# The Alabama Lawyer

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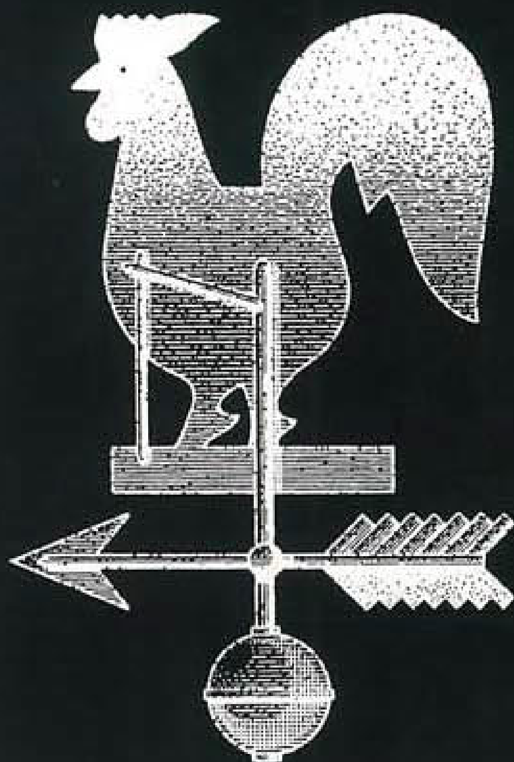

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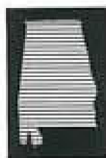

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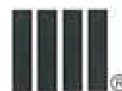

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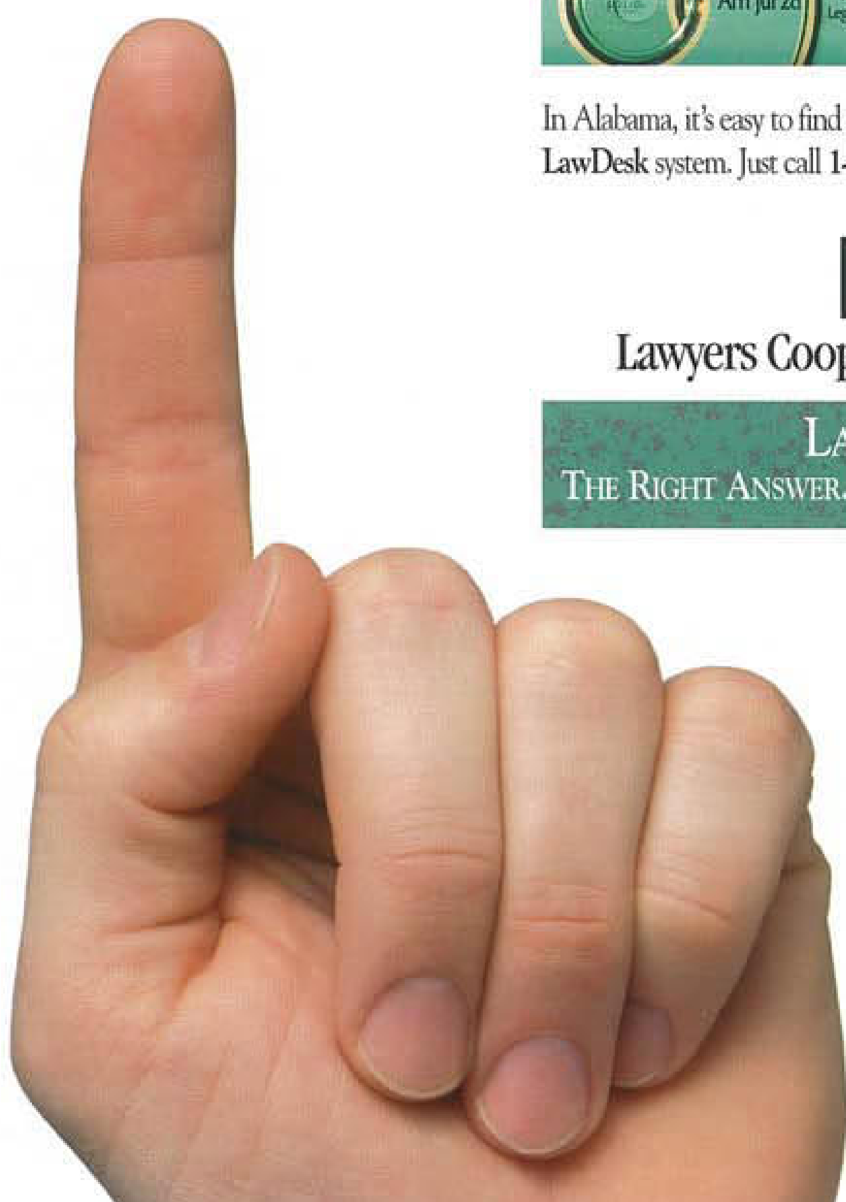

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# IN BRIEF

September 1995 Volume 56, Number 6

## ON THE COVER:

On the cover are Alabama State Bar 1995-96 President John Arthur Owens and his wife, Dorothy Terry Owens, of Tuscaloosa. The Owens are pictured in front of the President's Mansion at the University of Alabama. The mansion was built in 1841; on April 4, 1865, it was saved from the flames of Croxton's Raiders by President Garland's wife. Union soldiers had already set fire in the mansion when she arrived. She not only backed them down, she also required them to help put out the flames they had started. "This mansion epitomizes Tuscaloosa's rich history, culture, charm and 'grit,'" says Owens.
*— Photo by Crosby Thomley Photography, Tuscaloosa*

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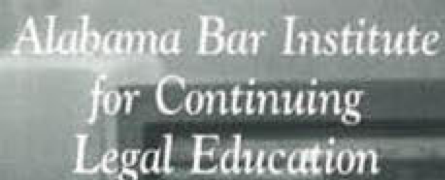


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# A TRIBUTE TO OUR BAR

I am honored, proud, humbled and somewhat awed to have assumed office as the 119th president of the Alabama State Bar. There is a list of past presidents on page 248 of the *Alabama Bar Directory* of the Alabama State Bar and I commend it to your perusal. If I began listing any past presidents because of their outstanding accomplishments I would err by omitting others with equal or greater accomplishments. It is a tribute to our bar to have been served by these outstanding past presidents over our 116-year history (that there are 118 presidents for the 116 years is because two—1883-1884 and 1981-1982—did not complete their terms and a second individual served part of those years).

From my own county of Tuscaloosa there have been eight prior presidents. I have done some research into the history of each, but space does not permit more than a recitation of their names. Most of these family names will be familiar to anyone who has practiced law in Tuscaloosa for very long at all: Archibald Bruce McEachin, 1891-1892; Andrew Coleman Hargrove, 1892-1893; J. Manly Foster, 1918-1919; Bernard Harwood, 1929-1930; John D. McQueen, Sr., 1932-1933; Devon K. Jones, 1941-1942; Walter P. Gewin, 1958-1959; and Hugh W. Roberts, Jr., 1978-1979. All are deceased except Hugh Roberts. Hugh enjoys retirement as a gentleman farmer in Tuscaloosa County, his mind as keen and his wit as sharp and dry as ever.

**John A. Owens**

Tuscaloosa has a strong bar and apparently always has. I am thankful for and proud of the support I received from its members when I decided to seek this office, most especially the support of my current firm, Owens & Carver, and my former firm, Phelps, Owens, Jenkins, Gibson & Fowler.

In May, I had the enjoyable but sometimes frustrating experience of making the appointments to the bar's 39 committees and task forces. I worked closely with Ed Patterson, Diane Weldon, and many other individuals on the state bar staff in this effort. I am constantly amazed at the quality of the staff Reggie Hamner and Keith Norman have assembled. I am extremely impressed by their dedication and knowledge of their jobs. Reggie told me once that it was his hiring philosophy to surround himself with people smarter than he was. I will not comment on that but whatever the philosophy was — it worked.

Through this effort we made 278 new appointments to the committees and task forces and continued 548 individuals' tenure on these committees and task forces. This means that we have 826 members of our state bar working on these 39 committees and task forces. The frustrating part was that 624 members submitted preference cards and it was not possible to appoint all of these to the committees without expanding beyond the size we felt workable. We did expand several committees and task forces — especially the Alternative Dispute Resolution Committee (the most popular choice) to try and accommodate more members who volunteered to serve. It is highly gratifying to see the extent of the interest that so many of our lawyers have in volunteering to work within the bar.

Over one-third of our lawyers (and lawyers nationally) are solo practitioners. According to the American Bar Association 48 percent of all lawyers in the United States are in firms of five or fewer lawyers. Of lawyers over age 39 the figure in firms of five or fewer rises to 70 percent of the total. In our own bar we define a "small firm" as seven or fewer and roughly 70 percent of our members are in such firms. Consequently, President Holmes formed a task force on solo and small firm practitioners under the able leadership of Paul A. Brantley of Montgomery. I have continued this task force with Paul as its chair and appointed Harold Albritton of Andalusia as its vice-chair. I have charged it with two new responsibilities. The first is to review the highly successful North Carolina and Georgia management assistance program, gather information on other similar programs and report early in the bar year on whether such a program is needed and feasible in Alabama and, if so, to work to implement the same. North Carolina and Georgia have

*Continued on page 266*

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*Continued from page 264*

employed individuals who are knowledgeable management consultants on the state bar staff. They are available at reasonable costs to go into solo offices and small firms, assist them with all aspects of management (computerization, case management, time keeping, scheduling, billing, accounting, docketing, time management, file systems, etc., etc.). They are also available for telephone advice, provide helpful publications and information all designed to assist solo and small firm practitioners in serving their clients more efficiently and more profitably and, at the same time, lessening the possibility of malpractice claims and grievances. Hal Albritton has undertaken to serve as head of this subdivision of the task force.

Toward the same end (helping lawyers better serve their clients and themselves), many state and local bars have formed mentoring programs with varying structures. These function roughly like the idea of a big brother or big sister in fraternities and sororities. They seek to place an older more experienced lawyer with a young lawyer for advice, counseling, etc., i.e. mentoring. I have given the same task force the job of studying various programs around the country, determine if the same is needed and feasible in our state, if so, which form. If the decision is to implement the same, then they will work toward that end. Allen R. Stoner of Montgomery has volunteered to head this aspect of the work of the task force.

I have created a new task force on fee dispute resolution. Rodney Max of Birmingham and Woody Sanderson of Huntsville have agreed to co-chair this task force. Presently many grievances are filed with the Alabama State Bar which are automatically rejected because they are not in fact "grievances" at all but a fee dispute. Members of the public who are unhappy with their attorney over fees don't necessarily recognize the distinction between unethical conduct which gives rise to a grievance and a conflict over the amount of a fee. Consequently, many states have established some form of mechanism to handle such disputes within the bar therefore generally helping both the lawyer and the unhappy client. Some programs are mandatory, some are voluntary. I have charged the task force with the primary responsibility of studying such programs, making a recommendation as to whether such a program is needed and feasible in Alabama and if so, which program, and if approved to implement the program. As a secondary, but equally important function, I have asked this task force to study the Consumer Assistance Program of the Mississippi Bar. This program (as are fee dispute resolution programs) is aimed at resolving differences between clients and attorneys before they reach the stage of a grievance or a lawsuit. A staff person answers a consumer hotline within the Mississippi Bar and attempts to reconcile conflicts between attorneys and clients in a fast, informal and helpful way. The Mississippi Bar is quite pleased with their results. The fee dispute resolution task force will study this and other similar programs, make a recommendation as to whether such is needed and feasible in Alabama, and, if so, the form. If approved, they will implement the program.

Obviously I have a bias toward these programs in that I think that, most probably, they are all needed. I hope that they are all feasible and if so that we can get some or all of them enacted and up and running during the coming year.

By focusing on these new programs I do not want to ignore the important ongoing work of the many other committees and task forces, and I plan to use future articles to spotlight these efforts. Broox Holmes sounded a team of unity to reunite the bar and to try and minimize the fractionalization we've experienced. I will continue to work hard at this effort.

I look forward to my year of service to your bar as its president. I am already gratified by the encouragement and support that I have received from the members of the board of bar commissioners, chairs and co-chairs of the committees and task forces, the bar staff, and many, many other lawyers and judges throughout the state. I am happy to report that not one lawyer or judge has failed to return my call made as president-elect of the Alabama State Bar and I am confident that this will continue to be the case as president.

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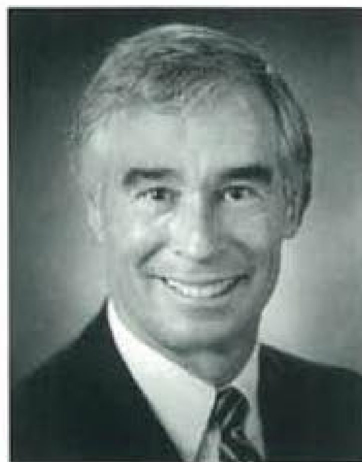
# PROFILE

# Warren Bricken Lightfoot

***Pursuant to the Alabama State Bar's rules governing the election of president-elect, the following biographical sketch is provided of Warren Bricken Lightfoot. Lightfoot was the sole qualifying candidate for the position of president-elect of the Alabama State Bar for the 1995-96 term, and became president-elect on July 22, 1995.***

Born on August 21, 1938, Warren Lightfoot grew up in Luverne, Alabama, where he graduated from Luverne High School in 1956. He thereafter attended The Citadel in Charleston, South Carolina, from 1956-1958, received his undergraduate degree from the University of Alabama in 1960, and graduated from the University of Alabama School of Law in 1964. A member of Phi Beta Kappa and Jasons, he also served as president of Omicron Delta Kappa and Phi Delta Phi legal fraternity and as leading articles editor of *The Alabama Law Review*. From 1960 to 1962, Lightfoot was on active duty in the United States Army. An infantry officer and paratrooper, he served as a company commander from 1961-1962.



**Warren Bricken Lightfoot**

Following graduation from law school in 1964, Lightfoot practiced law with Bradley, Arant, Rose & White for 25 years, until January 15, 1990, when he and seven other partners formed Lightfoot, Franklin & White, now a 28-lawyer litigation firm in Birmingham.

Lightfoot was elected president of the Young Lawyers' Section of the Birmingham Bar in 1969, served on the city bar's Executive Committee from 1970 to 1972, and was elected president of the Birmingham Bar Association in 1991. He was Jefferson County's sole bar commissioner from 1979 to 1985, was a founding member of the MCLE Commission in 1982 and served on the Alabama State Bar Executive Committee in 1979. During the first six years of MCLE, from 1982 to 1988, he gave over 45 presentations to and on behalf of various bar groups, and in recognition for those efforts received the Alabama Bar Institute's 1988 Walter P. Gewin Award for Outstanding Service to Bench and Bar in Continuing Legal Education. In 1994, he became the first president of the Birmingham Bar Foundation, and currently is a member of the Board of Trustees of the Alabama Law School Foundation.

He is a Fellow of the American College of Trial Lawyers and has been a member of its state committee since 1992. He also is an Advocate of the American Board of Trial Advocates, is a member of the International Association of Defense Counsel, and has been listed in *Best Lawyers In America* since 1983.

Lightfoot chaired the Advisory Committee to the United States District Court for the Northern District of Alabama from 1988-1990 and presently is a member of the 11th Circuit's Lawyers Advisory Committee. He served as co-chair of the program committee for the 11th Circuit Judicial Conferences of 1994-1995.

Lightfoot was a charter member of Leadership Birmingham (1983-1984) and served on its faculty in 1986. A past president of the Birmingham Kiwanis Club, he also served in 1991 as president of the Civic Club Foundation, which owns the Harbert Center in downtown Birmingham. Lightfoot was an elder at Independent Presbyterian Church from 1972-74 and 1978-79, and has frequently been an adult Sunday School teacher there during the last 20 years. He is currently serving as chairman of Independent's Board of Trustees, and he was a trustee of the Presbyterian Home for Children in Talladega from 1987 to 1993.

Lightfoot has been married since 1963 to the former Robbie Cox of Birmingham, and they have two children: a daughter, Ashley, who is a branch manager for AmSouth Bank in Birmingham, and a son, Warren, Jr., who practices with Maynard, Cooper & Gale in Birmingham and whose wife, Valerie, is an investment consultant with Highland Associates. ■

**Notice**

**Alabama Rules of Evidence**

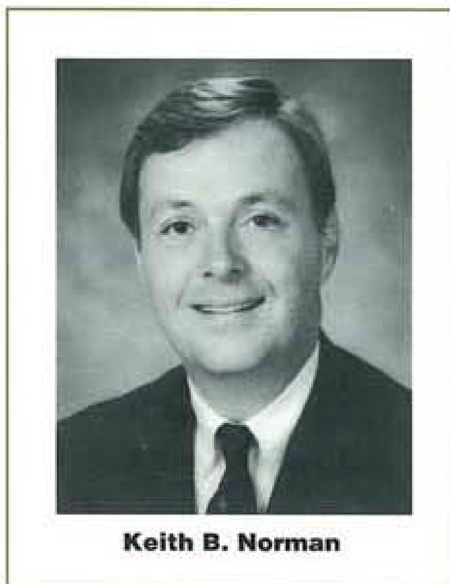
The Alabama Supreme Court on July 19, 1995, issued an order adopting Alabama Rules of Evidence. Those rules become effective January 1, 1996. They are to be published in a So. 2d Advance Sheet dated on or about August 10, 1995. They also should be available on the LEXIS and Westlaw services and on the State Law Library's ALALINK bulletin board service.

**George Earl Smith**
**Reporter of Decisions**
**Alabama Appellate Courts**

# THE SIX MILLION DOLLAR GIFT

With the new bar year underway, I decided to determine the value of time contributed by bar members participating in various state bar activities. Not only do the regulatory and licensing functions of the bar require strong volunteer support, but so do the bar's other programs that benefit the profession and the public.

For the 1995-96 bar year, some 900 lawyers will be serving on the bar's 39 committees and task forces. I estimate that through committee and task force work, lawyers will contribute approximately 18,000 hours by attending meetings, traveling to meetings, and carrying out committee or task force activities. Interestingly, this total reflects only an average contribution of two hours per month for ten months (September through June), or 20 hours per volunteer. I believe that this average contribution figure takes into account that all committees and task forces will not meet the same number of times as well as the fact that not all committee or task force members are always able to attend meetings or work on a particular project. What is especially gratifying about committee and task force service is the fact that more than 700 bar members volunteered this year and there were only 200 vacant positions.


**Keith B. Norman**

The 1,600 lawyers participating in the Volunteer Lawyers Program (VLP) who have volunteered to provide 20 hours of *pro bono* legal work will account for approximately 32,000 service hours statewide. Although I assumed that all 1,600 would contribute 20 hours, not all will receive a referral and some will contribute more than the 20-hour minimum handling their assigned *pro bono* cases. I am sure the VLP will continue to grow with even more lawyers joining the ranks of other VLP lawyers.

The lawyers who have been elected as officers of the state bar and those elected from the state's 40 judicial circuits to serve on the board of commissioners will be contributing their time in several capacities. For example, as a member of the commission, each of the 60 members and officers will attend at least eight board meetings during the year. Counting travel time, attendance time and preparation time for handling matters at each meeting, each commission member will average approximately ten hours per meeting and devote a total of 80 hours per year to commission business for a total of 4,800 hours of service. This does not include the additional time required of the state bar president in carrying out the responsibilities of that office.

In addition to board meetings, many commissioners serve on disciplinary panels that hear charges which are pending against attorneys. These panels decide what, if any, violation has occurred as well as the appropriate punishment for a violation of the rules of professional conduct. There are a total of five disciplinary panels which consist of four commission members and one layperson. On an average, each panel has ten hearings during the year. Including travel time and hearing time, I estimate that each hearing accounts for approximately seven hours of a panel member's time, or a total of 1,400 hours for the 20 bar commissioners who serve on the disciplinary panels.

The other area that requires an additional commitment of time by commission members is the Disciplinary Commission. The Disciplinary Commission is composed of five commission members who review approximately 700 grievances a year to determine if there are sufficient grounds to prefer charges against the named attorney. During the course of a year, a commission member will generally average spending 14 hours a month or 140 hours a year, devoted solely to Disciplinary Commission matters. For the entire Disciplinary Commission, this represents 840 hours of service.

The final area is the hours contributed by those lawyers who serve as members of the board of bar examiners. There are 12 examining members and one non-examining chairperson who conducts the affairs of the bar examiners. The bar examiners not only grade the written examinations that are given in February and July of each year, they also have to prepare the questions and model answers. Bar examiners serve four-year terms. With almost 850 people sitting for the February and July examinations each year, and an average of 15 minutes spent by an examiner grading each exam (this includes time that was spent in the initial preparation of drawing the question and model answer), each examiner contributes 207 hours per year for total of 2,697 hours for the entire board.

*(see chart on next page)*

Assuming that the average hourly rate in Alabama is $100, these service hours represent a contribution by lawyers in this state of $5,973,700! While I realize the service hour totals are a "best guess", it is probably a figure that is too low rather than too high because I took steps to be very conservative in my "guestimating" the time which lawyers actually spend in performing the activities in the six named areas of service. Indeed, a host

**To recap:**

| | |
|---|---|
| 1. Committees and Task Forces | 18,000 hours of service |
| 2. Volunteer Lawyers Program | 32,000 hours of service |
| 3. Board of Bar Commissioners | 4,800 hours of service |
| 4. Disciplinary Panels | 1,400 hours of service |
| 5. Disciplinary Commission | 840 hours of service |
| 6. Board of Bar Examiners | 2,697 hours of service |
| total service hours | 59,737 |

of other state bar related groups did not figure in the calculation, including service through the bar's 19 sections and the Alabama Law Foundation. While some people may take issue with my figures, one thing is for certain: the figure of $6,000,000 represents only a portion of the altruistic service which lawyers in Alabama perform. Examine the rosters of every charitable organization or worthwhile cause in this state and I believe that you will find more members of the legal profession offering their time and talent than any other profession. I do not think this is an accident. I believe it represents a commitment to service and professionalism by lawyers. If, as Abraham Lincoln observed many years ago, a lawyer's time is his stock and trade, I would suggest that a lawyer's *service* is a *gift* of time that comes from a limited inventory. ■

# A FOND FAREWELL

With no small sense of sadness, we say farewell to our colleagues Bob Norris and Melinda Waters. Since 1988, Bob served as general counsel, while Melinda directed the Volunteer Lawyers Program since its inception in 1991. Both have served the bar admirably, leaving behind an indelible impression and shoes that will be difficult to fill. Bob has returned to his hometown of Birmingham to enter private practice. Melinda is the new executive director of Legal Services Corporation of Alabama.

*Melinda and Michael Waters*

Bob joined the bar staff following his retirement from the United States Air Force where he had achieved the rank of major general and served as judge advocate general. Upon assuming the general counsel's position, Bob faced a backlog of grievances pending before the local grievance committees and at the Center for Professional Responsibility. To address this problem he implemented a number of administrative measures and staff assignment changes to make the disciplinary process more streamlined and efficient. Moreover, under his guidance significant strides were made in the areas of professional responsibility and discipline by virtue of the adoption of the new Rules of Professional Conduct, Alabama Standards for Imposing Lawyer Discipline and the Rules of Disciplinary Procedure which also included provisions for lay members to serve on disciplinary panels.

*Martha and Bob Norris*

Melinda became director of the VLP at a time when a statewide *pro bono* network was but a vision. She took what was basically an idea and transformed it into a viable and functioning network of attorneys that now numbers 1,600 and is growing. Melinda accomplished this remarkable feat in a relatively short period of time and has created a program that uses the talents of private lawyers to meet the civil legal needs of many of Alabama's poor citizens.

I personally thank Bob and Melinda for their dedication to the Alabama State Bar. The staff, commissioners and officers of the bar will miss them and we wish them well in their new endeavors. ■

# ABOUT MEMBERS, AMONG FIRMS

## ABOUT MEMBERS

**Twala Grant Wallace** announces the relocation of her office to 2000 First Avenue, North, Suite 215, Brown Marx Tower, Birmingham, Alabama 35203. Phone (205) 322-5077.

**William Eric Colley,** formerly of Charles A. McGee & Associates, announces the opening of his office at 202 4th Street, SW, Fort Payne, Alabama 35967. The mailing address is P.O. Box 1045, Fort Payne 35967. Phone (205) 845-8101.

**DeeAnn R. Truelove** has been appointed district judge of Sumter County. The mailing address is P.O. Box 9, Livingston, Alabama 35470. Phone (205) 652-7364.

**Russell T. Duraski** announces the opening of his office at 1038 Woodley Road, Montgomery, Alabama. The mailing address is 377 Avon Road, Montgomery 36109. Phone (334) 244-2058.

**Russell C. Balch** announces the opening of his office at 2101 Executive Park Drive, Opelika, Alabama 36801. Phone (334) 745-3933.

**Anna Lee Giattina** announces the formation of **Mediation Solutions, Inc.** Her law practice will continue under the name of **Anna Lee Giattina.** The mailing address is P.O. Box 59486, Birmingham, Alabama 35259. Phone (205) 328-9111.

**C. Brandon Sellers, III** announces the relocation of his office to 415 E. Commerce Street, Greenville, Alabama 36037. The mailing address is P.O. Box 432, Greenville 36037. Phone (334) 382-6907.

**George E. Jones, III,** former deputy attorney general of Alabama (1993-94) and assistant attorney general of Alabama (1988-1993), announces the opening of his office at the Bell Building, 207 Montgomery Street, Suite 922, Montgomery, Alabama 36104. Phone (334) 265-3822.

**Mark A. Sanderson** announces the opening of his office at 402 S. Cedar Street, Florence, Alabama. The mailing address is P.O. Box 311, Florence 35630. Phone (205) 760-8759.

**Timothy K. Corley** announces the opening of his office at 600 Suntrust/First National Building, 201 S. Court Street, Florence, Alabama 35630. Phone (205) 760-0048.

**Romaine S. Scott, III** announces the opening of his office at 500 Park Place Tower, 2001 Park Place, North, Birmingham, Alabama 35203. The mailing address is P.O. Box 370166, Birmingham 35237-0166. Phone (205) 322-2500.

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

**Vicki A. Bell**, formerly of Stephens, Millirons, Harrison & Williams, announces the opening of her office at 200 W. Court Square, Suite 752, Huntsville, Alabama 35801. Phone (205) 533-4491.

**Betsy E. Berman** announces the relocation of her office to 699 Gallatin Street, Suite C-1, Huntsville, Alabama 35801. Phone (205) 539-0201.

**John G. Scherf, IV** announces the opening of his office at 2122 First Avenue, North, Birmingham, Alabama 35203. Phone (205) 324-9991.

**John Eric Burnum,** formerly of Rogers & Alexander, announces the opening of his office at 14414 Court Street, Moulton, Alabama 35650. Phone (205) 974-7087.

## AMONG FIRMS

**Katherine McKenzie Thomson** has been promoted to counsel at **American General Life and Accident Insurance Company.** Offices are located in Nashville, Tennessee. Thomson is a 1991 admittee to the Alabama State Bar.

**Thomas L. Read** announces his appointment to assistant general counsel for the

## McLAIN APPOINTED TO THE POSITION OF GENERAL COUNSEL

J. Anthony McLain has been appointed to the position of general counsel for the Alabama State Bar. Tony replaces General Robert W. Norris, who served as general counsel for seven years and retired August 1, 1995.

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

**Tony McLain**

**Federal Bureau of Prisons.** The mailing address is Office of General Counsel, 320 First Street, NW, Washington, DC 20534. Phone (202) 307-3872. Read is a 1988 admittee of the Alabama State Bar.

**Thomas D. Samford, III, Auburn University's** general counsel and primary legal advisor since 1961, retired June 30, 1995. Samford is a 1961 admittee to the Alabama State Bar.

**Harold F. Herring, Richard E. Dick, Michael K. Wisner** and **H. Carey Walker, III** announce the formation of **Herring, Dick, Wisner & Walker. Charles P. Helms, Jr.** has become an associate. Offices are located at 100 Washington Street, Suite 200, Huntsville, Alabama 35801. Phone (205) 533-1445 and (205) 534-4343.

**McGowen & McGowen** announces that **Aubrey J. Holloway, Jr.** has become a member. Offices are located at Cobb Building, 924 Montclair Road, Suite 116, Birmingham, Alabama 35213. Phone (205) 595-8209.

**Tingle, Watson & Bates** announces that **Edwin O. Rogers** and **Mark T. Waggoner** have become associated with the firm. Offices are located at 900 Park Place Tower, 2001 Park Place, North, Birmingham, Alabama 35203-2759. Phone (205) 324-4400.

**Beasley, Wilson, Allen, Main & Crow** announces that **P. Leigh O'Dell** and **Joseph G. Stewart, Jr.** have become associates. Offices are located at 218 Commerce Street, Montgomery, Alabama. The mailing address is P.O. Box 4160, Montgomery 36103-4160. Phone (334) 269-2343.

**James C. King** and **Garve Ivey, Jr.**, formerly of Wilson & King, announce the formation of the **King & Ivey. Barry A. Ragsdale** has joined the firm as an associate in the Birmingham office, and **Clatus Junkin,** former circuit judge for Fayette, Lamar and Pickens counties, and **Charles E. Harrison** have joined the Fayette office. Associates in the Jasper office are **John E. Warren, III, Salem N. Resha, Jr., Gina L. Thomas, David M. Harrison,** and **Elizabeth Kelley**. Offices are located in Birmingham, Fayette and Jasper, Alabama.

**C.O. Burkhalter** announces that **Allison B. Anderson** has become an associate. Offices are located at 107 Second Avenue, NE, Gordo, Alabama 35466. The mailing address is P.O. Box 223, Gordo 35466. Phone (205) 364-7183.

**McRight, Jackson, Dorman, Myrick & Moore** announces that **Bradley R. Byrne** has become a partner and **William T. McGowin, IV** and **Randall Scott Hetrick** have become associates. Offices are located at the First Alabama Bank Building, 11th Floor, 106 St. Francis Street, Mobile, Alabama. The mailing address is P.O. Box 2846, Mobile 36652. Phone (334) 432-3444.

**Gonce, Young & Westbrook** announces a name change to **Gonce, Young & Sibley. Melissa A. Moreau** and **David A. Tomlinson** have become associates. Offices are located at 109 N. Court Street, Florence, Alabama 35630. Phone (205) 767-7411.

**R. Michael Raiford** announces that **Richard L. Chancey** has joined the firm as an associate. Offices are located at 502 14th Street, Phenix City, Alabama 36867. Phone (334) 297-6478.

**M. Douglas Ghee** announces the dissolution of Ghee & Giddens and that **G. Rod Giddens'** new mailing address is P.O. Box 1066, Talladega, Alabama 35160.

**Hogan, Smith & Alspaugh** announces that **David R. Donaldson** and **David J. Guin,** both formerly with Ritchie & Rediker, have joined the firm as members. Offices are located at 2323 2nd Avenue, North, Birmingham, Alabama 35203. Phone (205) 324-5635.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**McDonnell Dyer** announces that **Rosemary Clark** has become an associate. Offices are located in Memphis, Nashville and Knoxville, Tennessee. Clark is a 1990 admittee to the Alabama State Bar.

**Gillion, Brooks & Hamby** announces the relocation of its offices to 618 Azalea Road, Mobile, Alabama 36609. The mailing address is P.O. Box 161629, Mobile 36616. Phone (334) 661-4118.

**Foley & Mahmood** announces a name change to **Foley, Smith & Mahmood** and that **Robert Sellers Smith** has become a member. Offices are located at 101 Northside Square, Huntsville, Alabama 35801. Phone (205) 536-8877.

**Smitherman & Smitherman** announces the relocation of their offices to 2029 2nd Avenue, North, Birmingham, Alabama 35203. Phone (205) 322-0012.

**Berkowitz, Lefkovits, Isom & Kushner** announces that **A. Lee Martin, Jr.** has become a member and that **Judy P. Hamer** has become an associate. Offices are located at 1600 SouthTrust Tower, Birmingham, Alabama 35203-3204. Phone (205) 328-0480.


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**Walker, Hill, Adams, Umbach, Meadows & Walton** announces that **Robbie Alexander Hyde**, formerly of Dominick, Fletcher, Yielding, Wood & Lloyd, has become an associate. Offices are located at 205 S. 9th Street, Opelika, Alabama. The mailing address is P.O. Drawer 2069, Opelika 36803-2069. Phone (334) 745-6466.

**Langston, Frazer, Sweet & Freese** announces that **Richard A. Freese** has joined as a principal in the Birmingham office. Offices are located in Jackson, Mississippi and Birmingham, Alabama.

**Lightfoot, Franklin, White & Lucas** announces that **William R. Lucas, Jr.** has resigned from the firm to become executive vice-president and general counsel of **Birmingham Steel Corporation.** The firm's new name will be **Lightfoot, Franklin & White.**

**Veal & Associates** announces that **Sandra Gooding Marsh** has become a partner and the firm's name has changed to **Veal & Marsh.** Offices are located at 2001 Park Place Tower, Suite 525, Birmingham, Alabama.

**Charles McKinney & Associates** announces that **Marva Owens-James** has become an associate. Offices are located in Dayton and Middletown, Ohio. Owens-James is a 1992 admittee to the Alabama State Bar.

**George H. Wakefield, Jr.** and **Frederick T. Enslen** announce the relocation of their offices to 6825 Halcyon Park Drive, Montgomery, Alabama 36117. Phone (334) 244-7333.

**Borden Martin Ray, Raymond E. Ward, Thomas W. Powe, Jr., Borden Martin Ray, Jr.,** and **Richard R. Newton** announce the formation of **Ray, Oliver & Ward. Laura K. Gregory** has joined as a member. Offices are located at 2020 University Boulevard, Tuscaloosa, Alabama 35401. Phone (205) 345-5564.

**Buschman, Ahern & Persons** announces that **Jeffrey R. Bankston** has become a partner. The firm's new name is **Buschman, Ahern, Persons & Bankston.** Offices are located at 2215 S. Third Street, Jacksonville Beach, Florida 32250. Phone (904) 246-9994. Bankston is a 1988 admittee to the Alabama State Bar.

**Charles M. Thompson** and **A. James Carson** announce the formation of **Thompson & Carson.** Offices are located at 2838 Culver Road, Mountain Brook Village, Birmingham, Alabama 35223. Phone (205) 870-0570.

**Johnston, Barton, Proctor, Swedlaw & Naff** announces that **Bradley C. Mayhew** and **W. Jonathan Daniel** have become associates. Offices are located at 2900 AmSouth/Harbert Plaza, Birmingham, Alabama 35203-2618. Phone (205) 458-9400.

**Chris S. Christ** announces that **Marona Posey** has joined the firm as an associate. Offices are located at 205 20th Street, North, Suite 710, Birmingham, Alabama. Phone (205) 251-2700.

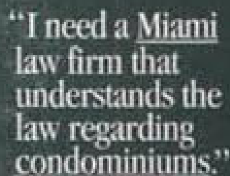
**Robert W. Hensley, Jr.** and **A. Patrick Ray, III** announce the formation of **Hensley & Ray**. Offices are located in Columbiana and Birmingham, Alabama.

**Daniel R. Klasing** and **Edward B. Strong,** formerly of Janecky, Newell, Potts, Hare & Wells, announce the formation of **Strong & Klasing.** Offices are located at 1314 Alford Avenue, Suite 101, Birmingham, Alabama 35226. Phone (205) 823-9393.

**Killion & Vollmer** announces that **Tracy S. Guice** has become an associate. Offices are located at 2513 Dauphin Street, Mobile, Alabama 36606. The mailing address is P.O. Box 8527, Mobile 36608. Phone (334) 476-5900.

**Teresa N. Ryder,** formerly of Dick & Wisner, has joined the firm of **Bradley P. Ryder** as *of counsel*. Offices are located at 100 Jefferson Street, Suite 300, Huntsville, Alabama 35801. The mailing address is P.O. Box 18095, Huntsville 35804. Phone (205) 534-3288.

**Jeffrey A. Cramer** announces that **Michael J. Schofield** and **John A. Unzicker** have become partners, and the firm will practice under the name of **Cramer, Schofield, Unzicker & Wade.** Offices are located in Pensacola and Jacksonville, Florida. Both Schofield and Unzicker are 1993 admittees to the Alabama State Bar. ■

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# Building Alabama's Courthouses

*By SAMUEL A. RUMORE, JR.*

# Mobile County Courthouse REVISITED

*The Alabama Lawyer* issue of July 1993 contained a feature on the Mobile County Courthouse. At the time that article was written, a new courthouse was being built. It is now completed and has opened for use.

The Thursday, January 26, 1995 edition of the *Mobile Press Register* contained a special insert celebrating the grand opening of the Mobile Government Plaza on January 27 and January 28, 1995. It reported that this facility is the only one of its kind in the United States because a county government, a city government, and a court system are all located under one roof.

The Plaza consists of a nine-story Courts Building, and a ten-story Administration Building connected by a 50,000-square-foot public atrium. Construction costs had been estimated at $58 million, but the final cost was approximately $500,000 under budget. The entire facility contains 581,000-square-feet.

Designers for the project were Houston architects Harry Golemon, who grew up in Mobile, and Mario Bolullo in association with Mobile architect Frederick C. Woods. Instead of one general contractor, the project had a construction management team consisting of a joint venture between the Hardin Construction Group, Inc. of Atlanta and the Haston Construction Company of Mobile.

*The author and his family*

Bids were broken down into 31 separate bid categories.

The atrium between the two buildings serves as the replacement for a traditional town square. It even contains a set of ceremonial granite courthouse steps that are used for speeches, concerts, or simply as a place for lunch. The building materials for the Plaza are basically glass, steel and granite.

The opening ceremonies took place in three phases on Friday, January 27, 1995. At 9 a.m. a ceremonial ribbon-cutting opening the facility took place at the Conception Street entrance. At 10 a.m. a judicial ceremony was held in the ceremonial courtroom. And at 11 a.m. the county and city governments officially opened the Administration Building.

The old Mobile County Courthouse will continue to house various county offices as well as the probate court. The Courts Building has courtrooms on levels two, four, six and eight. Support offices are located on levels three, five, seven and nine.

A ceremonial courtroom is located on the mezzanine level. In the administration building, the county has offices on levels six, eight, and ten. The city offices are located on levels two, three, four, five, nine, and ten.

A highlight of the opening ceremonies occurred on Saturday, January 28. A symposium took place in the ground floor auditorium on the building's merits as an example of modern architecture, and as a new concept in government building design. The public came to take part and ask questions of the panelists.

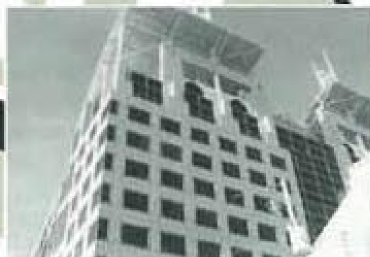
The architects were not surprised that their design has generated a variety of comments. This building is quite different from traditional buildings and invites interpretation. They hope that their state-of-the-art structure will be considered "modern" well into the next century.

The author acknowledges the assistance of Barbara Rhodes, executive director of the Mobile Bar Association, for material used in this update, and Birmingham attorney Harry Asman for the photographs of the new building.

**Samuel A. Rumore, Jr.**

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

PICK UP PHOTO July 95 Page 209



# BAR BRIEFS

• **Boyd F. Campbell** of the Montgomery firm of **Campbell Warner & McBryar** has been appointed chair of the **Immigration Law Committee** in the General Practice Section of the American Bar Association. Campbell was appointed to this position for a period of one year beginning at the conclusion of the annual meeting of the ABA in Chicago in August 1995, and ending at the conclusion of the annual meeting of the ABA in Orlando in August 1996.

• **James R. "Spud" Seale** of Montgomery was recently elected a Fellow of the **American Bar Foundation**. The Fellows is an honorary organization of attorneys, judges and law teachers whose professional, public and private careers have demonstrated outstanding dedication to the welfare of their communities and to the highest principles of the legal profession. Seale is a past president of the Alabama State Bar and the Southern Conference of Bar Presidents. He is on the board of directors of the Alabama Defense Lawyers Association, and is currently president of the Alabama Law Foundation. He was a member of the Alabama Disciplinary Commission from 1989 to 1992 and is a member of the Supreme Court Commission on Dispute Resolution. He is with the firm of **Robison & Belser**.

• **The Alabama Defense Lawyers Association (ADLA)** has been recognized as one of the outstanding defense bar groups in the United States by the 19,500-member Defense Research Institute (DRI), the nation's largest association of civil litigation defense lawyers.

DRI recently honored ADLA with its Exceptional Performance Award, citing "the association's dedicated efforts to advance the goals and objectives of the organized defense trial bar, including preservation of the civil jury and the promotion of fairness and balance in the civil justice system." Accepting the award was immediate past President **Richard P. Manley**, senior partner in the Demopolis firm of **Manley, Traeger & Perry**. ADLA has some 800-plus members throughout Alabama.

• Montgomery attorney **Steve Glassroth** was elected president of the **Alabama Criminal Defense Lawyers Association**, a statewide organization of lawyers representing citizens accused of criminal offenses, during the ACDLA's recent annual meeting. Glassroth is the principle in the firm of **Glassroth & Associates** and has been in practice for nearly 16 years.

Other elected officers for 1995-96 are **Everette Price** of Brewton, president-elect; **Rick Sandefer** of Birmingham, vice-president; **Dennis Knizley** of Mobile, secretary; **Tommy Nall** of Birmingham, treasurer; and **Mary Turner** of Tuscaloosa, vice-president/public defender position. Chosen as the organization's area vice-presidents are **John Mays**, Decatur; **John Lentine** and **Richard Jaffee**, Birmingham; **Richard Keith**, Montgomery; **Mike Dasinger**, Robertsdale; **Domingo Soto**, Mobile; and **Jim Parkman**, Dothan. The area vice-presidents serve as liaisons between the organization and the membership. ■

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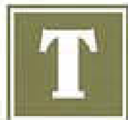
# Report on 1995 Midyear Meeting of the ABA House of Delegates

*By H. Thomas Wells, Jr., Birmingham, Alabama State Delegate*



The 1995 Midyear Meeting of the American Bar Association was held February 9-14, 1995, in Miami, Florida.

The 56th Midyear Meeting of the association marked several important milestones. Thirty years ago, under the leadership of then-ABA President Lewis F. Powell, the House of Delegates first endorsed the concept of federal funding to support the provision of legal services to the poor. At this meeting, the issue was the topic of much discussion as consideration of funding for the Legal Services Corporation was being considered by Congress. Also of note, attendees bid farewell to retiring executive director David J. A. Hayes, Jr. at a reception held Sunday evening that commemorated his 30 years of service to the ABA.

A subject of great discussion at this meeting was the recently released draft report of the Special Committee on Governance. The Special Committee has been engaged in an in-depth review of the governance structures and processes of the ABA for the last two years. The draft released in mid-January was the subject of an open hearing conducted on Sunday afternoon at the Midyear Meeting which was heavily attended. The committee's final report and recommendations will likely be the subject of much debate at the association's annual meeting in August in Chicago when the proposals will be considered in the form of amendments to the association's Constitution, Bylaws and House Rules of Procedure by the Assembly and the House of Delegates.

The House convened on Monday morning, February 13, with Martha W. Barnett of Florida taking her place as the first woman ever elected as chair of the House of Delegates.

The Nominating Committee convened on Tuesday morning and determined to nominate N. Lee Cooper of Birmingham as president-elect for a term beginning at the conclusion of the 1996 annual meeting. Donna C. Willard-Jones of Anchorage, Alaska was nominated as secretary-elect, and John A. Krsul, Jr. of Detroit, Michigan was nominated as treasurer-elect, both to assume those positions at the conclusion of the 1995 Annual Meeting. I had the distinct pleasure of placing Lee's name in nomination with the Nominating Committee, and of seconding John Krsul's nomination.

The House of Delegates is the legislative policy-making body of the American Bar Association which meets for two days during each midyear and annual ABA Meeting. The House is made up of delegates elected by state and local bar associations, based upon lawyer populations ("Bar Association Delegates"); delegates elected by the ABA members resident in each state ("State Delegates"); delegates of the various sections and divisions of the ABA; delegates from affiliated organizations; and assembly delegates elected at each annual meeting of the association by those registered members who attend that meeting.

The House acts on proposals ("Reports with Recommendations") brought before it by state and local bar associations, by ABA sections, divisions, commissions and committees, by individual delegates and by affiliated organizations. These proposals are often vigorously contested with extensive debate and considerable floor amendment. Resolutions approved by the House become ABA policy and may become the subject of ABA lobbying efforts in Congress and in other forums.

At the 1995 Midyear Meeting, the agenda of the House of Delegates contained more than 43 items with debate and voting on the various resolutions taking place on Monday, February 13, and Tuesday, February 14. A brief summary of the items on which action was taken at the meeting has been provided to the state bar, or is available from my office, phone (205) 254-1000.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**Vice-chair:**
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**Board of Bar Commissioners Liaison:**
Caine O'Rear, III, *Mobile*—694-6308

**LSCA Liaison:**
Melinda Waters, *Montgomery*—832-8570

**Young Lawyers' Representative:**
Linda Collins, *Mobile*—690-8400

**Staff Liaison:**
Edward M. Patterson, *Montgomery*— 269-1515

**Members:**
Anne W. Mitchell, *Birmingham*
Denise A. Copeland, *Abbeville*
John Mark Englehart, *Montgomery*
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Anita Lynn Archie, *Montgomery*
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Hugh M. Lee, *Tuscaloosa*
Linda L. Lund, *Dothan*
Katherine Elise Moss, *Huntsville*
Al L. Vreeland, *Tuscaloosa*
Robert D. Segall, *Montgomery*
Stanley Weissman, *Montgomery*
Shelbonnie Coleman-Hall, *Mobile*
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Spencer Brent Walker, *Grove Hill*
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Charles L. Miller, Jr., *Mobile*
George A. Tonsmeire, *Mobile*
Jimmy H. Fernandez, *Mobile*

**Task Forces will be listed in next issue**

★ Bill Coleman gives ADR report at "Update '95".

★ Lexis-Nexis computer training is well attended by ASB members.

★ Jay Foonberg presents "Mirror, Mirror, On the Wall—Why Lawyers Aren't the Fairest of Them All".

★ Broox Holmes thanks Bench & Bar luncheon speaker Morris Dees of Montgomery.

★ General Robert Norris is recognized for years of service as ASB general counsel.

★ Members enjoyed Annual Meeting reception at the Birmingham Museum of Art ...

★ ...just ask Jerry Wood of Montgomery!

★ Judges Charles Nice (retired) and Oliver P. Head, with their wives, visited Thursday night.

★ Broox Holmes, Laura Holmes and Broox Holmes, Jr.

★ Twenty exhibitors displayed products and services for ASB members.

★ Thomas Metzloff presents "The Cost of Winning: An Ethical View".

★ Birmingham Heritage Trio provided entertainment before the annual meeting dinner.

★ Lee Bradley of Birmingham was recognized Friday night as the oldest ASB member.

★ Dave Werner loosens up the crowd with his political "observations"!

★ Members of Women in the Profession Task Force gather for Saturday's Committee/Task Force Breakfast.

★ Featured speaker Governor Fob James, Jr.

★ Mike Freeman (left) and Greg Ritchey present to YWCA representative Jackie DeBone a $3,000 check, proceeds from Thursday night's YLS Benefit Party.

★ Marshall Timberlake, Award of Merit recipient for years of service to the ADR program

★ Retired Justice Oscar Adams, along with Governor Albert Brewer (not pictured), received Award of Merit for co-chairing Citizens' Conferences.

★ Broox Holmes passes on gavel and president's ribbon to John Owens.

★ Frank Caprio, grand prize winner of two round-trip tickets to London

★ Past President Broox Holmes, President John Owens and President-elect Warren Lightfoot

# Opinions of the General Counsel

*By ROBERT W. NORRIS, general counsel*

**UESTION:**

"I am doing this for a clarification of one of the prior decisions submitted in the letter particularly RO-90-57. I would especially like to address Issue One and Two in the opinion with regard to the principle of 'vicarious disqualification.' I notice that under these rulings the *Code of Professional Responsibility* disqualified subsequent associate attorneys from participation in any cause in which the new associate had previously participated.

I also note the decision in Issue Two states that if this decision was revisited under the 'new' rules it would probably be addressed in a 'different fashion.'

Reviewing the new rules, particularly Rule 1.11(c)(1), which is footnoted to the fact that 'Paragraph (C) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.'

Probably more simply stated, the issues would be:

1. Are district attorneys and assistant district attorneys disqualified from participation in pending criminal cases by the principle of vicarious disqualification when the newly employed assistant has participated in the pending criminal case as a defense attorney?
2. Are district attorneys and assistant district attorneys disqualified from participation in pending criminal cases by the principle of vicarious disqualification when the newly employed assistant has participated in a pending criminal matter through previous representation of a co-conspirator?
3. Are district attorneys and assistant district attorneys disqualified from participation in pending criminal cases by the principle of vicarious disqualification when the newly employed assistant has participated in a pending criminal case through previous representation of an alleged co-conspirator who is a husband or wife of the subject case?"

**NSWER, QUESTION ONE:**

District attorneys and assistant district attorneys are not vicariously disqualified pursuant to Rule 1.11, Alabama Rules of Professional Conduct, when a newly employed assistant has participated in criminal cases as a defense attorney so long as the "new" attorney is adequately "screened" from participation in the governmental activity.

**ANSWER, QUESTION TWO:**

Same as Answer One, above.

**ANSWER, QUESTION THREE:**

Same as Answer One, above.

**ISCUSSION:**

The Disciplinary Commission previously issued formal opinion RO-90-57 dealt with similar issues proposed in the instant inquiry.

The Disciplinary Commission determined in that matter that the determination reached therein might be different if the Supreme Court of Alabama adopted the Model Rules of Professional Conduct. On January 1, 1991, the supreme court's order adopting the Model Rules effectively established the new standard by which vicarious disqualification of governmental and private attorneys would be determined.

Rule 1.11(c)(1), Alabama Rules of Professional Conduct, states as follows:

> "Rule 1.11 Successive Government and Private Employment
>
> (c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:
>
> (1) Participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter."

The pertinent provision of the Comment states:

> "Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated."

Further, Hazard and Hodes, in their treatise, *The Law of Lawyering*, state:

> "When a lawyer moves into the government from private practice, he is still bound by Rules 1.6 and 1.9. He may not divulge any information about a former client and may not oppose the client in a matter in which he had previously represented him, or in a matter substantially related thereto. This bar can be lifted only by the consent of the former client.
>
> On the other hand, imputed disqualification of the government — treating it as a new 'firm' under Rule 1.10 — is inappropriate. If Rule 1.10(a) were to apply to the government, the government would either have to forego certain enforcement matters, or hire lawyers who had never been in private practice, or who had represented only clients who would never be adverse to the governmental unit hiring the lawyer.
>
> The only practical escape from this dilemma is to screen the affected lawyer from participation in government activity that is adverse to his former clients and related to work that he performed for them; Rule 1.11(c)(1) so directs." §1.11:400.

Further, the Supreme Court of Alabama, in a footnote to its opinion in *Roberts v. Hutchins*, 572 So.2d 1231 (Ala. 1990), affirms the availability of the "Chinese Wall" in certain cases involving the movement of lawyers between the government and private law firms. 572 So.2d 1234, n.3.

Based on the foregoing, it is the opinion of the Discipli-

nary Commission that an effective application of the "Chinese Wall" to the newly employed assistant would allow the district attorney and other assistant district attorneys to participate in pending criminal cases even though the newly employed assistant had represented a co-conspirator of a pending case, specifically, husband and wife co-conspirators.

The new assistant would have to insure his compliance with Rules 1.6 and 1.9, Alabama Rules of Professional Conduct. He could in no way participate in the pending criminal matters absent the consent of his client. The remaining members of the district attorney's staff employing the effective "Chinese Wall" concept would not be vicariously disqualified from further participation in the other pending criminal matter.

To the extent that RO-90-57 is inconsistent with the holding herein, that opinion is modified accordingly. ■

[RO-94-10]

## RULES OF THE U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Pursuant to 28 U.S.C. §2071(b) and (e), notice is hereby given of proposed amendments to the Rules of the U.S. Court of Appeals for the Eleventh Circuit (Rules), and amendments to Addenda Three, Four, and Eight to the Rules which have been implemented by General Order of the Court.

**The proposed amendments to the Rules would:**

- require that in bankruptcy appeals a Certificate of Interested Persons identify the debtor, members of the creditor's committee, any entity which is an active participant, and other entities whose stock or equity value may be substantially affected by the proceedings;
- clarify the spacing and type size requirements in briefs;
- specify that the time for issuance of the mandate and for filing a petition for rehearing or suggestion of rehearing *en banc* begins anew upon entry of an order authorizing publication of a previously unpublished opinion; and
- require that a motion to dismiss an appeal must state whether the dismissal is sought with or without prejudice.

Other 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 1994, as well as those pending before Congress and scheduled to take effect in December 1995.

Addendum Three is proposed to be amended in accordance with General Order No. 94-A to conform to the Judicial Improvements Act of 1990, Pub.L.No. 101-650, which amended 28 U.S.C. §372(c)(1). Addendum Four is proposed to be amended in accordance with General Order No. 95-C to conform to the U.S. Supreme Court opinion in Austin v. U.S., ___U.S. ___, 115 S.Ct. 380, 130 L.Ed.2d 219 (1994). Addendum Eight is proposed to be amended in accordance with General Order 17 to provide, among other matters, an alternative procedure for issuing an order to show cause when the alleged misconduct concerns an attorney's failure timely to file any required paper or brief with the Court. Other proposed revisions to Addendum Eight would: explicitly include payment of the costs of disciplinary proceedings and removal from CJA panels as possible disciplinary sanctions; clarify confidentiality provisions; and provide that only orders imposing disbarment or suspension would routinely be transmitted by the clerk to other disciplinary authorities.

A copy of the proposed amendments and General Orders may be obtained without charge on and after August 28, 1995, from the Office of the Clerk, U.S. Court of Appeals for Eleventh Circuit, 56 Forsyth Street, NW, Atlanta, Georgia 30303 [phone: (404) 331-6187]. Comments on the proposed amendments and General Orders may be submitted in writing to the clerk at the above address by September 29, 1995.

**Andrew Gyarfas**
**Deputy Clerk**
**Eleventh Circuit**
**Atlanta, Georgia**

# DEDICATION SPEECH, Judge Frank M. Johnson Historical Marker

## Haleyville, Alabama, July 11, 1995

*By Jack Bass*

*This article originally appeared in the July 15, 1995 edition of the* Northwest Alabamian.

We come here today to honor one of Winston County's most loyal sons, a man who became the legal conscience of the South. Six years ago this week, I drove up here with the judge. We visited his grandfather's grave in Carbon Hill, then drove on up to Haleyville for lunch at the Galley Restaurant and then to Double Springs and back to Montgomery. I can tell you from personal knowledge that Frank Johnson's love of Alabama and love of Winston County runs deep. That love of Winston County runs just as deep for Ruth Johnson, his sweetheart from Haleyville, who is the other half of a great team.

When I first met my editor at Doubleday, Jacqueline Kennedy Onassis, I asked how she became interested in Frank Johnson. She paused for a moment, then said, "He's long been a hero of mine. I guess it goes back to the White House and hearing Jack and Bobby talk about him."

Earlier that day in New York I interviewed Bill Moyers, who in 1980 produced two one-hour programs, shown a week apart, on Judge Johnson. What he told me that morning will, I believe, be of special interest to you who are here today.

Judge Frank M. Johnson, Jr. is honored as an outstanding jurist of his time with a historic marker. Pictured are Haleyville Mayor Larry Gellilard, Judge Johnson and Ruth Johnson. Photo courtesy of the *Northwest Alabamian*

Moyers told me, "I think in terms of his decisions on the court he will be seen as the giant in regard to civil rights in the South, more so than anyone on the Supreme Court in my lifetime....

"I think geographically and spiritually and culturally, if he had been born a hundred years earlier, he would have been Abraham Lincoln, or vice versa....I think the way their culture acted upon them, the circumstances of where they were born, their birth, the antecedents of the forces that were upon them, that those two men are interchangeable, that if Johnson had been born earlier, he would have been Lincoln, and vice versa.

"And it has something to do with that territory that influenced them. Winston County is almost a nation unto itself," Moyers continued. "There's something about the force of place and time and circumstance on him that made him ready when the court decisions presented themselves.

"Obviously he had no idea, nor did Eisenhower when he went on that court, what the issues were that they were going to face, any more than Lincoln did when he arrived in the White House. But the force of personality so shaped by their origins made them ripe for the opportunity that would cause some people to say it was providential and others to say, 'Weren't we lucky?'"

On that national television program, Judge Johnson talked about his Winston County roots and the kind of people here today. "We always had an intense pride in being Americans," he

said. "I think my regional background had a very, very decisive effect on my approach to dispensing what I consider to be justice, and attempting, through judicial decisions, to thwart actions that I considered unjust. People in that section of the country have a fiercely independent attitude and personality. They have an intense respect for the individual and the individual's rights. They believe in a person's dignity, and they believe each person is possessed of and is entitled to integrity. They believed that without regard to race, creed, color, or ideology. 'Every man's his own man' is a real basic philosophy. I came here [to Montgomery] with that, maybe most of it unconsciously ingrained in me."

That strong sense of fair play and respect for the individual and the individual's dignity, Judge Johnson said, "served me in great stead as a lawyer and as a judge."

During his 24 years as a trial judge, Judge Johnson wrote opinions that transformed the law in school desegregation, voting rights, jury selection, First Amendment issues, gender discrimination, and treatment of mental patients and prison inmates. He never viewed matters before him as societal issues, however. To him they always were legal issues.

Later this month President Clinton will present Judge Johnson with the Presidential Medal of Freedom, the nation's highest civilian honor. In his letter to Judge Johnson informing him of the award, President Clinton wrote, "You remain an inspiration to all who value justice."

In an editorial yesterday in response to that letter, the *New York Times* said, "Frank Johnson was guided by a vision of constitutional principle and the sanctity of law rather than a thirst for approval."

Thirty-four years ago in Alabama, George Wallace campaigned successfully for his first term as governor, and his biggest applause line was attacking "that federal judge in Montgomery"—there wasn't but one—as "an integrating, scalawagging, carpetbagging, bold-faced liar." As most of you well know, he didn't let up after his inauguration.

But when I interviewed him almost 30 years later, Governor Wallace acknowledged that he had been "wrong" and that "in the long run" Judge Johnson was "right."

During his 40 years on the federal bench, the Judge has kept under a glass paperweight on his desk a typed quotation from Abraham Lincoln. The middle sentence reads, "If the end brings me out all right, what is said against me won't amount to anything."

The Alabama House of Representatives, which 25 years earlier voted to impeach Judge Johnson, voted unanimously in 1992 to praise Congress for naming the federal courthouse in Montgomery for him. Judge Johnson hadn't changed, but Alabama had.

Like a solitary ship taming a storm, Frank Johnson prevailed by steering the right course. His impact went far beyond Alabama. His application of constitutional principles to unprecedented circumstances, in President Clinton's words, "helped bring our nation closer to the ideals upon which it was founded."

And what you here today are saying by your presence is that you can come home again.

Thank you very much. ■


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# Unauthorized Practice of Law

*By L. Bruce Ables*

During 1994-1995, there were numerous complaints pertaining to the unauthorized practice of law filed with the Alabama State Bar. Many of these were handled by the state bar staff on an informal basis. There were approximately 55 formal complaints made pertaining to unauthorized practice. Of those formal complaints, it is interesting to note what the individuals were doing that involved the unauthorized practice of law.

One 17-year-old was (but not now) preparing uncontested divorces in Marshall County, Alabama. An elderly man was and still is preparing uncontested divorces in Winston, Walker and Marion counties. This man attended law school, but has never been licensed. In Mobile, a man who attended Miles College and never had a license was preparing uncontested divorces and representing people in small claims court. Another individual in Mobile was handling Social Security Disability Claims and is also representing an individual in court on a slip-and-fall case. There were, and still are, individuals in Jefferson County, Mobile County and Madison County preparing uncontested divorces. A Tennessee attorney who is not licensed in Alabama was involved in representing an individual in Jefferson County. An individual in Jefferson County, who is unlicensed, is holding himself out as a mediator or an arbitrator and also a financial consultant or debt manager. There was an individual claiming to be an attorney representing a party in an insurance claim. An individual in south Alabama has prepared and filed lawsuits for various parties; Judge Dale Segrest enjoined and restrained him from further activities in his court. He refuses to cooperate with the committee and will not agree to no longer practice law; however, he is now permanently enjoined statewide. There is an individual who has been convicted of a felony and has also plead guilty to bank fraud and was acting as an attorney for prisoners. This individual at one time was admitted to practice law in New Jersey but he has been permanently disbarred. There are also lawyers who have been disbarred in Alabama and continue to practice law. Individuals around Ft. McClellan were advertising divorces for $89, bankruptcies for $169 and wills for $39 to $50 who are not attorneys and have never been licensed attorneys. There are also former legal assistants in law offices who were preparing uncontested divorces. A title company in Mobile continues to prepare deeds and mortgages and other instruments of conveyance and give legal advice at real estate closings. There was a Mississippi attorney soliciting asbestos claims who actually had an office in Northport, Alabama; he has now moved out of state. We have individuals in Mobile who were trying to represent a police officer in a grievance proceeding. There was one individual working in a law office who is not an attorney, but who was holding himself out to the public as an attorney.

One can readily see from all of these claims that the unauthorized practice of law is rampant in Alabama. It is taking place in most every county. It seems to be much worse in the larger, metropolitan areas. Your Unauthorized Practice of Law Committee of the Alabama State

Bar is one of the more active committees.

Section 34-3-1, 1975 *Code of Alabama* makes it a crime for any person to practice or assume to act, or hold himself out to the public as a person qualified to practice or carry on the calling of a lawyer, guilty of a misdemeanor and on conviction, the person can be fined not to exceed $500 or be imprisoned for a period not to exceed six months or *both*. Section 34-3-6, 1975 *Code of Alabama* states that only persons who are regularly licensed to practice law may do so. This section specifically defines the practice of law. What constitutes the practice of law has also been defined by the courts: State Ex Rel, *Porter v. Alabama Association of Credit Executives*, 338 So.2d 812 (Ala. 1976), *Pratt v. State*, 278 So.2d 724, *cert. denied*, 278 So.2d 729 (Ala.) 414 US 1002. Probably the most far-reaching and well-reasoned decision is the case of *Coffee County Abstract and Title Company v. State*, Ex Rel Norwood, 445 So.2d 852 (Ala. 1983). Among other things, this case held that the preparation of deeds and the filling in of the blanks in forms by title companies is prohibited. An argument was made by the title company that the forms were prepared by attorneys and these forms were used by the title company wherein the title company only filled in the blanks. The title company argued that this was essentially a clerical task and was not the practice of law. The court said this overlooked the fact that decisions must be made regarding the information to go in the blanks. The court in the case of *Land Title Company vs. State*, Ex Rel Porter, 299 So.2d 289 (Ala. 1974), specifically held that title insurers may only prepare simple affidavits and statements of fact to support its title policies.

Unquestionably, the Legislature intended that §34-3-6 was enacted for the purposes of insuring that lay individuals would not serve others in a representative capacity in areas requiring the skill and judgment of a licensed attorney.

It has recently been brought to the attention of the committee that actions are being prosecuted in the district courts of the state by individuals not licensed to practice law under §35-9-80, 1975 *Code of Alabama* (Sanderson Act). These individuals are not owners of the land. They are agents for the landlord in the renting, leasing and managing the properties. Clearly, any person may manage his or her own case, §34-3-19, 1975 *Code of Alabama*. However, it appears to be the unauthorized practice of law for a person who is neither a party nor a licensed attorney to appear in a trial as a representative of a party, *Birmingham Bar Association v. Phillips*

**Important!**

# Licensing/Special Membership Dues 1995-96

*All* licenses to practice law are sold through the Alabama State Bar headquarters, as well as payment of special membership dues—the same as last year.

In mid-September, a dual invoice to be used by both annual license holders and special members will be mailed to every lawyer currently in good standing with the bar.

*If you are actively practicing or anticipate practicing law in Alabama* between October 1, 1995 and September 30, 1996 please be sure that you purchase an occupational license. Licenses are $250 for the 1995-96 bar year and payment must be received between October 1 and October 31 in order to avoid an automatic 15 percent penalty ($37.50). **Second notices will not be sent!**

An attorney not engaged in the active practice of law in Alabama may pay the special membership fee of $125 to be considered a member in good standing.

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*and Marsh*, 196 So. 725. Generally a corporation may not appear in court except through an attorney. It cannot appear pro se, *Brown v. Parnell*, 386 So.2d 1137 (Ala. 1980); *ex parte Lamberth*, 5 So.2d 622 (Ala. 1942). This prohibition has been eased by statute for actions in small claims court, §12-12-31(b), 1975 *Code of Alabama*. There is no similar provision for appearances in district or circuit court. Therefore, it seems quite obvious that an agent cannot represent the property owner in the court proceedings. The statute seems to only allow the owner, his agent or attorney-at-law or attorney-in-fact to make affidavit of the facts required under §35-9-80, but does not give authority for an unlicensed person to appear in a trial as a representative of a property owner.

During the last two years, this committee has been very active with full committee meetings four to five times per year. Various complaints are assigned to various members in the locale where the complaint originates. These committee members have devoted an average of 60 to 100 hours per member each year, plus an undetermined amount of out-of-pocket expenses. The committee has primarily met in Birmingham, and those members of the committee from extreme south Alabama, such as Mobile, Dothan, Bay Minette, Greenville, etc., have devoted even more hours. Those members spend six to eight hours in travel time alone to meetings. This is one full day out of their office for each meeting they attend. There is no compensation (nor is any expected) or reimbursement to any member; therefore, these members are to be commended. The active members for the 1995-96 year of the committee are: Charles N. McKnight, Mobile; David B. Cauthen, Decatur; Steve Thomas, Jasper; David L. Beuoy, Arab; Randall S. Ford, Molton; David D. Shelby, Birmingham; James W. Porter II, Birmingham; Marc Brakefield, Tuscaloosa; Rufus E. Elliott III, Birmingham; Neva C. Conway, Millbrook; Charles E. Crumbley, Montgomery; Janice Boyd Neal, Opelika; Thomas Haigh, Troy; Daniel A. Benton, Fair Hope; Charles L. Miller, Mobile; George A. Tonsmeire, Mobile; and Jimmy H. Fernandez, Mobile.

How can this unauthorized practice of law be stopped, or at least curtailed? Perhaps the Legislature should pass an act requiring a sworn certification on all documents filed in the courts of the State of Alabama requiring the name, address and telephone number of the individual who prepared the document. The act should provide severe criminal penalties if the affidavit is made falsely. This should cause much of the unauthorized practice to be severely curtailed. The affidavit would give the state bar some leverage in policing the unauthorized practice. It should be incumbent upon the supreme court to promulgate a rule requiring that all judges in the state inquire as to the preparation of any documents, pleadings and papers filed in their court. A requirement such as this would also severely curtail unauthorized practice. The state bar should hire a full-time investigator to investigate the unauthorized practice complaints and grievances.

Other than the criminal statute, the state bar has available to it a *quo warranto* proceeding pursuant to §6-6-591-599, 1975 *Code of Alabama*. Members of the committee have been assigned the task to file the *quo warranto* proceeding pertaining to a person engaged in the unauthorized practice of law in their geographical area. That member has to prepare the petition and then forward it to the state bar for review by state bar counsel and for signing by Executive Director Keith B. Norman. The petition is then forwarded back to the member for filing with the circuit court. The member is responsible for seeing that the general counsel is advised at all times of what is taking place in the proceeding. That member must also prepare the case for trial just as that member would be preparing a case for a client in his office. That member must see that proper individuals are subpoenaed so that proper proof can be presented to the court and/or jury to prove that the individual is engaging in the unauthorized practice of law. Once the individual is found guilty of engaging in the unauthorized practice of law, the circuit judge enters an order permanently enjoining the individual from engaging in the practice of law in the State of Alabama without a license. Even after this is done, it is still left up to the committee to police the situation to make sure that an enjoined person does not continue to engage in the unauthorized practice. If he or she does, it will be up to the bar to bring a contempt proceeding under that *quo warranto* action. Fortunately, of all of the *quo warranto* proceedings that have been filed within the last two years, none at this time have actually been tried. There are several pending. There are some where the defendant has agreed or consented to a permanent injunction being entered against them. At this time, there are two *quo warranto* proceedings pending. At least one will have to be tried, and it will probably end up in the Alabama Supreme Court.

There is a common statement by those accused of engaging in the unauthorized practice of law that this committee is only pursuing them because they, the accused, are taking money from lawyers. No member of the committee has ever taken that position about any complaint. The committee is charged with the duty of protecting the public from these individuals who are engaging in various fraudulent activities and also stopping those individuals from creating more legal problems for the public. The problems that people create without having any intent whatsoever to engage in the unauthorized practice of law is incredible. For example, bank employees who advise elderly people to put one son or one daughter on the account with them create many problems. At the time of the death of the parent, sometimes that son or daughter takes the entire account and deprives the other brothers and sisters of what they think would be their fair share. This takes place throughout the state hundreds of times every week. How many times there are greedy or unscrupulous brothers and sisters, I do not know. These individuals preparing deeds who do not know the ramifications of a deed conveying as tenants in common, joint tenants with right of survivorship, etc., are also creating nightmares for Alabamians.

Report any unauthorized practice of law that is brought to your attention to the state bar or to a committee member in your area. ■

**L. Bruce Ables**
L. Bruce Ables received his law degree from Vanderbilt University, and was admitted to the Alabama State Bar in 1963. He has been a frequent lecturer at Vanderbilt University and ALI-ABA. He is also a member of the Tennessee Bar Association and the American Bar Association.

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## Registration Form

**Mail:** ABICLE, Box 870384, Tuscaloosa, AL 35487-0384 **Fax:** 205-348-1072 **Phone:** 800-627-6514

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# Sex-Based Wage Discrimination:

## *Recovery Under the Equal Pay Act, Title VII, or Both*

*By Judge Debra H. Goldstein*

In 1963 and 1964, Congress passed two statutes which were designed to address gender-based discrimination in the workplace: The Equal Pay Act of 1963 (EPA) and Title VII of the Civil Rights Act of 1964 (Title VII). The scope of the Equal Pay Act is limited to disparate wage practices but Title VII, although including compensation, is more encompassing in its employment related prohibitions. Thus, when bringing an action for redress of sex-based wage discrimination, a plaintiff has two statutory options which provide for differing burdens of proof and the possibility of different results.

These differing results are further complicated by a split in the circuits as to the appropriate method for establishing gender-based wage discrimination under Title VII. At issue is whether to utilize the traditional Title VII method of proof or the standards and burdens established by the Equal Pay Act. Consequently, the relationship between Title VII and EPA remains "a complex area of law, suffused with legislative and judicial uncertainty."[1]

This uncertainty has a direct impact on whether a plaintiff's claims will be successful. The purpose of this article is to explain the statutory interpretation of the EPA and Title VII, to examine the burdens of proof each requires, and to examine their relationship to each other in light of the actions of the Eleventh Circuit.

### Equal Pay Act

In 1945, as an outgrowth of measures taken by the War Labor Board, the first federal equal pay bill was presented to Congress.[2] The bill was not passed. For the next 17 years, all proposed federal legislation dealing with equal pay was defeated. In 1962, the House and Senate each passed legislation requiring equal pay for equal work,[3] however a reconciled bill was not approved before Congress adjourned. When the 88th Congress convened in 1963, the equal pay proposals were renewed and a reconciled bill was accepted and submitted to President John F. Kennedy for signature. On June 10, 1963, he signed the Equal Pay Act into law as an amendment to the Fair Labor Standards Act.[4]

As an amendment to the Fair Labor Standards Act, the Equal Pay Act was immediately subject to severe restrictions.[5] First, it was limited to discrimination in pay. Second, its coverage was tied to the specific coverage provisions and exemptions of the Fair Labor Standards Act.[6] Essentially, the EPA forbids payment of unequal wages for equal work which requires equal skill, effort and responsibility and is performed under similar working conditions by employees of the opposite sex, except where one of four statutory exceptions exists.[7]

### Equal skill, effort and responsibility

Since the first judicial determination under the EPA, *Central Hanover Bank & Trust Co. v. Commissioner*, 159 F.2d 167, 169 (2nd Cir. 1947), courts have held that equal does not mean identical. Rather, as the *Miranda* decision reiterates, equal has been held to be substantially similar. 975 F.2d at 1526. Courts have opted to look behind job labels and to focus on the actual duties and qualifications for a given position. *Brock v. Georgia Southwestern College*, 765 F.2d 1026, 1032 (11th Cir. 1985).

To analyze specific positions under the EPA, courts first look to whether equal skill is required in the performance of the various job duties. Pursuant to 29 C.F.R. §800.125 (1980), skill is defined to include such factors as experience, training, education, and ability. Equal skill exists if the compared employees have essentially the same prerequisites to perform in either of the two positions, even if one employee does not exercise the required skill as frequently in the performance of one job as the other employee does in the other position.

Neither the possession of skills necessary to meet the job's requirements nor efficiency of an employee's performance in the job can be considered in evaluating skill equality. Moreover, the equal pay standard is inapplicable if the degree of skill required for the performance of the first job is substantially greater than that of the second.

Effort relates to the measurement of the physical or mental exertion needed for the performance of a job. 29 C.F.R. §800.127 (1980) dictates that the equality of two jobs be analyzed in terms of the amount or degree of effort that is actually expended in their performance. Even though the employees may expend their effort in different ways during performance of the comparable jobs, wage differentials will be justified unless it can be shown that differences exist in the kind of effort being expended. For an employer to rely on effort for the basis of pay disparity, three tests must be met: (1) the effort must in fact be greater; (2) the duty or duties which require the extra effort must consume a significant amount of time of all those employees whose added wages are sought to be justified in terms of the extra effort; and (3) the extra effort must have a value commensurate with the differential.

"Responsibility is concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation." 29 C.F.R. §800.129 (1980). There are many possible instances, as set forth in 29 C.F.R. §800.130 (1980), in which different degrees of responsibility sanction different rates of pay. For example, a higher wage can be justified in the instances where employees perform work which is equal in all respects, except that one employee is required and actually does from time to time perform supervisory functions in the absence of the regular supervisor as a means of training for a permanent supervisory position.

The Fifth Circuit, in caselaw adopted by the Eleventh Circuit, has used the test of whether the increased responsibility is substantially greater than that of the other employees and whether the added responsibility has a value commensurate with the differential. *Brennan v. Victoria Bank & Trust Co.*, 493 F.2d 896 (5th Cir. 1974). Situations where the differential is found to be based on contrived responsibility, such as where a woman is assigned to tasks formerly performed by a man but is not immediately accorded a wage increase to the man's former salary or where very little time, if any, is actually spent in performing the additional responsibility, have been held to be unjustified. *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719 (5th Cir. 1970). The key for substantiating a pay differential is for the difference in responsibility "to be of a kind that is recognized in wage administration as a significant factor in determining wage rates." 29 C.F.R. §800.130 (c) (1973).

**Similar working conditions**

In order for the EPA to be applicable, the comparable jobs must be performed under similar working conditions. In *Corning Glass Works v. Brennan*, 417 U.S. 188, 202 (1974), the Supreme Court established that 'similar' incorporates a more flexible test to compare working conditions than is used for the other elements of the equal pay standard. The Supreme Court's references to "inside work v. outside work, exposure to heat, cold, wetness, humidity, noise, vibration, hazards (risk of bodily injury), fumes, odors, toxic conditions, dust, poor ventilation" indicate that work conditions include physical surroundings and the hazards of a job. Thus, in determining whether similar working conditions exist, one must ascertain whether the differences in working conditions are the kind customarily taken into consideration in setting wage levels.

Any distinction in wage rates attributable to working conditions must be rationally justified and cannot exist only when a specific sex holds the job. Essentially, if applied equitably by gender, the test for similar working conditions is one of economic reality —a higher rate may be paid to one who agrees to work under unpleasant, onerous or difficult conditions.

**Exceptions to Equal Pay Act**

Once a plaintiff establishes a prima facie case by showing that the employer is subject to the EPA, the plaintiff performed work in a position requiring equal skill, effort and responsibility under similar working conditions, and that the plaintiff was paid less than comparable employees of the opposite sex, the burden shifts to the defendant to demonstrate by a pre-

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ponderance of the evidence that any pay differential can be justified by one of four statutory exceptions: (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. *Mitchell v. Jefferson County Bd. of Educ.*, 936 F.2d 539, 547 (11th Cir. 1991).

An analysis of the wording of the four exceptions reveals that the first three are specific examples while the fourth is a general provision which by use of the phrase "any other factor" defines the specificity of the first three. By their very definition, the first three exceptions are limited in their application.

A seniority system is one in which pay increments are tied to units of time in service. If it can be shown that a starting wage was nondiscriminatory and that from the point of starting on the system is applied equally and consistently to males and females performing equal work, the exception will be met. If the starting salary point was discriminatory, the subsequent practice of a valid seniority system will not excuse the initial and continued wage disparity.

Merit systems hinge on performance. To be upheld as an exception to the EPA, they have usually contained objective methods for evaluating such criteria as performance on the job, reliability, initiative, responsibilities, and fulfillment of responsibilities. *See Hodgson v. Golden Isles Nursing Homes, Inc.*, 486 F.2d 1256 (5th Cir. 1972). A discriminate hiring wage has no impact on the establishment of a valid merit system, however a permissible merit system will serve to perpetuate the initial discrimination, as a raise based on a percentage of a lesser figure is still a lesser amount. *See generally Brennan v. Victoria Bank*, 493 F.2d at 902.

Another specific permissible exception to the Act is one that rests on a defined system of measuring earnings by quantity or quality of production. This exception is usually found in cases that relate to commission oriented positions.

The most commonly raised equal pay exception is the factor other than sex exception. Examples of acceptable factors other than sex include shift differentials, red circle rates, temporary reassignments, and training programs. 29 C.F. R. §145, 146, 147, and 148 (1980).

In instances where shift differentials have been permitted, the typical fact pattern involves a day and a night shift which either sex is permitted to work. Although both sexes have an equal opportunity to work either shift, the men tend to be the only ones to choose the night shift, with its higher pay. If a woman chose to work the night shift, she too would receive the wage differential. Thus, a factor other than sex—the night shift itself—has been found to be the reason for the pay disparity.

Another means of explaining wage differentials is utilization of a "red circle" rate. "Generally defined, the term 'red circle' describes 'certain unusual, higher than normal, wage rates which are maintained for many reasons.' (citation omitted)... One such reason recognized in the regulations is temporary reassignment." *Gosa v. Bryce Hosp.*, 780 F.2d 917, 918 (11th Cir. 1986). Temporary reassignment generally has been defined in terms of one month. 20 C.F.R. §800.147 (1980). Another instance of permissible red circling occurs when a company transfers a long-service male employee for health reasons from his regular job to one general-


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ly performed by women, but continues the higher rate of pay. With the addition of the health factor, this is a permitted practice, but if the differential was based merely on an employee's sex, the higher paid employee could not be red circled. Thus, if a nondiscriminatory reason for paying one employee more than another can be established, red circling can be shown to be a reasonable exception as a factor other than sex. *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 590 (11th Cir. 1994).

Employees working in the same area may receive unequal wages when one is in a bona fide training program and has been assigned to the work area as part of the training program. For the training program to be considered bona fide, it must be open to both sexes and must demonstratively utilize both sexes. Differentials based on male employees being the head of a household, or on the theory that it costs more to employ one sex than the other, or on the assumption that a given rate of take-home income is necessary and that if a married couple is employed this necessity amount can be divided between the salary of the two individuals, are all prohibited. Finally, if a bona fide market argument is advanced as a factor other than sex, more than mere assumption of a tight market or of the necessity of paying a higher wage must be demonstrated.

**Recovery under EPA**

If a defendant fails to meet the burden of establishing one of the four affirmative defenses provided in the statute, strict liability adheres. The plaintiff is not required, in an EPA case, to prove discriminatory intent on the part of the defendant. *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1533 (11th Cir. 1992). *See Mitchell v. Jefferson County Bd. of Educ.*, 936 F.2d 539 (11th Cir. 1991). Under this concept of strict liability, the plaintiff may be awarded backpay to a point two years prior to the day on which the lawsuit was filed. 29 U.S.C. §255(a)(1988). An additional amount equal to backpay may be awarded as liquidated damages unless the employer shows that the violation was in good faith. *Miranda* at 1526.

**Title VII**

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[8] "The legislative history of Title VII demonstrates that it was enacted primarily to counter racial discrimination; the prohibition against gender-based bias was added to the legislation at the last moment, and, according to some theories, in an effort to thwart passage of the Civil Rights Act." *Id.* at 1526. *See, e.g., County of Washington v. Gunther*, 452 U.S. 161, 190 n.4. (1981) (Rehnquist, J., dissenting).

Two models for discrimination exist under Title VII: disparate treatment and disparate impact. Disparate treatment involves intentional discriminatory employment practices based on race, sex, religion or national origin. Disparate impact claims relate to employment practices which are facially neutral, but which have a disparate impact on one group more than another and which cannot be justified by business necessity.[9]

**Disparate treatment**

In disparate treatment cases, an employer must intentionally act in a discriminatory manner predicated on race, sex, religion or national origin. To sustain an action for disparate treatment, the plaintiff must sustain the burden of proof. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Supreme Court specified the shifting burdens of production and proof which are necessary for determining whether or not an employer intentionally discriminated against employees.

The plaintiff must first prove, by a preponderance of the evidence, that a prima facie case of discrimination exists. To meet this burden, the plaintiff must demonstrate that the plaintiff is a member of one of the protected classes (race, sex, religion or national origin) and that the plaintiff has not been treated as well as a similarly situated employee who is not a member of the protected class. 411 U.S. at 802. If the plaintiff is successful in meeting the initial burden of proof, a presumption is created that the employer unlawfully discriminated against the employee. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). Although, according to Burdine at 253, the burden of proof remains with the plaintiff, the burden of production then shifts to the defendant to "articulate some legitimate nondiscriminatory reason" for the alleged discrimination. 411 U.S. at 802.

The defendant merely must provide a legitimate, nondiscriminatory reason for

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the specific employment practice. The defendant does not have the burden of proving the absence of a discriminatory motive. *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978). If the defendant can produce a legitimate, nondiscriminatory reason, the burden shifts to the plaintiff to "prove that the legitimate reason offered was a mere pretext for an illegal motive." *McDonnell Douglas* at 802; *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1528 (11th Cir. 1992).

Although proof of the discriminatory motive has been held to be critical, "it can in some circumstances be inferred from the mere fact of differences in treatment." 975 F.2d at 1529 quoting *Internat'l Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 355 n. 15 (1977).

**Disparate impact**

Disparate impact cases are predicated on "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."[10] In 1989, the Supreme Court held that a prima facie case of disparate impact discrimination was established when a plaintiff identified a specific or particular employment practice that created the disparate impact under attack. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989). Once a prima facie case was demonstrated, the plaintiff was required to utilize statistical evidence "of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Watson v. Fort Worth Bank & Trust*, 478 U.S. 977, 994 (1988).

The burden of production of evidence then shifted to the defendant to offer a business justification for the alleged practice. The employer needed only to show that the employment practice in question served the legitimate goals of the employer. *Wards Cove*, 490 U.S. at 659. The employer was not required to show that the practice was essential or indispensable to the business. *Id.* The burden of persuasion remained with the plaintiff who had to demonstrate that alternative business practices existed to achieve the same business ends, with less discriminatory impact. *Id.* at 658. If the plaintiff was able to prove an alternative business practice and the employer refused to utilize it, "such a refusal would belie a claim by [the employer] that their incumbent practices are being employed for non-discriminatory reasons." *Wards Cove*, 490 U.S. at 661.

In 1991, Congress codified most of the interpretative requirements that *Wards Cove* had held,[11] but specifically changed the employer's burden to include both production and persuasion.[12] Although the 1991 amendments are helpful to plaintiffs whose action relies on disparate impact discrimination, the majority of Title VII cases still involve disparate treatment situations.

**Relationship between Equal Pay Act and Title VII**

Because sexual discrimination was tacked on to Title VII two days before the Title VII legislation was voted on, any possible inconsistencies between the EPA and Title VII were not raised until late in the House of Representatives debate over the bill.[13] To address the concerns that were being raised over possible inconsistencies, Senator Bennett proposed a technical amendment to the Civil Rights Bill which provided "that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified." 110 Cong. Rec. 13,647 (1964).

The actual Bennett Amendment reads:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29 [the affirmative defenses to the Equal Pay Act]. 42 U.S.C. § 2000e-2(h). Since the 1964 enactment of Title VII and the Bennett Amendment, various interpretations have been advanced as to the relationship between Title VII and the EPA.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 46-49 & n. 9 (1974), the Supreme Court held that Title VII was intended to "supplement, rather than supplant, existing laws and institutions relating to employment discrimination" and that "the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable federal statutes." 975 F.2d 1518 at 1527. Because the EPA existed prior to enactment of Title VII, the simple premise would be that Title VII was intended to supplement the EPA; however, in practice, the interaction of Title VII, the Bennett Amendment, and the EPA has been an area of legal dispute.

The Supreme Court addressed Title VII causes of action brought under the disparate treatment or intentional sex-based wage discrimination theory in the case of *County of Washington v. Gunther*, 452 U.S. 161 (1981). In that instance, the Court concluded that Congress only intended to incorporate the affirmative defenses from the EPA, not the requirement of equal pay for equal work. 452 U.S. at 179-180. The Court's rationale was based upon its interpretation of the remedial aspects of Title VII and the Bennett Amendment: that effectively if equal pay for equal work was the standard, relief would not be possible, no matter how egregious the discrimination, if there were not a man in an equal job at higher pay or if the job in question was unique to the company but would have paid more had it been filled by a man. Id. at 178-179.[14] The Supreme Court concluded that "Congress surely did not intend the Bennett Amendment to insulate such blatantly discriminatory practices from judicial redress under Title VII." 452 U.S. at 179.

Although the *Gunther* decision clearly incorporated the EPA's affirmative defenses into Title VII sex-based wage discrimination cases, the Court actually fueled the area of dispute by failing to delineate the respective burdens of proof for gender-based wage discrimination under Title VII. Most of the dispute has

**Hon. Debra H. Goldstein**

Debra H. Goldstein is an Administrative Law Judge with the Office of Hearings and Appeals, Social Security Administration, in Birmingham. Prior to her 1990 ALJ appointment, she was a trial attorney for the Office of the Solicitor, U.S. Department of Labor. Judge Goldstein is a 1984 admittee to the state bar and is a member of *The Alabama Lawyer* Editorial Board.

concerned whether the Bennett Amendment incorporates the EPA's shifting burden of proof or only the four affirmative defenses. If only the four affirmative defenses are adopted, Title VII's evidentiary burdens remain unchanged.

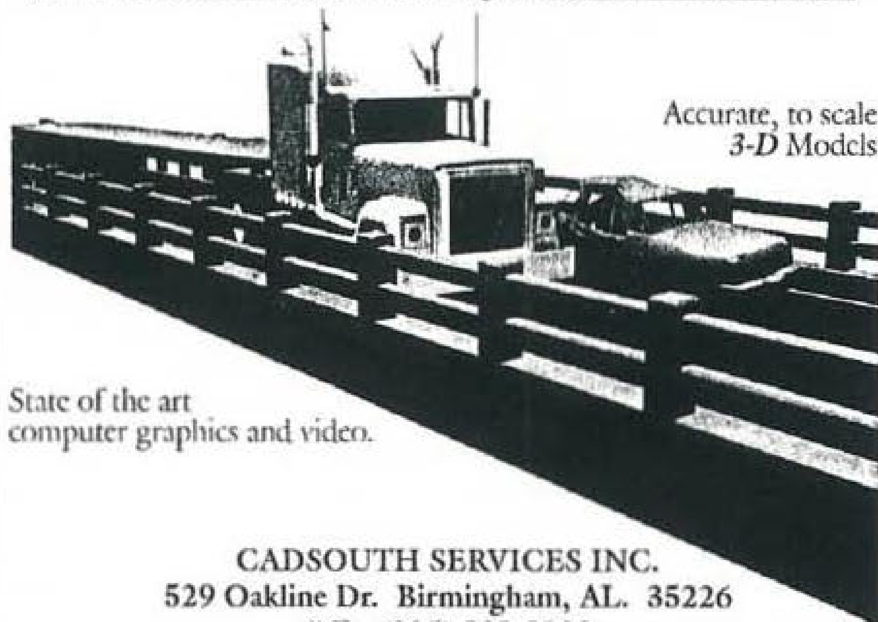
The importance of this distinction is that under the EPA, the burden of proof strictly requires proving that an employee performed substantially similar work as an employee of the opposite gender for less pay. The burden then shifts to the employer to establish one of the four statutory affirmative defenses. Failure to do so imposes strict liability. Contrarily, the disparate treatment Title VII approach advances a fairly relaxed standard of similarity between male and female-occupied jobs, but the plaintiff has the burden of proving the existence of an intent to discriminate on the basis of sex, race or national origin. *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1526 (11th Cir. 1992).

A distinction also exists in the area of available remedies. Under the EPA, a plaintiff need not exhaust all administrative remedies, may opt into a class action by giving written consent, may be awarded backpay back in time to a point two years prior to the date of the lawsuit filing, and may recover an amount equal to backpay as liquidated damages unless the employer shows that the violation was in good faith. Title VII requires exhaustion of all administrative remedies, automatically includes one in a class action unless written notification is provided to the court, permits an award of backpay only up to two years before a charge of discrimination is filed with the Equal Employment Opportunity Commission, and does not have a provision for liquidated damages. Finally, EPA section 16 actions permit a right to jury trial[15] while Title VII plaintiffs seeking backwages have no right to a jury trial.[16]

Despite the obvious interpretative conflicts remaining by *Gunther's* failure to address whether the traditional Title VII method of proof or the shifting burden EPA standard applies to disparate treatment Title VII sex-based wage discrimination claims, the Supreme Court has not revisited this issue. Miranda, 975 F.2d at 1528. The Eleventh Circuit addressed the issue of what standards should be applied to intentional sex-based wage discrimination cases brought under Title VII for the first time in Miranda v. B & B Cash Grocery Store, Inc., 975 F.2d 1418 (11th Cir. 1992). Prior Eleventh Circuit cases had stipulated at pretrial as to what burdens of proof and production would be controlling.[17]

The *Miranda* case consisted of two consolidated appeals resulting from a lawsuit filed by Karen Miranda Hopewell against B & B Cash Grocery Store, Inc. alleging gender-based discrimination in violation of Title VII and the EPA. Miranda also filed a claim for intentional infliction of emotional distress under Florida law. A magistrate granted defendant partial summary judgment on the Florida tort law and EPA issues on the grounds that the plaintiff failed to sustain her burden of establishing a prima facie case of sex-based discrimination under the EPA. After a bench trial on the Title VII allegation, the magistrate held that the defendant had discriminated against Miranda on the basis of her sex and awarded $52,765.83 in backpay. The parties cross-appealed the judgments. 975 F.2d 1518 at 1521-1522.

The pertinent facts of the case were that B&B Cash Grocery Stores, Inc. operated 24 U-Save Supermarkets in Florida. Each store's management team consisted of a fourth manager, third manager, assistant manager, and store manager.[18] The normal management progression was from stockboy or bag boy to third and fourth manager, to assistant manager, to store manager. Only two women, both of whom came up through the cashier or head cashier's position, had ever become store manager. Buyers worked out of the main office in Tampa, Florida. Except for Miranda, who progressed from cashier, to head cashier, to non-foods manager, to accounting and bookkeeping, to inventory control clerk, to being one of two grocery buyers, all B & B buyers had some experience in store management. Upon being made a grocery buyer, Miranda's salary was raised to $400 per week, only $34 more than she had earned as an

inventory control clerk. All male buyers were paid between $600 and $650 per week. Between July 1986 and July 1988, despite requests, Miranda's salary was not equated to the male buyers. In July 1988, Miranda was informed that B&B could not afford two grocery buyers and that her position would be terminated effective the following Monday. She was offered the option of a head cashier job at $8.00 an hour or references that she had done an outstanding job if she chose to obtain work elsewhere. She resigned. The only other female, who was an assistant buyer at a salary far below comparable male assistant buyers, was notified that her position was being terminated, but she could maintain her $390 per week salary as an assistant officer manager. At least five males were demoted, but were permitted to maintain their rate of pay. Eight to ten months after the females' buying positions were eliminated, many executives received pay raises, including the remaining grocery buyer who received a $125-per-week raise.

Miranda filed EPA and Title VII claims charging that B & B intentionally paid her less than male employees who performed substantially similar work. The trial court held that the plaintiff failed to establish a claim under the Equal Pay Act, but that she had proven a Title VII violation. 975 F.2d 1518 at 1525. On appeal, the defendant contended that a finding that a plaintiff has not presented a prima facie case of gender-based discrimination under the Equal Pay Act conclusively prohibits a finding of Title VII discrimination. *Id.* at 1525-1526.

After considering the *Gunther* decision and the legislative history of Title VII and the EPA, the court concluded that the *McDonnell Douglas/Burdine* approach to disparate treatment was the appropriate framework for evaluating Miranda's claim of sex-based wage discrimination. *Id.* at 1528. As such, the Eleventh Circuit agreed with the trial court that Miranda had carried her burden of proof for a Title VII prima facie case by establishing that she was female (class) and that the job she held was similar to higher paying positions held by males. In accordance with *Burdine*, the "exceedingly light"[19] burden of producing a legitimate, non-discriminatory reason for the pay disparity shifted to the defendant. By demonstrating reasons which appeared on the surface to be legitimate, the burden shifted back to the plaintiff to establish by a preponderance of the evidence that the employer had a discriminatory intent. The Eleventh Circuit upheld the trial court's finding that B & B's explanation was a pretext for gender based discrimination and that the defendant had intentionally discriminated against Miranda. 975 F.2d at 1529-1530.

In making its determination, the Eleventh Circuit relied on inferences drawn from circumstantial, rather than direct, evidence to affirm the trial court's finding of intentional gender-based wage discrimination under Title VII and to reverse and remand the case to the district court for trial on the Equal Pay issue. As the court held:

> We believe that the "direct evidence" standard, such as the one adopted by the Fifth Circuit, eviscerates the standards and burdens for a Title VII case as set out in *Burdine* and *McDonnell Douglas*.... Incorporating the "direct evidence" standard would only help clever, but venal, employers who discriminate against women and are not compliant enough to admit it directly. Most importantly, it would shield employers who significantly underpay women but seek to avoid the requirements of the Equal Pay Act by changing the job description in a slight way that does not affect the substance of the responsibilities. *Id.* at 1531.

By looking beyond the 'direct evidence' standard suggested by the Supreme Court, and adopted by the Fifth and Seventh Circuits,[20] the Eleventh Circuit followed the more flexible, and possibly realistic, burden of proof standard in intentional wage discrimination cases. As Circuit Judge Dubina observed in his concurring opinion, "Disparate treatment cases do not ordinarily require direct evidence; indeed, it almost never exists." *Id.* at 1536.

In following the *McDonnell Douglas/ Burdine* rationale, the Eleventh Circuit, in *Miranda*, effectively placed the risk of nonpersuasion with the plaintiff by holding that the Title VII burden could be satisfied by proving either that "a discriminatory reason more likely than not motivated [her employer] to pay her less, or that [the employer's explanation is not worthy of belief." *Miranda*, 975 F.2d at 1529. The *Miranda* holding was modified slightly in *Meeks v. Computer Associates, Inter.*, 15 F.3d 1013 (11th Cir. 1994), relying on the Supreme Court's decision in *St. Mary's Honor Center v. Hicks*, ___U.S. ___, ___, 113 S. Ct. 2742, 2749, 125 L.Ed.2d 407 (1993). *Hicks* holds that only a finding of intentional discrimination will satisfy the plaintiff's burden of proof under Title VII. Disbelief of the employer's explanation may, together with elements of the prima facie case, be sufficient to show intentional discrimination, but rejection of the defendant's reasons does not compel judgment for the plaintiff as a matter of law. *Meeks*, 15 F.3d at 1019 n. 1.

In summary, by adopting the *McDonnell Douglas/Burdine* rationale in *Miranda*, the Eleventh Circuit distinguished wage discrimination cases brought under Title VII and the EPA in two ways. First, the Court established that wage-based discrimination claims brought under Title VII should be adjudged under the more relaxed standard of similarity between male and female occupied jobs, as opposed to the stricter EPA equality provisions. 975 F.2d at 1529. *See Beall v. Curtis*, 603 F. Supp. 1563, 1580 (M.D. Ga.), aff'd without op., 778 F.2d 791 (11th Cir. 1985). Secondly, the *Miranda* and *Meeks* cases clarify that application of the *McDonnell Douglas/Burdine* framework to a Title VII claim places the burden of persuasion on the plaintiff to prove intent to discriminate on the part of the employer as opposed to the EPA burden on the employer to establish that the pay differential was premised on a factor other than sex. *Meeks*, 15 F.3d at 1019. See also *EEOC v. Reichhold Chem., Inc.*, 988 F.2d 1564, 1570 (11th Cir. 1993).

There is a significant difference between the standards and burdens for claims brought under Title VII and the EPA. The interpretation adopted and refined by the Eleventh Circuit reflects the determination made by the majority of circuits that have addressed the relationship between the two laws.[21] The essential difference is that under the Eleventh Circuit's holding a Title VII sex-based wage discrimination claim may be successful, with or without direct evidence, even when the more stringent EPA standards cannot be met. As such, the Eleventh Circuit, through its *Miranda* decision, afforded a Title VII sex-based wage discrimination case plain-

tiff the broadest breadth of interpretation.[22] Whatever the future outcome of any Supreme Court resolution of the circuit split, the Eleventh Circuit, in *Meeks*, 15 F.3d at 1020, has commented on its holding respecting the relationship between Title VII and the EPA that "having reviewed these decisions and the relevant Supreme Court precedent, we are convinced that our decision in *Miranda* not only binds us on this issue but has the added merit of being correct." ■

## Endnotes

1. *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1536 (11th Cir. 1992) (Dubina, J., concurring).
2. S.1178, 79th Cong., 1st Sess. (1945). *See* Hearings on S. 1178 before Subcomm. of the Senate Comm. on Education and Labor, 79th Cong., 1st Sess. (1945)
3. 108 Cong. Rec. 14771 (1962). *See* H.R. 11677, as amended, 87th Cong., 2d Sess. (1962).
4. Ross & McDermott, *The Equal Pay Act of 1963: A Decade of Enforcement*, 16 B.C. Indus. & Com. L. Rev. 1, 4, note 15 (1974).
5. Margolin, *Equal Pay and Equal Employment Opportunities for Women*, 19 N.Y.U. Cong. Lab. 297 (1967), *quoting Edwards v. California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).
6. Green, *An Application of the Equal Pay Act to Higher Education*, 8 Journal of College and University Law 203, 205 (1981).
7. 29 U.S.C. §206(d)(1) reads:

   No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (I) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.
8. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* provides, in relevant part:

   (a) It shall be an unlawful employment practice for an employer-

   1. to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
   2. to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
9. *See* Robert H. Cohen, *Pay Equity: A Child Of The 80s Grows Up*, 63 Fordham L. Rev. 1461, 1470-1474 (1995); Amy M.Sneirson, *One Of These Things Is Not Like The Other: Proving Liability Under The Equal Pay Act and Title VII*, 72 Wash. U. L. Q. 783.
10. *International Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 336 n. 15 (1977).
11. 42 U.S.C. §2000e-2(k)(1)(A)(i) (Supp. V 1993) states:

    An unlawful employment practice based on disparate impact is established under this subchapter only if —

    (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fail to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.
12. 42 U.S.C. §2000e(m) (Supp. V 1993) ("The term 'demonstrates' means meets the burdens of production and persuasion.")
13. *County of Washington v. Gunther*, 425 U.S. 161, 171-172 (1981).
14. Noting the possible remedial gaps if the two statutes were interpreted as having the same standards, the Supreme Court held:

    In practical terms, this means that a woman who is discriminatorily underpaid could obtain no relief-no matter how egregious the discrimination might be-unless her employer also employed a man in an equal job in the same establishment, at a higher rate of pay. Thus, if an employer hired a woman for a unique position in the company and then admitted that her salary would have been higher had she been male, the woman would be unable to obtain legal redress under petitioner's interpretation. Similarly, if an employer used a transparently sex-biased system for wage determination, women holding jobs not equal to those held by men would be denied the right to prove that the system is a pretext for discrimination. 452 U.S. at 179.
15. *Lorillard v. Pons*, 434 U.S. 575 (1978).
16. *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1427, 1429 n.4 (11th Cir.), cert. denied, 111 S. Ct. 353 (1990).
17. *E.g., Feazell v. Tropicana Products, Inc.*, 819 F.2d 1036 (11th Cir. 1987).
18. Fourth and third managers were also referred to as fourth and third "man." *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1522 n.3 (11th Cir. 1992).
19. *Perryman v. Johnson Products, Inc.*, 698 F.2d 1138, 1142 (11th Cir. 1983).
20. *But see, e.g., Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1133 (5th Cir. 1983); *E.E.O.C v. Sears, Roebuck & Co.*, 839 F.2d 302, 343 (7th Cir. 1988).
21. *Tidwell v. Fort Howard Corp.*, 989 F.2d 406 (10th Cir. 1993); *Fallon v. Illinois*, 883 F.2d 1206 (7th Cir. 1989); *Plemer v. Parsons-Gilbane*, 713 F.2d 1127 (5th Cir. 1983), cert. dismissed, 485 U.S. 930, 108 S. Ct. 1101, 99 L.Ed.2d 264 (1988); *Brewster v. Barnes*, 788 F.2d 985 (4th Cir. 1986). But see *Korte v. Diemer*, 909 F.2d 985 (6th Cir. 1990); *McKee v. Bi-State Development Agency*, 801 F.2d 1014 (8th Cir. 1986) and *Foster v. Arcata Associates, Inc.*, 772 F.2d 1453, 1465 (9th Cir. 1985).
22. *Miranda*, 975 F.2d at 1536.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# United States District Court, Middle District of Alabama
# Magistrate Judge Position

The Judicial Conference of the United States has authorized the appointment of a fourth full-time United States Magistrate Judge for the Middle District of Alabama at Montgomery, Alabama. This appointment is for a full eight-year term beginning upon appointment. The duties of the position are demanding and wide-ranging and will include: (1) conduct of most preliminary proceedings in criminal cases; (2) trial and disposition of misdemeanor cases; (3) conduct of various pretrial matters and evidentiary proceedings on delegation from the judges of the district court; (4) trial and disposition of civil cases upon consent of the litigants; and (5) examination and recommendations to the judges of the district court in regard to prisoner petitions and claims for Social Security benefits.

The basic jurisdiction of the United States Magistrate Judge is specified in 28 U.S.C. §§ 631 *et. seq.* To be qualified for appointment, an applicant must:

1. Be a member in good standing of the bar of the highest court of the state in which the magistrate judge is appointed. A nominee must have been, for at least five years, a member in good standing of the bar of the highest court of a state, the District of Columbia, the Commonwealth of Puerto Rico, or the Virgin Islands of the United States;
2. Have been engaged in the active practice of law for a period of at least five (5) years (with some substitutes authorized);
3. Be competent to perform all the duties of the office; be of good moral character; be emotionally stable and mature; be committed to equal justice under the law; be in good health; be patient and courteous; and be capable of deliberation and decisiveness;
4. Be less than 70 years old; and
5. Not be related to a judge of the District Court.

A merit selection panel composed of attorneys and other members of the community will review all applicants and recommend to the judges of the District Court, in confidence, the five persons whom it considers best qualified. The Court will make the appointment, following an FBI and IRS investigation of the appointee. An affirmative effort will be made to give due consideration to all qualified candidates, including women and members of minority groups. The salary of the position is $122,500 per annum.

Further information on the Magistrate Judge's position may be obtained from the clerk of the District Court:

**Thomas C. Caver, Clerk**
**United States District Court**
**P.O. Box 711**
**Montgomery, Alabama 36101-0711**
**(334) 223-7308**

Applications may be obtained from and must be submitted to Thomas C. Caver, Clerk, on or before September 29, 1995.

# Kids' Chance Golf

# SCRAMBLE A SUCCESS

Louis Coppedge, kneeling, lines up a putt as Mitch Allen, rear, and Greg Hawley, right, give advice.

Steve Ford, Doug McElvy, Earl Johnston and John Gullahorn, L-R, were relieved to birdie the hole sponsored by Steve and Doug's firm.

The participants enjoyed the opportunity to meet Chris Basselin, a repeat scholarship recipient. L-R, Steve Jackson, Steve Brown, Chris Basselin, Roger Monroe and Jared Taylor

These guys are ready to tee it up! L-R, Jerry Roberson, Bob Cooper, Charles Carr and Joe Driver

The first annual Kids' Chance Golf Scramble was held during the 1995 Annual Meeting to benefit the Kids' Chance Scholarship Fund. Oxmoor Valley, a course on the Robert Trent Jones Golf Trail, was the site of the tournament. Sixty-one golfers competed in the tournament. Steve Brown of Birmingham, the Workers' Compensation Section chair, thanked all participants for coming out and thanked the tournament sponsors for their support.

The tournament raised a net of $6,700 to help provide scholarships for young people who have had a parent killed or permanently and totally disabled in an on-the-job accident. Kids' Chance was established by the Workers' Compensation Section in 1992 and is administered by the Alabama Law Foundation. Twenty students will be receiving $28,000 in scholarships for the 1995-96 school year. The scholarships are for college and technical school.

**The winning teams and individual prizes are as follows:**

*First Place:* **Brent Tyra, Ken Webb, Mike Lucas and Mark Hughes**

*Second Place:* **John Gullahorn, Doug McElvy, Earl Johnson and Steve Ford**

*Third Place:* **Mitch Allen, Louis Coppedge, Frank Cauthen and Greg Hawley**

*Fourth Place:* **Scott Moss, Don Wissman, Bill Smith and Jon Barry**

*Closest-to-the-Pin on Hole #2:* **Tom Oliver**

*Closest-to-the-Pin on Hole #4:* **David Champlin**

*Closest-to-the-Pin on Hole #13:* **Mike Waters**

*Closest-to-the-Pin on Hole #16:* **Jon Barry**

*Longest Drive:* **Bill Smith**

*Longest Putt:* **Doug McElvy**

# The Nuts and Bolts of Civil Appeals

*By Deborah Alley Smith and Rhonda Pitts Chambers*

In order to protect your clients adequately during the appellate process you must have a basic understanding of the rules regarding filing and timing of appeals. While there is no substitute for reading and studying the Alabama Rules of Appellate Procedure, the following is a summary of some of the basic rules where problems tend to arise.

**Post-judgment motions:** The first issue that one confronts in seeking appellate review is whether the filing of post-judgment motions is necessary or desirable. The nuances of resolving that issue are beyond the scope of this article. However, this question must always be evaluated because in some circumstances a post-judgment motion is necessary in order to preserve an issue for appeal. See, e.g., *Wade v. Pridmore*, 361 So. 2d 511 (Ala. 1978)(motion to set aside default judgment must be filed before appealing entry of default judgment).

Motions for jnov, for new trial and to alter or amend the judgment must be filed within 30 days of the entry of judgment. Entry of judgment means the notation of the judgment on the docket sheet or the filing of a separate judgment or order. Ala. R. Civ. P. 58(c). Judgment is not always entered on the day the verdict is returned. The court may render judgment by separate order or announce the judgment from the bench, but the date that begins the running of the 30 days for filing post-judgment motions is the date the judgment is *entered*. Post-judgment interest does not begin to accrue nor does the time period for filing post-judgment motions begin to run until the judgment is entered.

**Disposition of post-judgment motions:** Under Rule 59.1, Ala. R. Civ. P., the trial court has 90 days from the date the post-judgment motions are filed to rule on the motions. If the 90 days expire and the trial court has failed to rule, the motions are deemed denied by operation of law. However, the 90-day period may be extended with the express consent of all the parties. The consent must appear of record, and it must be entered before the expiration of the original 90-day period. The 90-day period also may be extended by the appellate court to which an appeal of the judgment would lie.

Rule 59.1 applies only to post-judgment motions filed pursuant to rule 50 (j.n.o.v.), 52 (to amend findings of fact in non-jury cases), 55 (to set aside a default), or 59 (new trial or to alter or amend the judgment). It does not apply to Rule 60 motions, nor does it apply to rule 50 motions for judgment in accordance with a motion for directed verdict when no verdict is returned (i.e., when there is a mistrial). See *Pierson v. Pierson*, 347 So. 2d 985 (Ala. 1977).

**Time for appeal:** Generally, the appellant has 42 days from the entry of judgment in which to appeal. However, appeal must be perfected within 14 days in cases involving (1) interlocutory orders granting, continuing, modifying, refusing or dissolving an injunction, or refusing to dissolve or modify an injunction; (2) interlocutory orders appointing or refusing to appoint a receiver; (3) interlocutory orders determining the right to public office; and (4) judgments in actions for the validation of public obligations. See Ala. R. App. P. 4(a).

Timely filing of a notice of appeal with the trial court is the act that confers jurisdiction on the appellate court. If notice of appeal is not timely filed, the

appellate court lacks jurisdiction to consider the appeal, no matter how meritorious it may be, and the appeal must be dismissed. See *Hayden v. Harris*, 437 So. 2d 1283 (Ala. 1983) (time limit for filing notice of appeal is jurisdictional, it cannot be waived, nor is it subject to extension of time by agreement of the parties or order of the appellate court.); Ala. R. App. P. 2 (a)(1) ("An appeal *shall* be dismissed if the notice of appeal was not timely filed to invoke the jurisdiction of the appellate court.")

The notice of appeal must be received and filed in by the clerk of the trial court within the time for appeal in order to properly perfect the appeal. The provisions of the appellate rules concerning service by mail do NOT apply to the notice of appeal. Thus, depositing a notice of appeal in the mail is insufficient to constitute filing with the trial court. *Alabama Medicaid Agency v. Peoples*, 557 So. 2d 1281 (Ala. Civ. App. 1990) (service by certified mail applies only to filings in an appellate court; appellant's notice of appeal sent to circuit court by certified mail was not timely filed). Facsimile transmission of a notice of appeal also does not constitute filing the notice of appeal with the circuit court. *Ex parte Tuck*, 622 So. 2d 929 (Ala. 1993).

Rule 77(d), Ala. R. Civ. P., permits the trial court to extend the time for taking an appeal upon a showing of excusable neglect in failing to learn of the entry of the judgment. This rule may be utilized when a party does not receive notice of the entry of judgment. However, the appeal time may be extended no more than 30 days. *Lindstrom v. Jones*, 603 So. 2d 960 (Ala. 1992). Rule 77(d) does not permit the trial court to extend the time for appeal for any reason other than failure to learn of entry of the judgment. *Greystone Close v. Fidelity & Guaranty Ins. Co.*, [Ms. 1940544 & 1940584 July 14, 1995] ___ So. 2d ___ (Ala. 1995) (appeal dismissed because "litigant's miscalculation of time for filing notice of appeal, no matter how innocent or understandable, is not the kind of neglect excused under 77(d) and the trial court was without the power to grant ... an extension of time to ... appeal").

If *timely* post-judgment motions are filed pursuant to Rules 50 (j.n.o.v.), 52 (to amend findings of fact in non-jury case), 55 (to set aside a default), or 59 (new trial or to alter or amend the judgment), the appeal time is suspended and begins to run anew from the date of disposition of the post judgment motions. See Ala. R. App. P. 4. If the post-judgment motions are not timely filed, however, the time for appeal is not tolled and will expire 42 days after the entry of judgment. *Payne v. City of Athens*, 607 So. 2d 292 (Ala. Civ. App. 1992). If timely post-judgment motions are filed and they are deemed denied by operation of Rule 59.1, the appeal time begins to run from the 90th day, even if the trial court later enters an order purporting to dispose of the motions. See *Wood v. Benedictine Soc'y of Ala., Inc.*, (Ala. 1988) (42 day appeal time began to run on date that motion was denied by operation of rule 59.1 rather than from court's subsequent order purporting to rule on motion).

If a timely notice of appeal is filed by one party, any other party may file a notice of appeal within 14 days of that notice or within the original appeal time, whichever is later. Ala. R. App. P. 4(a)(2). The appellee may not raise any issues different from those raised by the appellant, unless he has filed a cross appeal. A cross appeal requires the filing of the same documents as any other appeal, and the docketing fee also must be paid.

**Effect of appeals taken during the post-judgment motion time period:** Prior to February 1, 1994, filing a notice of appeal before the disposition of one's own post-judgment motions would work as a waiver of the post-judgment motion and possibly the loss of certain issues for appellate review. *State Farm Mutual Automobile Insurance Co. v. Robbins*, 541 So. 2d 477 (Ala. 1989). The amended rules provide that a notice of appeal which is filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after, but on the same date as, the order is entered. Ala. R. App. P. 4(a)(4). If notice of appeal is filed after the entry of the judgment, but before the disposition of all post-judgment motions, the notice is held in abeyance until all post-judgment motions are ruled upon. The notice of appeal becomes effective upon the date of disposition of the last of all such motions. Ala. R. App. P. 4(a)(5). This "abeyance" procedure could result in an appeal from a judgment that has been altered substantially by subsequent rulings on post-judgment motions. In such a case, the appellee may move to dismiss the appeal. The appellant can respond and state whether appellate review is still sought on some aspect of the case. The appellant can amend the notice of appeal within 42 days after the disposition of the last motion. The appellant should notify the appellate court clerk when the appellant discovers that the notice of appeal is being held in abeyance or has been held in abeyance under Rule 4(a)(5).

**What to file:** The *notice of appeal* must specify the party or parties taking the appeal, must specify the judgment or order appealed from and must name the court to which the appeal is taken. The designation of the judgment or order appealed from does not limit the scope of appellate review. Further, designation of the wrong appellate court is treated as a clerical mistake and may be corrected accordingly. Ala. R. App. P. 3(c). The appellate court, within its discretion and considering any prejudice to the adverse

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party, also may treat the naming of the appealing party incorrectly as a clerical mistake and allow the real party to be substituted, even if the motion to substitute is filed outside the 42 day appeal period. See *Alabama State Tenure Comm'n v. Singleton*, 475 So. 2d 186 (Ala. 1985).

*Security for costs on appeal* (Ala. R. App. P. 7), an *appellate docketing statement* (Ala. R. App. P. 3(e)), and the $100 *docketing fee* (Ala. R. App. P. 12(a)) should be filed with the notice of appeal. A sufficient number of copies must be filed to allow the clerk of the trial court to serve the clerk of the appellate court, the court reporter, and counsel of record for each party to the appeal (or the parties themselves, if pro se). Although the trial court clerk must serve a copy of the notice of appeal on all parties, Ala. R. App. P 3(d)(1) now requires that the appellant also serve copies of the notice of appeal on all adverse parties. The primary purpose of the notice provision is to prevent the 14-day cross-appeal period from running before other parties learn of the filing of the notice of appeal.

*Designation of the record on appeal* — Within seven days of filing the notice of appeal the appellant must file with the clerk of the trial court and serve on appellee a written designation of the portions of the clerk's record which should be included in the record on appeal. Ala. R. App. P. 10(b)(1). If the appeal is from a summary judgment, the appellant must designate any depositions which are to be included in the record. If less than all of the record is designated, the appellant also must serve a statement of the issues he intends to present on appeal. The appellee then has seven days from service of the designation to file and serve a designation of any additional portions of the record he deems necessary.

*Transcript purchase order* — A transcript purchase order also must be completed and distributed and the estimated cost of the transcript paid to the court reporter within seven days of filing the notice of appeal. Ala. R. App. P. 10(b)(2). Again, if a transcript of less than all of the proceedings is ordered, a statement of the issues to be raised on appeal also must be served on the appellee. On the day the transcript purchase order is received, the court reporter must complete the portion of the order form certifying receipt of the estimated cost. The appellee has seven days from service of the transcript purchase order to designate any additional portions of the proceedings that he deems necessary and to pay the reporter the estimated costs of those portions. At any time, the appellee may apply to the trial court for an order requiring that the appellant reimburse the appellee for any or all of the payment made to the court reporter.

If the testimony presented to the trial court was not transcribed, an effort must be made to supply a statement of the evidence pursuant to Ala. R. App. P. 10 or there is nothing to review on appeal. Rule 10 provides two mechanisms for creating a record of the evidence presented. Subdivision (d) permits the appellant to prepare a statement of the evidence from the best available means, including the attorney's recollection. The statement must be served on the appellee within seven days after the filing of the notice of appeal. The appellee has seven days to serve objections or propose amendments, after which time the statement and objections or amendments must be submitted to the trial court for approval. The statement must then be filed and included by the clerk of the trial court in the record on appeal. Subdivision (e) differs from subdivision (d) in that the parties agree on the statement prior to approval by the trial court.

A party desiring to appeal when the evidence was not transcribed is, as a practical matter, at the mercy of the trial court and the opposing party. It is unlikely that either the opposing party or the trial court will approve a statement of the evidence that does not support the judgment entered. Thus, it always is advisable to see that a court reporter is present to record the proceedings.

Failure to timely file the security for costs, a docketing statement, a designation of the record or a transcript purchase order is not a jurisdictional defect. However, the appeal may be dismissed if any deficiency in this regard is not corrected. See *Holt v. State*, 361 So. 2d 348 (Ala. 1978). Failure to file a docketing statement also may be treated as contempt of court. Moreover, it is the appellant's responsibility to see that the record is prepared and filed in a timely manner, and the appeal may be dismissed if the appellant does not do so. See Ala. R. App. P. 12 (c) ("Dismissal for failure of appellant to cause timely completion of record").

Note: The Appellate Docketing Statement (Form ARAP 24 or 25) and the Transcript Purchase Order (Form ARAP 1A) may be obtained from the circuit court clerk's office or the Administrative Office of Courts. A printed Notice of Appeal form (Form ARAP-1) also is available, which form incorporates the notice of appeal, security for costs, designation of the record and supersedeas bond.

**Preparation of the record:** The rules

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allow the trial court clerk 28 days to assemble the clerk's record. The clerk's record includes the docket entries, pleadings and exhibits to the extent designated by the parties. The clerk must file a certificate of completion of the clerk's record within 28 days of the filing of the notice of appeal, unless the time period is extended by order of the trial court. The trial court may grant only two seven-day extensions for completion of the clerk's record. Further extensions must be sought in the appellate court.

The court reporter must complete and file any ordered portions of the transcript of the proceedings within 56 days of the filing of the notice of appeal. The trial court may grant up to four seven-day extensions for completion of the transcript. Further extensions must be sought from the appellate court.

The clerk then has seven days to compile the record on appeal, consisting of the clerk's record and the reporter's transcript (if a transcript was ordered). The clerk's filing in the appellate court of a Certificate of Completion of Record on Appeal begins the briefing schedule.

**The record:** Rule 11(a)(3), Ala. R. App. P., requires that the clerk make the record available to the parties for preparation of their briefs. The record should be retrieved from the clerk's office in a timely manner after receiving the certificate of completion, and counsel should review the record as soon as possible after receiving it. If something is left out, the parties may stipulate what action should be taken to correct or supplement the record. However, if the parties cannot agree, the appellant has only 14 days from the date of the certificate of completion of the record on appeal in which to file a motion with the trial court to supplement or correct the record on appeal. The appellee has only 14 days from the filing of appellant's brief to file such a motion. The record may be supplemented to include only those matters that originally were designated by the parties. See Ala. R. App. P. 10(f)("if admitted or offered evidence that is material to any issue on appeal is omitted from the record *after being designation for inclusion as required in Rule 10(b)...*" motion to supplement or correct the record may be filed). If a motion to supplement with portions of the transcript is filed, a copy of the original transcript purchase order must be attached to demonstrate that those portions were designated to be included in the record. If not ruled upon by the trial court within 14 days, a motion to supplement is deemed denied. Within seven days of the denial of a motion to supplement (or the date it is deemed denied), the dissatisfied party may seek relief in the appellate court.

The running of the time for filing briefs is not tolled during the pendency of a motion to supplement or during the time period a supplemental record is being prepared, *unless* the appellate court so orders on motion of a party or on its own initiative. See Ala. R. App. P. 10(f)(1).

Exhibits that cannot be copied may be sent to the appellate court in a separate container or they simply may be referred to in the record (i.e. Plaintiff's exhibit 2 was incapable of being copied). If oversized exhibits were offered into evidence and either party would like the court to see those exhibits, he should consider filing a motion to substitute a regular sized copy of the exhibit to be included in the record. That motion should be filed with the trial court *before* the clerk's

**Rhonda Pitts Chambers**

Rhonda Pitts Chambers is a 1986 graduate of Judson College and a 1989 graduate of Cumberland School of Law. She has authored numerous legal articles and served as associate editor of the *American Journal of Trial Advocacy* from 1987-89. She is an associate in the Birmingham firm of Rives & Peterson, and is a former law clerk to the Hon. Oscar W. Adams, Jr. She is a member of the standing committee on the Alabama Rules of Appellate Procedure.

**Deborah Alley Smith**

Deborah Alley Smith is a member of the Birmingham firm of Rives & Peterson. She graduated from the University of Tennessee and received her law degree from the University of Alabama School of Law.

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record is completed. If necessary, a motion to have the original exhibit transmitted to the court may be filed with the appellate court. Ala. R. App. P. 13.

Within 14 days of the filing of the certificate of completion of the record on appeal, the appellant must file with the clerk of the appellate court, a copy of the entire record. The appellant is responsible for ordering and paying for the second copy of the record. However, you should always check with the clerk of the trial court about the second copy. In some circuits, the clerk will make the second copy and send it to the appellate court. In other circuits, the appellant must arrange for the copy to be made and see that it is delivered to the clerk of the appellate court.

Security: How do you protect your client during the pendency of post-trial motions or appeal? Rule 62, Ala. R. Civ. P., provides an automatic stay of execution for 30 days after the entry of judgment in most circumstances. See Ala. R. Civ. P. 62 (a) (the automatic stay does not apply in some circumstances, such as actions for injunctions and in receivership actions). However, if a party is concerned that the judgment may become uncollectible or the status quo may be altered in some other respect during the 30 days, he may seek relief from the trial court. Rule 62 allows execution to issue and proceedings to be commenced to enforce the judgment during the 30-day period "by order of the court for good cause shown." See Ala. Code ß 6-9-22 ("execution may be issued by leave of the court before the time prescribed in the Alabama Rules of Civil Procedure for issuing of executions, the plaintiff, his agent or attorney showing sufficient cause therefor by affidavit"); Ala. Code ß 6-9-23 ("on affidavit being made and filed that the defendant is about fraudulently to dispose of or remove his property and that the plaintiff will probably lose his debt, the clerk or register *must* issue execution against the property of the defendant.")

The automatic stay expires after 30 days, but Rule 62(b) allows the trial court in its discretion to stay execution during the pendency of the post-judgment motions "on such conditions for the security of the adverse party as are proper." Thus, the appellee may request that the court require that a bond be posted or some other security be provided as a condition of granting a stay.

Once the post-judgment motions are overruled, a supersedeas bond in the amount of 125 percent of the judgment (150 percent if the judgment is $10,000 or less) is required in order to stay execution while the case is on appeal. Ala. R. Civ. P. 62(d); Ala. R. App. P. 8. The stay is effective upon approval of the bond by the clerk of the trial court.

**Interlocutory Appeals:** Ala. R. App. P. 5 permits a party to request permission to appeal from an interlocutory order under certain limited circumstances. In order to file a petition for permission to appeal, the trial court must certify the interlocutory order. The trial court's certification must state that in the opinion of the trial court the order involves a controlling question of law as to which there is substantial ground for difference of opinion, that an immediate appeal from the order would materially advance the ultimate termination of the litigation and that an appeal would avoid protracted and expensive litigation. The petition for permission to appeal must be filed in the supreme court within 14 days after the entry of the interlocutory order. A $50 docketing fee must be filed with the petition. If permission to appeal is granted, the case proceeds in the same manner as any other appeal. The petitioner (now the appellant) must file security for costs, a docketing statement and an additional $50 docketing fee with the supreme court. A notice of appeal need not be filed.

Appeals of interlocutory orders are limited to those civil cases which are within the original jurisdiction of the supreme court. Interlocutory appeals cannot be filed in the court of civil appeals.

**Briefs:** The filing of the certificate of completion of the record on appeal by the trial court clerk begins the briefing schedule. The appellant has 28 days within which to file his initial brief, the appellee has 21 days within which to respond, and the appellant then has 14 days within which to file a reply brief. Both the appellant and the appellee can obtain one seven-day extension. If the appellant is granted an extension for filing his principal brief, he cannot obtain an extension for filing his reply brief. "Extraordinary good cause" must be shown to obtain additional extensions.

**Deflection:** Ala. Code ß 12-2-7 permits the supreme court to transfer or "deflect" certain cases within its jurisdiction to the court of civil appeals. The supreme court cannot transfer cases presenting a substantial question of federal or state constitutional law, cases involving a novel legal question, utility rate cases, bond validation cases or Alabama State Bar disciplinary proceedings. Cases that the supreme court can transfer include (1) cases involving an amount of controversy of $50,000 or less, regardless of the basis of the claim appealed; (2) cases in which the dispositive legal issue turns on post-judgment enforcement procedures, including garnishments and executions; cases in which the dispositive legal issue turns on commercial contract law; and cases in which the dispositive legal issue turns on real property law. As the number of appeals increases every year, the supreme court likely will deflect more and more cases, particularly given the increase in the number of judges on the court of civil appeals. Thus, if a case falls within one of the categories

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to be considered for transfer and the appellant or appellee believes it should not be transferred, the reasons should be fully set forth on the docketing statement.

**Petitions for writ of certiorari:** In order to place a case in the proper posture to file a petition for writ of certiorari in the Alabama Supreme Court, an application for rehearing must be filed in the court of civil appeals. Decisions of the court of civil appeals may be reviewed by certiorari only after the court of appeals has overruled an application for rehearing directed to the issue or decision with respect to which the petitioner complains. Authority must be cited in the application for rehearing or the application will be *dismissed* and no review by certiorari will be available.

Certiorari review is limited to the facts stated in the opinion of the court of civil appeals. If the petitioner is dissatisfied with the facts stated in the opinion, he *must* file with his application for rehearing a motion to add or correct on rehearing the facts stated in the opinion. Ala. R. App. P. 39(k). The court of civil appeals rarely adds or corrects any facts in its opinions, but this is a necessary step for certiorari review.

If the court fails to accede to the request to add or correct facts, a copy of motion to add or correct facts must be included in the petition for writ of certiorari filed with the supreme court. This is necessary because the record is not transmitted to the supreme court unless the petition is granted. The supreme court's review is limited to those facts stated in the opinion of the court of civil appeals and the motion to add or correct facts. Failure to comply with this rule prevents review by the supreme court. *Ex parte Save Our Streams, Inc.*, 541 So. 2d 549 (Ala. 1989).

The petition for writ of certiorari must be filed with the Supreme Court of Alabama within 14 days after the denial of the application for rehearing. Ala. R. App. P. 39(a). Failure to file within the time period requires dismissal of the petition. *Accardo v. State*, 268 Ala. 293, 105 So. 2d 865 (1958). A docketing fee in the amount of $50 must accompany the petition. Although the rules state that the brief shall accompany the petition for writ of certiorari, a seven-day extension for filing the brief may be obtained, but the court cannot grant an extension for filing the petition itself. Merely refiling the same brief filed in the court of civil appeals is insufficient. *Bland v. State*, 277 Ala. 4, 166 So. 2d 735 (1964). Co.

The petition must state the style of the case, the name of the petitioner, the circuit court from which the cause is on appeal, the court of appeals to which the petition for certiorari is directed, the date of the decision sought to be reviewed, and the date of the order overruling the application for rehearing. The petition also must contain a concise statement of the grounds upon which the petition is based. A copy of the opinion of the court of appeals must be attached to the petition. Ala. R. App. P. 39(d).

Only five grounds will support a petition for writ of certiorari. They are: (1) the decision held valid or invalid a city ordinance, a state statute, a federal statute or treaty, or construed a controlling provision of the Alabama or federal Constitution; (2) the decision affects a class of constitutional, state or county officers; (3) the decision involves a material issue of first impression in this state; (4) the decision is in conflict with prior decisions of the United States Supreme Court, the Alabama Supreme Court or the Alabama courts of appeals; or (5) the petitioner seeks to have controlling supreme court cases overruled, which cases were followed by the court of appeals. If ground (4) is relied upon, the petition must quote that part of the opinion of the court of appeals and that part of the opinion of the prior decision that the petitioner contends are in conflict or the petitioner must state with particularity wherein the decisions conflict.

Within 14 days of the filing of the petition, the respondent may file an initial reply brief limited solely to the issue of whether any of the grounds set forth in Rule 39(c) support the issuance of the writ of certiorari. If the writ is issued, the respondent may file a reply brief addressing the substantive issues presented for review within 14 days after the writ has been issued. Petitioner may file a responsive brief within 14 days of receipt of respondent's brief. Ala. R. App. P. 39(f).


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# YOUNG LAWYERS' SECTION

*By Alfred F. Smith, Jr.*

"Money, money, money." That is how a recent hearing before a federal judge began. Before either attorney had begun to speak, the esteemed judge cried out from the bench, "Money, money, money—if I have to hear this motion, someone is going to pay money." The judge, obviously upset with the attorneys' repeated discovery disputes, gave notice from the start that he thought the motion could and should be resolved by the attorneys without the Court's involvement. The judge then questioned whether the attorneys had discussed the matter prior to the hearing. The attorneys confessed they had not. Incredibly, however, they launched into their arguments on the motion. The attorneys apparently did not understand the signals being given them by the judge. In the end, someone paid some money.

It is important for us as lawyers to recognize the signals being given to us. This is particularly true for young lawyers. We hear more senior attorneys complain that young lawyers today are too contentious and have taken the fun out of practicing law. Perhaps we should listen to the signals of our more experienced colleagues.

Training young lawyers is an important issue for the entire bar, and will be one of our section's priorities this year. Young lawyers seem to have more demands on them, but with less opportunity for real training, than our senior counterparts had. As a result, young lawyers frequently find themselves in situations for which they are ill-prepared. But if young lawyers are not learning the principles of lawyering and professionalism adequately, it is in part because they have not been trained properly by more senior attorneys. Virtually every respected attorney I know recalls fondly a mentor or mentors. Practicing law is complicated and dynamic. Since law schools generally do not prepare students for the practice of law, we all depend on others to help us learn the profession. As such, I believe more senior attorneys have an obligation to aid in the training and development of younger lawyers, even though training is not always cost-effective in the short term. Conversely, young lawyers should seek mentors who are concerned with teaching legal skills and ethics, not just marketing.

**Alfred F. Smith, Jr.**

Mentoring is at the heart of a project started recently by the North Carolina Young Lawyersí Section called "Silent Partners." The bar assigned first-year lawyers to experienced attorneys throughout the state. For the first year of practice, the new lawyer could call her silent partner confidentially for advice on any topic. The program was a tremendous success, and this August won an award at the annual meeting of the Young Lawyers Division of the American Bar Association in Chicago. This year the Alabama YLS will be looking into similar projects to assist Alabama young lawyers.

It is my pleasure to serve as president of the YLS for the 1995-1996 term. The job is made much easier by the good work of my predecessor, Hal West, to whom the section owes a debt of gratitude. Our goals for this year will be to improve the section's internal procedures and guidelines, to strengthen our ties with the local young lawyers' organizations and the state bar, and to continue the educational and public service projects with which we have been involved over the last few years. The 1995-96 Executive Committee members are listed below. You should feel free to contact any of these people with any concerns you have.

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Smith is a partner at Bainbridge, Mims, Rogers & Smith in Birmingham, Alabama. He is a 1986 graduate of the University of Alabama School of Law.

# Disciplinary Report

### Surrender of Licenses

• Walker County attorney **Marlin B. MacLaughlin** voluntarily surrendered his license to practice law effective May 26, 1995. The order from the Supreme Court of Alabama was entered on June 22, 1995. [ASB No. 95-099]

• On June 14, 1995, Opelika attorney **John Snow Thrower, Jr.** voluntarily surrendered his license to practice law. Accordingly, on June 29, 1995, the Supreme Court of Alabama entered an order cancelling his privilege to practice law in all the courts of the State of Alabama, and further ordered that his name be stricken from the roll of attorneys in this state. Under Rule 28 of the Rules of Disciplinary Procedure, Thrower cannot apply for reinstatement to practice until the expiration of at least five years. [ASB No. 95-164]

### Suspensions

• On June 7, 1995, the Alabama Supreme Court suspended Fort Payne attorney **Charles A. McGee** for a period of 45 days. McGee failed to respond to a grievance filed by a former client, who alleged that McGee had settled a case without the client's knowledge. A default judgment was entered against McGee but it was later set aside. A full hearing was conducted on October 14, 1993. McGee was found not guilty of the substantive charges, but guilty of failure to respond to a disciplinary authority's request for information. The Disciplinary Board considered McGee's prior discipline which often included instances of his refusal to cooperate in the investigation of grievances filed against him. [ASB No. 93-017]

• On June 9, 1995, the Disciplinary Commission of the Alabama State Bar ordered that Mobile attorney **Thomas Earle Bryant, Jr.** be interimly suspended from the practice of law in the State of Alabama pursuant to Rule 20 of the Rules of Disciplinary Procedure. [Rule 20(a); Pet. No. 95-03]

• On June 21, 1995, Huntsville attorney **Barbara C. Miller** was suspended from the practice of law for a period of 90 days effective June 19, 1995. This suspension was the result of a plea agreement between Miller and the Office of General Counsel. Miller entered guilty pleas to charges ASB 93-363 and ASB 94-086. In return, Miller received the 90-day suspension and a dismissal of all other pending cases. In ASB 93-363, Miller was charged with continuing to act on behalf of a client, after she had been terminated for over two weeks. She attended a final hearing and attempted to participate in it "as an officer of the court," while admitting she was not representing any party to the action. In ASB 94-086, Miller filed a lawsuit in circuit court against a house painter for a breach of contract. This defendant had earlier prevailed on the merits of this same claim in small claims court. The circuit court sanctioned Miller under Alabama's Litigation Accountability Act. [ASB Nos. 93-363 & 94-086]


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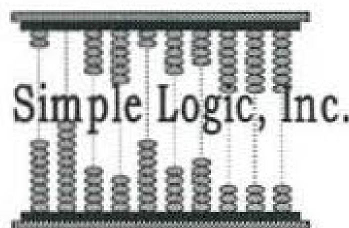


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# RECENT DECISIONS

By DAVID B. BYRNE, JR., WILBUR G. SILBERMAN and DEBORAH ALLEY SMITH

## UNITED STATES SUPREME COURT — CRIMINAL

**Title 18, §1001 does not extend to courts, thereby overruling *United States v. Bramblett*, 348 U.S. 503 (1955)**

*Hubbard v. United States*, Case No. 94-172, 63 US LW 4393 (May 15, 1995). Does *Title 18, § 1001*, which makes it a crime to make false statements "in any matter within the jurisdiction of any department or agency of the United States," apply to unsworn papers filed in a bankruptcy court? The Supreme Court said no by a six-to-three vote.

Led by Justice Stevens, the Court overturned its 1955 decision in *United States v. Bramblett, 348 U.S. 503 (1955)* that had designated a court as a department of the United States. The 1955 ruling "must be acknowledged as a seriously flawed decision," Justice Stevens said. "In ordinary parlance, federal courts are not described as departments or agencies of the government."

Hubbard's falsehoods in unsworn papers filed in a federal bankruptcy court prompted his indictment under *18 U.S.C., § 1001* which criminalizes false statements and similar misconduct occurring "in any matter within the jurisdiction of any department or agency of the United States." Hubbard was convicted after the district court, relying on *United States v. Bramblett*, instructed the jury that a bankruptcy court is a department of the United States within the meaning of *§ 1001*.

Justice Stevens reasoned that "under both a common-sense reading and the terms of 18 U.S.C. §6 – which applies to all of Title 18 and defines 'agency' to include, *inter alia*, any federal 'department, independent establishment, commission, administration, authority, board of bureau' – it seems incontrovertible that 'agency' does not refer to a court."

Justice Scalia filed a concurring opinion, and joined by Justice Kennedy, agreed that *United States v. Bramblett* should be overruled.

Chief Justice Rehnquist dissented, joined by Justices O'Connor and Souter.

**Common law 'knock and announce rule' forms part of Fourth Amendment's reasonableness inquiry**

*Wilson v. Arkansas*, Case No. 94-5707, 63 us LW 4456 (May 23, 1995). Is the common law practice of requiring police to knock and announce their presence before entering a residence with a court warrant to conduct a search generally required by the Fourth Amendment? A unanimous Supreme Court said yes.

Justice Thomas, writing for the Court, said, "Given the longstanding common-law endorsement of the practice of announcement, we have little doubt that the framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure."

The Court further reasoned that an officer's unannounced entry into a home might, in some circumstances, be unreasonable under the Fourth Amendment. In evaluating the scope of the constitutional right to be secure in one's home, the Supreme Court looked to the traditional protection against unreasonable searches and seizures afforded by the common law at the time of the writing of the Constitution.

However, it is important to note that the common law principle (knock and announce) was never stated as an inflexible rule requiring announcement under all circumstances. Clearly, there can be countervailing law enforcement concerns, including, *e.g.*, threat of physical harm to police, hot pursuit, or the existence of reason to believe that the fruits or instrumentalities of a crime would likely be destroyed.

**Sentence consideration of relevent conduct does not trigger double jeopardy provisions of fifth amendment**

*Witte v. United States*, Case No. 94-6187, 63 US LW 4576 (June 14, 1995). The Double Jeopardy Clause of the Fifth Amendment prohibits successive prosecutions or multiple punishment for the "same offense." This case, which involves application of the United States Sentencing Guidelines, raises the issue of whether a court violates the Double Jeopardy Clause by convicting and sentencing a defendant for a crime when the conduct underlying that offense has been considered in determining the defendant's sentence for a previous conviction.

Witte pleaded guilty to a federal marijuana charge. A pre-sentence report calculated the base offense level under the United States Sentencing Guidelines by aggregating the total quantity of drugs involved, not only in Witte's offense of


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# United States District Court, Northern District of Alabama Magistrate Judge Position

The current term of the office of United States Magistrate Judge Paul W. Greene at Huntsville, Alabama is due to expire January 20, 1996. The United States District Court is required by law to establish a panel of citizens to consider the reappointment of the magistrate judge to a new eight-year term.

The duties of a magistrate judge position include the following: (1) conducting most preliminary proceedings in criminal cases, such as initial appearances, bond and detention hearings, and arraignments; (2) the trial and disposition of misdemeanor cases; (3) conducting various pretrial matters and evidentiary proceedings on reference from the judges of the district court, including civil discovery and other non-dispositive motions; (4) conducting preliminary reviews and making recommendations regarding the disposition of prisoner civil rights complaints and habeas corpus petitions; and (5) trial and disposition of civil cases upon consent of the litigants.

Comments from members of the bar and the public are invited as to whether the incumbent magistrate judge should be recommended by the panel for reappointment by the court and should be directed to:

Perry D. Mathis, Clerk
U.S. District Court
Northern District of Alabama
Room 140, 1729 5th Avenue, North
Birmingham, Alabama 35203

Comments must be received no later than Friday, October 13, 1995.

conviction, but also in uncharged criminal conduct in which he had engaged with several co-conspirators. The result in guideline range was higher than it would have been if only the drugs involved in his conviction had been considered, but it still fell within the scope of the legislatively authorized penalty. The trial court accepted the PSI in sentencing Witte, concluding that the other offenses were part of a continuing conspiracy that should be taken into account under the guidelines as "relevant conduct." *See § 1B1.3.*

When Witte was subsequently indicted for conspiring and attempting to import cocaine, he moved to dismiss the charges, arguing that he had already been punished for the offenses because that cocaine had been considered as "relevant conduct" at his marijuana sentencing.

The trial court dismissed the indictment on double jeopardy grounds, but the Court of Appeals reversed relying upon the Supreme Court's decision in *Williams v. Oklahoma, 358 U.S. 576 (1959)*. Justice Sandra Day O'Connor, writing for the majority, held that "the Fifth Amendment's Double Jeopardy Clause does not bar prosecution of a defendant for criminal activity that was treated, in prior sentencing proceeding as 'relevant conduct,' under *§ 1B1.3* of the Federal Sentencing Guidelines, and, as such, influence the sentencing court's determination of sentence within legislatively prescribed range for offenses of conviction." The Court further reasoned that the Sentencing Guidelines, which envision but do not require that offenders be sentenced in a single proceeding for all related offenses, do not forbid imposition of a sentence for conduct that was considered as relevant conduct in a prior sentencing proceeding. In such an event, the sentencing court has the authority to prevent a sentence from being grossly increased by separate prosecutions, either by applying principles on concurrent and consecutive sentences set out in the guidelines, *§ 5G1.3*, or by departing from the sentence range prescribed by the guidelines as permitted by *18 U.S.C. § 3553(b)* and *§ 5K2.0*.

**David B. Byrne, Jr.**

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

**Wilbur G. Silberman**

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

**Deborah Alley Smith**

Deborah Alley Smith is a member of the Birmingham firm of Rives & Peterson. She graduated from the University of Tennessee and received her law degree from the University of Alabama School of Law.

### Late but safe

*Garlotte v. Fordice*, Case No. 94-6790, ___ US LW ___ (May 29, 1995). Can a state inmate serving consecutive sentences challenge, in a federal court, a conviction for which he already has completed the sentence? The Supreme Court answered yes by a seven-to-two vote.

Justice Ginsburg held that such inmates are "in custody" for the conviction even when that individual sentence is completed. Justice Ginsburg's opinion relies heavily on the Court's 1968 ruling in *Peyton v. Rowe, 391 U.S. 54 (1968)*, that held that consecutive sentences should be treated as a continuous series for purposes of habeas corpus relief.

In *Peyton*, an inmate serving consecutive sentences was allowed to challenge a conviction even though he had not begun serving the sentence. Applying that rationale to the other end of the spectrum, Justice Ginsburg reasoned, "We will not now adopt a different construction simply because the sentence imposed under the challenged conviction lies in the past rather than in the future."

## RECENT BANKRUPTCY DECISIONS

### Eleventh Circuit denies jurisdiction of lower courts on claim of Chapter 7 debtors for tortious interference with contract to sell their home

*Community Bank of Homestead v. Daniel Boone and Sara Boone*, 27 B.C.D. 372, 52 F.3d 958, (11th Cir. May 23, 1995). Debtors pre-petition had mortgaged their residence to the bank. The mortgage contained a dragnet clause which, in addition to the mortgage loan, also secured any future debts to the bank. Debtors had guaranteed a corporate loan. The corporate loan went into default around the same time debtors entered into a contract to sell their home, both events being approximately one week prior to filing a Chapter 7 petition. The bank, post-petition, sent an estoppel letter claiming proceeds from the sale. The amount claimed included the debt owing by reason of the guaranty. The estoppel letter prevented the closing; consequently debtors filed a suit in bankruptcy court claiming damages for tortious interference with the contract of sale. The bank contended that there was no bankruptcy jurisdiction over the state law tort claim. The bank appealed from the judgment in favor of the debtors. The district court affirmed, holding that the bankruptcy court had jurisdiction because the claim arose in the bankruptcy case.

In reversing the district court ruling, the Eleventh Circuit stated that the test for determining relation to bankruptcy of a civil action is whether the outcome has any effect on the administration of the estate in bankruptcy. Citing 28 U.S.C. §1334(b) as to civil proceedings arising under Title 11 or arising from or related to a case under Title 11, the court stated that as the alleged tort arose after the petition in bankruptcy, the cause of action was not property of the estate but only that of the debtors individually. It inferred that the result might be different under Chapter 11 or 13, or even in Chapter 7, should there be evidence of non-dischargeable unsecured claims of the bank, for in such instances a favorable result would be beneficial to pre-petition creditors. The court further rejected the argument

that the tortious interference claim constituted an adjustment of the debtor/creditor relationship under 28 §157(b)(2)(O), by stating that the claim had no effect on the estate.

**COMMENT:** The alleged tort was based upon Florida law. It is curious that neither the caption of the case nor the opinion mentions the trustee who, rather than the debtor, seemingly should have contended that the claim belonged to the estate. Conversely, why did the debtors not contend that the claim, having arisen post-petition, was the property of the debtor?

**Under approved plan of reorganization, liquidating trustee had authority to institute avoidance action on behalf of unsecured creditors**

*McFarland v. Leyh (In re Matter of Texas General Petroleum Corp.)*, 52 F.3d 1330, 27 B.C.D. 399, (5th Cir. June 1, 1995). The plan of liquidation provided for authority to the liquidating trustee to assert a list of certain avoidance actions. No case trustee was appointed under §1104, but the plan created the position of liquidating trustee under §1123(b)(3)(B) which provided for a transfer of avoidance powers to a party other than the debtor. The liquidating trustee brought a post-confirmation fraudulent conveyance action against McFarland who claimed that because no alleged cause of action was mentioned in the plan, the liquidating trustee had no standing to initiate the action.

The bankruptcy court's judgment for the trustee was affirmed by the district court, and McFarland appealed to the Fifth Circuit. The appellate court initially held, with respect to the trustee's standing, that it must be shown that (1) such party has been appointed and (2) is a representative of the estate. To prove that the trustee is a representative of the estate, the court must determine whether a successful recovery by such appointee would benefit the debtor's unsecured creditors. After determining this in the affirmative, the court then considered whether the plan allowed the liquidating trustee to take action against the specific defendant, McFarland, who had not been named in the plan's list of contemplated actions. In reaching its conclusion that the liquidating trustee had standing, the court said that as a matter of interpretation of the plan of reorganization, if there is ambiguity, the intent of the parties controls. The court found that the bankruptcy court in employing parol evidence to determine the intent of the plan proponent, found it proper to allow the liquidating trustee acting on behalf of unsecured creditors to assert the avoidance action against McFarland.

The next questions were whether the bankruptcy court had the power to adjudicate the fraudulent conveyance action, and whether there was a right to a jury trial. The court determined that although McFarland may have been originally entitled to an Article III court, he had consented to the bankruptcy court's entry of a final judgment by not objecting to the bankruptcy court's assumption of core jurisdiction. As to entitlement to a jury trial, it said that because of a stipulation entered into between the parties and the failure of McFarland to present such an issue to the trial court, McFarland was now precluded from a right to a jury trial.

**COMMENT:** There is a large mouthful in this case. Probably the appellate court could have gone either way in its decision. It furnished its reason for rejecting precedent because of waiver on the part of the defendant. Anyone wishing an Article III court or a jury trial must be careful in pre-trial procedure and agreements to make sure to preserve the right.

## Continuation of review of 1994 Amendments

**Some glitches in 1994 amendments**

Section 552 is a section on the post-petition effect of security interests. A new subsection (b)(2) was inserted,


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reading as follows:

> [I]f the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to amounts paid as *rents* of such property or the fees, charges, accounts, or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties, then such security interest extends to such *rents* and such fees, charges, accounts, or other payments acquired by the estate after the commencement of the case to the extent provided in such security agreement, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise. (emphasis supplied)
>
> 11 U.S.C. §552(b)(2)

The former subsection (b) was changed to subsection (b)(1) but it deleted the word "rents" in both places where it formerly appeared.

Under the new subsection (b)(2), if the lending agreement grants a security interest in the real estate rents, the secured lender's security interest in the post-petition rents continues automatically. Arguably, this new subsection applies only to hotels, motels or other lodging properties. Some courts may hold that the word "rents" applies to all real estate rentals, while other courts may strictly construe the language of the new subsection and determine that it applies only to "hotels, motels, or other lodging properties" and not to shopping center, office, or apartment rents. Under the latter interpretation, the real estate lobby will lose most of what it sought in the 1994 legislation.

## SUPREME COURT OF ALABAMA

**Insurer may be estopped from asserting exclusions if insured did not receive copy of policy**

In *Brown Machine Works & Supply Co. v. Insurance Co. of North America*, MS. 1930617 (March 31, 1995), the Alabama Supreme Court responded to two certified questions from the United States District Court for the Middle District of Alabama.

Brown Machine Works had entered into a contract with Texas Corporate Aircraft Sales (TCAS), pursuant to which TCAS was to attempt to sell an airplane owned by Brown. TCAS took possession of the airplane in exchange for a post-dated check in the amount of $100,000. The parties agreed that if TCAS was not successful in selling the aircraft within 120 days, Brown would accept the $100,000 as full payment for the plane. TCAS was to provide insurance on the plane while it was in its possession.

TCAS had a blanket policy with INA covering all of its aircraft. Coverage for Brown's airplane was secured under the INA policy. Brown was not furnished a copy of the insurance policy, but Brown did receive a certificate of insurance from INA, showing it as an additional insured. The certificate stated that the "Certificate of Insurance does not amend, extend, or otherwise alter the terms and conditions of insurance coverage contained in policies listed above issued by Insurance Company of North America." The certificate also had "All Risks" printed under the "Aircraft Physical Damage" designation of the type of policy.

When Brown discovered that TCAS, by forging a certificate of title, had sold Brown's aircraft, Brown attempted to cash TCAS' check, but TCAS had stopped payment on it. Brown filed a claim with INA for coverage under the policy's theft provision. INA rejected the claim, asserting that the policy did not provide theft coverage to Brown as an additional insured and stating that even if it did, coverage was excluded for "conversion".

The first question certified by the federal district court was whether an insurer is estopped to assert an otherwise valid exclusion by reason of its failure to deliver a copy of the policy to the insured in accordance with *Ala. Code* 1975, § 27-14-19, when it does provide a certificate of insurance which sets out the general coverage without enumerating the limitations and exclusions. The supreme court determined that the crux of the question was whether, in order to give effect to the statutory requirement that an insurer deliver a copy of the insurance policy to the insured, it should recognize an exception to the longstanding rule against enlarging the coverage of an insurance policy by estoppel.

Reviewing statutes and cases from several other jurisdictions, the court found that the clear weight of persuasive authority recognizes that where an insurer fails to deliver the policy in accordance with a statutory requirement, the insurer may be estopped from asserting coverage conditions or exclusions that are in the policy but are not disclosed to the insured. The court noted that if it held otherwise, the statute would have no practical effect. In a situation in which the insurer failed to comply with the statute, it could simply assert the general rule that insurance coverage cannot be created or enlarged by estoppel, perhaps pay a nominal fine and deny coverage. The court thus recognized an exception to the general rule, holding that in Alabama, an insurer who fails to follow the statutory mandate of § 27-14-19

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may be estopped from asserting otherwise valid coverage conditions or exclusions, if the insured is prejudiced by the insurer's failure to comply with the statute.

Whether an insurer is, in fact, estopped to deny coverage by its failure to deliver a copy of the policy to a particular insured depends, in part, upon whether that particular insured is "the insured or ... the person entitled" to a copy of the policy within the meaning of the statute. The court noted that it could not determine whether Brown was entitled to a copy of the policy. That issue must be decided by the trier of fact.

The court was reluctant to state what types of insureds are entitled to a copy of a policy. However, the court observed that on one end of the continuum of insureds are the purchaser and the named insured, who are clearly entitled to copies of the policy. On the other end of the continuum are incidental beneficiaries and beneficiaries of group policies, who are not entitled to copies of the policy, absent an inquiry. Between the ends of the continuum lies a large group whose status remains to be determined. The court noted:

> In determining which persons are included in that phrase [in the statute] ... one should be guided by the following statement: In the hypothetical spectrum set out above, the further away a particular insured or beneficiary is from those we have held are definitely included in the statutory phrase, then the less likely that the insured or beneficiary will be included. Accordingly, proceeding in the spectrum away from those to whom the statute definitely applies, it becomes more likely that provisions of undelivered policies will control over the terms of a delivered certificate of insurance if the certificate disclaims any effect on the coverage contained in the policy and if it does not "definitely contradict" the policy; consequently, it also becomes less likely that the insurer will be estopped from asserting otherwise valid conditions of, or exclusions from, coverage that are contained in the policy but not in the certificate.

The second certified question asked whether the court's opinion would change if the insured had relied on representations, made by the insurer's agent, that the insured had full coverage. The supreme court responded that the alleged misrepresentations on which the insured relied did not alter its opinion, as any fraud would be a separate matter not affecting Brown's status as an insured. The court added, however, that the representations could be relevant in determining prejudice by reason of the insurer's failure to comply with the statute. ■

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## SPECIAL THANK YOU!

The following court reporters and firms provided pro bono assistance in documenting the proceedings of the **Third Citizens' Conference** on the Alabama State Courts.

**Dunn, King & Associates (Montgomery)**
Jenny Dunn
Risa Entrekin
Mary King
Suzanne Spiers

**Prince Institute of Professional Studies (Montgomery)**
Chani Muller
Donna Gaskins
Michele Lee

**Edmondson Reporting & Video (Birmingham)**
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Cathy Jackson
Gail Shadburn

**The Stenograph Corporation**
Gil Claborn

# LEGISLATIVE WRAP-UP

*By ROBERT L. McCURLEY, JR.*

The Alabama Legislature adjourned on Monday, July 31, 1995, having passed several major pieces of legislation of interest to lawyers that were prepared by the Alabama Law Institute and received passage. They are as follows:

**Uniform Commercial Code.** Revised Articles 3 & 4 (Negotiable Instruments and Bank Deposits and Collections) H.B. 110, sponsored by Senator Steve Windom and Representative Mike Hill, effective January 1, 1996, see March 1995 *Alabama Lawyer*.

**Curators are abolished;** after January 1, 1997 all existing curators will automatically be converted into conservators. H.B. 634.

**Unincorporated Nonprofit Association** H.B. 218, sponsored by Senator Doug Ghee and Representative Mark Gaines, effective January 1, 1996, see November 1994 *Alabama Lawyer*.

**Retirement Benefits** as property settlement in divorce, S.B. 118, sponsored by Senator Pat Lindsey and Representative Tony Petelos, effective January 1, 1996, see May 1995 *Alabama Lawyer*.

Other legislation of interest to lawyers is as follows:

- The jurisdiction of the district court was raised from $5,000 to $10,000. H.B. 449.
- Circuit and district court fees, the temporary court costs that were to expire October 1, 1995, were made permanent, see S.B. 146.
- The pocket parts of the *Code* were adopted and made officially part of the *Code of Alabama*, S.B. 19.
- Video depositions of a victim or a witness in a criminal case may be used when the person is unavailable for trial for medical reasons. S.B. 60.
- Court may permit jurors to separate in a capital case, thereby amending *Ala. Code* §12-16-9. S.B. 77.
- Trustee Powers Act which provides automatic powers for trustees unless restricted in a trust agreement. S.B. 260.
- Amendments to the Fair Campaign Practice Act concerning acceptance and expenditures of campaign funds. S.B. 266.
- Accident reports may be filed within 30 days instead of ten days after the accident. S.B. 308.

- A bill was passed to provide for the formation and operation of Real Estate Investment Trusts. S.B. 384.
- The "death penalty" for foreign corporations that do not qualify to do business in Alabama was reinstated. S.B. 512.
- A rebuttable presumption is created that it is not in the best interest of a child to be in the custody of a parent who was the perpetrator of domestic violence. S.B. 522.
- Grandparents have the right to petition for visitation rights of their grandchildren who have been adopted by the new husband or wife of their deceased child's former spouse. S.B. 583.
- The Legislature passed a new ethics law that applies to public officials, public employees and lobbyists. H.B. 135.
- Partial child or spousal support payments shall be applied first to principal and the balance to interest. H.B. 401.
- Section 18-1A-21 is amended to change the interest rate paid on judgments in condemnation cases. S.B. 750.
- Sexual assault examinations will be paid by the state rather than by the victim. H.B. 863.
- Four court reform bills passed. H.B. 655 concerning adding a non-lawyer and district judge to the Judicial Inquiry Commission; H.B. 371 adds two non-lawyers and a district judge to the court of the judiciary; H.B. 194 requires justices and judges to file a list of contributors annually; and H.B. 854 provides that no state court may require disbursement of state funds unless approved by the legislature.

## Supreme court rules

The Alabama Supreme Court approved a revision of the Rules of Civil Procedure to be effective October 1, 1995. They further entered an order July 19, 1995 approving new Rules of Evidence which will become effective January 1, 1996.

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

**Robert L. McCurley, Jr.**

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

# • M·E·M·O·R·I·A·L·S •

## William Hutchins Cole, Sr.

For every thing there is a season, a time for every matter under heaven: A time to be born, and a time to die....

"The business of life," says John Morley, "is to be, to do, to do without, and to depart." Judge Cole, probably more than those of us left, understood that sooner or later he must face the palled messenger with the inverted torch. But the Judge knew that there was beyond the darkened hall, a life so exciting, so wonderful that it is beyond human comprehension.

William Hutchins Cole, Sr. was born in Towson, Maryland on March 11, 1918. He graduated from the University of Maryland in 1938 and from the University of Maryland Law School in May 1941.

After law school he served with the Federal Bureau of Investigation until 1943. In 1946, Judge Cole entered the practice of law with Lange, Simpson, Robinson & Somerville and remained until 1957. In 1957, he formed a partnership with John H. Jenkins in the general practice of law. In 1964, a new partnership was formed with John Jenkins, Dugan Callaway and Robert Vance. It is interesting to note that the firm of Jenkins, Cole, Callaway & Vance ultimately produced Judge William H. Cole, Judge Dugan Callaway (both circuit court judges) and Judge Robert Vance of the Fifth and Eleventh Circuit courts of appeals.

In the course of practicing law, Judge Cole served the Birmingham Bar Association well. He was a member of the Grievance Committee. He was elected as a member of the Executive Committee and was elected vice-president of our bar association in 1963. In 1970, he was a member of the "Special Unauthorized Practice of Law Committee" chaired by Frank Bainbridge, and authorized by the BBA. This committee investigated and assisted in the efforts to terminate "The Quickie Divorce Racket." This practice of obtaining fraudulent divorces was ended through the efforts of the many committee members.

In 1964, William H. Cole was elected president of the Birmingham Bar Association. He was the founder and first editor of the Birmingham Bar Association *Bulletin*. As stated at its inception, this *Bulletin* was to advise bar members of the activities, legal decisions and items of interest to the bar. This publication was the forerunner of the present *Bar Bulletin*, a beautiful quarterly publication, which has 27 of our members named on its board of editors.

Judge Cole was one of three candidates nominated to fill the vacancy on the circuit court by the retirement of Judge George Lewis Bailes. Judge Cole was elected for the six-year term. After serving ten years in this Domestic Relations Court and with the consent of all circuit judges, Judge Cole was seated as a circuit criminal court judge.

In 1988, upon reaching the age of 70, and after serving over 20 years, he retired. He continued to serve in a supernumerary status until 1991 when, at the suggestion of his physician, he discontinued all work as a judge. During his latter years, Judge Cole served as a volunteer librarian at Baptist Medical Center, Montclair.

Judge Cole was active in the Birmingham Kiwanis Club and Brookwood Baptist Church and served as president of the Alabama District Exchange Clubs.

Judge Cole left behind a devoted wife, three sons who bear his name, two daughters and an innumerable host of colleagues and friends who mourn his passing.

Whereas, it is well that we pause and reflect on this life which was so important to our own, mindful that such reflection can do no less than contribute to a better tomorrow for each of us; and,

Whereas, this resolution is offered as a record of our admiration and affection for Judge Bill Cole and of our condolences to his wife, his sons and daughters and the members of his family.

**—J. Fredric Ingram**
**President**
**Birmingham Bar Association**

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## William Edgar Davis

Whereas, William Edgar Davis, a distinguished member of the Birmingham and Federal bar associations, passed away on February 24, 1995; and,

Whereas, Bill, a native of Huntsville, lived in Birmingham for 42 years; and,

Whereas, he served in the United States Army during World War II, in the European Theater, attaining the rank of colonel; and,

Whereas, in 1953, he was appointed clerk of the United States District Court, serving the Court for 22 years. During Bill's tenure as clerk of court, because of his compassion toward people, not just lawyers, he assisted more young lawyers trying to negotiate the pitfalls of federal procedure than can be accurately counted; and,

Whereas, it would be a disservice not to mention the organizations in which Bill was an active member. He was a member of Shades Valley Presbyterian Church; Vestavia Country Club; Birmingham Downtown Optimist Club; Birmingham Quarterback Club; Birmingham Audubon Society; Pi Kappa Alpha Fraternity; University of Alabama Alumni Society; Veterans of Foreign Wars; American Legion; and Sons of the American Revolution; and,

Whereas, Bill was always talking about his family. He was so proud of his family, expressing, without hesitation, the happiness his wife, Marie, and his daughter, Brenda, brought into his life; and,

Whereas, the Birmingham Bar Association desires to remember his name and recognize his tremendous contributions both to our profession and to this community:

Now, therefore, be it resolved, by the executive committee of the Birmingham Bar Association in meeting here assembled that Bill not only loved lawyers, but spread that love and compassion to everyone he touched. Bill never spoke disparagingly of another, having a good word for all. He was loved and respected by one and all. He was a good person and will be missed by those of the bench and bar of this city, this county and this state.

**—J. Fredric Ingram**
**President**
**Birmingham Bar Association**

# • M·E·M·O·R·I·A·L·S •

## Herman Walter Maddox

Whereas, the Walker County Bar Association was saddened to learn of the death of one of its members, Herman Walter Maddox, in the 24th day of May 1995; and

Whereas, Herman Walter Maddox was, within the legal profession, respected by his peers for his devotion to his clients, community, church and family; and

Whereas, Herman Walter Maddox was admitted to the practice of law in June 1936, upon his graduation from the University of Alabama School of Law, and he served in virtually every office of the Walker County Bar Association, as well as being president of the Junior Bar Section of the Alabama State Bar from 1949 through 1950, and further served on the Alabama State Bar Board of Commissioners 1965 through 1968; and

Whereas, Herman Walter Maddox further served his country as a special agent to the Federal Bureau of Investigation during the years which this country was at war from 1942 through 1945; and

Whereas, Herman Walter Maddox further distinguished himself in service to his community by serving several terms on the City of Jasper Board of Education, as mayor of the City of Jasper October 1958 through September 1970, and further serving for many years as the municipal judge of the City of Jasper; and

Whereas, Herman Walter Maddox lived life to its fullest and shall be remembered not only for his contributions to our community but also for his love of people and his joy of living;

Now, therefore, be it resolved by the Walker County Bar Association that we do hereby mourn the death of Herman Walter Maddox, and further extend our heartfelt sympathy to his daughters, Lisbeth Thornley and Carol Kilgore.

**—Richard Fikes**
**President**
**Walker County Bar Association**

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## Norman Knight Brown

*Orange Beach*
*Admitted:* 1949
*Died:* June 27, 1995

## George William Cameron, III

*Montgomery*
*Admitted:* 1989
*Died:* May 11, 1995

## William Bibb Eyster

*Decatur*
*Admitted:* 1947
*Died:* June 2, 1995

## Lester Alexander Farmer, Jr.

*Dothan*
*Admitted:* 1947
*Died:* May 22, 1995

## Edward M. Friend, Jr.

*Birmingham*
*Admitted:* 1935
*Died:* June 5, 1995

## Horace Nolan Lynn

*Montgomery*
*Admitted:* 1976
*Died:* May 2, 1995

## Herman Walter Maddox

*Jasper*
*Admitted:* 1936
*Died:* May 24, 1995

## Nicholas Stallworth McGowin

*Mobile*
*Admitted:* 1937
*Died:* May 19, 1995

## Please Help Us

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

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# • M·E·M·O·R·I·A·L·S •

## Marcus Eugene McConnell, Jr.

**McConnell**

Born in Livingston on December 10, 1917, son of long-time Probate Judge Marcus E. McConnell and Julia Lawrence McConnell, Marcus E. McConnell, Jr. was admitted to the bar in 1941 and practiced law in Livingston for more than 50 years until his retirement in 1991.

He died on April 25, 1995 at the age of 77 in his residence at 3850 Galleria Woods Drive, Suite 201, Birmingham, Alabama 35244, where he lived with his brother, John Reid McConnell, and his sister, Mary Emily McConnell, who survive him.

After attending public school in Livingston, he attended Livingston State Teachers College and Davidson College for one year each and completed his education at the University of Alabama where he received his AB degree in 1939 and his LLB degree in 1941. While at Davidson College he lived in the room next to that of his classmate, Sam Spencer, who later became president of Davidson and, on learning of his death, stated: "Although at Davidson for only one year, Marcus made a major impact on all who knew him. He was a true friend and I am deeply saddened to know that he is gone."

At the University of Alabama, he was a member of the DKE fraternity and an outstanding student. His law classmate and fraternity brother, Robert Denniston of Mobile, attended his graveside funeral service and lauded him as a warm and loyal friend with a noble character, impeccable manners and a forceful and proud supporter of his fraternity and the school of law.

Marcus was very proud of his family. His father's family came to Alabama in the 1840s, settling in the community of McConnell in Sumter County. His maternal grandfather, William Haywood Lawrence, attended the University of Alabama in 1875-79 and was persuaded by Julia Tutwiler to move to Livingston where he founded and edited a weekly newspaper, Our Southern Home, which was published by the family for many years. His great-grandfather, also William Haywood Lawrence, attended the University in 1848-50, and later was killed in battle as a captain of Cavalry near Rome, Georgia in 1864.

Marcus began his legal career as an attorney in the State Revenue Department under John W. Lapsley in 1941. After war was declared, he returned to Livingston to begin private practice there. From there he entered the service of the American Red Cross during World War II, serving as a director for services at a number of military posts in this country. In 1944, he returned to Livingston to receive appointment as circuit solicitor when Thomas M. Boggs was called into military service. When Tom returned in 1945, Marcus was made Sumter County Solicitor, a position which allowed him to also practice civil law, and served in this position until 1970. He was active in the Sumter County, Alabama State and American bar associations.

Due to a degenerative condition he gradually lost his eyesight in the sixties and seventies, but with a dedicated and competent secretary, Mrs. Mary Helen Jones, was able to continue to render superior legal service to his numerous clients. She said that he had a brilliant mind and believed as did Robert E. Lee that duty is the most sublime word in the English language, and that he did his duty as he saw it every day of his life to his family, clients, community, church, and country. Retired District Judge Thomas F. Seale, Jr., who was his longtime colleague in the Livingston Bar, recalled him as a competent attorney, very prompt and proficient, primarily in the fields of probate and property law, and also a very generous person to his church, community and schools in time, money and wise counsel.

On his retirement, Marcus, with the concurrence of his brother and sister, created a trust which will provide a significant endowment for the University of Alabama School of Law after their death. He joined with his brother and sister in providing chimes and the gift of their home for Livingston University, which for his lifetime support awarded him an honorary LL.D. degree in 1991. He was an active member of the Livingston Presbyterian Church, serving as a deacon, elder, elder emeritus and as the chairman of the building committee for the construction of the present sanctuary. He also served as a longtime chairman of the Myrtlewood Cemetery Association and for several years as chairman of the Sumter County Hospital Board.

The life of Marcus McConnell will stand as a shining example of a good man, a wise counselor and a stalwart supporter of his profession, his community and his church.

**—J. Rufus Bealle**
**Tuscaloosa**

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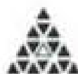

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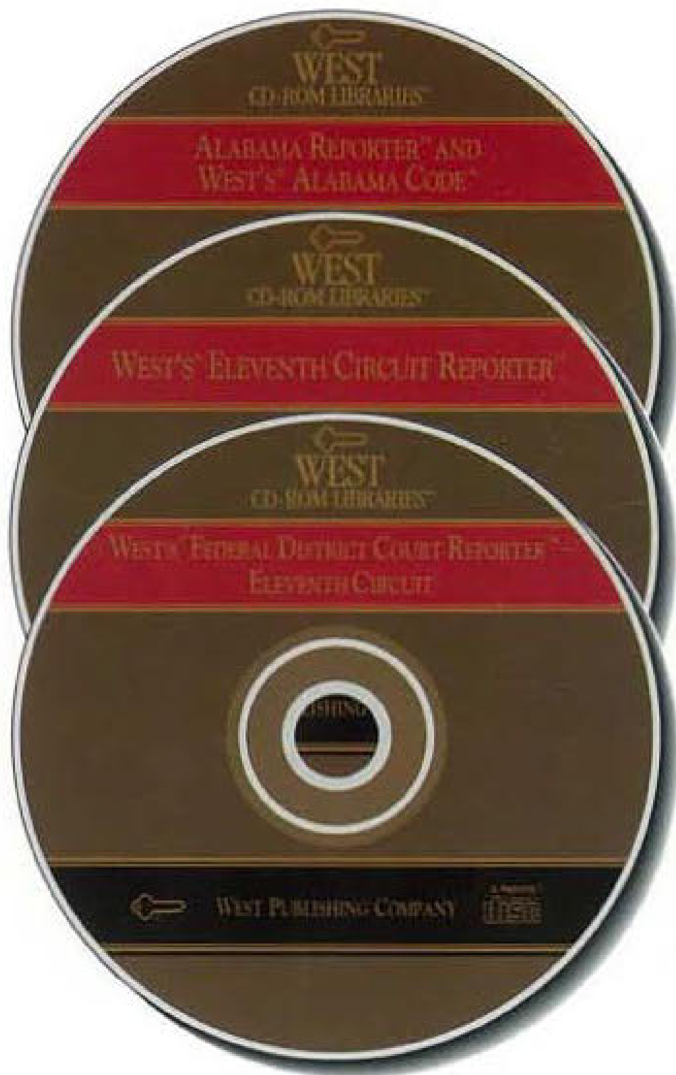


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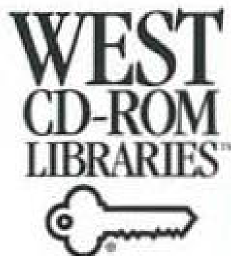


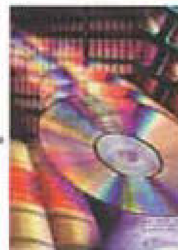

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