating a clear, specific and legitimate reason for the challenge which relates to the particular case to be tried, and which is nondiscriminatory.... However, this showing need not rise to the level of a challenge for cause...." *Ex Parte Branch*, 526 So.2d 623 (Ala. 1987).¹ The state can show, for example, that white jurors were struck for the same reasons given for striking non-white jurors, and that the number of strikes for non-white and white jurors were proportionate.

It is important to note that general denials of discriminatory intent or general objections which are not *juror specific* have been held to be "pretextual". *Newman v. State*, [Ms. Ct. Crim. App. No. 961, Nov. 25, 1992], ____ So.2d ____, (Ala. 1993). In addition, the state may also specifically show that:

1. the reasons given are specifically related to the case being tried;
2. voir dire examination of the struck jury was in fact sufficient;
3. similar jurors were all treated the same way;
4. no more questions were addressed to non-white jurors than to white jurors;

5. not all of the non-white jurors were removed; or
6. strikes were based on juror specific reasons and not on group or class characteristics.

Ex Parte Branch, 526 So.2d at 624 (Ala. 1987).

Factors to consider in determining whether a prima facie showing is made

The Supreme Court of Alabama has held that when the ratio of non-white to white on the jury is substantially the same as the ratio on the entire venire or the total group of prospective jurors from which a particular jury is selected, then no prima facie case is shown when the lawyers have divided their strikes between the racial groups. For example, if the group of potential jurors had a ratio of 60 percent white to 40 percent non-white, and the actual jury, after the exercising of peremptives, had four or five blacks, this would serve as an indicator that there was no *Batson* problem. See *Ex Parte McWilliams*, January 1993, 27 ABR 1475 - statistical evidence to show the absence of a discriminatory purpose. See also *Long v. State*, 615 So.2d 114 (1993), *cert. denied* (Ala. 1993), and *Scott v. State*, 599 So.2d 1222 at page 1227, *cert. denied*, 599 So.2d 1229 (Ala. 1992).

If attorneys had divided their strikes in some degree between the races, and the racial composition of the actual jury is close to the racial composition of the venire, in all probability the judge would not determine a prima facie case of unconstitutional peremptory challenges. In such circumstances, no expla-

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nation would be required on a juror by juror basis.

The Court could well determine that a prima facie case of racial selection of the jury is present if there were less than three non-whites on the jury and the original jury panel consisted of 40 percent to 50 percent non-whites - at least a "red flag" would have been raised. In such a case, if the judge determined that a prima facie showing of racial strikes was made, the judge would proceed to require the offending party to justify each individual strike; that is to explain non-racial reasons for removing each juror. *Ex Parte Bird*, 594 So.2d 676 (Ala. 1991).

Explanations for exclusionary strikes

As previously noted, upon a showing of a prima facie violation, the party must show specific and legitimate non-discriminatory reasons for the challenge which relates to the particular case. The party must clearly articulate a nonracial basis for each strike.

The following are cases which cite sufficient reasons for justifying juror strikes:

A. Relationship with Defendant/Family

1. Related to Defendant/Family

Jackson v. State, 549 So.2d 616, 618-619 (Ala. Cr. App. 1989) (cousin to defendant's stepfather); *Ex parte Lynn*, 543 So.2d 709 (Ala. 1988), (husband related to defendant),

2. Knew Defendant

Carey v. State, 560 So.2d 1103 (Ala. Cr. App. 1989), *cert. denied*, 560 So.2d 1103 (Ala. 1990); *Baker v. State*, 555 So.2d 273 (Ala. Cr. App.), *cert. denied*, 555 So.2d 273 (Ala.

1989); *Hyter v. State*, 545 So.2d 194 (Ala. Cr. App. 1988); *Avery v. State*, 545 So.2d 123 (Ala. Cr. App. 1988), *cert. denied*, 545 So.2d 123 (Ala. 1989); *McGee v. State*, 594 So.2d 219 (Ala. Cr. App. 1991), *cert. denied*, February 21, 1992.

3. Knew Defendant's Family

Jackson v. State, 549 So.2d 616 (Ala. Cr. App. 1989) (knew mother, school with family); *Gilder v. State*, 542 So.2d 1306 (Ala. Cr. App.), *cert. denied*, 542 So.2d 1306 (Ala. 1989); *Powell v. State*, 548 So.2d 590 (Ala. Cr. App. 1988), *aff'd*, 548 So.2d 605 (Ala. 1989); *Ex parte Lynn*, 543 So.2d 709 (Ala. 1988).

4. Live Near Defendant/Family

Ex parte Lynn, 543 So.2d 709 (Ala. 1988); *Avery v. State*, 545 So.2d 123 (Ala. 1988), *cert. denied*, 545 So.2d 123 (Ala. 1989);

5. Knew Victim

Yelder v. State, 596 So.2d 596 (Ala. Cr. App. 1991), *cert. denied*, May 1, 1992.

B. Contact with Prosecutor/Criminal Justice System

1. Prior Conviction/Prosecution

Baker v. State, 555 So.2d 273 (Ala. Cr. App.), *cert. denied*, 555 So.2d 273 (Ala. 1989) (DUI and assault); *Jackson v. State*, 549 So.2d 616 (Ala. Cr. App. 1989); *Pollard v. State*, 549 So.2d 593 (Ala. Cr. App.), *cert. denied*, 549 So.2d 593 (Ala. 1989) (in a vehicular homicide case, traffic offenses); *Hyter v. State*, 545 So.2d 194 (Ala. Cr. App. 1988) (DUI where defendant claimed substance abuse during crime); *Ward v. State*, 539 So.2d 407 (Ala. Cr. App. 1988), *cert. denied*, 539 So.2d 407 (Ala. 1989); *Strong v. State*, 538 So.2d 815 (Ala. Cr. App. 1988); *Ex parte Lynn*, 543 So.2d 709 (Ala. 1988); *Avery v. State*, 545 So.2d 123 (Ala. Cr. App. 1988), *cert. denied*, 545 So.2d 123 (Ala. 1989); *Kelley v. State*, 622 So.2d 473 (Ala. 1992), *cert. denied*, August 21, 1992.

2. Relative Arrested/Prosecuted/Convicted

Carey v. State, 560 So.2d 1103 (Ala. Cr. App. 1989), *cert. denied*, 560 So.2d 1003 (Ala. 1990) (nephew prosecuted); *Riggs v. State*, 558 So.2d 980 (Ala. Cr. App. 1989), *cert. denied*, 558 So.2d 981 (Ala. 1990) (son awaiting trial, brother-in-law charged with burglary); *Baker v. State*, 555 So.2d 273 (Ala. Cr. App.), *cert. denied*, 555 So.2d 273 (Ala. 1989); *Smith v. State*, 531 So.2d 1245 (Ala. Cr. App.), *cert. denied*, 531 So.2d 1245 (Ala. 1987); *Fearn v. City of Huntsville*, 568 So.2d 349 (Ala. Cr. App.), *cert. denied*, 568 So.2d 349 (Ala. 1990) (in a DUI case, DUI arrests); *Green v. State*, 571 So.2d 356 (Ala. Cr. App. 1990); *Powell v. State*, 548 So.2d 590 (Ala. Cr. App. 1988), *aff'd*, 548 So.2d 605 (Ala. 1989); *Moss v. City of Montgomery*, CR-89-1063 (Ala. Cr. App. March 29, 1991); *O'Neal v. State*, 602 So.2d 462 (Ala. Cr. App. 1992), *cert. denied*, August 21, 1992; *Childers v. State*, 607 So.2d 350 (Ala. Cr. App. 1992), *cert. denied*, Nov. 25, 1992, (venire member and daughter were being prosecuted for bad check cases).

3. Juvenile Court Contact

Baker v. State, 555 So.2d 273 (Ala. Cr. App.), *cert. denied*, 555 So.2d 273 (Ala. 1989), (brother had juvenile "problems").

4. Prior Arrest

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Baker v. State, 555 So.2d 273 (Ala. Cr. App.), *cert. denied*, 555 So.2d 273 (Ala. 1989), (harassment, menacing, disorderly conduct); *Scales v. State*, 539 So.2d 1074 (Ala. 1988); *Moss v. City of Montgomery*, CR-89-1063 (Ala. Cr. App. March 29, 1991), (traffic citation where defendant alleged police harassment).

C. Dissatisfaction with Police/Law Enforcement

Powell v. State, 548 So.2d 590 (Ala. Cr. App. 1988), *aff'd*, 548 So.2d 605 (Ala. 1989).

D. Relationship with Defense Counsel

Ward v. State, 539 So.2d 407 (Ala. Cr. App. 1988), *cert. denied*, 539 So.2d 407 (Ala. 1989), (defense counsel had represented); *Strong v. State*, 538 So.2d 815 (Ala. Cr. App. 1988), (knew defense counsel); *Lewis v. State*, 535 So.2d 228 (Ala. Cr. App.), *cert. denied*, 535 So.2d 228 (Ala. 1988), (defense counsel had represented).

E. Prior Jury Service

Watkins v. State, 551 So.2d 421 (Ala. Cr. App.), *cert. denied*, 551 So.2d 421 (Ala. 1989), (prior not guilty verdict and prior hung jury); *Smith v. State*, 531 So.2d 1245 (Ala. Cr. App.), *cert. denied*, 531 So.2d 1245 (Ala. 1987), (prior not guilty verdict).

F. Demeanor/Personal Characteristics

NOTE: Subjective reasons like this one are viewed suspiciously and generally allowed only if the trial judges find that the juror's attitude was in fact unfavorable or if the prosecutor puts a sufficient explanation of how the juror acted into the record.

1. Unfavorable Attitude Toward Prosecution Voir

Dire Questions

Currin v. State, 535 So.2d 221 (Ala. Cr. App.), *cert. denied*, 535 So.2d 225 (Ala. 1988); *Baker v. State*, 555 So.2d 273 (Ala. Cr. App.), *cert. denied*, 555 So.2d 273 (Ala. 1989).

2. Physical/Mental Disability

Riggs v. State, 558 So.2d 980 (Ala. Cr. App. 1989), *cert. denied*, 558 So.2d 981 (Ala. 1990), (probable hearing difficulty, found as fact by trial judge); *Scales v. State*, 539 So.2d 1074 (Ala. 1988), (slow to respond to questions, found as a fact by trial judge); *Currin v. State*, 535 So.2d 221 (Ala. Cr. App.), *cert. denied*, 535 So.2d 225 (Ala. 1988), (apparent lack of intelligence); *Ex parte Lynn*, 543 So.2d 709 (Ala. 1988), (feeble and hard of hearing); *Avery v. State*, 545 So.2d 123 (Ala. Cr. App. 1988), *cert. denied*, 545 So.2d 123 (Ala. 1989), (hard of hearing); *Grider v. State*, 600 So.2d 401 (Ala. Cr. App. 1992), *cert. denied*, 600 So.2d 404 (1992), (mentally disabled).

3. Hostile

Riggs v. State, 558 So.2d 980 (Ala. Cr. App. 1989), *cert. denied*, 558 So.2d 981 (Ala. 1990); *Currin v. State*, 535 So.2d 221 (Ala. Cr. App.), *cert. denied*, 535 So.2d 225 (Ala. 1988).

G. Law Enforcement Recommendations

NOTE: The simple statement "recommended by law enforcement" will not be enough. See, *Robinson v. State*, 560 So.2d 1130 (Ala. Cr. App. 1989), *cert. denied*, 560 So.2d

1130 (Ala. 1990); *Henderson v. State*, 549 So.2d 105 (Ala. Cr. App.), *cert. denied*, 549 So.2d 105 (Ala. 1989). To have the strike stand you must state the reason law enforcement recommends strike and that reason must be a good one. The deputy sheriff told the prosecutor that just about the whole family had been prosecuted by the DA held to be acceptable in *Newman v. State*, [Ms. Ct. Crim. App. No. 91-961, Nov. 25, 1992], ____ So.2d ____, (Ala. 1993).

Pollard v. State, 549 So.2d 593 (Ala. Cr. App.), *cert. denied*, 549 So.2d 593 (Ala. 1989); *Currin v. State*, 535 So.2d 221 (Ala. Cr. App.), *cert. denied*, 535 So.2d 225 (Ala. 1988); *Wilson v. State*, 571 So.2d 1237 (Ala. Cr. App. 1989), *rev'd on other ground*, 571 So.2d 1251 (Ala. 1990),



Judge Joseph D. Phelps

Judge Joseph D. Phelps received his undergraduate and law degrees from the University of Alabama. He has served as circuit judge, 15th Judicial Circuit, since 1976. In addition to service on numerous professional and civic committees, he currently chairs the state bar's Bench & Bar Relations Committee. Judge Phelps received the Alabama State Bar's Judicial Award of Merit in 1990.

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(black investigator recommended strike).

H. Bias/Prejudice Short of Challenge For Cause

Wilson v. State, 571 So.2d 1237 (Ala. Cr. App. 1989), rev'd on other ground, 571 So.2d 1251 (Ala. 1990).

I. Favorable Attitude/Response to Defense Voir Dire

Strong v. State, 538 So.2d 815 (Ala. Cr. App. 1988); *Smith v. State*, 531 So.2d 1245 (Ala. Cr. App.), cert. denied, 531 So.2d 1245 (Ala. 1987).

J. Appearing Baffled or Confused

McGlown v. State, 598 So.2d 1027 (Ala. Cr. App. 1992), cert. denied, May 29, 1992.

The following cases cite reasons which are insufficient to justify juror strikes:

A. Age

Powell v. State, 548 So.2d 590 (Ala. Cr. App. 1988), aff'd, 548 So.2d 605 (Ala. 1989), (youth); *Williams v. State*, 548 So.2d 501 (Ala. Cr. App. 1988), cert. denied, 548 So.2d 501 (Ala. 1989), (youth); *Avery v. State*, 545 So.2d 123 (Ala. Cr. App. 1988), cert. denied, 545 So.2d 123 (Ala. 1989); *Acres v. State*, 548 So.2d 459 (Ala. Cr. App. 1987), cert. denied, 548 So.2d 459 (Ala. 1989), (youth and elderly); *Floyd v. State*, 539 So.2d 357 (Ala. Cr. App. 1988), cert. denied, 539 So.2d 357 (Ala. 1989).

B. Unmarried

Thomas v. State, 555 So.2d 320 (Ala. Cr. App. 1989): The court points out that although "single" is a highly suspect reason for striking a veniremember, such strikes may be upheld where all single venire members are struck.

Kelley v. State, 602 So.2d 473 (Ala. Cr. App. 1992), cert. denied August 21, 1992.

C. Traffic convictions

Powell v. State, 548 So.2d 590 (Ala. Cr. App. 1988), aff'd, 548 So.2d 605 (Ala. 1989), (blacks and whites treated differently); *Acres v. State*, 548 So.2d 459 (Ala. Cr. App. 1988), cert. denied, 548 So.2d 459 (Ala. 1989), (blacks and whites treated differently).

D. Employment

Powell v. State, 548 So.2d 590 (Ala. Cr. App. 1988), aff'd, 548 So.2d 605 (Ala. 1989), (teacher); *Williams v. State*, 548 So.2d 501 (Ala. Cr. App. 1988), cert. denied, 548 So.2d 501 (Ala. 1989), (teacher/counselor/school worker); *Madison v. State*, 545 So.2d 94 (Ala. Cr. App. 1987), cert. denied, 545 So.2d 94 (Ala. 1989), (mental health worker).

E. Miscellaneous

1. Working Outside of County

Williams v. State, 548 So.2d 501 (Ala. Cr. App. 1988), cert. denied, 548 So.2d 501 (Ala. 1989).

2. Living in a High Crime Area

Williams v. State, 548 So.2d 501 (Ala. Cr. App. 1988), cert. denied, 548 So.2d 501 (Ala. 1989).

3. Same Name as Family Connected with an Unrelated Prosecution

Avery v. State, 545 So.2d 123 (Ala. Cr. App. 1988), cert. denied, 545 So.2d 123 (Ala. 1989).

4. Living in a Community Hostile to the Police
Madison v. State, 545 So.2d 94 (Ala. Cr. App. 1987), cert. denied, 545 So.2d 94 (Ala. 1989).

5. Unexplored Relationship to Another Defendant
Floyd v. State, 539 So.2d 357 (Ala. Cr. App. 1987), cert. denied, 539 So.2d 357 (Ala. 1989).

6. "Gut Reaction"

Henderson v. State, 549 So.2d 105 (Ala. Cr. App.), cert. denied, 549 So.2d 105 (Ala. 1989); *Lemley v. State*, 599 So.2d 64 (Ala. Cr. App. 1992).

7. Unexplored Affiliation with a Political Group

Parker v. State, 568 So.2d 335 (Ala. Cr. App.), cert. denied, 568 So.2d 335 (Ala. 1990).

In addition, the appellate courts look "very unfavorably" on the articulation of reasons such as "an unexplainable gut reaction that the veniremember was 'bad'", although they are not per se prohibited. *Ex parte Bankhead*, April 16, 1993, 27 ABR 2571.

Remedial Measures

If during jury selection, the court is informed by either side that they have exercised all strikes for which they have reasons, either side could choose to relinquish their remaining strikes to the court. If the court agrees to make the remaining strikes on behalf of either side, such should be done by a court reporter or some other neutral official, possibly from the clerk's office, and extreme caution should be used to insure the process is random and not a subjective decision by anyone connected with the trial court. *Pettway v. State*, [Ms. Ct. Crim. App. No. 91-842, March 5, 1993], _____ So.2d _____, (Ala. Crim. App. 1993).

As noted in *Branch*, if a constitutional violation is found in jury selection, the court should either order another jury selected from a new panel or place improperly excluded jurors back on the jury. *Ex Parte Branch*, 526 So.2d 625 (Ala. 1987). When jury selection has taken a considerable amount of time, for example, a case involving pretrial publicity, the court may seek an alternative method to striking an entirely new jury. Once a constitutional violation is shown, it is not difficult for the court to identify which potential jurors were improperly removed. Present case law offers little guidance as to how a judge may allow improperly struck jurors to be placed back on the jury. This area is addressed generally in *Branch*, however no specific guidelines have been developed. Some judges have been successful in having the lawyers agree to a remedial measure as worked out by the attorneys themselves. One possible solution could be to prepare a card for each juror who was not struck and also a card for any improperly excluded jurors, and to randomly select a new jury from all available cards. All parties would have to agree to this selection process. ■

ENDNOTE

1. Reference here is made to the state making explanations, however, the Courts hold that neither the state nor the defendant may exclude jurors for racial reasons. *Ex parte Pilot*, 607 So.2d 311 (Ala. 1992).

ADAP'S RURAL/MINORITY OUTREACH AND ASSISTANCE PROGRAM COMPLETES SUCCESSFUL YEAR

By REUBEN W. COOK

The Alabama Disabilities Advocacy Program (ADAP) is the statewide program set up under federal law to protect the rights of people with developmental disabilities or mental illness. With funding from Alabama Law Foundation's IOLTA program, ADAP was able to provide information, training and assistance to people with disabilities and their families residing in seven rural Alabama counties (Greene, Hale, Marengo, Perry, Sumter, Choctaw, and Clarke). The grant's goal was to provide assistance and information regarding numerous services and benefits available to individuals with disabilities with special emphasis placed on the identification and notification of parents of disabled children who may be eligible for Social Security Supplemental Security Income (SSI) benefits.

In the 1990 *Sullivan v. Zebley* case, the United States Supreme Court ruled that the regulations employed by the Social Security Administration (SSA) to determine a child's eligibility for SSI benefits were too restrictive and directed SSA to review all such claims denied between January 1980 and February 20, 1990. As a result, many former claimants became entitled to current benefits as well as payment of retroactive benefits dating back to the effective date of the original claim. ADAP under-

took a massive publicity campaign throughout the project's seven counties in an effort to notify residents of this new entitlement.

Local residents responded enthusiastically to the SSI outreach effort. A total of 223 clients with disabilities received assistance. Of that number, 177 clients participated in the SSI clinics held in each of the seven counties. The remaining 46 clients received assistance by telephone and mail. The assistance provided took various forms including hands-on assistance with claims preparation, legal referrals for claimants already in the appeals process, information and supervised referrals for health care and social services, extensive casework follow-up, and individualized training regarding SSA policies and procedures, as well as basic self-advocacy techniques.

Program staff provided direct assistance with the completion of 73 SSI claims in the seven-county target area, 43 of which were filed on behalf of children. The outreach staff also helped clients whose initial application for SSI appeals were assisted, including 30 clients referred to attorneys throughout the target area who had been identified by ADAP as willing to accept such cases. Many of these clients had received denial notices from SSA before they received ADAP's services.

ADAP staff compiled and disseminated training packets. The packets contained materials regarding SSA policies and procedures packets contained materials regarding SSA policies and procedures related to the SSI program, as well as information regarding the services offered by ADAP and numerous social service and health care providers. Information regarding basic self-advocacy

techniques was also included in the training packets. Staff also distributed information about the *Zebley* decision to parents of every child enrolled in special education and programs for the elderly went to clients requesting this material.

Many of the project's clients needed a variety of services warranting extensive casework follow-up. For example, ADAP staff coordinated multi-agency efforts to secure housing, education and legal services. Despite the obvious human resource limitations, ADAP advocates and attorneys provided direct casework assistance and legal advice to many of the clients.

It is evident that the outreach program assisted only a fraction of the individuals needing assistance. However, ADAP's continued work in this area has resulted in greater awareness of the IOLTA program and the services available to people in the seven-county area.

ADAP is grateful to the Alabama Law Foundation for its assistance and financial support in providing information and legal services to Alabama citizens with disabilities. ■

Reuben W. Cook

Reuben W. Cook is the executive director of the Alabama Disabilities Advocacy Program (ADAP) which is a part of The University of Alabama School of Law School Clinical Law Programs. He is a 1978 graduate of The University of Alabama School of Law and holds an LL.M. from Emory University School of Law. In the Alabama Equity Funding Law-suit (*ACE v. Hunt*), ADAP represents the subclass of all school children in Alabama aged three through 21 years old with disabilities.

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DISCIPLINARY REPORT

Disbarment

• The license to practice law of Mobile attorney **John S. Gonas, Jr.** was cancelled and annulled effective May 12, 1993 by order of the Supreme Court of Alabama. Gonas, as part of a plea bargain in federal criminal court, executed a consent to disbarment and surrender of license. [Rule 23(a) Pet.#93-01]

Surrender of License

• **Jerry DeWitt Baker**, a Huntsville lawyer, surrendered his license to practice law on June 29, 1993. The Alabama Supreme Court ordered Baker's name to be stricken from the roll of attorneys by order dated July 7, 1993. Norman Bradley, a Huntsville lawyer, has been appointed trustee to inventory Baker's client's files and to protect the rights of those clients. [Rule 23 (a) Pet #93-02]

Suspensions

• On May 25, 1993, the Supreme Court of Alabama interimly suspended Tuscaloosa attorney **Brenda Ann Dixon** from the practice of law. On April 22, 1993, Dixon had been convicted of the criminal attempt of murder in the Circuit Court of Tuscaloosa County. Under Rule 20(a) of the Rules of Disciplinary Procedure, a lawyer convicted of a "serious crime" (any felony) may be temporarily suspended. When and if the conviction becomes final, mandatory suspension or disbarment follows under Rule 22 of the Rules of Disciplinary Procedure. [ASB No. 93-004]

• By order of the Supreme Court of Alabama, dated April 20, 1993, Dothan attorney **Cada Mills Carter** was temporarily suspended from the practice of law in the State of Alabama, effective April 19, 1993. Said suspension was based upon an order of the Disciplinary Commission of the Alabama State Bar temporarily suspending Carter from the practice of law. [Rule 20(a) Pet.#93-03]

• Decatur attorney **J. Norman Roby** was suspended from the practice of law for a period of three years, effective July 1, 1993, by order of the Supreme Court of Alabama. After a full hearing on March 12, 1993, the Disciplinary Board found that Roby had wrongfully withheld funds given to him by the son of a long-time client, recently deceased. Roby took the funds (\$1,049) and did nothing further from that point. Over a period of two years, he gave continual assurances that he was going to return the money to the son and only heir. The Disciplinary Board found that aggravating circumstances justified the discipline imposed. Those circumstances included Roby's prior discipline, his failure to cooperate in the investigation of the complaint and his failure to produce trust account records both requested and subpoenaed by the bar. [ASB No. 91-473]

• Phenix City attorney **Richard C. Hamilton** has been temporarily suspended from the practice of law for the violation of the Rules of Professional Conduct of the Alabama State Bar. Hamilton entered into an agreement with the Office of General Counsel in resolution of formal charges pending against him. Hamilton failed to comply with the terms of the agreement.

[Rule 20(a) Pet. #93-05]

• Effective June 25, 1993, attorney **William Roberts Wilson, Jr.**, living in Jackson, Mississippi, was suspended from the practice of law for noncompliance with the Mandatory Continuing Legal Education Rules. [CLE No. 93-33]

• Effective July 16, 1993, Bessemer attorney **John Howard McEniry, III** was suspended from the practice of law for non-compliance with the Mandatory Continuing Legal Education Rules. [CLE No. 93-23]

Public Reprimands

• Millry attorney **Daniel C. Ware** received a public reprimand with general publication on May 21, 1993 for violating Rule 1.3 and 1.16(d) of the Rules of Professional Conduct. A Mobile client paid Ware a retainer to represent her in a civil action which had been filed against her in Mobile. Ware sent her some interrogatories to answer, but had no further contact after that. When the client received a notice of the trial date she attempted to contact Ware, only to learn that he had closed his Mobile office and moved his practice to Millry. Apparently, Ware had made an oral motion to withdraw from the case without communicating this to his client. The court directed him to file a written motion, which Ware failed to do before abandoning his Mobile practice. [ASB No. 92-461]

• On May 21, 1993, Huntsville lawyer **Barbara C. Miller** received a public reprimand with general publication in connection with a legal advertising complaint. Miller's 1990-91 and 1991-92 Yellow Page ads did not contain the disclaimer required by the ethical rules, even though her areas of practice were prominent in the ads. Miller had previously requested permission to remove the disclaimer from her ads because she resented "paying for the space it takes, believes it misleads the public and serves no useful purpose." The Disciplinary Board found that Miller's failure to comply with the disclaimer rule was an intentional and knowing violation. In addition to the reprimand, Miller was ordered to attend six classroom hours of instruction on the Rules of Professional Conduct. [ASB No. 90-058] ■

Correction

In the article on African-American lawyers published in the May 1993 issue of *The Alabama Lawyer*, Selma attorney J.L. Chestnut is quoted as stating that Judge Blanton of the County Court of Common Pleas chastised Chestnut for making an evidentiary objection and referred to him as a "glorified notary public." Judge Blanton was incorrectly identified as the jurist making these comments. Instead, these remarks were made by another judicial officer who is now deceased. Both the author and Mr. Chestnut apologize for the erroneous reference to Judge Blanton.

LEGISLATIVE WRAP-UP

By ROBERT L. McCURLEY, JR.

Annual Meeting

The annual meeting of the Alabama Law Institute was held concurrently with the Alabama State Bar Annual Meeting in Mobile. New officers for the following year are:

President: James M. Campbell
Vice-president: Yetta Samford
Secretary: Robert L. McCurley, Jr.

Executive Committee:
George Maynard
Richard Manley
Oakley Melton
Ryan deGraffenried
E.C. Hornsby
Frank Ellis

Since the 1992 annual meeting, five Law Institute-prepared bills were passed by the Alabama Legislature. Legislators who sponsored these bills were recognized and presented with plaques. These were:

Article 2A UCC "Leases"

Senator Jack Floyd
Senator Steve Windom
Representative Jim Campbell
Representative Mary Zoghby
Representative Michael Box

Article 4A UCC "Funds Transfer"

Senator Steve Windom
Representative Mary Zoghby
Representative Jim Campbell

Administrative Procedure Act Amendments

Senator John Amari
Senator Walter Owens
Senator Ryan deGraffenried, Jr.

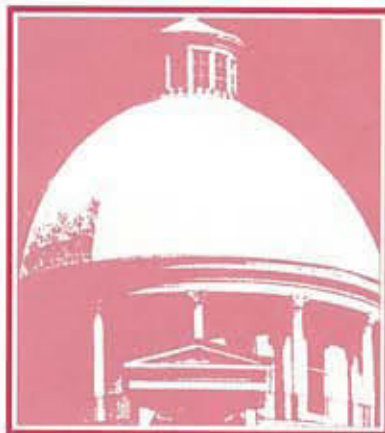
Senator Frank Ellis
Representative Jim Campbell

Probate Procedure

Senator Michael Figures
Senator Don Hale
Senator Doug Ghee
Representative Marcel Black
Representative Jim Campbell

Limited Liability Company

Senator Steve Windom
Representative Hugh Holladay



It is anticipated that there will be several special sessions prior to the 1994 regular session. These special sessions are rumored to include a session on ethics and campaign spending limits, gambling casinos and education reform. Other matters may be brought up in the special session but matters not included in the call require a two-thirds majority vote of each house.

Revisions completed

The Proposed Rules of Alabama Evidence have been completed and are presently before the Alabama Supreme Court. A copy of these rules with commentary may be found at 615 So.2d, No. 2 in the May 13, 1993 advance sheets. The Alabama Supreme Court has set October 7, 1993 as the date for oral arguments on these rules.

Business Corporation Revision: This revision of the Business Corporation law follows the most recent American Bar Association revisions. Our current Business Corporation Act, although passed in 1980, reflected the 1974 Model draft. See May 1993 *Alabama Lawyer*.

Commission on Uniform State Laws: The 1993 Legislature amended Alabama's act on the composition of Alabama's representatives to the Commission on Uniform Laws, adding to the three members appointed by the Governor a member of the House of Representatives and the state Senate. Current Alabama members are: Professor Thomas L. Jones, University of Alabama School of Law; John Andrews, attorney, Montgomery; Richard L. Jones, retired justice of the Supreme Court of Alabama; Senator Steve Windom; Representative Mark Gaines; Bob McCurley, director of the Alabama Law Institute; and Jerry Bassett, director of the Legislative Reference Service. The commission at the 1993 annual meeting approved a "Uniform Healthcare Decisions Act", a "Uniform Statutory Construction Act", amendments to the "Uniform Partnership Act", "Uniform Correction or Clarification of Defamation Act", and Article 8 of the Uniform Commercial Code "Investment Securities". The Commission is also studying a Uniform Adoption Act (similar to Alabama's new act) and a Limited Liability Company Act (similar to Alabama's new Limited Liability Company Act).

Governor's legal advisor

Governor Folsom has appointed Professor Brad Bishop of Cumberland Law School as his legal advisor, replacing Judge John Karrh who returned to law practice in Tuscaloosa.

For more information, contact Bob McCurley, director, Alabama Law Institute, P.O. Box 1425, Tuscaloosa, Alabama 35486, (205) 348-7411. ■



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.




ALABAMA STATE BAR


1993 ANNUAL MEETING

H I G H L I G H T S




 Bench & Bar Luncheon speaker Sheryll Cashin of Washington, D.C. with her parents, Dr. and Mrs. John Cashin of Huntsville




 Judge Sam C. Pointer, Jr. (right) of Birmingham, recipient of the Judicial Award of Merit, with President Small




 '92-'93 YLS President Sid Jackson of Mobile with newly-elected '93-'94 YLS President Les Hayes of Montgomery




 President Small with daughter Laura and wife Jean at the "Bayou Backwater" membership reception at the Grand Hotel, Point Clear




 Melba and Oakley Melton and Alvin Prestwood, all of Montgomery, enjoying the Cajun cuisine Thursday night



 George and Jane Higginbotham of Bessemer having fun at Point Clear Thursday night



 Michael Seibert of Huntsville also enjoyed the Membership Reception.



ALABAMA STATE BAR

1993 ANNUAL MEETING

H I G H L I G H T S



✿ Ginger Tomlin of Birmingham and Frank Thiemonge of Mobile receive LEXIS-NEXIS training.



✿ Past Presidents Ed Thornton and E.T. Brown share memories before the Past Presidents' Breakfast Friday.



✿ Attendees at the breakfast were, left to right, Ed Thornton of Mobile, Drew Redden of Birmingham, Oakley Melton of Montgomery, Bill Scruggs of Ft. Payne, E.T. Brown of Birmingham, Tommy Greaves of Mobile, Phil Adams of Opelika, Jim North of Birmingham, Alva Caine of Birmingham, Norborne Stone of Bay Minette, Bill Hairston of Birmingham, and Ben Harris of Mobile.



✿ Members of the Christian Legal Society gather for breakfast Friday.



✿ Nat Hansford, dean, University of Alabama School of Law, with Camille Wright Cook, who is retiring as professor with the University's School of Law and honored at the University's Alumni Luncheon



ALABAMA STATE BAR

1993 ANNUAL MEETING

H I G H L I G H T S



Charles Vere, Earl of Burford, entertained attendees of Friday night's Annual Dinner with the question, "Who was William Shakespeare?"



After his presentation, Earl Burford signed autographs and answered questions.



Governor Jim Folsom, Jr. addresses attendees of the 1993 Grande Convocation Saturday morning.



President Small accepts a \$3,000 donation to the Building Fund from Joe Spransy, chair, Labor & Employment Law Section.



Ron Waldrop of Vestavia Hills, winner of the Expo '93 lap top computer



Laurie Smith of Cullman, a representative with West Publishing Company, one of many exhibitors at EXPO '93

Some of the other exhibitors at Expo '93 were Norman Dunwoody, Time-N-Timber Wood crafters; Mike Barnett, Insurance Specialists, Inc.; and Greg Alford, Merrill Lynch. Each company provided prizes given away Saturday morning.



President Small presents Commissioners' Medallion to Gorman Jones of Sheffield.



ALABAMA STATE BAR

1993 ANNUAL MEETING

H I G H L I G H T S



☒ (Left to right) Charles Reeder of Mobile, Frank Hawthorne, Sr. of Montgomery and Al Byrne of Dothan take a break.



☒ Broox Holmes of Mobile, president-elect for '93-'94, congratulated by President Small



☒ President Small accepts his "red ribbon" from Past President Adams...



☒ ...and turns over the responsibilities and the gavel to '93-'94 President Spud Seale.

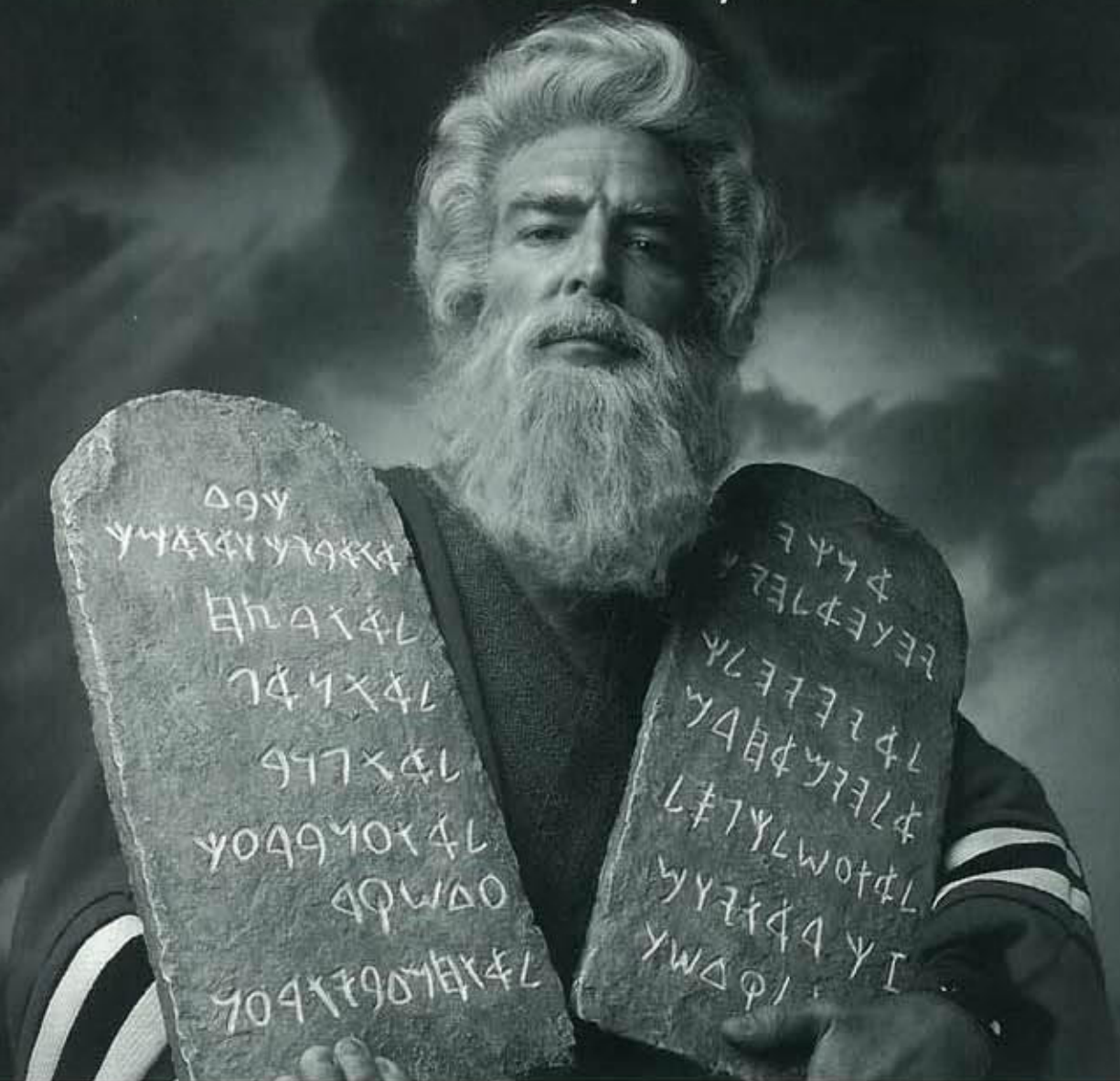


☒ Judge William Robertson visits AIM booth at Expo '93



☒ (Left to right) Broox Holmes, Sr., president-elect; Spud Seale, president; and Clarence Small, past president

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RECENT DECISIONS

By DAVID B. BYRNE, JR., TERRY A. SIDES and WILBUR G. SILBERMAN

UNITED STATES SUPREME COURT

Erroneous reasonable doubt instruction cannot be harmless error

Sullivan v. Louisiana, 61 USLW 4518 (June 1, 1993). The jury instructions in Sullivan's murder trial included a definition of "reasonable doubt" essentially identical to the one held unconstitutional in *Cage v. Louisiana*, 498 U.S. 39 (1990). Sullivan was found guilty and sentenced to death. On appeal, the Louisiana Supreme Court held that the erroneous reasonable-doubt instruction was harmless error.

In a unanimous decision, the United States Supreme Court disagreed, holding that Sullivan's Sixth Amendment right to a trial by jury was denied by the giving of the constitutionally deficient instruction. Justice Scalia, writing for the Court, held that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement that the jury, rather than the judge, reach the requisite finding of "guilty", are interrelated: The instruction of the sort given in this case did not produce the required jury verdict of guilt beyond a reasonable doubt.

The Court further held that the giving of a constitutionally deficient reasonable-doubt instruction is among those constitutional errors that require reversal of a conviction, rather than those that are subject to the harmless-error analysis. Consistent with the jury-trial guarantee, *Chapman v. California*, 386 U.S. 18 (1967), instructs a reviewing court to consider the actual effect of the error on the guilty verdict in the case at hand. However, because there was no jury verdict within the meaning of the Sixth Amendment in Sullivan's case, the premise for harmless-error analysis is absent. Unlike an erroneous presumption regarding an element of the offense, see *Sandstrom v. Montana*, 442 U.S. 510

(1979), a deficient reasonable-doubt instruction vitiates all the jury's factual findings, leaving a reviewing court to speculate as to what a reasonable jury would have done. When it does that, Justice Scalia wrote, the wrong entity judges the defendant guilty.

Plain feel exception

Minnesota v. Dickerson, 61 USLW 4544 (June 7, 1993). Based upon Dickerson's seemingly evasive actions when approached by police officers and the fact that he had just left a building known for cocaine traffic, the officers decided to investigate further and ordered Dickerson to submit to a pat-down search. The search revealed no weapons, but the officer conducting it testified that he felt a small lump in respondent's jacket pocket and believed it to be a lump of crack cocaine. The officer then reached into the pocket and retrieved a small bag of cocaine. The Minnesota Supreme Court held that both the stop and frisk of Dickerson were valid under *Terry v. Ohio*, 392 U.S. 1 (1968), but found the seizure of the cocaine to be unconstitutional. Refusing to enlarge upon the "plain view" exception to the Fourth Amendment's warrant requirement, the state court appeared to adopt a categorical rule barring the seizure of any contraband detected by an officer through the sense of touch during a patdown search.

The United States Supreme Court disagreed, holding that the police may seize nonthreatening contraband detected through the sense of touch during a protective patdown search of the sort permitted by *Terry*, so long as the search stays within the bounds marked by *Terry*. This protective search—permitted without a warrant and on the basis of reasonable suspicion less than probable cause—is not meant to discover evidence of crime, but must be strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others. However, if the search goes beyond what is necessary to

determine if the suspect is armed, it is no longer a valid *Terry* search, and its fruits will be suppressed. *Sibron v. New York*, 392 U.S. 40 (1968). In *Michigan v. Long*, 463 U.S. 1032 (1983), the seizure of contraband other than weapons during a lawful *Terry* search was justified by reference to the Court's cases under the "plain view" doctrine. Thus, if an officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity as contraband immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for a weapon.

However, the Supreme Court affirmed the Minnesota Court's ruling, holding that application of these principles to the facts of this case demonstrates that the officer who conducted the search

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was not acting within the lawful bounds marked by *Terry* at the time he gained probable cause to believe that the lump in Dickerson's jacket was contraband. Based on the Minnesota Court's interpretation of the record, the officer never thought that the lump was a weapon, but did not immediately recognize it as cocaine. Rather, he determined that it was contraband, *i.e.*, cocaine, only after he squeezed, slid and otherwise manipulated the pocket's contents. Justice White noted that while *Terry* entitled the officer to place his hands on Dickerson's jacket and to feel the lump in the pocket, his continued exploration of the pocket after he concluded that it contained no weapon was unrelated to the sole justification for the search under *Terry*. Because this further search was constitutionally invalid, the seizure of the cocaine that followed was likewise unconstitutional.

Forfeiture—Punishment and the Eighth Amendment

Austin v. United States, 61 USLW

4811 (June 28, 1993). After a South Dakota state court sentenced Austin on his guilty plea to one count of possession with intent to distribute cocaine, the United States filed an *in rem* action in federal district court against his mobile home and body shop under 21 U.S.C. §881(a)(4) and (a)(7), which provide for the forfeiture of vehicles and real property used or intended to be used to facilitate the commission of certain drug-related crimes. The District Court granted the Government's motion for summary judgment on the basis of an officer's affidavit that Austin had brought two ounces of cocaine from the mobile home to the body shop in order to consummate a prearranged sale, and rejected Austin's argument that forfeiture of his properties would violate the Eighth Amendment's prohibition against excessive fines. The Court of Appeals for the Eighth Circuit affirmed, agreeing with the Government that the Eighth Amendment was inapplicable to *in rem* civil forfeitures.

The United States Supreme Court dis-

agreed, holding that forfeiture under 21 U.S.C. § 881(a)(4) and (a)(7) is a monetary punishment and, as such, is subject to the limitations of the Excessive Fines Clause contained in the Eighth Amendment. Justice Blackmun, writing for the Court, held that the determinative question was not, as the Government contended, whether forfeiture was civil or criminal, but rather whether the forfeiture was a monetary punishment. The Court held that because sanctions frequently serve more than one purpose, the fact that forfeiture serves remedial goals will not exclude it from the Eighth Amendment's purview, so long as it can only be explained as serving in part to punish.

However, while holding that civil *in rem* forfeiture was subject to the limitations imposed by the Eighth Amendment's Excessive Fines Clause, the Court declined to establish a test for determining whether a forfeiture is constitutionally "excessive", stating that "prudence dictates that the lower courts be allowed to consider that question in the first instance."

Grady v. Corbin overruled

United States v. Dixon, 61 USLW 4835 (June 28, 1993). In unrelated incidents, Dixon and Foster were tried for criminal contempt of court for violating court orders that prohibited them from engaging in conduct that was later the subject of a criminal prosecution. Based on Dixon's arrest and indictment for possession with intent to distribute cocaine, he was convicted of criminal contempt for violating a condition of his release on an unrelated offense forbidding him to commit "any criminal offense." The trial court later dismissed the cocaine indictment on double-jeopardy grounds. Conversely, the trial court in Foster's case ruled that double jeopardy did not require dismissal of a five-count indictment charging him with simple assault, threatening to injure another on three separate occasions, and assault with intent to kill, even though the events underlying the charges had previously prompted his trial for criminal contempt for violating a civil protection order requiring him not to "assault...or in any manner threaten..." his estranged wife. The Court of Appeals for the District of

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Columbia Circuit consolidated the cases on appeal and ruled that both subsequent prosecutions were barred by the Double Jeopardy Clause under *Grady v. Corbin*, 495 U.S. 508 (1990).

The Supreme Court affirmed in part and reversed in part the judgment of the Circuit Court. In so doing, the Court concluded that the Fifth Amendment's prohibition against double jeopardy attaches nonsummary criminal contempt prosecutions just as it does in other criminal prosecutions. In the contexts of both multiple punishments and successive prosecution, the double jeopardy bar applies if the two offenses for which the defendant is punished or tried cannot survive the "*Blockburger*" test. See *Blockburger v. United States*, 384 U.S. 299 (1932). This test inquires whether each offense contains an element not contained in the other; if not, they are the "same offense" within the Double Jeopardy Clause's meaning, and thus, double jeopardy bars a subsequent punishment or prosecution. However, *Grady v. Corbin* holds that in addition

to passing the *Blockburger* test, a subsequent prosecution must satisfy a "same-conduct" test to avoid the double jeopardy bar. That test provided that, "If to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted," a second prosecution may not be had. *Grady v. Corbin*, 495 U.S. at 510.

Based on the *Blockburger* analysis, the Court held that because Dixon's drug offense did not include any element not contained in his previous contempt offense, his subsequent prosecution failed the *Blockburger* test. Dixon's contempt sanction was imposed for violating the order through commission of the incorporated drug offense. His "crime" of violating a condition of his release cannot be abstracted from the "element" of the violated condition. Here, as in *Harris v. Oklahoma*, 433 U.S. 682 (1977), the underlying substantive criminal offense is a species of a lesser-included offense,

whose subsequent prosecution is barred by the prohibition against double jeopardy. The Court applied the same analysis to Foster's indictment for simple assault, and held that it was likewise barred by the prohibition against double jeopardy.

However, the Court determined that the remaining four counts of Foster's indictment were not barred by the *Blockburger* test. Foster's first prosecution for violating the civil protection order forbidding him to assault his wife does not bar his later prosecution under assault with intent to kill, since that offense requires proof of the specific intent to kill, which the contempt offense did not. Similarly, prosecution of the contempt offense required knowledge of the civil protection order, an element not required for the charge of assault with intent to kill. Justice Scalia likewise held that the remaining three charges did not violate the *Blockburger* rule in that different elements had to be established in order to obtain a conviction.

ADDRESS CHANGES

Complete the form below ONLY if there are 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 an address change, we cannot make the necessary changes on our records, so please notify us when your address changes. **Mail form to: Alice Jo Hendrix, P.O. Box 671, Montgomery, AL 36101.**

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Justice Scalia then announced that although prosecution under four counts of Foster's indictment would be barred by the *Grady* "same-conduct" test, *Grady* must be overruled because it contradicted an unbroken line of decisions, contained less than accurate historical analysis, and has produced confusion. Justice Scalia went on to state that unlike the *Blockburger* analysis, the *Grady* test lacked constitutional roots and was wholly inconsistent with the Court's precedents and with the clear, common law understanding of double jeopardy.

Supreme Court of Alabama—Civil

Personal injury actions do not abate when plaintiff dies as result of alleged wrongful act of defendant — but what about statute of limitations?

In *Hogland v. The Celotex Corporation*, [Ms. 1910077, April 30, 1993], ___ So.2d ___ (Ala. 1993), the issue was whether a personal injury action may be amended by a personal represen-

tative after the plaintiff dies, allegedly as the result of the personal injury, even though more than two years has expired after the death of the plaintiff. The basic facts were as follows:

The plaintiff filed a claim against various fictitiously named parties, alleging that he had suffered personal injuries from having been exposed to asbestos. The plaintiff alleged that asbestos-containing products had caused him to contract an illness diagnosed as mesothelioma. The plaintiff died of mesothelioma on November 10, 1985.

On December 6, 1989, one of the defendants filed a suggestion of death of the plaintiff. On June 4, 1990, the plaintiff's executrix filed a motion to revive the action as a personal representative, and to amend the complaint to include an action alleging wrongful death. The trial court granted her motion.

On April 2, 1991, one of the defendants moved to strike the amendment, alleging that the personal action had been extinguished upon the plaintiff's death, pursuant to the holding in *Elam v. Illinois Central Railroad*, 496 So.2d 740 (Ala. 1986), and that a wrongful death action was barred by the two-year statute of limitations set out in *Ala.*

Code §6-5-410 (1975). The trial court granted that motion to strike.

On appeal, relying upon its recent holding in *King v. National Spa & Pool Institute*, 607 So.2d 1241 (Ala. 1992), the supreme court reversed the trial court's summary judgment for the defendant. In *King*, the court overruled *Elam* and held that personal injury actions do not abate when a plaintiff dies as a result of the alleged wrongful act of the defendant.

Justice Houston dissented for the reasons set forth in his dissenting opinion in *King*. Moreover, he made the following observation:

I . . . note that the [instant] wrongful death claim was not filed until five years after Hogland's death. I do not see how the majority can rely on *King v. National Spa* for its holding in this case. In *King*, the wrongful death action was filed a few weeks after [the plaintiff's] death, well within the two-year limitations period provided for in *Ala. Code* 1975, §6-5-410(d) . . . This is a molar movement by this Court and by implication overrules numerous cases: [citations omitted].

Doctrine of "piercing corporate veil" alive and well

In *re Birmingham Asbestos Litigation*, [Ms. 1911617-CRE, April 16, 1993], ___ So.2d ___ (Ala. 1993), presented the supreme court with the following question of law certified from the United States Court of Appeals for the Eleventh Circuit:

Whether under Alabama law the tort doctrine of "duty to control" could be applied to hold a parent corporation liable for the acts of its subsidiary.

This question arose in regard to those actions encompassed by a January 8, 1991 order issued from the United States District Court for the Northern District of Alabama, in which the court consolidated, for pre-trial purposes, all cases in that district "asserting claims for personal injury, illness or death from exposure to asbestos products or asbestos-containing products". In these consolidated actions, the plaintiffs generally alleged that they had been

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exposed to asbestos in the workplace and had suffered serious injury as a result. The defendants were parent corporations that the plaintiffs alleged held voting interests in subsidiaries that manufactured, installed or sold asbestos or asbestos-containing products, and then placed these products into the stream of commerce, where they ultimately became a part of the buildings where the plaintiffs worked. The plaintiffs sought to hold the parent corporations liable for the activities of the asbestos-related subsidiaries.

The supreme court answered the certified question by holding that, under Alabama law, the "duty to control" doctrine may not be applied to hold a parent corporation liable for the acts of its subsidiary. The plaintiffs had advocated a departure from the well-established doctrine of "piercing the corporate veil". They argued that a parent corporation should be liable for the acts of its subsidiary if (1) the parent controls the subsidiary and (2) the parent can foresee the harm that the subsidiary's activities may have. The plaintiffs based their "duty to control" theory on *Restatement (Second) of Torts*, §315 (1965). The plaintiffs contended that the association between a parent company and its subsidiary should be deemed a "special relation" for purposes of §315, much like those of parent and child, master and servant, and the relation of a possessor of land or chattels to a licensee. The plaintiffs' theory of liability rested upon the premise that the §315 duty to control should apply in *any* circumstance where one individual controls the actions of another and the other's actions result in foreseeable harm.

In rejecting all of the plaintiffs' arguments, the supreme court reaffirmed that the law in Alabama is that a plaintiff must first "pierce the corporate veil" before the parent corporation's liability may be established. A parent corporation, even one that owns all of the stock of a subsidiary corporation, is not subject to liability for the acts of its subsidiary unless the parent so controls the operation of the subsidiary as to make it a mere adjunct, instrumentality or alter ego of the parent corporation. Moreover, there must be the added elements

of misuse and harm or loss resulting from the misuse.

Landlord liability for criminal acts of third persons

In *L.M.S. v. Angeles Corporation*, [Ms. 1911413, March 12, 1993], ___ So.2d ___ (Ala. 1993), the plaintiff, a resident of Gadsden, Alabama, was raped by an intruder who came through the living room window of her apartment. She sued her landlord, alleging that it negligently failed to maintain her apartment window in a safe condition and that this negligence resulted in the attack on her. The trial court entered a summary judgment for the defendant. The primary issue on appeal

was whether the trial court erred in determining that, as a matter of law, the defendant could not be held liable for the attack on the plaintiff.

A majority of the supreme court agreed that the trial court properly determined that the defendant owed no *statutory* duty to the plaintiff under the 1985 Standard Housing Code, since the plaintiff's apartment complex was constructed before the effective date of Gadsden's adoption of the Code. Accordingly, "[A]bsent such a statutory duty, a landlord may not be held liable for the criminal acts of third persons unless such acts were reasonably foreseeable." *Brock v. Watts Realty Co.*, 582 So.2d 438 (Ala. 1991). A majority of the



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court concluded that even though the plaintiff failed to comply with the provision of her lease which required she give the defendant written notice of any defects in her apartment, a jury question was created on the issue of foreseeability, given the defendant's failure to dispute the plaintiff's statement that she gave oral notice to the defendant's agent who would have been required to repair the defect in the window.

In separate dissents, Justices Almon, Shores and Houston opined that given the majority's holding that the Gadsden ordinances were not applicable to this case, such should end the matter and result in an affirmance. Justice Almon went further and recognized that even if this case could not be disposed of solely on the basis of no statutory duty, the proper question was whether the rape of the plaintiff was foreseeable, not whether "the defendants knew or should have known of the condition of [the plaintiff's] window", as the majority said. "The judgment should be affirmed on this question also, because [the plaintiff] does not contend that the rape

was foreseeable because of similar incidents or for any other reason beyond the ordinances."

Do facsimile transmissions constitute "filings" under Alabama Rules of Court?

In *Ex parte Jan Tuck d/b/a Colony Pools*, [Ms. 1920134, May 14, 1993], ___ So.2d ___ (Ala. 1993), the supreme court was presented with the following issue of first impression:

Whether sending, by facsimile, a copy of a notice of appeal from district court to circuit court satisfies the Rule 5(e), *A.R.Civ.P.*, requirement of "filing with the clerk or register of the court".

The plaintiff sued the defendant in district court on March 4, 1991. On December 19, 1991, the district court entered a judgment in favor of the plaintiff and against the defendant. On January 2, 1992, the defendant sent a facsimile transmittal sheet to the office of the circuit clerk; that transmittal included a copy of a notice of appeal from the district court to the circuit court. The defendant also advised the circuit clerk's office that the original of the notice of appeal was being placed in the mail the same day. The clerk's office received the original notice of appeal on January 3. The plaintiff filed a motion to dismiss, arguing that the defendant's notice of appeal was untimely — specifically that it was not filed within the 14-day period prescribed by *Ala. Code* §12-12-70(a) (1975).

The circuit court granted the plaintiff's motion to dismiss. The court of civil appeals reversed the trial court's judgment of dismissal. The supreme court granted the defendant's petition for a writ certiorari, and unanimously held that, "For purposes of this appeal", the facsimile copy of the notice of appeal transmitted on January 2 was a timely filing under Rule 5. The court then went on to say as follows:

This Court has referred the whole subject of facsimile filing, including notices of appeal, to its Standing Committee on the Rules of Civil Procedure and its Standing Committee on the Rules of Appellate Procedure. As of now, we have not received a report from these committees.

We offer the following caveat to the Bar: The notice of appeal from the district court to the circuit court in this case is treated as a proper and timely filing. Likewise, other filings attempted by facsimile transmission in reliance on the opinion of the Court of Civil Appeals will be taken as proper on the same basis through the period ending July 31, 1993. After that date we will not recognize facsimile transmissions as filing, within the meaning of our rules of court or the statutes of this state, except as statutes or rules may specifically authorize "filing" by facsimile transmission. The Alabama rules of court do not presently specifically authorize any "filings" either of notices of appeal or any other documents, by facsimile transmissions.

Accordingly, it appears that until the standing committees act on this issue, the court, as of July 31, 1993, will not recognize facsimile transmissions as filings under Rule 5.

Editor's Note: The federal courts do allow papers to be filed by facsimile transmission "if permitted by rules of the district court . . . Rule 5(e), *F.R.Civ.P.* Moreover, a facsimile transmittal as a form of filing has recently been authorized by the state courts in Arkansas, Florida, Maine and New York.

Settlement agreements under Rule 47, Ala.R.App.P. and Alabama Code §34-3-21

In *Ex parte Wilma D. Simms*, [Ms. 1911395, May 28, 1992], ___ So.2d ___ (Ala. 1992), the supreme court granted a writ of certiorari to review a holding by the court of civil appeals that settlement agreements entered into in the trial court are controlled by the provisions of Rule 47, *Ala.R.App.P.*

The plaintiff filed a negligence action against the defendant for injuries received in an automobile accident. The plaintiff's attorneys negotiated a proposed settlement agreement with the defendant's attorney. The plaintiff's attorneys reduced the agreement to writing, and the plaintiff and his attorneys signed it. The trial court subsequently enforced the written settlement agreement, and the defendant appealed to the court of civil appeals.

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Notwithstanding the fact that the settlement agreement was entered into in the trial court, the court of civil appeals applied the provisions of Rule 47 and concluded that the requirements of a valid settlement agreement had not been met.

The supreme court recognized that some confusion exists among the bench and bar regarding whether Rule 47 applies to settlement agreements reached at the trial level. After noting several cases in which it has reviewed the validity of settlement agreements reached in the trial court and has on those occasions applied the provisions of §34-3-21, without mentioning Rule 47, the court agreed with Judge Ira DeMent's interpretation that, "It would seem that Rule 47 would govern settlement agreements reached while the matter is on appeal, while section 34-3-21 would govern settlement agreements reached while the case is still at the trial level." *Spurlock v. Pioneer Financial Services, Inc.*, 808 F.Supp. 782, 783 (M.D.Ala. 1992). Accordingly, it is now clear that Rule 47 governs settlement agreements on appeal, while §34-3-21 controls settlements in the trial court.

Supreme Court of Alabama—Criminal

Prior testimony and the Sixth Amendment

Ex parte Wright, 27 ABR 3079 (May 21, 1993). Wright was charged with first degree assault in the shooting of Facemire. At his first trial, the jury was unable to reach a verdict and the trial court declared a mistrial. His second trial resulted in a conviction. In both of his trials, Wright's defense to the assault charge was that another person—E.M., and not Wright—had shot Facemire. At Wright's first trial, defense witness Seals testified that he had seen E.M. in the possession of a .25 caliber gun. The bullet that injured Facemire also came from a .25 caliber gun. Seals also stated that E.M. later told him that he [E.M.] had shot Facemire. This testimony was the only testimony directly supporting Wright's theory of defense.

Seals was not present to testify at the

second trial. However, Wright requested that Seals's testimony from the first trial be read to the jury. The trial court refused this request. The court of criminal appeals, by an unpublished memorandum opinion, affirmed Wright's conviction.

Citing *McElroy's Alabama Evidence*, the supreme court held that although former testimony is hearsay, it is admissible when the personal attendance of a witness is not procurable and when the former testimony meets certain criteria. Chief Justice Hornsby, writing for the court, stated as follows:

Without hearing Jones's testimony, the trial court could not have determined whether her testimony would have established either that Seals was permanently or indefinitely absent from the state, or that Wright's attorney used due diligence in attempting to secure Seals's presence at trial. Thus, we conclude that by refusing to consider Jones's testimony, the trial court abused its discre-

tion. Further, when we consider the substance of Seals's testimony in the first trial, compared with the evidence presented in the second trial, and the fact that in the first trial the jury could not reach a decision as to Wright's guilt, we must further conclude that the trial court's error prejudiced Wright's defense.

Accordingly, the supreme court reversed Wright's conviction, holding that the trial court abused its discretion in refusing to allow defense counsel to present testimony established Seals's unavailability as a predicate for the introduction of his prior testimony.

Use of depositions in criminal cases

Ex parte Robertson, 27 ABR 3471 (June 4, 1993). Robertson was indicted for first degree burglary, first degree rape and first degree robbery. The indictments were based on the State's evidence that Robertson had entered the homes of two elderly women [then

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aged 72 and 88] and had raped and robbed them.

The State moved to take the depositions of the elderly victims pursuant to § 12-21-261, *Code of Alabama* (1975); Robertson objected to the State's request. At a hearing on the State's motion, the State argued that the portion of § 12-21-261, which provides that the State may preserve a witness' testimony in a criminal case only with the consent of a defendant, violated the Equal Protection Clause of the Fourteenth Amendment. The trial court agreed, holding that the consent requirement had no rational relationship to a legitimate state interest or protected right, and entered an order holding that portion of § 12-21-261 unconstitutional.

Robertson petitioned the supreme court for writ of mandamus, which was granted. In a *per curiam* opinion, the court held that the trial court erred in holding § 12-21-261 unconstitutional because the limited interrogatory procedure set out in § 12-21-261 did not allow adequate protection of the defendant's Sixth Amendment right of confrontation. For that reason, the consent requirement bears a rational relationship to the purposes of protecting the right of confrontation. However, the supreme court agreed with the trial court that this problem regarding the right of confrontation needed to be eliminated and referred the matter to the Standing Committee on the Rules of Criminal Procedure to consider whether the supreme court should adopt a rule allowing both the State and a defendant, in the limited circumstances specified by § 12-21-261, to take depositions of witnesses to preserve their testimony, referencing Rule 15(d) of the Federal Rules of Criminal Procedure.

BANKRUPTCY

Bifurcation of residential mortgage not allowed in Chapter 13

Nobleman v. American Savings Bank, June 1, 1993, 113 S.Ct. 2106 (1993). The debtor sought to bifurcate a residential mortgage into a secured claim for the value of the real estate,

and unsecured for the deficiency, as provided for under §506(a) of the Bankruptcy Code. The plan also provided for the same treatment of the unsecured as that of the other unsecured creditors, and to resume payment on the mortgage until the secured portion was paid. The lower courts held that this violated §1322(b)(2).

Justice Thomas, in speaking for the court, stated that although 506(a) does divide the claim into secured and unsecured according to the value of the collateral, §1322(b)(2) prohibits modification of *rights* of the holder of a claim *secured only by the debtor's principal residence*. The court distinguished *rights* as contrasted with a *claim* under §1322(b)(2). The court resolved the tension between the statutes in favor of §1322(b)(2) in holding there can be no modification of the rights of the home mortgage holder. The court ruled that there can be no bifurcation of the mortgage, but it will remain as security for the entire claim. Thus, the *Dewsnup* rule which created such a stir as to its reasoning now also applies to lien stripping under a Chapter 13. There is not much left on the subject unless Congress wishes to act. It will be interesting to observe what occurs when a lender obtains a junior residential real estate mortgage in which it is obvious that there is no equity at any time. Also, will it be held that the reasoning of *Nobleman* applies in Chapter 11 cases?

In Chapter 13, U.S. Supreme Court holds that in curing default, debtor must pay interest on arrearage

Rake v. Wade, June 7, 1993, 113 S.Ct. 2187 (1993). In a followup to *Nobleman*, decided June 1, the Supreme Court affirmed the 10th Circuit's holding that even if the mortgage instrument fails to require interest on arrearage, and, moreover, under state law would not be payable, to cure the default, in bankruptcy, interest must be paid. In this unanimous decision, also authored by Justice Thomas, the opinion first mentioned §506(b) as providing that an over-collateralized creditor is entitled to interest post-petition until confirmation. He then followed by referring to §1322(b)(2), and, in particular, the prohibition against modifying

rights of creditors with only security on the principal residence of the debtor. The Court called attention to §1322(b)(5) as to cure of the deficiency stating that it should be read in conjunction with §506(b), and that in so doing, it is evident that the secured leader is entitled to present value of the arrearage. "Present value of the arrearage" means interest must be paid. The debtor had argued that §1325(a)(5), which requires payment of interest on the claim, was not applicable because it applies only to modifications, and §1322(b)(2) does not allow modification to a mortgage on a residence. The Supreme Court refused to accept this argument; it held that §1325(a)(5) governs all allowed secured claims provided for by the plan.

Limitation of incarceration period for civil contempt in bankruptcy case

In the Matter of Younger, 986 F.2d 1376, (11th Cir. March 5, 1993). The involuntary debtor was arrested in order



David B. Byrne, Jr.

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Terry Alan Sides, who covers the civil portion of the decisions, is a graduate of the University of Alabama and Cumberland School of Law of Samford University. He is a member of the Montgomery firm of Hill, Hill, Carter, Franco, Cole & Black.



Wilbur G. Silberman

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

to compel attendance at a 2004 examination. He still refused to testify, pleading the Fifth Amendment as an excuse. He was given immunity under §344 of the Bankruptcy Code, and was ordered to testify by a magistrate judge. He still refused, and then was held in contempt and jailed indefinitely until complying. On appeal to the Eleventh Circuit, the debtor contended that under 28 U.S.C. §1826, no incarceration can exceed 18 months. The question was the applicability to the cited Code section to a bankruptcy civil contempt. The Court held that taking the words of the statute literally, it does apply, and that the confinement order by the District Court on November 20, 1992 is limited to the length of the bankruptcy case or 18 months from the order, whichever is less.

Eleventh Circuit holds that punitive damages arising from fraudulent conduct are non-dischargeable

In re St. Laurent, 991 F.2d 672, (11th Cir. May 20, 1993). The creditor had obtained a Florida judgment against a debtor (St. Laurent) who had failed to

pay off a real estate mortgage from the purchase funds. The state court found St. Laurent liable for fraud, awarding \$48,705 compensatory and \$50,000 punitive damages. St. Laurent, in a Chapter 7 case, tried to obtain discharge on the judgement debt. The Bankruptcy Court applied collateral estoppel to hold the debt non-dischargeable under §523(a)(2)(A) and §523(a)(4); the District Court affirmed. On appeal, the debtor claimed that punitive damages for fraud are dischargeable as a matter of law under the cited Code sections. The Eleventh Circuit first held that collateral estoppel was applicable. It then, as a matter of first impression in the circuit, determined that although most Bankruptcy Courts (including the Northern District of Alabama) hold such damages as dischargeable, the contrary view is correct. In holding the punitive damages as non-dischargeable, it wrote that the language of the statute is clear that the term "debt" encompasses punitive damage awards. It rejected the argument that the 1984 amendment of 523(a)(2)(A) limited the definition of "debt" to compensatory damages.

Priority of federal tax lien over judgment lien

U.S. (IRS) v. McDermott, 61 USLW 4282 (1993). This case discussed the "first in time" rule, holding that it applies only when perfected as a state lien when there have been established the following: (1) identity of lienor, (2) property subject to the lien, and (3) amount of lien. Justice Scalia, writing for the majority, determined that a federal tax lien primed a state court judgment lien earlier recorded, but upon which the lien did not attach on the after-acquired property until the property was acquired, and that the time of acquisition is when the debtor acquires rights in the property. To summarize the facts: the creditor recorded a judgment lien, the IRS then recorded its federal tax lien, and then the debtor acquired rights in the property. The creditor agreed that it had no rights in the property until the debtor obtained the property, which was after the filing of the federal tax lien. Thus, the majority of the Court held the federal tax lien to be superior. Justices Thomas, Stevens and O'Connor dissented. ■

Lawyer Referral Service Does Pay Off!



By JAMES F. HAMPTON

Over the past nine years, my participation in the Alabama State Bar Lawyer Referral Service has led me to a variety of interesting and profitable clients. While many of these referrals resulted in no fee and no representation on my part, many have resulted in the establishment of an attorney-client relationship with an occasional client returning for subsequent representation in other matters.

I recently had the unusual but most pleasant opportunity to gain additional benefits from this referral service. As luck would have it, I was referred a client who had contacts on the Caribbean island of Barbados, where I was about to visit. After my initial meeting with my client, in which I casually informed him of my impending travel, he arranged to have a driver and car meet my wife and me in Barbados. The driver

took us on an extensive tour of the island, showing us points of interest. He then drove us to a popular Barbados restaurant before dropping us off to continue our trip.

Obviously, we cannot count on such benefits simply by participating in the bar's Lawyer Referral Service. However, I can say with certainty that had I not participated I never would have had such an opportunity to see Barbados as thoroughly as I did or to participate as fully in the culture of it!

The benefits to the practitioner participant are obvious, and occasionally there are even some hidden benefits, such as this. I strongly encourage other attorneys to participate in this program. ■

First Kids' Chance Scholarships Awarded



(L-R) Richard L. Chambers, HealthSouth, Melissa R. Parker, Chuck D. Byrd, Joe Ellis, Jr.

At the 1992 annual meeting of the Alabama State Bar, Charles Carr, then chair of the Workers' Compensation Section, challenged section members to work with him to establish the Kids' Chance Scholarship Fund. The purpose of the fund is to provide high school, trade school and college scholarships to children who have had a parent killed or permanently and totally disabled in a work-related accident.

The Kids' Chance Organizational Committee, chaired by John Coleman, III, a Birmingham attorney, and Richard Browning, a Mobile attorney, began working to establish the program in Alabama. Committee members pledged between \$750 and \$1,500 each to the fund as well as a substantial amount of their time. The committee put a great deal of effort into developing a fundraising plan, appropriate procedures and application forms. (The program is administered by the Alabama Law Foundation.) Contributions were also sought outside the legal community. HEALTHSOUTH became a major corporate sponsor, giving \$15,000. The Alabama Power

Foundation and Aetna each awarded \$5,000 to Kids' Chance. Over \$40,000 was raised in Kids' Chance's first six months of operation.

The Kids' Chance Scholarship Committee was comprised of non-lawyers as well as lawyers, with Charles Carr serving as chair. Its members put in many hours evaluating applications and helping publicize the program in their respective communities.

Committee members include: Rick Chambers of HEALTHSOUTH; Richard Davis of the United Steel Workers Association; Richard Duren of Birmingham Steel; Steve Ford, a Tuscaloosa attorney; Mary Kessler, a Birmingham rehabilitation specialist; and Joe Pierson of Aetna. Lenora Pate, director of the Alabama Department of Industrial Relations, and Jimmy Dill, insurance commissioner of the State of Alabama, have served as honorary committee members.

Ten applications were received for the first scholarships. The scholarship committee reviewed the applications and chose three recipients for scholarships totaling \$17,500. Chuck Byrd of Staple-

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ton will be a freshman at Bishop State Community College in Mobile. Chuck plans to study drafting and design. Joe Ellis of Bessemer is a rising junior at Alabama A & M, majoring in forestry. Melissa Parker of Eight Mile will be a freshman at the University of South Alabama. Melissa plans to major in education and pursue a teaching career. Receiving the scholarship enabled one student to attend school full time, rather than work full time and be a part-time student. Another student was kept from having to take out substantial loans to help pay the cost of attending school.

The scholarships were awarded at the 1993 annual meeting of the Alabama State Bar in Mobile. The recipients and their parents joined the scholarship committee for breakfast prior to the Grande Convocation. The three young people were truly grateful to be chosen winners of the first Kids' Chance Scholarships and for the opportunity being provided. Charles Carr expressed the feelings of those involved with the program when he stated, "You were in a situation where an unfortunate circumstance developed, and we are happy that we were there to provide some help for you. All we ask in return is to do good in

school, work hard and make good grades."

Kids' Chance has made tremendous progress in one year thanks to the caring and hard work of all who helped with its organization. We would appreciate your help, too. If you can contribute

or make a pledge, do so on the pledge form that follows. Please spread the word about Kids' Chance in your community. For more information contact Charles Carr at Rives & Peterson, (205) 328-8141 or Tracy Daniel at state bar headquarters (800) 354-6154. ■

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In the Interest of Justice:

A Tribute to Judge James Edwin Horton, Jr. and Clarence Lee Watts

On April 30, 1993 the Huntsville-Madison County Bar Association and the Limestone County Bar Association honored Judge James E. Horton, Jr. of Athens (1878-1973) and Clarence L. Watts of Huntsville (1886-1963) for their participation in the infamous "Scottsboro Boys" cases which drew international attention to racial injustice in Alabama in the 1930s. All of the children of both the late Judge Horton and the late Mr. Watts attended the very emotional Law Day ceremony which was capped by the unveiling of two bronze plaques commissioned by the bar associations.

T

he fourth prosecution of Haywood Patterson—one of nine defendants in the infamous Scottsboro Cases—began in a Decatur courtroom on January 20, 1936. By contemporary standards, the events which unfolded there amounted to little more than a pale, scandalous imitation of justice; from the jury selection to the court's oral charge, the proceedings brimmed with fundamental unfairness. Although it is difficult to imagine in this era of complex procedural rules and stringent appellate scrutiny, Patterson's fourth trial was as much a mockery as his third and much more so than his second.

By JAMES R. ACCARDI



Judge James Edwin Horton, Jr.



Clarence Lee Watts

Yet, out of the dark shadow cast by the Scottsboro debacle, two members of the Alabama bar emerged as courageous—almost heroic—figures: Judge James Edwin Horton, Jr. of Athens and Clarence Lee Watts of Huntsville. Neither man sought participation in the proceedings. Each had followed his conscience and sense of ethical duty and was rewarded, in differing amounts, with the harsh sting of public reprobation.

James Edwin Horton, Jr. was a native of north Alabama, the "descendant of pioneers, planters, politicians and Confederates." Educated at Vanderbilt and Cumberland universities, he was classically trained and well versed in literature, history, Greek and Latin. After engaging in a successful law practice and serving with distinction in the state Legislature, Horton was appointed to fill the unexpired term of Judge William Simpson, chancellor of the northern chancery division. He returned to his practice after his seat on the bench was abolished in the 1915 judicial reorganization which created the circuit court system. Horton ran for the circuit judgeship in 1922 and was elected; he was reelected in 1928 without opposition. A soft-spoken, even-tempered man, he was held in high regard by the citizens of Limestone County and the attorneys who practiced before him.

In March 1933, Judge Horton received the call that would alter the course of his public life. The Scottsboro defendants' first convictions had been overturned by the United States Supreme Court; Horton was informed that he had been selected to preside over the second trial in Decatur.

The judge accepted his assignment matter-of-factly, acutely aware of the public scrutiny and prejudice which had attended the Scottsboro trial, yet determined that the Morgan County proceeding would be fair. Described by historian Dan T. Carter as generally "calm and unruffled", he ruled with an even-handedness that impressed even Haywood Patterson's New York attorney, Samuel Leibowitz. The judge, according to his son, Ed Horton, began the trial feeling "as did most Alabamians, that the defendants were probably guilty." Before the proceedings had concluded, however, he had completely changed his mind. After Patterson was again convicted and sentenced to

death, Horton, in the face of express and implied threats, granted a defense motion and ordered a new trial. Says Ed Horton, "He had neither a political nor social agenda [in granting the new trial]. It was purely a matter of law and conscience." The following year, he was unseated in the Democratic primary after having been removed from the case. He left law entirely, first working with TVA doing land acquisitions, then settling in as a cotton and cattle farmer in Limestone County. According to Horton's son, he lived the remainder of his long life with no regrets concerning his Scottsboro ruling. "He said once," Ed Horton says, "that if he *hadn't* ruled the way he did, he wouldn't have lived so long. He was comfortable with his decision [and his political fate] to the end."

The removal of Judge Horton from the Patterson case had not completely snuffed out his influence in the matter, however. After the defendant's third conviction was reversed by the supreme court for systematic exclusion of blacks from the jury venire, a fourth trial was docketed in Decatur. By this time, the Scottsboro Defense Committee, an incarnation of the socialist-oriented, New York organization devoted to the defense of the nine young men charged in the cases, had devised a new strategy regarding the defense team for Patterson's next trial. It had become obvious that, as talented an advocate as Samuel Leibowitz might have been, the fact that he was an outsider was proving to be more of a liability than an asset. Indeed, a major theme of the prosecution team throughout the second and third trials had been, in essence, "us" v. "them." Leibowitz was obviously from Brooklyn and a New York physician had been revealed to be a benefactor of surprise defense witness Ruby Bates (one of the alleged rape victims). As Dr. Allan Knight Chalmers, chairman of the SDC, observed, "...[a] Southern lawyer must be given the primary position with regard to strategy and appearance before the court." Judge Horton, when asked, recommended Clarence L. Watts of Huntsville.

Watts was a highly respected attorney with a reputation as a "lawyer's lawyer." Although characteristically conservative

in his political attitudes, he believed passionately in the equality of all people in the eyes of the law. A graduate of the Georgetown University School of Law, he was a family-oriented individual—he had five children and 13 grandchildren—and served as a church elder for most of his adult life. According to his son, William Park Watts, he lived a "long and exemplary life" and was an intellectual, admired and loved by many. He was, in summary, precisely what the SDC was looking for. As Dr. Chalmers noted, "...[the] lawyer that we were seeking had to be a local man of unquestioned public reputation, a believer in the boys' innocence, and willing to risk for a year's pay

the possibility that local hostility would outlast that year's pay...[w]e found such a man in C.L. Watts...."

Watts was immediately faced with a troubling ethical, moral and personal dilemma. Accepting a position on the defense team was sure to result in social and professional ostracism: there were many in the community who would have been delighted to have Patterson and several of his co-defendants whisked off immediately to die. Moreover, the SDC had clear ties with the Communist party and other groups not particularly popular in the country at the time. On the other hand, Watts believed Haywood Patterson to be innocent. In the end, this imperative out-

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weighed all the other considerations. He asked for, and was guaranteed, a sum of \$5,000; Watts clearly regarded this as more the professional insurance policy described by Dr. Chalmers than a legal fee. With Leibowitz reluctantly settled into an unfamiliar supporting role, the trial began.

It did not take long for Watts to learn that things were not going to change much because of his presence. During jury selection, the trial judge made several prejudicial remarks that seemed to indicate his impatience with the defense. When Victoria Price, Patterson's accuser, took the stand, the court refused to allow the defense to cross-examine her on facts now deemed to be highly relevant. As the trial wore on, the judge entered his own objections to evidence from the bench and, as Dan Carter notes, "made no attempt to conceal from the jury either his disgust with the defense attorneys or his contempt for their contentions...." Watts

struggled with the court's rulings and, at one juncture, moved for a mistrial on the grounds that the court's open and flagrant hostility had effectively denied his client a fair trial. The motion was denied by the judge and the trial continued.

In his closing argument, Watts introduced himself as a "friend and neighbor from Madison County." Speaking in a calm voice, he appealed to the jury's sense of logic and fair play. He attacked Mrs. Price's testimony and countered the prosecution's plea for the "protection of womanhood" with an urgent appeal for the "protection of the innocent."

Haywood Patterson, once again, was found guilty. However, this time the jury fixed his sentence at 75 years instead of death.

Watts would later participate in the defense of Clarence Norris, another of the Scottsboro defendants. Despite the efforts of Watts and Leibowitz, Norris

was found guilty and sentenced to death. At the conclusion of the trial, obviously beaten down by the stress and pressure, Watts rose from his chair and announced that he was too ill to continue. Compromises were eventually arranged with respect to a number of the Scottsboro cases; Watts remained disillusioned and disheartened by what he felt had been a complete failure of justice.

Clarence Watts co-founded the firm that eventually was to become Watts, Salmon, Roberts, Manning & Noojin (which recently merged with Lange, Simp-

son, Robinson & Somerville). He was an active member of the state and local bar associations, and served a term as a state bar commissioner and as president of the Huntsville Bar Association. He died in 1963 after a long life and productive legal career.

History, with much justification, has looked upon the Scottsboro cases with a disapproving eye. Obviously, the fact that the various defendants were denied due process for so long certainly is a sad commentary on the system. In addition, the cases reflect very poorly on the quality of justice available to black defendants in Alabama during the period. More than one historian has used the term "tragic" to describe the prosecutions and their aftermath.

Out of tragedies, however, emerge heroic figures; the Scottsboro cases are not exceptions. Among the individuals who took courageous stands for justice and fair play, at great personal risk, were Judge James Horton, Jr. and Clarence Watts. Watts stated it well in his closing argument in the Patterson trial, "It takes courage to do the right thing in the face of public clamor for the wrong thing...."

These two men serve as shining exemplars for all members of the bar. Each ignored the "public clamor" and faithfully and courageously executed their respective duties. Moreover, they did so without any expectation of being rewarded by history.

It is precisely for these reasons that we should remember them. ■

The author relied upon materials researched and prepared by Dr. William P. Watts; a conversation with Ed Horton, III; *James Edwin Horton, Jr., Scottsboro Judge* (a thesis by Gillian White Goodrich[1974]); *Scottsboro: A Tragedy of the American South*, by Dan T. Carter (LSU Press, 1969); and *"A Reasonable Doubt"* by Dan T. Carter (1968). Footnotes have been omitted, but quotes used are attributable to these sources.

James R. Accardi

James R. Accardi received his undergraduate degree from the University of North Alabama and his law degree from the University of Alabama School of Law. He is the deputy district attorney for Madison County, and the author of two books of satirical essays, *The Abridged Significant Historie* and *Amber Aspects*.



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• M • E • M • O • R • I • A • L • S •



**Samuel McCoy
Johnston, Jr.**

Whereas, the Mobile Bar Association notes with regret the death in Mobile on April 18, 1993 of member Samuel McCoy Johnston, Jr.

Now, therefore, be it resolved that Sam, as he was affectionately known, was born in Mobile and educated in Mobile public schools. From 1942-46,

he served in the United States Army Signal Corps, being separated as a captain. In 1946, he married June Crowell. In 1949, he obtained his law degree from the University of Alabama School of Law and commenced his career in the law, serving as an assistant circuit solicitor. In January 1950, he joined his father, Sam Johnston, and his brother, Bill Johnston, in the private practice of law, specializing in corporate law and utility regulation.

He distinguished himself by serving his profession and his community in many admirable ways. He was a life-long member of Dauphin Way United Methodist Church. He was one of the founding members of the Mobile Chapter of the University of Alabama Red Elephant Club. He was a member of the board of directors of several Mobile companies, serving also as secretary and general counsel for Mobile Gas Service Corporation. He served as second vice-president of the Alabama

State Bar on two occasions, and he was a member of the board of bar commissioners for 18 years.

Upon his death, he was a partner in the firm of Johnston, Wilkins, Druhan & Holtz. One of his partners, upon his passing, commented, "He was one of the most positive and happy people I've ever met. He appreciated everybody he's been around. He was just remarkable in that sense. He never had anything bad to say about anyone."

Sam Johnston was a devoted husband and father whose loss is felt keenly by all who knew him. He is survived by his sister, Annie Ruth Foshee of Houston, and three sons, James C. Johnston, Carter U. Johnston and Joseph S. Johnston, of Mobile. Both Jim and Rusty are practicing lawyers with Johnston, Wilkins. He also left six grandchildren and other relatives.

*Thomas E. Bryant, Jr.
President, Mobile Bar Association*

Franklin James Allen, II

Boaz

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Died: June 14, 1993

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Mobile

Admitted: 1938

Died: June 24, 1993

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Tuscaloosa

Admitted: 1930

Died: February 11, 1993

Lawrence Dumas, Jr.

Birmingham

Admitted: 1932

Died: June 11, 1993

George Mortimer Harrison

Dothan

Admitted: 1934

Died: May 23, 1993

Luther Lister Hill

Montgomery

Admitted: 1961

Died: July 15, 1993

Samuel McCoy Johnston, Jr.

Mobile

Admitted: 1949

Died: April 18, 1993

James Mac Jones

Montgomery

Admitted: 1934

Died: April 8, 1993

Olen Hill Pate

Gordo

Admitted: 1936

Died: February 20, 1993

John Howard Perdue, Jr.

Vestavia Hills

Admitted: 1936

Died: March 10, 1993

Edward Harris Reynolds, Jr.

Notasulga

Admitted: 1943

Died: May 6, 1993

Marshall Herbert Sims

Birmingham

Admitted: 1961

Died: May 3, 1993

Christopher Michael West

Huntsville

Admitted: 1988

Died: May 30, 1993

Douglas Percy Wingo

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Admitted: 1924

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