

The Alabama Lawyer

Vol. 57, No. 6

September 1996





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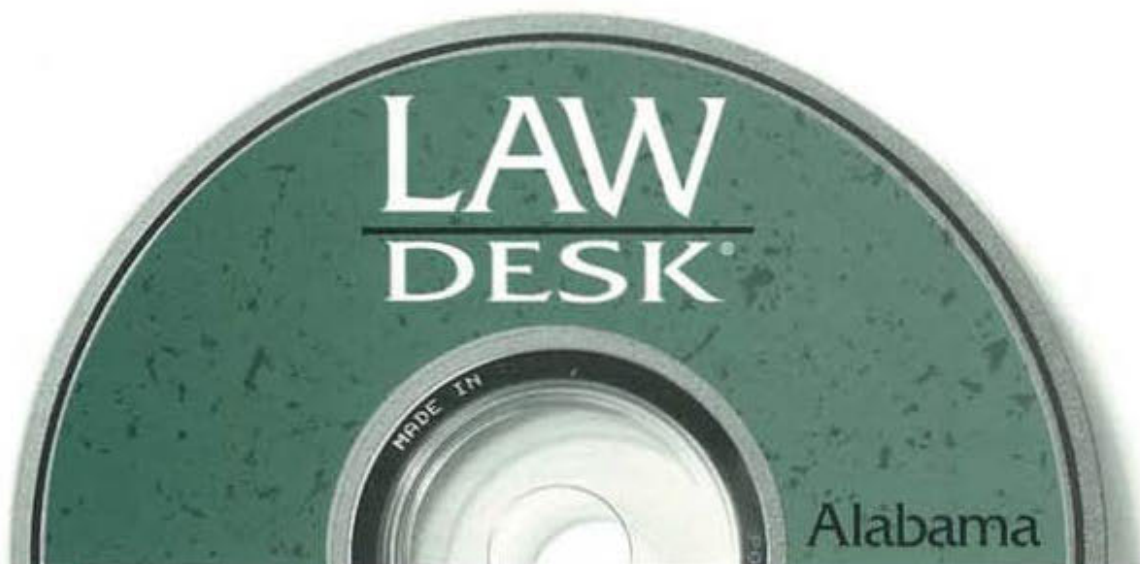
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The Alabama Lawyer

Vol. 57, No. 6 September 1996

On the Cover

The cover photograph shows Alabama State Bar President Warren Lightfoot and his family on the terrace of The Club overlooking the skyline of Birmingham. From left to right are: son Warren Lightfoot, Jr., a lawyer with Maynard, Cooper & Gale; daughter-in-law Valerie Lightfoot, an investment consultant with Highland Associates; Mr. Lightfoot; wife Robbie Lightfoot; and daughter Ashley Lightfoot, a bank officer with AmSouth Bank. Mr. Lightfoot practices in Birmingham with Lightfoot, Franklin & White, a 31-lawyer defense firm.

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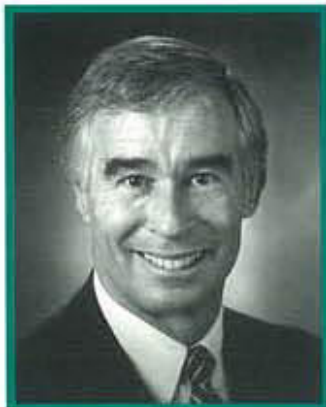
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PRESIDENT'S PAGE

By Warren B. Lightfoot

Age of Images



Warren B. Lightfoot

The following remarks were delivered by the 1996-97 Alabama State Bar president, Warren B. Lightfoot, on July 26 during the annual meeting's Grande Convocation. At the conclusion of this presentation, President Lightfoot received a standing ovation from the lawyers and judges in attendance.

We live in an age of images. Corporations and individuals worry about their images. The press and the public complain about our image, and my answer to those critics is, "We're going to be the best lawyers we can be, and our image will take care of itself." We're not in a popularity contest; we never have been. We're supposed to be tough, resourceful advocates for our clients and within the bounds of propriety, we're trying to prevail. To the press and public, I say: Don't come patronizing us and telling us we need to work on our image. That's not a concern that governs what we do as lawyers.

If J.L. Chestnut and Arthur Shores had worried about their image, they would never have walked into those courtrooms of the '60s. If Fred Gray had worried about his image, Rosa Parks would have languished in jail, and the civil rights movement might have foundered. Fred Gray and J.L. Chestnut are giants of our profession, and I am proud to be associated with them. We don't make the laws and we don't interpret them, but we are called on to use them for the benefit of our clients and that is precisely what we do, as hard as we can.

And just as unrelentingly, we police ourselves and discipline ourselves to a degree far beyond any other profession. Architects, engineers, physicians, preachers, bankers, and journalists do not even come close. The American lawyer is scrutinized more closely than any profession on earth, and we welcome it. It serves the public and it makes us better lawyers. None of us is perfect but all of us require

certain standards of each other.

Our critics point out those among us who don't measure up, and not only do they tar us with the same brush, they go further and say our profession is responsible for many of society's ills. But think about it: We live in a time of shifting mores, of increasing violence, of family abuse. Sometimes the very fabric of society seems to be tearing: a confrontational, in-your-face mentality pervades; we see incivility among motorists, professional athletes, government employees, salespersons; we see slipshod work, persons without pride in their production, outright dishonesty. Our profession is a part of that fabric and is not immune from this generalized decline in values. But more than most, we fight it; we continue to hold our colleagues accountable, we insist on our standards and we continue to strive for civility among our members. More than most, we are mindful of our moral and ethical obligations; more than most, we remember that everything we do and say reflects not only on us personally but also on our profession.

Look at what we do for society as lawyers: We manage disputes, we reduce the friction generated everyday in the workplace and the marketplace because we provide an outlet and oftentimes a cure. Other societies have fewer lawyers, but the governments of those countries are far more intrusive than ours; it is precisely the presence of our profession that permits this country to be so unregulated. We make deals possible; we merge corporations; we keep companies in business and jobs in place. It is because of lawyers and lawsuits that women and minorities have the right to vote, to serve on juries, to receive fair treatment in the workplace; because of lawyers and lawsuits the disabled are accommodated; the environment is clean; civil liberties are preserved; our products, our workplaces,

our recreation areas are the safest in the world. Don't come patronizing us and telling us that lawyers are a necessary evil; most of this country's bedrock values are in place because of lawyers, and many of this country's most positive changes occurred because of lawyers.

And look at what our colleagues do outside the profession. In addition to the demands of practicing law, our lawyers bear children and raise them; they coach little leagues; they teach Sunday school; they serve on church boards; they preach a sermon occasionally; they quite literally put God before mammon; they serve on library boards, city councils, school boards, United Way, they provide leadership to countless educational and charitable organizations.

As we speak, the largest peacetime gathering in world history is convening in Atlanta, conceived by Billy Payne, a

lawyer, and implemented largely by his committee of nine, of which five are lawyers and one is the spouse of a lawyer. Don't come patronizing us and saying that lawyers are just in it for the money; our profession gives more back to society than any other in terms of volunteer time, and I don't want to hear that we are a drain on the economy, because it is not so. We have 11,000 lawyers in this state, and if we assume that for every lawyer another three persons is employed either as staff or in a vendor capacity, we have an industry of 45,000 pumping literally billions of dollars into the Alabama economy every year, in salaries, judgments, benefits, expenses, fees, and settlements.

So, is it fair that our image be criticized or that our contributions to society be ignored? I submit to you that it is not fair, but that it goes with the territory.

We are the guardians of our country's mores, in a real sense. We are watched, and what we do affects the rest of the nation in a unique way. Alexander Solzhenitsyn marveled at our legal system when he came to this country; he could not get over our fundamental belief that every person has the right to have a lawyer's advice and protection. Solzhenitsyn's reaction says a lot about our importance to this nation's quality of life, and it is truly beyond measure. In other countries the totem or symbol of a society is a crown, or a mausoleum, or a spot of sacred ground; in this country it is a document under glass at the national archives. That document was written by lawyers and every day is being preserved by lawyers. I, for one, am proud to be among that number, and I'm proud to be your president. I'll do my best to be a good one. ■

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EXECUTIVE DIRECTOR'S REPORT

By Keith B. Norman

Membership Programs: Services and Products That Help Lawyers



Keith B. Norman

There are several committees and task forces whose mission is to study programs that will help bar members. Among these are the **Insurance Programs Committee**, chaired by **J. Bentley Owens** of Birmingham; the **Membership Services Task Force**, chaired by **Alva Lambert** and formerly by **James Jerry Wood** of Montgomery; and the **Task Force on Small Firms and Solo Practitioners**, chaired by **Paul A. Brantley** of Montgomery. These committees and task forces are responsible for reviewing and recommending programs to the board of commissioners which would provide a service or benefit to Alabama lawyers.

The Insurance Programs Committee has been principally responsible for ensuring member access to competitively priced insurance products, including life insurance and disability insurance. For many years, the committee has worked with the bar's endorsed insurance plan administrator, **Insurance Specialists, Inc.** of Atlanta, to make sure that Alabama State Bar members have reasonably priced insurance products.

An important feather in the cap of this long-active committee is the principal role it played in the bar's creating its own captive professional liability insurance company—**Attorneys Insurance Mutual of Alabama, Inc. (AIM)**. After experiencing a "hard" insurance market during the early 1980s the Insurance Programs Committee worked assiduously to help find a stable source of coverage. For many lawyers, it was not a question of cost but rather whether coverage could be obtained at any cost. The gyrations of the professional liability market resulted in the committee's recommendation to the bar's leadership that a mutual insurance company be started. Today, AIM is a successful and thriving

insurance company that has helped stabilize the professional insurance market for Alabama lawyers.

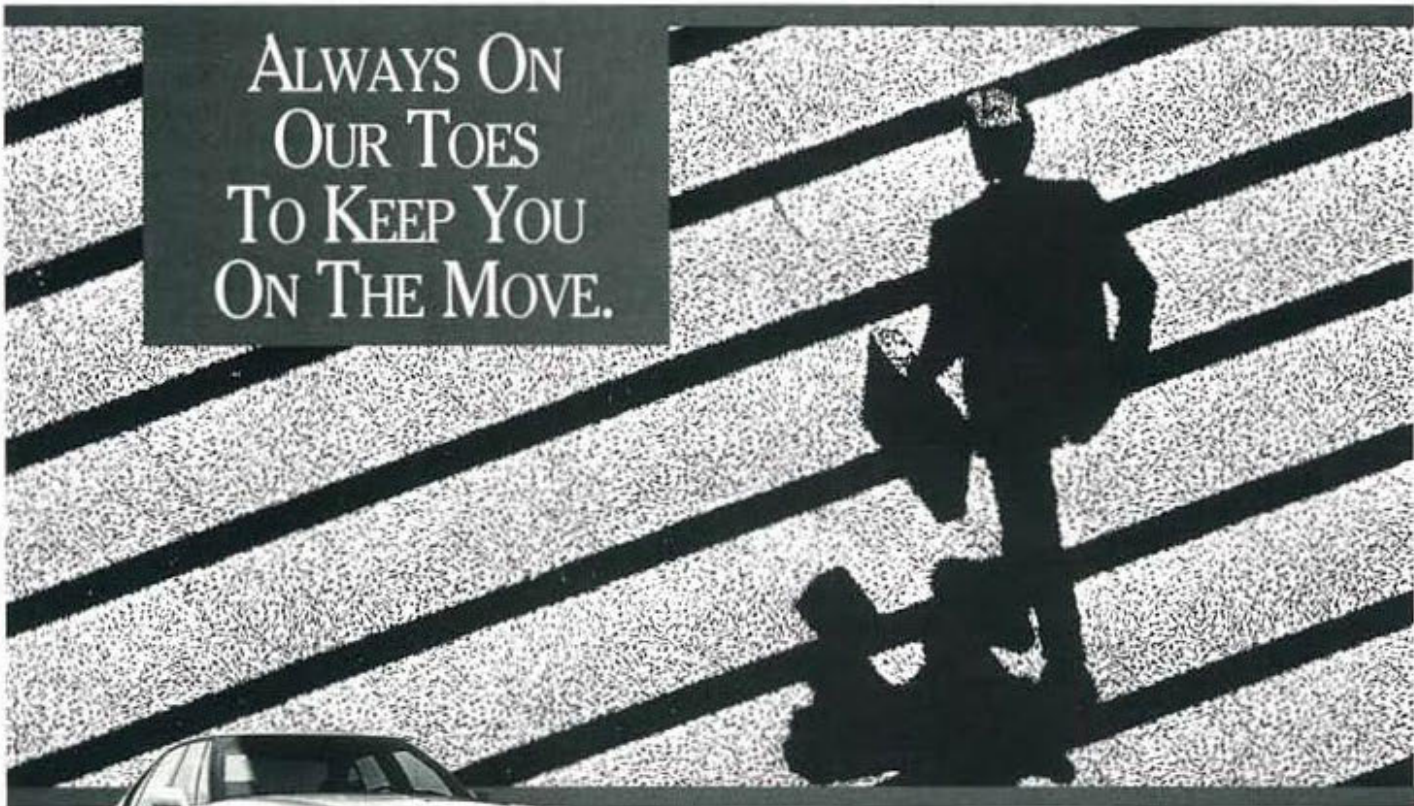
Since its creation several years ago, the Membership Services Task Force has recommended several outstanding member programs providing high quality products or services to lawyers at a substantial savings. These include **Airborne Express** discounts, **LEXIS-NEXIS** group membership discounts and office supplies discounts through the **Penny Wise Company**.

The newest service available to members is the **AT&T Profit By Association Program (PBA)**. After extensively reviewing this and other long distance discount programs, the task force recommended to the board of commissioners the bar's participation in the AT&T plan. PBA provides five percent discounts above and beyond basic plans offered by AT&T. For example, firms that spend between \$25 and \$200 on long distance can save by joining the AT&T Small Business Advantage Service and save ten percent on qualified calls each month. This is in addition to the five percent awarded under PBA. Firms that spend more on long distance can save even more on their long distance calls.

A new program that will be up and running soon is the **Alabama State Bar Law Office Management Assistance Program**. The Task Force on Small Firms and Solo Practitioners recommended this important service as a way for the bar to provide assistance to lawyers and law firms, particularly small firms and solo practitioners. This new service will entail the hiring of a staff person at the state bar headquarters with knowledge and experience to assist lawyers in every phase of the management of their practices. The scope of this service is likely to include: in-house audits and consultations;

(Continued on page 266)

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Executive Director's Report

(Continued from page 264)

advice regarding establishment of a new law practice; telephone advisory services; technological assistance; referral to other resources, programs and consultants; risk management guid-

ance and systems setup; personnel and financial guidelines; and ethical guidance, among others. The Law Office Management Assistance Program will no doubt evolve over time as member needs become more defined.

These are not all the services that are available to you as a member of the

Alabama State Bar. If you would like to find out more about these and other member benefits, including ethics opinions, CLE schedules and use of state bar conference rooms, call bar headquarters at 1-800-354-6154 and ask for the 1996 membership services brochure. ■

Important! Licensing/Special Membership Dues 1996-97

All licenses to practice law, as well as special memberships, are sold through the Alabama State Bar headquarters.

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, 1996 and September 30, 1997, please be sure that you purchase an occupational license. Licenses are \$250 for the 1996-97 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!***

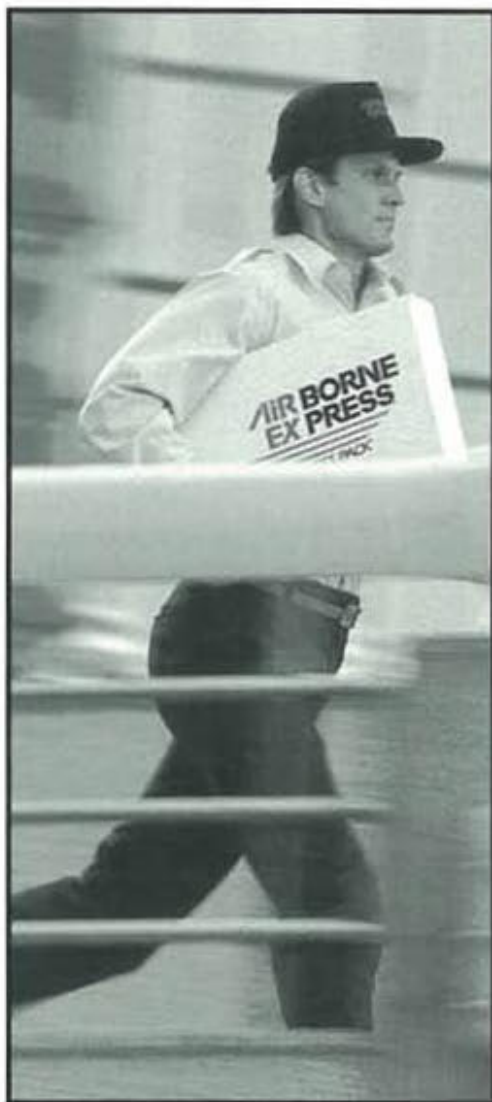
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NEWEST ADDITIONS TO THE ALABAMA STATE BAR STAFF

Rita Gray joined the Alabama State Bar last November as communications/publications assistant, bringing with her 22 years of administrative experience, customer service and data entry. She worked for 13 years with Scrivner, Hudson Thompson.



RITA GRAY

Her husband, Bruce, is sales

manager for Jay Electric and has been with the company for 26 years.

They have one daughter, Gina, who is married and will receive her accounting degree from Auburn University at Montgomery in

December. Gina then will begin work in January 1997 to receive her master's degree. She is employed by the First National Bank in Wetumpka.

In Rita and Bruce's spare time, they



ANGIE CROWE

like to travel the Nascar Circuit. They have traveled to Daytona, Charlotte, North Wilkesboro, Rockingham, and our hometown Nascar track, Talladega. They also sponsor youth at their local church, New Home.

Angie Crowe joined the state bar last November, too, and

is the receptionist. Previously, Angie worked as an administrative assistant for a local association. Her husband, Ed, is a sales representative for Graybar Electric. Angie and Ed enjoy auto racing and traveling.

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ABOUT MEMBERS, AMONG FIRMS

About Members

G. Scott Frazier announces the relocation of his office to 2223 8th Street, Tuscaloosa, Alabama 35401. The mailing address remains P.O. Box 2504, Tuscaloosa 35403. Phone (205) 344-4555.

Morris J. Princiotta, Jr. announces the relocation of his office to 2100-C Rocky Ridge Road, Birmingham, Alabama 35216. Phone (205) 822-5440.

William P. Sproule announces the relocation of his office to 843 Park Road, Pleasant Grove, Alabama 35127. The mailing address is P.O. Box 492. Phone (205) 744-8700.

Lisa Milner Karch announces a name change to **Lisa Milner Hancock**. Her office is located at 2312 Taylor Street, P.O. Drawer 906, Guntersville, Alabama 35976. Phone (205) 582-6940.

Gregory L. Case announces the relocation of his office to 200 Cahaba Park South, Suite 118, Birmingham, Alabama 35242. The mailing address is 416 Cahaba Park Circle, Suite 101-G. Phone (205) 991-9193.

Patricia Y. Comer announces the opening of her office at Suite 500, The Massey Building, 290 21st Street, North, Birmingham, Alabama 35203. Phone (205) 251-1248.

Michael Bray Houston announces a change of address to P.O. Box 160763, Mobile, Alabama 36616. Phone (334) 626-5091.

Robert J. Landry, III announces a change of address to the U.S. Bankruptcy Administrator's Office, N.D. of Alabama, E.D., U.S. Courthouse, 1129 Noble Street, Anniston, Alabama 36201. Phone (205) 237-8397.

Victor B. Griffin announces the relocation of his office to 210 Frank Nelson Building, 205 N. 20th Street, Birmingham, Alabama 35203. Phone (205) 324-2116.

Terry G. Key announces the relocation of his office to 164 E. Main Street, Dothan, Alabama 36302. Phone (334) 702-4487. The mailing address is P.O. Box 758, Dothan.

Among Firms

Raymond D. Waldrop, Jr. announces the formation of **Waldrop & Associates** as successor to the firm of Smith & Waldrop and that **M. Andrew Mantler** has joined the firm as an associate. Offices will remain at 108 South Side Square, Suite A, Huntsville, Alabama 35801-4256. Phone (205) 534-8485.

Martin, Drummond & Woosley announces that **Marjorie O. Dabbs** and **Roy F. King, Jr.** have become members and that **Linda S. Lehe** has joined the firm as an associate. Offices are located at Lakeshore Park Plaza, 2204 Lakeshore Drive, Suite 130, Birmingham, Alabama 35209. Phone (205) 802-1100.

Helmsing, Lyons, Sims & Leach announces that **John J. Crowley, Jr.** and **Joseph D. Steadman** have become members and **Robin Kilpatrick Fincher, John T. Dukes, Leslie T. Fields** and

(Continued on page 272)

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About Members, Among Firms

(Continued from page 270)

P. Bradley Murray have become associates. The mailing address is P.O. Box 2767, Mobile, Alabama 36652-2767. Phone (334) 432-5521.

McCain & Ogletree announces that **Lee T. Ozmint**, formerly of Espy, Nettles & Scogin, has become an associate. Offices are located at the Printup Building, 350 Locust Street, Second Floor, Gadsden, Alabama 35901. Phone (205) 547-0023.

Donald D. Lusk, John M. Fraley, David L. McAlister and **K. Donald Simms** announce the formation of **Lusk, Fraley, McAlister & Simms**. **Kenneth A. Dowdy, David L. Dean** and **Bryan O. Balogh** are associates. Offices are located at 1901 Sixth Avenue, North, Suite 1700, AmSouth/Harbert Plaza, Birmingham, Alabama 35203. Phone (205) 323-7100.

Engel, Hairston, & Johanson announces that **Tameria S. Driskill** has joined the firm. Offices are located at 109 N. 20th Street, 4th Floor, Birmingham, Alabama 35203. Phone (205) 328-4600.

Duell & Spina announces that **Paul K. Lavelle** has become an associate. Offices are located at 2100-A SouthBridge Parkway, Suite 570, Birmingham, Alabama 35209. Phone (205) 870-7900.

Duke & Campbell announces that **Robert Gardner** has become an associate. Offices are located at First Commercial Bank Building, 550 Montgomery Highway, Suite 300, Birmingham, Alabama 35216-1808. Phone (205) 823-3900.

W. Kirk Davenport and **Thomas P. Willingham** announce the formation of **Davenport & Willingham** and that **Ted G. Meadows** has become an associate. Offices are located at 3928 Lorna Road, Suite 302, Birmingham, Alabama 35244. Phone (205) 988-4038.

Michael W. Carroll and **Perryn G. Carroll** announce the new address of **Carroll & Carroll** at 950 Financial Center, 505 20th Street, North, Birmingham, Alabama 35203-2678. Phone (205) 328-2600.

Hare, Wynn, Newell & Newton announces that **Michael D. Ermert** has become a partner and **Nolan E. Awbrey** has joined the firm as an

associate. Offices are located at Suite 800, The Massey Building, 290 21st Street, North, Birmingham, Alabama 35203. Phone (205) 328-5330.

Chris S. Christ and **Christopher McCary** announce the relocation of their offices to 205 20th Street, North, Suite 730, Birmingham, Alabama 35203. Phone (205) 252-2222.

David H. Marsh, Jeffrey C. Rickard and **Susan J. Silvernail** announce the formation of the **Law Offices of David H. Marsh**. Offices are located at Two Chase Corporate Drive, Suite 460, Birmingham, Alabama 35244. Phone (205) 733-1000.

David K. Howard and **Charles J. Kelley** announce the formation of **Howard & Kelley**. Offices are located at 101 Mobile Plaza, P.O. Box 1310, Florence, Alabama 35631. Phone (205) 718-6040.

Mack, Williams, Haygood & McLean announces that **Sonja F. Bivins** has become a partner in the firm. Offices are located in Atlanta, Georgia and Boca Raton, Florida.

Diamond, Hasser & Frost announces that **Stuart Y. Luckie** has become associated with the firm. Offices are located at 1325 Dauphin Street, Mobile, Alabama 36604. Phone (334) 432-3362.

Manley, Traeger, & Perry announces that **K. Scott Stapp** has joined the firm and the firm's new name will be **Manley, Traeger, Perry & Stapp**. Offices are located at 111 S. Walnut Avenue, Demopolis, Alabama 36732. Phone (334) 289-1384.

Hornsby, Watson & Meginniss announces that **Ralph W. Hornsby, Jr.** has become a partner in the firm. Offices are located at 1110 Gleneagles Drive, Huntsville, Alabama 35801. Phone (205) 650-5500.

Najjar Denaburg announces that **Keith J. Nadler, Walter F. McArdle** and **Denise Jones Pomeroy** have become shareholders. Offices are located at 2125 Morris Avenue and 2209 Morris Avenue, Birmingham, Alabama 35203. Phone (205) 250-8400.

Gaines, Gaines & Rasco announces that **Thomas M. Little, C. David Stubbs**

Rule 11, Alabama Rules of Criminal Procedure ("Incompetency and Mental Examinations")

The Supreme Court of Alabama, by order dated May 1, 1996, amended Rule 11, Ala. R. Crim. P., dealing with "incompetency and mental examinations." The amendment makes a significant change in procedure. This amendment appears in a So. 2d Advance Sheet dated on or about August 8, 1996. The amendment also is available on ALALINC and should be available on WESTLAW and LEXIS.

George Earl Smith
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and **L. Shaw Gaines** have become associates. Offices are located in Talladega, Alabama. Phone (205) 362-2386.

Cabaniss, Johnston, Gardner, Dumas & O'Neal announces that **Sandy G. Robinson** has become a partner. Phone (205) 716-5200 and (334) 433-6961. Offices are located in Birmingham and Mobile, Alabama.

Melton, Espy, Williams & Hayes announces that **J. Flynn Mazingo** is now an associate. Offices are located at 301 Adams Avenue, Montgomery, Alabama 36101. Phone (334) 263-6621.

Fish & Richardson announces that **David E. Sewell** has become an associate. Offices are located at One Riverway, Suite 1200, Houston, Texas 77056. Phone (713) 629-5070.

Lange, Simpson, Robinson & Somerville announces that **Harald E. Bailey, Jeffrey E. Holmes** and **Allison Taylor** have become associates and that **David F. Ovson** has joined as a partner. Offices are located 100 Jefferson Street, Huntsville, Alabama 35804. Phone (205) 533-3500.

Powell, Peek & Weaver announces its relocation to 201 Troy Street, Andalusia, Alabama. The mailing address is P.O. Drawer 969, Andalusia, 36420. Phone (334) 222-4103.

Balch & Bingham announces that **John S. Bowman, Jr., David B. Champlin, Gregory S. Curran** and **Donald R. Jones, Jr.** have become partners. Offices are located in Montgomery, Birmingham and Huntsville, Alabama and Washington, D.C.

Walston, Stabler, Wells, Anderson & Bains announces that **William R. Sylvester** and **Ronald A. Levitt** have joined the firm. Offices are located at 500 Financial Center, 505 20th Street, North, Birmingham, Alabama 35203. Phone (205) 251-9600.

Sherrill, Batts & Mathews announces that the **Honorable Henry W. Blizzard**, former presiding circuit court judge of the 39th Judicial Circuit, has become a member of the firm. The firm is now **Sherrill, Batts, Mathews & Blizzard**. Offices are located at 102 S. Jefferson Street, Athens,

Alabama 35611. Phone (205) 232-0202.

Bruce Rice, Charles Rice, Bruce Adams and **Dwight Rice** announce the formation of **Rice, Rice, Adams & Rice**. Offices are located at 403 Choccolocco Street, Oxford, Alabama. The mailing address is P.O. Box 3267, Oxford 36203. Phone (205) 831-0098.

Battaglia Law Office announces that **Chandra Wright** has become an associate. Offices are located at 5950 Carmichael Place, Suite 102, Montgomery, Alabama 36117. Phone (334) 244-2983.

Lamar, Nelson & Miller announces that **Rick D. Norris** has become a

partner and **Lynn Randall**, former assistant district attorney for the County of Tuscaloosa, and **J. Stuart McAtee**, former clerk to the Honorable Tennant Smallwood, have become associates. Offices are located at 1600 Financial Center, 505 20th Street, North, Birmingham, Alabama 35203. Phone (205) 326-0000.

Hardwick, Hause & Segrest announces that **G. Ward Beeson, III**, formerly staff attorney for Judge Frank Long, Alabama Court of Criminal Appeals, has become an associate. Offices are located at 212 N. Leana Street, Dothan, Alabama. The mailing address is P.O. Box 1469, Dothan 36302. Phone (334) 794-4144. ■

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BAR BRIEFS

• **John M. Wood**, attorney with John M. Wood, P.C. was recently chosen as one of Birmingham's "Top 40 Under 40" by the *Birmingham Business Journal*. He was nominated for this honor by fellow attorney Paul B. Shaw, Jr. with recommendations from clients and colleagues in the field of jurisprudence.

A 1990 graduate of Georgetown University Law School, Wood practiced in Birmingham at the firm of Balch & Bingham. In 1993, he founded John M. Wood, P.C.

He has written articles and given speeches on divorce and child custody issues and is currently publishing a book entitled *Survival of the Fittest: A Guide to Your Pending Divorce*.

• On November 6, 1995, Anniston attorney **Earl P. Underwood** became board certified in civil trial law by the National Board of Trial Advocacy, an ABA-accredited organization. He has joined a group of 1,900 lawyers nationwide who have become certified by NBTA.

• **Harwell E. Coale, Jr.**, with the Mobile firm of Coale & Dukes, has been elected a Fellow of the American College of Trust and Estate Counsel. His election took place in March 1996. The College is an association of lawyers recognized as outstanding practitioners in the laws of wills, trusts, estate planning, estate administration, and related tax planning. Membership is by invitation of the Board of Regents.

• **John C. Hall, III**, a shareholder in the Birmingham firm of Rives & Peterson, was named one of The Birmingham News "Unsung Heroes of 1996" in recognition for volunteering hundreds of hours of his legal time for various public service projects statewide. Hall also recently received the "1996 Children's Advocate Award" and the "1996 Jefferson Award" for public service, and the "1996 Good Shepherd Award" from St. Andrew's Episcopal Church of Birmingham. Hall was the keynote speaker for the U.S. Department of Justice Juvenile Conference

in May. He is the co-founder and president of Children First Foundation, Inc. and co-chairman of the Lieutenant Governor's Task Force on School and Youth Violence and has helped develop a pilot program on Adult Literacy in Alabama.

• The **McKinley Young Lawyers of the Shoals** recently elected new officers. They are:

President: William E. Smith, Jr.
Vice-President: James M. Hivner
Treasurer/Secretary: David Allen Tomlinson

The McKinley Young Lawyers take their name from John McKinley. He was a citizen and one of the founding fathers of Florence, Alabama. He served as a U.S. Senator and Congressman from Alabama. On January 9, 1838, while a resident of Florence, McKinley was sworn in as the 23rd Associate Justice of the United States Supreme Court. ■

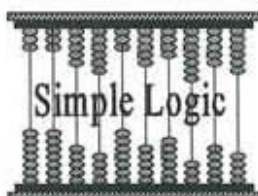
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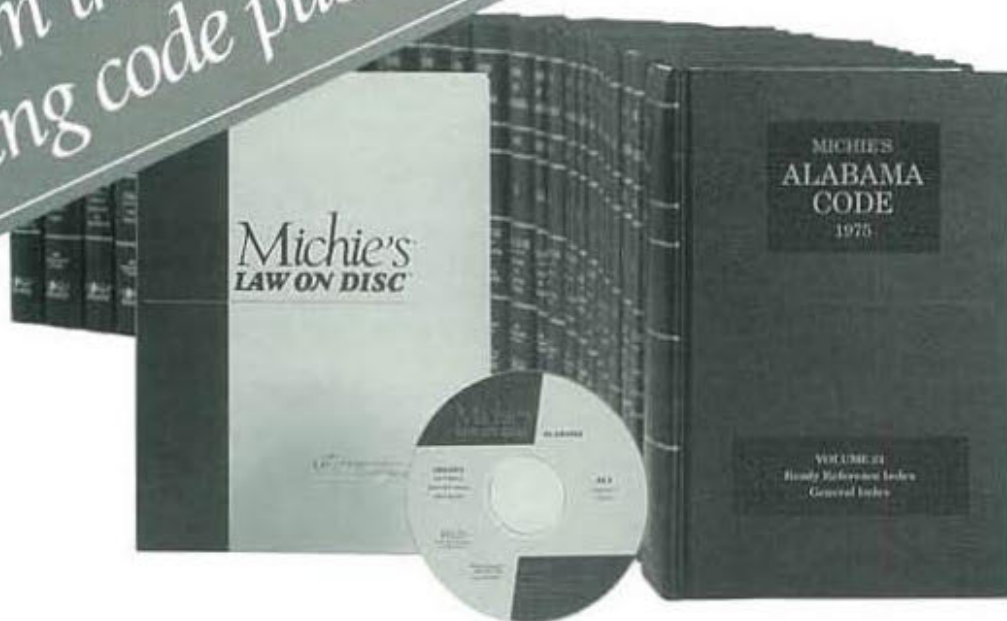
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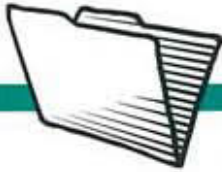
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DISCIPLINARY NOTICE

Notices to Show Cause

• Notice is hereby given to **Clarence Blake West** of Cullman, Alabama that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated April 24, 1996, he has sixty (60) days from the date of this publication, (September 15, 1996), to come into compliance with the Mandatory Continuing Legal Education Requirements. Noncompliance shall result in a suspension of his license. [CLE 96-68]

• Notice is hereby given to **John Archie Acker, Jr.** of Tuscaloosa, Alabama that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated April 16, 1996, he has sixty (60) days from the date of this publication, (September 15, 1996), to come into compliance with the Mandatory Continuing Legal Education requirements. Noncompliance shall result in a suspension of his license. [CLE 96-01]

Disbarments

• By order of the Supreme Court of Alabama, Dothan attorney **Cada M. Carter** was disbarred from the practice of law effective April 19, 1993. Carter consented to disbarment, pursuant to Rule 23 of the Alabama Rules of Disciplinary Procedure, based on his felony conviction in the Circuit Court of Houston County, Alabama, said conviction being for a charge of theft of property first degree. [ASB No. 96-67]

• By order of the Supreme Court of Alabama, Mobile attorney **Joseph Talmadge Brunson** was disbarred from the practice of law effective May 13, 1996. Brunson consented to disbarment, pursuant to Rule 23 of the Alabama Rules of Disciplinary Procedure, based on his felony conviction in the United States District Court for the Southern District of Alabama, said conviction for a charge of conspiracy to possess with intent to distribute marijuana and for possession of cocaine. [Rule 22(a)(2); Pet. No. 95-03]

• Birmingham attorney **John Calvin Coggin, III** was disbarred by order of the Supreme Court of Alabama effective May 20, 1996. Coggin consented to disbarment after having been convicted in the United States District Court for the Northern District of Alabama for making false statements to the Internal Revenue Service and for bank fraud. [Rule 23(a); Pet. No. 96-02]

• Florence attorney **John O. Morrow** has been stricken from the roll of attorneys, disbarred and excluded from

the practice of law in the State of Alabama by order of the supreme court effective May 23, 1996. This action was taken after Morrow voluntarily surrendered his license to the Alabama State Bar. Morrow admitted having misappropriated and converted to his own use funds belonging to a client. [ASB No. 96-150]

Suspensions

• Leeds attorney **William Richmond Stephens** has been intermily suspended from the practice of law by order of the supreme court effective May 23, 1996. Stephens was suspended as a result of his failure to respond to eight different charges filed against him by the Office of General Counsel of the Alabama State Bar. The charges allege that Stephens had neglected legal matters entrusted to him by his clients, had failed or refused to communicate with his clients, had engaged in sexual misconduct toward his clients and had misappropriated and converted to his own use funds belonging to his clients. [ASB Nos. 94-264, 94-265, 95-30, 95-97, 95-121, 95-317, 95-352, and 96-13]

• On July 18, 1996, the Alabama Supreme Court suspended Shelby County attorney **Marcus Lavon Whatley** for a period of forty-five (45) days, retroactive to June 17, 1996. This mandatory suspension was the result of Whatley's conviction for theft of property in the third degree in the Circuit Court of Jefferson County, Alabama on April 17, 1996. [Rule 22(a); Pet. No. 96-004]

• On May 17, 1995, the Disciplinary Commission of the Alabama State Bar ordered that Birmingham attorney **Jesse Woodrow Shotts** be intermily 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. 95-07]

Public Reprimand

• Montgomery attorney **Allen W. Howell** received a public reprimand without general publication for violating Rule 5.6 (b) in connection with a settlement he was proposing in a letter to defendant's counsel. After indicating how much he would accept in settlement for various clients' cases, Howell requested \$100,000,000 as "compensation to us to agree to never, ever sue your client again." Howell withdrew the letter after his co-counsel reviewed it a few days later. The Disciplinary Board granted summary judgment and then imposed the reprimand after a full hearing. Howell's appeal to the Alabama Supreme Court was unsuccessful. [ASB No. 93-274] ■

A Practitioner's Guide to Alabama's Tort of Bad Faith



By
**Stephen D.
Heninger
and
Nicholas W.
Woodfield**

Over a dozen years have passed since the Supreme Court of Alabama recognized the intentional tort of bad faith in first party insurance actions. However, today's supreme court recognizes that the *Chavers v. National Security Fire & Casualty Co.*¹ court failed to anticipate that the tort would return to challenge and confound the court in the following years.² Bad faith has been substantially delineated in the past decade, and continues to be redefined periodically. Since few efforts have been made to chronicle the development of first party bad faith in the last ten years,³ this article will attempt to address and explain the evolution of several aspects of the tort as it has been shaped by the courts of Alabama.

Bad Faith Defined

The elements of a bad faith case were set out by the supreme court in *National Security Fire & Casualty Co. v. Bowen*⁴:

- (a) An insurance contract between the parties and a breach thereof by the defendant;
- (b) an intentional refusal to pay the insured's claim;
- (c) the absence of any reasonably legitimate or arguable reason for that refusal (the absence of a debatable reason);
- (d) the insurer's actual knowledge of the absence of any legitimate or arguable reason;
- (e) if intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim.

In short, the plaintiff must go beyond a mere showing of nonpayment and prove a bad faith nonpayment without any reasonable ground for dispute. Or, stated differently, the plaintiff must show that the insurance company had no legal or factual defense to the insurance claim.⁵

In making the determination of whether an insurer's conduct amounted to bad faith, the trial court must limit the scope of its examination to the evidence that was before the insurer at the time of its denial of the claim.⁶ This is because an insurer is not entitled to deny a claim in the hope that it will later uncover evidence to support its denial.⁷ Accordingly, evidence that arises after the denial of the claim is not relevant to the propriety of the insurer's conduct at the time of the denial, and should not be considered by the trial court.⁸

The supreme court has further stated that an insurer may be guilty of bad faith for failing to properly investigate the facts underlying a claim.⁹ This is also true if the insurer ignores "critical" items necessary to show a "cognitive" evaluation and review.¹⁰ Evidence of an insurer's failure to follow existing guidelines and manuals that are designed to make sure claims are handled in a uniform and predictable format will assist in meeting this burden.¹¹

The supreme court determined that an insurer's investigation was "incomplete" and demonstrated a "reckless indifference to facts" in *USAA v. Wade*.¹² In *Wade*, the court noted that:

This Court has held that whether an insurance company is justified in denying a claim under a policy must be judged by what was before it at the time the decision is made. *National Savings Life Ins. Co. v. Dutton*, 419 So. 2d 1357, 1362 (Ala. 1982). Each of the facts discussed above was before USAA when the decision to deny the Wades' claim or would have been before USAA had it conducted a complete investigation. USAA, however, did not conduct a complete investigation. Therefore, the trial court did not err in holding that USAA acted in bad faith when it denied the Wades' claim under their homeowner's policy.¹³

The supreme court formulated a test to determine when the improper investigation of a claim amounts to bad faith in *Gulf Atlantic Life Insurance Co. v. Barnes*.¹⁴ In *Barnes*, the court stated that:

The relevant question before the trier of fact would be whether a claim was properly investigated and whether the results of the investigation were subjected to a cognitive evaluation and review. Implicit in that test is the conclusion that the knowledge or reckless disregard of the lack of a legitimate or reasonable basis may be inferred and imputed to an insurance company when there is a reckless indifference to facts or to proofs submitted by the insured.¹⁵

In assessing what qualifies as a lawful basis for the refusal of an insured's claim, the supreme court has stated that a lawful basis is "any reasonably legitimate or arguable reason for refusal... a debatable reason... one that is open to dispute or question."¹⁶ The court has further stated that:

When a claim is 'fairly debatable' the insurer is entitled to debate it, whether the debate concerns a matter of fact or law. Coupled with the actual knowledge of that fact implies

conscious doing of wrong. Bad faith, then, is not simply bad judgment or negligence. It imports a dishonest purpose and means a breach of known duty, i.e., good faith and fair dealing, through some motive of self-interest or ill will.¹⁷

The supreme court has also recognized that evidence of a "lawful basis" may be of such a nature that the jury should determine whether it is sufficient (or existed in fact) along with the determination of the contract claim.¹⁸

Lawful basis means that the reason for the denial would be colorable or seriously arguable in good faith under the facts and the law. For example, if a claim for fire damage was denied based on the insurer's allegation of arson, the insurer must be able to present a good faith argument that would satisfy the legal elements of:

- 1) an intentional fire;
- 2) the insured had a motive to set the fire; and
- 3) that the insured either set it or had it set which may be proved by unexplained circumstantial evidence implicating the insured.¹⁹

Such evidence would have to be so convincing that it will sustain no other reasonable hypothesis.²⁰ However, that does not mean that the insurer must prove the arson defense beyond a reasonable doubt.²¹

Procedural questions concerning the partial payment of a claim and the initiation of a declaratory judgment or interpleader action may affect the viability of a claim for bad faith.²² Further, the supreme court has held that an insurer's assertion that it denied a claim based on the advice of counsel is not an absolute defense, although it might be considered as a lawful basis for denial.²³ The court has noted, however, that this defense requires a showing that a full and fair disclosure of all facts and circumstances was made to counsel,²⁴ and that this is a question of fact for the jury.²⁵ Of course, if this is claimed by the insurer, the file of the attorney is discoverable since the privilege is waived. Further, the insurer's reliance

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on this counsel may make him/her an expert for the purposes of cross-examination since their opinion is placed in such high esteem.

Directed Verdict on the Contract Claim Standard

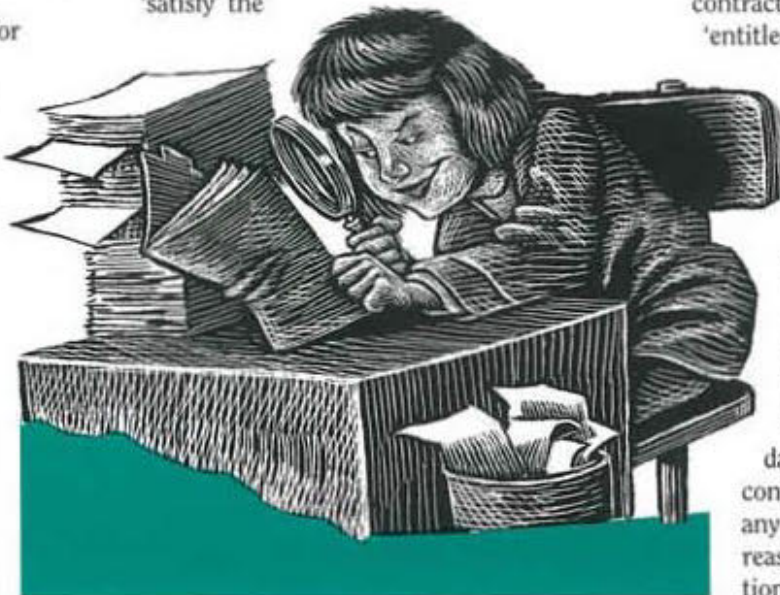
Perhaps the most noteworthy developments in litigating actions for the bad faith failure to pay a claim have involved the standard of proof. In *National Savings Life Insurance Co. v. Dutton*,²⁶ Justice Shores explained that:

In the normal case in order for a plaintiff to make out a prima facie case of bad faith refusal to pay an insurance claim, the proof offered must show that the plaintiff is entitled to a directed verdict on the contract claim and, thus, entitled to recover on the contract claim as a matter of law. Ordinarily, if the evidence produced by either side creates a fact issue with regard to the validity of the claim and, thus, the legitimacy of the denial thereof, the tort claim must fail and should not be submitted to the jury.²⁷

The *Dutton* court thus delineated the standard that a plaintiff had to prove that he was entitled to a directed verdict on the underlying contract before the trial court could submit his bad faith claim to the jury.

A little more than one year later, the Eleventh Circuit addressed this issue in *Dempsey v. Auto Owners Insurance Co.*²⁸ In *Dempsey*, the Dempseys had a homeowners policy with Auto Owners. The Dempseys' house burned one morning when nobody was home, and the Dempseys made a claim under their policy. Auto Owners claimed that the Dempseys made material misrepresentations to Auto Owners during the course of Auto Owners' investigation of the Dempseys' fire loss. Auto Owners' investigation also revealed that the Dempseys were heavily in debt to the bank holding their mortgage notes, and that Mr. Dempsey had lied to insurance

company investigators about where he stayed the night of the fire. Later, however, the truth about his whereabouts at the time of the fire was voluntarily revealed "off the record" to an independent investigator hired by Auto Owners. Auto Owners paid the Dempseys' first mortgage on the lost property, and offered to pay off the remaining note. This would have paid the policy limits, and the Dempseys would then have owed Auto Owners \$19,000. "In a further effort to 'satisfy' the



Dempseys's claim, Auto Owners hired a hitchhiker for \$340 that its agents met along a highway... to 'dig up' information on Dempsey. When the investigation proved fruitless, Auto Owners sought to retrieve its \$340." The jury rejected Auto Owners' misrepresentation defense, and returned a verdict in favor of the Dempseys for \$3,100,000 on the breach of contract and bad faith counts.

Auto Owners appealed, claiming the trial court committed reversible error by allowing the Dempseys' bad faith claim to go to the jury despite the Dempseys' failure to secure a directed verdict on the contract claim. Auto Owners relied on the above-quoted language from *Dutton* to support its argument. The Eleventh Circuit disagreed with the insurer's reliance on *Dutton*, and explained that "the categorical statement of *Dutton* was not intended to apply in all circumstances, but was qualified to apply in 'normal cases.'"

The *Dempsey* court based its decision on the holding in *Safeco Insurance Company of America v. Sims*,²⁹ and quoted the Alabama Supreme Court's opinion, explaining:

This 'directed verdict on the contract claim' test is not to be read as requiring, in every case and under all circumstances, that the tort claim be barred unless the trial court has literally granted plaintiff's motion for a directed verdict on the contract. Indeed, the words 'entitled to a directed verdict,'

so indicate. Rather, this test is intended as an objective standard by which to measure plaintiff's compliance with his burden of proving that defendant's denial of payment was without any reasonable basis either in fact or law; i.e., that defendant's defense to the contract claim is devoid of any triable issue of fact or reasonably arguable question of law... We conclude by stating that whether there is a bad faith claim will be determined by of [sic] the facts and circumstances of each case.³⁰

Despite the efforts of the Eleventh Circuit to create a functional standard that would apply in atypical fact scenarios, the issue of the requisite standard of proof became so onerous that another effort was necessary to provide the bar with a workable standard. Accordingly, the supreme court re-addressed the issue in *Jones v. Alabama Farm Bureau Mutual Casualty Co.*³¹ In *Jones*, the plaintiffs had a standard homeowner's insurance policy issued by the defendant. The policy provided coverage for loss or damage to the house and its contents directly caused by "such perils as lightning, [but] the policy excluded coverage of losses or damage caused indirectly, such as from a power surge resulting from a tree limb falling on the service entrance line." The Joneses

experienced difficulty with the electrical service to their home one day, and, as a result, there was damage to several items of personal property in the house. The Joneses made a claim under their homeowners' policy, and stated that lightning had struck the house and caused the resulting damage. Mrs. Jones filed a proof of loss claim, and Mr. Jones met with a claims adjuster to discuss the loss. The claims adjuster alleged that, at their meeting, Mr. Jones told him that the loss occurred when the tree limb fell on the power line. However, Mr. Jones contended that while he told the claims representative about the tree limb, he also told the claims representative that the damage was caused by the lightning strike and not this later incident. The Joneses did not dispute that the tree limb fell on the entrance line, but they argued that "it was the lightning strike and not the damage to the service entrance line that caused the damage." Farm Bureau denied coverage, and Mrs. Jones filed suit alleging breach of contract and bad faith refusal to pay an insurance claim.

The trial court granted Farm Bureau's motion for summary judgment on the bad faith claim, and Mrs. Jones appealed.

On appeal, Justice Adams declared that:

Although the plaintiff's burden of proof in a bad faith action is great, it should not be insurmountable. Precluding a plaintiff's bad faith action by the application of the "directed verdict on the contract claim" test when the disputed factual issue arises solely from a contradicted oral conversation between the insurer and the insured or a third person puts too onerous a burden on the plaintiff.³²

The *Jones* court recognized that the directed verdict standard favored the insurer when the disputed factual issues arise solely from "contradicted oral conversations" between the insurer and the insured, and therefore frustrates the purpose of a bad faith action "by allowing an insurer simply to misrepresent the content of an oral conversation to avoid liability."³³ Accordingly, Justice Adams stated that "under the facts presented by the instant case, the trial court erred by granting partial summary judgment in favor of Farm Bureau on Mrs. Jones's bad faith claim, as there

was a disputed factual issue to be decided by the trier of fact."³⁴

In a further effort to define the functional standard, the supreme court announced, in *Kizziah v. Golden Rule Insurance Co.*,³⁵ that the directed verdict on the contract claim standard was still the law in Alabama. However, the *Kizziah* court also recognized the existence of exceptional situations where the cases fall outside the "ordinary" or "normal" cases described in *Dutton*.³⁶ The court cited *Jones, supra*, and *Continental Assurance Co. v. Kountz*,³⁷ as examples of extraordinary instances where the directed verdict standard would have resulted in an inequity to the plaintiff. These situations were outside the *Dutton* standard because they focused on the insurer's failure to determine the existence of a valid reason for initially denying payment. "It was this inference of bad faith, not the denial of summary judgment on the breach of contract claim, that allowed the bad faith claim to be presented to the jury."³⁸

The supreme court was cognizant, however, of the need for guidance as an ever-growing number of allegedly exceptional cases continued to come before the court. In *Thomas v. Principal Financial Group*,³⁹ Justice Houston exhaustively recounted the history of the directed verdict on the contract standard. *Thomas* quoted extensively from Justice Jones' special concurrence in *Safeco Insurance Company of America v. Sims*,⁴⁰ and listed specific instances which would qualify as an exception to the "directed verdict" rule. Justice Jones suggested a fact situation "where the insurer insists that its refusal of payment was grounded solely on a hospital record, and the plaintiff denies the very existence of such an entry. Merely because the insurer may be able to withstand a directed verdict motion—the existence *vel non* of the record entry being an issue of fact—would not, as a matter of law, bar the plaintiff's tort claim."⁴¹ Justice Jones also cited *Jones* and *Kountz* as examples of where the "directed verdict" standard was deemed inapplicable and the insurer was barred from avoiding bad faith liability by putting on evidence "sufficient to defeat the plaintiffs' motions for a directed verdict on the contract claims." Justice

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Jones then noted that, "Certainly these rare examples will not be difficult to recognize, nor will the general rule, because of rare exceptions, be difficult to apply."

More recently, however, the supreme court altered its position on the directed verdict on the contract claim standard. In *Loyal American Life Insurance Co. v. Mattiace*,⁴² the court's *per curiam* opinion held that an insurer could not "rely on its chosen method of 'subjective underwriting' to create its own legitimate reason for denying a claim," and effectively allowed the exceptions to swallow the rule with regard to the directed verdict on the contract standard. Instead, the *Mattiace* court proffered the qualification that, for the plaintiff's bad faith claim to go to the jury, it was first necessary to determine "whether there was at least a question of fact warranting a jury determination on whether Loyal American acted within its legal rights when it rescinded [the] insurance policy and refused to pay... Mattiace's claim for policy benefits. In other words, was Loyal American entitled to rescind [the] policy, as a matter of law?"

The controversy in *Mattiace* arose when Sue Mattiace made a claim on a life insurance policy issued by Loyal American. The policy had been taken out by Joseph Mattiace, Sue Mattiace's son, on his own life and listed Sue Mattiace as the beneficiary. When asked in the application if he had been convicted of driving under the influence in the last five years, Joseph Mattiace lied and stated that he had not.⁴³ After Joseph's death, Loyal American learned of the deceit and denied Sue Mattiace's claim for policy benefits. Loyal American claimed that Joseph Mattiace had made a material misrepresentation in his application, and, if the truth had been known, Joseph Mattiace would have been charged an additional premium amount to cover the additional risk. Sue Mattiace's attorney contacted Loyal American and sought an explanation of the underwriting practices that justified the denial of Mattiace's claim. Loyal American's vice president of claims responded with a letter in which he noted that the company had relied on "a page from our underwriting manual" to determine that the extra premium would have been charged.

The problem with Loyal American's explanation was that it did not have its own underwriting manual but instead chose to utilize numerous underwriting manuals prepared by various reinsurance companies and utilized "'subjective underwriting' based on its underwriters' background and knowledge." Since no particular manual was binding on any particular type of risk, the company was free to choose between manuals that were in accord with its adopted position. This "created an atmosphere of underwriting that makes it impossible to determine whether a misrepresentation, such as Joseph's, regarding a DUI conviction, was always considered to be a material misrepresentation." The *Mattiace* court held that this was an untenable position since it allowed Loyal American "to create its own legitimate reason for denying a claim."

The critical issue for the *Mattiace* court thus became whether Loyal American would have issued Joseph the same policy at the same premium if he had indicated on his application that he had been convicted of DUI within the preceding year. The supreme court held that the fact question created by Loyal American was the product of an atmosphere where an insurer could create its own debatable reason for denying the claim.⁴⁴ "We cannot condone such action and let self-created uncertainty as to underwriting standards defeat a claim of bad faith where that uncertainty is the very basis of the allegation of bad faith. Thus... we conclude that Sue Mattiace presented substantial evidence in support of each element of an action for bad faith."

While this might later be construed to be yet another "exceptional case" under the directed verdict standard, it is apparent at this time that the *Mattiace* holding effectively eviscerates the directed verdict on the contract count standard.⁴⁵ In fact, the *Mattiace* court explains in a footnote that a trial court "need not expressly direct a verdict in favor of the plaintiff on a breach of contract claim in order to submit a bad faith claim to the jury. The trial court must simply determine that the plaintiff has met the standard of proof required for a directed verdict."⁴⁶

The *Mattiace* holding presents a scenario in which each claim for bad faith must be considered on a factual basis,

and an insurer's efforts to provide a factual basis to justify the denial of the claim become a significant factor in the fact question/question of law for the trial judge. Thus, while the directed verdict standard, heralded by the supreme court since *Dutton*, continues to exist, it is gutted by the *Mattiace* holding that allows a plaintiff to get to the jury with a bad faith claim by presenting substantial evidence in support of each element of an action for bad faith. With regard to the present status of the directed verdict standard, the shoe is now presumably on the other foot, as an insurer can now only prevent a bad faith claim from being sent to the jury by demonstrating that it, and not the plaintiff, is entitled to a directed verdict on the bad faith count.

Applicability of Bad Faith to Other Fields of Contract Law

Soon after the supreme court handed down its opinion in *Chavers*, enterprising trial lawyers were before the courts

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arguing that the decision in *Chavers* should be expanded to cover all contracts. In *Brown-Marx Associates, Ltd. v. Emigrant Savings Bank*,⁴⁷ the plaintiffs, Brown-Marx Associates, sued as the result of an alleged breach of a loan commitment executed by the defendant, Emigrant Savings Bank. The plaintiffs alleged that the lender "breached its duty at law and... dishonored its covenant to deal in good faith, to deal fairly, to deal honestly, and to make honest disclosures to the plaintiffs." The defendant argued in response that the tort of bad faith was only applicable to insurance contracts, and that it was therefore entitled to summary judgment on the bad faith claim. In a case of first impression, Judge Propst stated that "[i]t is not disputed that every contract carries with it an implication that the parties will act in good faith." However, the rule of the precursor opinions of the Supreme Court of Alabama prior to *Chavers*, "was, in the case of insurance contracts, to imply the obligation of evaluating and paying claims in good faith as a duty in law as opposed to its being an implied covenant in contract."⁴⁸ [The supreme court] has now taken this step with regard to insurance contracts." Judge Propst referred to the test for bad faith as adopted by the court in *Chavers*, and noted the court's language in specifying that the tort "arises for an insurer's intentional refusal to settle a direct claim." Accordingly, Judge Propst held that the Alabama Supreme Court did not recognize in *Chavers* "an implied duty in law, as distinguished from an implied covenant, of bad [sic] faith except in 'an insurance contract context'," and granted the lender's motion for summary judgment.

The question of whether the tort of bad faith applies to contracts outside of the insurance context reached the Supreme Court of Alabama in 1983 in the case of *Kennedy Electric Co. v. Moore-Handley, Inc.*⁴⁹ In *Kennedy Electric*, Kennedy Electric (Kennedy) executed a contract with the Alabama State Docks Department (docks) to supply electrical equipment based on a set of specifications prepared by a third

party. Thereafter, Kennedy obtained a quotation from Moore-Handley, a distributor for Westinghouse Electric, to supply various electrical equipment as set out in the third-party's specifications. Kennedy negotiated a price with Moore-Handley and issued a purchase order based on



Moore-Handley's quotation sheet. On the back of Moore-Handley's quotation sheet was a set of provisions limiting Moore-Handley's liability for consequential and delay damages.

Moore-Handley ordered the equipment from Westinghouse, but was told by the engineers at Westinghouse that the equipment ordered would not be up to specifications for the project. Moore-Handley failed to pass this information on to Kennedy, and the equipment was installed as contracted for. A year later, a docks inspector noticed the equipment problem, and substantial costs were incurred by Kennedy in an effort to remedy the problem. Kennedy filed suit against Moore-Handley and Westinghouse, and alleged, among other things, breach of the duty of good faith. The trial court granted the defendants' motion to dismiss the bad faith claim, and Kennedy appealed.

On appeal, Kennedy argued that the supreme court should extend the tort of bad faith to the area of general contract law. The supreme court handled the question tersely, and held that:

Although every contract does imply good faith and fair dealing (see § 7-1-203, Code 1975), it does not carry with it the duty imposed by law which we have found in the context of insurance cases. We are not prepared to extend the tort of bad faith beyond the area of insurance policy cases at this time. See *Brown-Marx Associates, Ltd. v. Emigrant Savings Bank*, 527 F. Supp. 277 (N.D. Ala. 1981).⁵⁰

The supreme court has not wavered in its opinion that the tort of bad faith is only available in the insurance context, and most recently reiterated its position in a detailed discussion in *Tanner v. Church's Fried Chicken*.⁵¹

Quite understandably, insurance companies have bridled at the notion that the tort of bad faith is only applicable against them. In *United America Insurance Co. v. Brumley*,⁵² the trial court entered judgment in a bad faith action against an insurer in the amount of \$1,005,000. The jury verdict was comprised of \$5,000 for breach of contract, and \$1,000,000 in punitive damages. The insurer appealed the judgment on several grounds, including its contention that the tort of bad faith as defined by the supreme court violated the insurer's equal protection and due process rights. The insurer's position was based on the proposition that "all contracts in Alabama contain a requirement of good faith and fair dealing, (citing *Chavers*), but only in insurance contracts can the party against whom the requirement of good faith was breached recover punitive damages."

In his discussion of the insurer's contention of the unconstitutionality of the court's application of the tort of bad faith solely in the insurance context, Justice Almon turned to historical and policy considerations to support the court's holding that "the classification of insurance companies as the sole potential defendants in bad faith actions is

reasonable and does not violate those companies' right to equal protection of the laws.³³ In his opinion, Justice Almon explained that:

Historically, legislatures and courts have treated the insurance industry as an industry affected with the public interest... Given that insurance is affected with the public interest, the law should not permit an insurance company to refuse or fail to pay valid claims purely for perceived economic reasons. Public policy demands that valid claims be promptly paid.³⁴

The court also noted that the rationale that justified the adoption of the tort of bad faith in *Chavers* was equally applicable in this context. "Insurance companies are in a bargaining position manifestly superior to that of their insureds. Insurance claimants, by definition, are calling upon insurance companies during times of need or crisis."³⁵ Accordingly, the court qualified its position that insurers could justifiably be deemed the sole defendants in bad faith actions.

Admissibility of Expert Testimony in a Bad Faith Action

The supreme court has yet to define the role of the expert witness in proving or disproving an insured's claim of bad faith refusal to pay against his own insurer. Rule 702 of the Alabama Rules of Evidence, effective January 1, 1996, addresses the admissibility of expert testimony and states that "[i]f scientific, technical, or otherwise specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify there-to in the form of an opinion or otherwise." The Advisory Committee's notes explain that under Rule 702, "it is possible that an expert opinion or testimony on a question of common knowledge would be admitted by the trial judge as helpful to the trier of fact." This is a departure from the traditional focus of expert testimony in Alabama on subjects that are "beyond common understanding to whether the expert's opinion or testimony will assist the trier of fact."³⁶

This shift reflects the recent trend in Alabama decisions that "in speaking of expert testimony have increasingly used the words 'helpful to' or 'assist' the trier of fact."

A careful examination of Alabama and other jurisdictions' case law provides helpful insight as to how the supreme court may define the scope of admissibility of expert testimony when the issue eventually comes before the court. In *Macon County Commission v. Sanders*,³⁷ the Supreme Court of Alabama held that an expert may testify *as to* the ultimate issue in a case.³⁸ However, in *Yarborough v. Springhill Memorial Hospital*,³⁹ the supreme court held that expert witnesses are prohibited from giving *their opinions on* the ultimate issue of a case.⁴⁰ The *Yarborough* court explained that the "long-established and accepted rationale for this rule is that to allow an opinion upon the ultimate issue in a case would be to usurp the function of the trier of fact."⁴¹ Accordingly, the rule in Alabama appears to be that an expert witness may give his opinion concerning the ultimate *factual* issue in a case, but is precluded from stating it in the form of a *legal* conclusion.

Expert testimony has been expressly allowed in bad faith actions in several jurisdictions.⁴² In *Clearwater v. State Farm Mutual Automobile Insurance Co.*,⁴³ the Supreme Court of Arizona addressed the issue of when expert testimony would be admissible, if not necessary, in an insurance bad faith refusal to settle action. The *Clearwater* court, in pertinent part, stated that:

The fact that the jury did not necessarily need the expert testimony did not render the testimony inadmissible. The testimony was at least useful, if not indispensable. It can hardly be said that the average juror was as well equipped as an experienced insurance defense attorney to judge the good or bad faith of an insurer, based upon the facts included within the hypothetical question.⁴⁴

Furthermore, the court noted that the "admission or rejection of expert testimony is left to the discretion of the trial court and we find no abuse." This is in

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accord with the Supreme Court of
Alabama's decision in *Tidwell v. Upjohn
Co.*,⁶⁵ where the court noted that, in
Alabama:

A ruling on the admissibility of
expert testimony is largely
within the discretion of the trial
court and will not be over-
turned unless there has been an
abuse of discretion. The pur-
pose of expert testimony is to
aid the trier of fact where the
subject matter is beyond the
ken of the average juror. Thus,
where a witness has sufficient
'knowledge, skill, experience, or
training... that his opinion will
be considered in reason as giv-
ing the trier of fact light upon
the question to be determined'
it should be admitted as expert
testimony.

To date, the only Alabama decision to
proximately address this issue is *Thomas
v. Principal Financial Group*.⁶⁶ In
Thomas, the mother of a deceased child
brought an action against her insurer
for breach of contract and bad faith
refusal to pay insurance benefits. The
plaintiff, Ms. Thomas, filed a claim after
her 24-year-old daughter's death from
cancer. The group life insurance policy
that Ms. Thomas possessed authorized
recovery for the death of a dependent,
and defined the word "dependent," in
pertinent part, as "each unmarried child
who is nineteen years but less than
twenty-five years of age provided he is
attending school on a full-time basis and
is dependent upon the Person for his
principal support and maintenance." At
the time of her death, Melinda Warren,
Ms. Thomas's daughter was enrolled
full-time in school, but had not attended
for the last 22 months because of her ill-
ness. The claims examiner for Ms.
Thomas's insurer questioned whether
Ms. Thomas's daughter was a dependent
as defined by the policy, and made the
determination that Melinda Warren was
not a dependent as defined by the policy
language. This decision was then con-
firmed by the examiner's supervisor, and
then by the supervisor's supervisor. The
insurer notified Ms. Thomas of its
refusal to pay the claim, and then
reviewed its decision at the request of

Ms. Thomas's attorney. Upon learning
that the insurer intended to stand by its
earlier determination not to pay the
claim, Ms. Thomas filed suit. A jury
awarded Ms. Thomas \$1,000 on her
breach of contract claim, and \$750,000
on her bad faith claim. The insurer
appealed, contending among other
things that the trial court had erred in
allowing the case to go to the jury as the
policy language was not ambiguous
regarding Ms. Warren's status, and
therefore there was no question of fact
to be determined by the jury.⁶⁷

The crux of the insurer's defense was
the interpretation of the policy language
requiring the dependent to be "attending
school on a full time basis." Ms.
Thomas argued that the language was
ambiguous, and that accordingly she,
not the insurer, was entitled to a direct-
ed verdict on the contract claim. To
prove her case at trial, Ms. Thomas
offered an insurance consultant with
over 20 years' experience in interpreting
group insurance policies as an expert
witness in support of her position. The
expert testified that Ms. Warren would
have been considered a dependent by all
other insurers within the industry, and
that at least two of the insurer's claims
examiners "seemed confused as to exact-
ly what the policy language meant." The
supreme court found no error in the
admission of this testimony.⁶⁸

The *Thomas* court never directly
addressed the issue of whether an expert
could be called upon to testify concern-
ing the viability of a bad faith claim.
However, the court impliedly accepted
this position when, in its holding, it
relied upon the testimony of the expert
in coming to its conclusion that
"according to the custom and practice
within the insurance industry, Ms.
Warren should have been considered a
'dependent' within the meaning of the
policy."⁶⁹ Accordingly, when read in con-
junction with Alabama Rule of Evidence
702 and *Tidwell v. Upjohn Co.*, it is
apparent that the Alabama Supreme
Court will probably admit expert testi-
mony offered to demonstrate the exist-
ence or non-existence of bad faith in an
effort to facilitate the triers of fact in
reaching their ultimate determination.

The Supreme Court of California's
holding in *Neal v. Farmers Insurance*

*Exchange*⁷⁰ serves as a bulwark in support of this proposition. In *Neal*, an insured brought an action against his own insurer to recover compensatory and punitive damages for the insurer's bad faith failure to pay uninsured motorist benefits. In the plaintiff's case in chief, the trial court allowed the testimony of two expert witnesses who offered their "opinions on the subject of [the insurer's] bad faith or lack of it." The jury returned a verdict for the plaintiff, and the insurer contended on appeal that this "was not a proper subject for expert opinion because it was not a matter 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.'" The *Neal* court held that the matter of the admission of expert evidence was within the sound discretion of the trial court and affirmed the trial court's decision, noting that there were:

many ways in which a lay jury, in assessing the conduct and motives of an insurance company in denying coverage under its policy, could benefit from the opinion of one who, by profession and experience, was peculiarly equipped to evaluate such matters in the context of similar disputes.

Also consistent with this interpretation of Alabama precedent is *Aetna Casualty & Surety Co. v. Broadway Arms Corp.*⁷¹ In *Aetna*, the Supreme Court of Arkansas held that an attorney experienced in insurance law was competent to testify as an expert in a bad faith action as long as he did not testify that, in his opinion, the insurer acted in bad faith.⁷² "To do so would not only touch upon the upon the ultimate issue but would in effect tell the jury how to decide the case."⁷³

Conclusion

Since the *Chavers* court announced that an insurer's bad faith failure to pay a claim was a viable cause of action in Alabama, the supreme court has been deluged with cases in which the parties have sought to determine the parameters of this new and heretofore undefined tort. With enormous sums of puni-

tive damages at stake in virtually all bad faith actions, it is understandable how the supreme court might have underestimated the attractiveness of this new cause of action. The ensuing rush of litigation has brought with it a multitude of differing fact situations, each one seeking to define the issues of admissibility and liability. Unfortunately for the supreme court, this tribulation has not subsided as an expansive body of case law has developed because each new interpretation of the law invites a host of actions seeking to define the newest parameters. ■

Endnotes

- 405 So. 2d 1, 6 (Ala. 1981).
- In her opinion in *United Ins. Co. of Am. v. Cope*, 630 So. 2d 407, 412 (Ala. 1993), Justice Shores remarked that "[w]hen this Court recognized the tort of bad faith refusal to pay a valid insurance claim, it anticipated that such claims would be rare. That has not been the experience."
- See Woodham, Comment, "Constructive Denial," "Debatable Reasons," And Bad Faith Refusal to Pay an Insurance Claim—The Evolution of a Monster, 22 Cumb. L. Rev. 349 (1992);
- Talkington, *Reviewing the Practicality of Alabama's Tort of Bad Faith*, 16 Cumb. L. Rev. 329 (1986); Blan, *The Tort of Bad Faith—A Defense Viewpoint*, 34 Ala. L. Rev. 543 (1983); and Heninger, *Bad Faith in Alabama: An Infant Tort in Intensive Care*, 34 Ala. L. Rev. 563 (1983).
- 417 So. 2d 179 (Ala. 1982).
- Bowen*, 417 So. 2d at 183. It is crucial to note at this juncture that the supreme court held in *Jemison v. Scottsdale Ins. Co.*, 646 So. 2d 1389, 1390 (Ala. 1994), that the insured's duty to fulfill its obligation to its insurer is a prerequisite to the insured's establishing a prima facie case of bad faith failure to pay on the part of its insurer. Accordingly, an insured's failure to notify its insurer of its dissatisfaction with a claim payment before filing suit would serve to bar a claim for bad faith refusal to pay. *Jemison*, 646 So. 2d at 1390; See also *United Ins. Co. v. Cope*, 630 So. 2d 407 (Ala. 1993).
- National Savings Life Ins. Co. v. Dutton*, 419 So. 2d 1357, 1362 (Ala. 1982).
- The Standard Plan, Inc. v. Tucker*, 582 So. 2d 1024, 1028 (Ala. 1991).
- Nationwide Mut. Ins. Co. v. Clay*, 525 So. 2d 1339, 1342 (Ala. 1987). The supreme court has noted that this rule must be followed regardless of how good subsequently discovered reasons allowing denial might be. *King v. National Foundation Life Ins. Co.*, 541 So. 2d 502, 505 (Ala. 1989).



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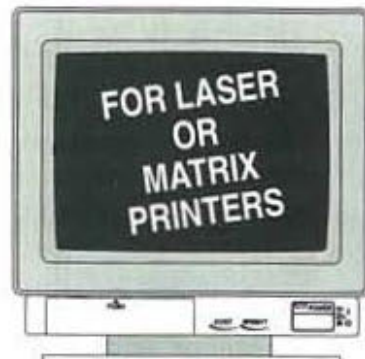
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9. *Thomas v. Principal Fin. Group*, 566 So. 2d 735 (Ala. 1990). This standard is also applicable to uninsured motorist coverage. In *Lefevre v. Westberry*, 590 So. 2d 154, 161 (Ala. 1991), the supreme court held that the tort of bad faith is applicable in the uninsured motorist context, and that when a claim is filed by an insured, the carrier is under an obligation to diligently investigate the facts, fairly investigate the claim, and act promptly and reasonably.
10. *Carter v. Old Am. Ins. Co.*, 544 So. 2d 917 (Ala. 1989).
11. See *Aetna Life Ins. Co. v. Lavoie*, 470 So. 2d 1060, 1074 (Ala. 1985); *National Sec. Fire & Cas. Co. v. Vinton*, 454 So. 2d 942 (Ala. 1984). While the failure to have any guidelines may also show a reckless approach, there are cases holding that a "sloppy" investigation is not enough. *State Farm Fire & Cas. Co. v. Balmer*, 672 F.Supp. 1395 (M.D. Ala. 1987), aff'd. 891 F.2d 874 (11th Cir. 1990). A protracted investigation may also support the finding of bad faith. *Livingston v. Auto Owners Ins. Co.*, 582 So. 2d 1038, 1043 (Ala. 1991).
12. 544 So. 2d 906 (Ala. 1989). "Even if an insured is not entitled to a directed verdict on the contract claim, the bad faith claim can be submitted to the jury if the insurer recklessly or intentionally fails to properly investigate a claim or subject the results of the investigation to a cognitive evaluation and review." *Loyal Am. Life Ins. Co. v. Mattiace*, Ms. 1941777 at 13 n.2 (Ala. 1996).
13. 544 So. 2d at 915. See also, *Intercontinental Life v. Linblom*, 571 So. 2d 1092 (Ala. 1990).
14. 405 So. 2d 916 (Ala. 1981).
15. *Id.* at 924.
16. *Bowen*, 417 So. 2d at 183. The supreme court held in *Aetna Cas. & Surety Co. v. Beggs*, 525 So. 2d 1350, 1352-53 (Ala. 1988), that an administrator's failure to make an offer of proof to demonstrate the amount of the deceased's carrier's liability on a death claim under its uninsured motorist provision entitled the carrier to a directed verdict on the bad faith count, which was based on the insurer's alleged failure to deal in good faith. "With only punitive damages recoverable in wrongful death cases and with no standards for determining excessiveness or inadequacy... it is doubtful that an insured could ever prove the amount of an insurer's liability under uninsured motorist coverage in a wrongful death case with the specificity necessary to recover against an insurer for bad faith in failing to negotiate or pay a wrongful death claim under uninsured motorist coverage." *Id.*
17. *Thomas v. Principal Fin. Group*, 566 So. 2d 735, 741 (Ala. 1990). For example, the mere delay of claims payments is not bad faith, but the court has said that it could be if the intent to injure is found. *Coleman v. Gulf Life Ins. Co.*, 514 So. 2d 944, 947 (Ala. 1987). Note, however, that an insurer's mistake of law consisting of lack of awareness of a court opinion does not show a conscious intent to injure or bad faith. *Harrington v. Guaranty Nat'l. Ins. Co.*, 628 So. 2d 323, 326-27 (Ala. 1993).
18. See e.g., *Jones v. Alabama Farm Bur. Mut. Cas. Co.*, 507 So. 2d 396 (Ala. 1987).
19. *Shadwick v. State Farm Fire & Cas. Co.*, 578 So. 2d 1075, 1078 (Ala. 1991).
20. *Id.* at 1077.
21. *Bush v. Alabama Farm. Bur.*, 576 So. 2d 175, 179 (Ala. 1991). However, in the recent case of *Pennsylvania National Mutual Casualty Co. v. Lane*, 656 So. 2d 371 (Ala. 1995), the supreme court found that the insurer's contention that the insured had a motive to burn his own home was not reasonable. The court noted that while the desire to move coupled with the inability to sell a current residence has been listed as circumstantial evidence of a motive to intentionally burn a residence (citing *Shadwick*, *supra.*), the facts in *Lane* were not sufficient to support such an inference. The *Lane* court further stated that the evidence of financial need was too weak to support the insurer's contention of motive.
22. The supreme court has explained that, "[w]hile it is true that partial payments [by an insurer of an insured's claim] may be considered as evidence of a lack of a dishonest purpose or ill-will in an insurer's denial, it does not follow that partial payment, in and of itself, precludes recovery under a bad faith theory." *Aetna Life Ins. Co. v. Lavoie*, 470 So. 2d 1060, 1075 (Ala. 1985). The supreme court has explained, however, in *Gilbert v. Congress Life Insurance Co.*, 646 So. 2d 592, 594 (Ala. 1994), that an insurer who brings an interpleader action to determine the proper beneficiary of an insurance policy "cannot logically be subjected to a claim alleging bad faith refusal to pay." The rationale underlying this position is that the insurer, in "initiating an interpleader action,... is admitting that it holds funds that are not its own, but says that it owes those funds to an undetermined party." *Id.* However, simply filing a declaratory judgment action does not necessarily preclude an action for bad faith failure to pay a claim. *Safeco Ins. Co. v. Sambas* So. 2d 1219, 1223 (Ala. 1983).
23. *Davis v. Cotton States Mut. Ins. Co.*, 604 So. 2d 354, 359 (Ala. 1992).
24. *Gamble v. Webb Quarterback Club*, 386 So. 2d 455 (Ala. Civ. App. 1980).
25. *Allen v. Moulton Allen & Williams*, 495 So. 2d 27 (Ala. 1986).
26. 419 So. 2d 1357 (Ala. 1982).
27. *Dutton*, 419 So. 2d at 1362.
28. 717 F.2d 556 (11th Cir. 1983).
29. 435 So. 2d 1219, 1223 (Ala. 1982).
30. *Dempsey*, 717 F.2d at 561.
31. 507 So. 2d 396 (Ala. 1986).
32. *Jones*, 507 So. 2d at 401.
33. *Id.*; See *Aetna Life Ins. Co. v. Lavoie*, 470 So. 2d 1060, 1072 (Ala. 1985). In a similar vein, Justice Shores' opinion in *Affiliated FM Ins., Co. v. Stephens Enterprises*, 641 So. 2d 780 (Ala. 1984), affirmed Judge Daniel Rogers's order overruling a defendant insurance company's motion for J.N.O.V., or, in the alternative for a new trial, which explained that "[t]he failure to fully disclose the known and evaluated loss prevention reports by the insurer certainly provided a legitimate inference that this matter was handled and investigated in bad faith. Moreover, there were other facts brought out during the examination of the defense witnesses that indicated an attempt by the defendant to build a defense on a less than satisfactory and fair evaluation of the claim." *Stephens*, 641 So. 2d at 783. The *Stephens* court noted that "there was evidence from which the jury could conclude that [the defendant] attempted to manufacture a defense through the creation of a cover-up that would give a legal basis of a reason for denying coverage... and from that attempt it could infer a pattern of bad faith." *Stephens*, 641 So. 2d at 784. See also *Blackburn v. Fidelity & Deposit Co.*, 667 So. 2d 661 (Ala. 1995); *Loyal Am. Life Ins. Co. v. Mattiace*, [Ms. 1941777 at 19-21, May 24, 1996].
34. *Jones*, 507 So. 2d at 401. See also *Blackburn v. Fidelity & Deposit Co.*, 667 So. 2d 661 (Ala. 1995). In contrast, the supreme court held, in *Union Bankers Ins. Co. v. McMinn*, 541 So. 2d 494, 497 (Ala. 1989), that an insurer's cancellation of an insurance policy after being notified of the existence of a claim was not grounds for a cause of action for bad faith failure to pay when the insurer was already researching the accuracy of the plaintiff's application for insurance, and there was testimony that the insurer would have never issued the policy if the plaintiff's actual medical history had been known. The *McMinn* court based its decision on the *Dutton* standard and explained that "in a normal case, to sustain a bad faith claim the plaintiff must prove that when the insurer denied the claim there was no debatable or arguable issue of fact or law justifying the denial; that is, a plaintiff must be entitled to a directed verdict on the insurance contract in order to recover for bad faith... This is such a 'normal' case." *McMinn*, 541 So. 2d at 497.
35. 536 So. 2d 943, 946 (Ala. 1988).
36. *Kizziah*, 536 So. 2d at 947. "This test is not applicable to every bad faith claim. Even if an insured is not entitled to a directed verdict on the contract claim, the bad faith claim can be submitted to the jury if the insurer recklessly or intentionally fails to properly investigate a claim or subject the results of the investigation to a cognitive evaluation and review... The trial court must simply determine that the plaintiff has met the standard of proof required for a directed verdict." *Loyal Am. Life Ins. Co. v. Mattiace*, Ms. 1941777 at 13 n.2, May 24, 1996.

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37. In *Kountz*, 461 So. 2d 802 (Ala. 1984), the supreme court determined from the evidence presented at trial that Continental Assurance intentionally failed to determine that the real reason for the removal of their insured's teeth was the injury as claimed, not the pre-existing chronic periodontal disease. That intentional failure to determine the existence of a valid reason for denying payment was sufficient to support an inference of the insurer's bad faith failure to pay. It was this inference of bad faith, not the denial of the motion for summary judgment on the breach of contract claim, that allowed the bad faith claim to be presented to the jury.
38. *Id.*
39. 566 So.2d 735, 742-45 (Ala. 1990).
40. 435 So. 2d 1219, 1224 (Ala. 1983).
41. *Safeco*, 435 So. 2d at 1224.
42. Ms. 1941777 at 19, May 24, 1996.
43. Joseph Mattiace had been convicted of DUI approximately eight months before he before he applied for the life insurance policy. *Mattiace*, Ms. 1941777 at 3.
44. *Id.* at 20.
45. In Justice Maddox's dissent, he notes that a "reading of the majority opinion... convinces me that the majority today effectively abandons the 'directed verdict test' of *Chavers*. In *Chavers*, the majority of the court unequivocally stated that the plaintiff must show that the insurance company had no legal or factual defense to payment of the insurance claim (citation omitted). The test set out today is quite different, and when the two tests are placed side by side, it is obvious that the legal principles set out in *Chavers* cannot co-exist with the legal principal upon which today's case is decided, because they are directly contradictory one to the other." *Mattiace*, Ms. 1941777 at 33-34 (Emphasis in original).
46. *Id.* at 13 n. 2.
47. *Brown-Marx Assoc., Ltd., v. Emigrant Savings Bank*, 527 F. Supp. 277 (N.D. Ala. 1981).
48. See *Berry v. Druid City Hosp. Bd.*, 333 So. 2d 796 (Ala. 1976); *Waters v. American Cas. Co. of Reading, Pa.*, 261 Ala. 252, 73 So. 2d 524 (1953); and *Hamner v. Mutual of Omaha Ins. Co.*, 49 Ala.App. 214, 270 So. 2d 87, cert. denied 291 Ala. 781, 282 So. 2d 256 (1973).
49. 437 So. 2d 76 (Ala. 1983).
50. *Kennedy Electric*, 437 So. 2d at 81.
51. 582 So. 2d 449 (Ala. 1991). The supreme court has noted, however, that the Code of Alabama, 1975, § 27-1-2(1) defines "insurance" as "[a] contract whereby one undertakes to indemnify another or pay or provide a specified amount or benefit upon determinable contingencies," and § 27-1-2(2) defines "insurer" as "[e]very person engaged as indemnitor, surety or contractor in the business of entering into contracts of insurance." *Schoepflin v. Tender Loving Care Corp.*, 631 So. 2d 909, 910 (Ala. 1993). Accordingly, the *Schoepflin* court held that a new car mechanical failure service contract issued by the defendant service provider "was an insurance contract within the meaning of our cases defining the tort of bad faith and, therefore, that the defendant was not entitled to a summary judgment [on the bad faith claim] on the basis that it is not an insurer." *Schoepflin*, 631 So. 2d at 912.
52. 542 So. 2d 1231, 1232 (Ala. 1989).
53. *Id.* at 1239.
54. *Brumley*, 542 So. 2d at 1238-39.
55. *Brumley*, 542 So. 2d at 1239. Similarly, the supreme court has consistently upheld the standard set out in *L&S Roofing v. St. Paul Fire & Marine*, 521 So. 2d 1298, 1304 (Ala. 1987), that requires an insurer conducting the defense of its insured under a reservation of rights to do so under an enhanced obligation of good faith toward its insured. The objective of this enhanced duty "is to put in place a procedure by which the insured can be confident that his interests will not be compromised nor in any way subordinated to those of the insurer as a result of the defense he is required to accept under the contract of insurance." *L&S*, 521 So. 2d at 1304. See also *Blackburn v. Fidelity & Deposit Co.*, 667 So. 2d 661 (Ala. 1995); *Home Ins. Co. v. Rice*, 585 So. 2d 859 (Ala. 1991); *Shelby Steel Fabricators, Inc. v. U.S.F. & G.*, 569 So. 2d 309 (Ala. 1990); and *Burnham Shoes, Inc. v. West American Ins. Co.*, 504 So. 2d 238 (Ala. 1987).
56. Ala. R. Evid. 702 advisory committee's note.
57. 555 So. 2d 1054, 1058 (Ala. 1990).
58. See also *Harrison v. Wientjes*, 466 So. 2d 125 (Ala. 1985).
59. 545 So. 2d 32, 34 (Ala. 1989).
60. This position is now codified in Alabama Rule of Evidence 704, which states "[t]estimony in the form of an opinion or inference otherwise admissible is to be excluded if it embraces an ultimate issue to be decided by the trier of fact."
61. *Yarborough*, 545 So. 2d at 34. (Signal in text to See C. Gamble, *McElroy's Alabama Evidence*, § 127.01(5) (1977)).
62. See *Clark v. Interstate Nat'l. Corp.*, 486 F.Supp. 145 (E.D. Pa. 1980); *Neal v. Farmers Ins. Exchange*, 148 Cal. Rptr. 389, 582 P.2d 980 (1978); *Groce v. Fidelity Gen. Ins. Co.*, 448 P.2d 554 (Or. 1968); *Clearwater v. State Farm Mut. Auto. Ins. Co.*, 161 Ariz. 590, 780 P.2d 423 (1989).
63. 161 Ariz. 590, 595, 780 P.2d 423, 428 (1989).
64. *Clearwater*, 780 P.2d at 595. (Quoting text from *Groce v. Fidelity Gen. Ins. Co.*, 448 P.2d 554, 560 (Or. 1968)).
65. 626 So. 2d 1297 (Ala. 1993).
66. 566 So. 2d 735 (Ala. 1990).
67. *Id.* at 738.
68. In a case involving expert testimony that was quite similar to the expert testimony offered in *Thomas*, the Supreme Court of Arizona held in *Rawlings v. Apocada*, 151 Ariz. 149, 158, 726 P.2d 565 (1986), that the failure to comply with industry custom may be relevant to the question of an insurer's alleged bad faith. Accordingly, the *Rawlings* trial court did not err by allowing into evidence the testimony of the plaintiff's expert witness that the defendant insurer breached industry custom in its attempts to limit its exposure as the insured's liability carrier. *Id.*
69. *Thomas*, 566 So. 2d at 749.
70. 148 Cal. Rptr. 389, 582 So. 2d 980 (1978).
71. 281 Ark. 128, 664 S.W.2d 463 (1984).
72. *Aetna*, 664 S.W.2d at 467.
73. *Id.* However, in *Kooyman v. Farm Bur. Ins. Co.*, 315 N.W. 2d 30, 37 (Iowa 1982), the Iowa Supreme Court rejected the testimony of an attorney in a bad faith action because the attorney had sought to testify that the insurer's attorney had acted in bad faith. The *Kooyman* court explained that "[b]ad faith is the standard by which Farm Bureau's liability must be measured; a witness may not give an opinion whether it did or did not meet that standard. It is not a proper subject of expert testimony, and the district court properly refused it." *Id.* However, implicit in the *Kooyman* court's rejection of the expert's opinion on the ultimate issue of the case was the court's acceptance of the expert's testimony as to the ultimate factual issues in the case.



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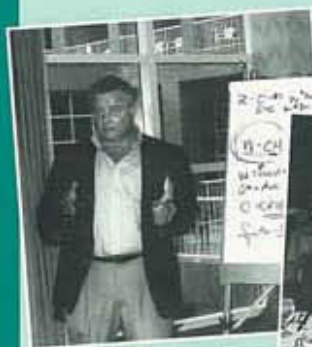
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Convention Highlights



Ward Bower of Altman Weil Pensa conducts "Service Strategy" workshop.



Robbie Lightfoot, Dot Owens and Joy Cooper visit during the Bench & Bar luncheon.



John Owens thanks luncheon speaker and ABA President Lee Cooper.



Justice Ralph Cook receives the Judicial Award of Merit.



Sonny Hornsby and Alva Caine relaxing with other past presidents.



Jack Marshall leads Friday's plenary session, "Legal Ethics in a New Era"...



...with humor provided by the Ethical Arts Players!



After-dinner music by the Charlie Lyle Band...



...gets Broox and Laura Holmes and John and Dot Owens out on the floor!



John Owens thanks Saturday's featured speaker, Supreme Court Clerk William K. Suter.

Charles Carr, recipient of 1996 ASB Award of Merit



Tutt Barrett, commissioner for the 37th circuit, accepts Local Bar Achievement Award for the Lee County Bar.



Broox Holmes gives "Past President" ribbon to John Owens





Twenty-six exhibitors, including Rosemary Beach, display products and services for ASB members.



"Prime Time" provided music during Thursday's Membership Reception.



Fred Gray, Sr. and Wanda Devereaux catching up during Thursday's reception.



The Children's Carnival is a big hit!



Staff from the Ft. Walton Beach YMCA greet participants of the Children's Carnival, sponsored by Insurance Specialists.



Nancy and Allan Chason and Commissioner Sam Franklin and wife Betty visit with John Owens before Friday's Dinner/Dance.



VLP Director Kim Oliver recognizes volunteers Al Vreeland and Pam Bucy.



Merceria Ludgood gives Legal Services update.



Tuscaloosa County Bar President Steve Ford accepts Local Bar Achievement Award.



John Owens passes on the ASB "necessities" (parking garage opener and president's credit card) to Warren Lightfoot.



Ben Harris, two-time grand prize winner



1996-97 ASB President Warren Lightfoot and Past President John Owens





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The Institute, when it studies a Uniform or Model act, will obtain a reporter, who is usually a law professor or practicing lawyer with expertise in the field to compare the suggested act with existing Alabama law. A committee of approximately 15 lawyers is

appointed who will meet generally every one to three years to consider how these changes will affect current Alabama law and how it will have an impact on other areas of adjacent law. Through this process the Institute can assure a workable revision rather than just accept a law drafted by another body and adopt it in Alabama.

During the past two years the Legislature has passed several Acts initially promulgated by the Commissioners on Uniform State Laws and the American Law Institute. These revisions were the Uniform Commercial Code Article 3 "Negotiable Instruments," Article 4 "Bank Deposits and Collections," Article 8 "Investment Securities," Unincorporated Nonprofit Associations, and Partnerships. Each of these laws was modified to some extent to meet Alabama needs. The Unincorporated Nonprofit Association law added a provision for governance, while the Partnership law added a provision for limited liability partnerships that was not included in the Uniform Partnership Act.

Volunteer Efforts

It is through the volunteer efforts of lawyers that over 45 major revisions of law have been presented and adopted in the last 20 years. Several family laws were reviewed by an Institute committee. The committee drafted a "Cooling-Off Period Before Divorce," "Joint Custody of Children," "Retirement Benefits as Marital Property," and "Legal Separation." These acts were drafted to meet specific needs in Alabama and were not based on model or uniform acts. Currently, the Institute has committees dealing with UCC Article 5 "Letters of Credit," Uniform Principal and Income Act, Uniform Custodial

Trust Act, Interstate Family Support Act, TOD Accounts, Multiple Party Accounts, and Limited Partnership Revision. There are also standby committees on criminal procedure, evidence and family law. Unlike other legislation considered by the Legislature, the Institute's revisions of law always are accompanied with commentary. This commentary relates the new legislation to existing law.

The annual meeting of the Institute was held Thursday, July 25, 1996 during the Annual Meeting of the Alabama State Bar. The following officers and members of the Executive Committee were elected for 1996-97: President, James M. Campbell, Anniston; Vice-President, Demetrius Newton, Birmingham; and Secretary, Bob McCurley. Executive Committee: Seth Hammett, Andalusia; Rick Manley, Demopolis; George Maynard, Birmingham; Oakley Melton, Montgomery; Wendell Mitchell, Montgomery; Yetta Samford, Opelika; and Steve Windom, Mobile.

Special Session

The second Special Session of the Legislature was called by the Governor and began July 17 to consider basically two bills, one dealing with absentee ballots and the other with voter identification. The legislature met for seven days, and 164 bills were introduced. Only 25 passed, of which all but 13 were local bills.

Anyone wishing any other information concerning the Institute or any of its projects may obtain this information by contacting Bob McCurley, director, Alabama Law Institute, P.O. Box 861425, Tuscaloosa, Alabama 35486-0013. Phone (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.



BUILDING ALABAMA'S COURTHOUSES

Montgomery County - Part 1

Fifteen cities in the United States contain Montgomery in their name. However, only two, Montgomery City, Missouri and Montgomery, Alabama have the distinction of being the county seats of a Montgomery County. Montgomery, Alabama is unique because the city of Montgomery is named for one Mr. Montgomery while the county is named for another. How this came about will soon be explained.

As with much of Alabama, the first Europeans to set foot in present-day Montgomery County were the Spanish explorers of Hernando De Soto's expedition. In the fall of 1540, De Soto passed through the Indian village of Tawasa, the site of which is today the golf course at Maxwell Air Force Base. On September 6, 1540, the Spaniards arrived at the village of Ecunchati, meaning "red bluff" or "red ground," located on the bluff above the Alabama River at the bend where Montgomery is located today.

The next significant European incursion in the area did not take place until almost 200 years later. In 1714, the French under Bienville explored the area with the goal of establishing an outpost among the Indians upriver from Mobile. In 1717, they built Fort Toulouse near the junction of the Coosa and Tallapoosa rivers. The fort remained in French hands until the Treaty of Paris in 1763 transferred control to the British. The British allowed the fort to deteriorate.

Following the American Revolution, the territory became a part of the United States. On April 7, 1798,

Congress formally established the Mississippi Territory, which included most of present-day Mississippi and Alabama. Over the next few years, counties were organized in the area that would become Alabama, including Washington County (1800), Madison and Baldwin (1808), and Mobile and Clarke (1812).

The Creek Indian War took place in Alabama in 1813 and 1814. The deci-



Montgomery County

Established: 1816

Projected Population: 214,996,000

The following continues a history of Alabama's county courthouses—their origins and some of the people who contributed to their growth. If you have any photographs of early or present courthouses, please forward them to: Samuel A. Rumore, Jr., Miglionico & Rumore, 1230 Brown Marx Tower, Birmingham, Alabama 35203.



Statue of Lemuel Pennell Montgomery located outside the Montgomery County Courthouse

sive Battle of Horseshoe Bend, which ended the war, was fought on March 27, 1814. Following this battle, a meeting to draw up the terms of surrender took place at the old site of Fort Toulouse, which Andrew Jackson had rebuilt and renamed Fort Jackson. After the Treaty of Fort Jackson was concluded, the Mississippi Territorial Legislature created Monroe County in

1815. Thereafter, on December 6, 1816, the legislature divided Monroe County, creating Montgomery County out of it.

The name for this new county came directly from the events at the Battle of Horseshoe Bend. Andrew Jackson brought with him from Tennessee an army of volunteer soldiers, one of whom was Major Lemuel Purnell Montgomery, for whom the county is named.

Montgomery had been born in Virginia in 1786. His mother, whose maiden name was Purnell, was a first cousin to Benjamin Franklin. Lemuel moved to Tennessee, studied law, and

was admitted to the bar under a special license at the age of 18. He practiced law in Nashville.

Montgomery was appointed a major in the 39th Infantry and came to Alabama with Andrew Jackson. At the Battle of Horseshoe Bend, Montgomery led his men up to the Indian breastworks. He was shot in the head as he climbed over the barricade and became the first casualty at the battle. His heroic courage inspired his men to take the Indian position and win a decisive victory. On seeing the fallen Montgomery, it was reported that Andrew Jackson wept and said, "The

flower of my army has fallen."

Montgomery is buried in Tallapoosa County. He was only 28 years of age at the time of his death. A life-sized statue of Lemuel P. Montgomery today graces the entrance of the Montgomery County Courthouse. The sculptress was Clydetta Fulmer, a native of Montgomery. The statue commemorates the brilliant lawyer and valiant

The regular feature "Building Alabama's Courthouses" did not appear in the July issue of *The Alabama Lawyer*. Courthouse author Sam Rumore took time off to visit courthouses in other states. His favorite find was the Massac County Courthouse in Illinois. The county seat is the city of Metropolis. Instead of the traditional Civil War statue on the courthouse grounds, Metropolis has a statue of its most famous citizen, a native of Krypton. (See photo.) "Building Alabama's Courthouses" continues in this issue with part one of Montgomery County.



soldier for whom Montgomery County, Alabama was named.

Following the defeat of the Creek nation, new settlers began moving into the former Indian lands. On March 1, 1817, anticipating the creation of two new states, Congress divided the Mississippi Territory into two parts. The eastern portion became the new Alabama Territory.

On the third Monday in June 1817, the first court convened in Montgomery County. The first county seat was Fort Jackson, in present-day Elmore County, at the location of the former Fort Toulouse. No record or description exists of the first courthouse.

In August 1817, the lands along the Alabama River in Montgomery County were placed on sale at the United States Land Office at Milledgeville, Georgia. Milledgeville was the capital of Georgia and a very important city at that time. Interestingly, at the land sales, speculators paid the highest price for the land located along the bluff at the bend where the city of Montgomery is located today.

One of the first purchasers was Andrew Dexter, a lawyer and member of a prominent New England family, whose uncle, Samuel Dexter, had served as Secretary of the Treasury

under John Adams. Years earlier in New England, Dexter had obtained a bank charter and became involved in various business ventures which had resulted in his financial ruin. He had fled the United States for Canada in order to avoid debtors' prison. Later, in 1816, he inherited land scrip in Georgia from his father's estate. Thereafter, he became a land speculator



A pioneer Alabama town, 1839

in the newly opened territory to the west.

Dexter and his financial backer, John Falconer, selected land east of present-day downtown Montgomery. He had confidence that his development would prosper. He called his town "New Philadelphia" after the leading American metropolis of the day. The main street was built 140 feet wide, and was named Market Street after Philadelphia's major thoroughfare. This street led up a hill to a square of land that Dexter did not sell. It was reported that he grazed his goats on that hill. As early as 1821, he predicted that one day the capitol of Alabama would rise on that hill, which is known today, some would say prophetically, as "Goat Hill".

On the same day that Dexter purchased his land, General John Scott of Baldwin County, Georgia bought land to the west of Dexter's holdings. Scott was born in Virginia, spent much of his childhood in South Carolina, and then moved to Georgia, where he became a

prosperous planter and was named a general in the Georgia militia. In 1804, he built the state house of Georgia, when the capital was moved from Louisville in Jefferson County to Milledgeville in Baldwin County. Scott named his development in Montgomery County "Alabama Town."

From the first time they met in 1817, Dexter and Scott became rivals.

Scott's lands effectively cut off the access of Dexter's holdings to the river. Still, Dexter held the higher ground, and his town site greeted settlers first, because it was closer to the Federal Road from Georgia. He was able to attract more people to buy lots in his town than was Scott.

In 1818 it became apparent that the town at Fort Jackson was dying and that the new settlements in Montgomery County near the Alabama River were prospering. The county judges

asked the Territorial Legislature to select a more suitable site for the county seat. On February 12, 1818, Governor William Wyatt Bibb signed the enactment creating a five-member commission to select a temporary county seat until a permanent one could be chosen.

Dexter and Scott were in competition again, each one seeking to have the county seat in his town. Dexter and his associates pledged \$20,000 for the construction of the courthouse and jail. However, as such decisions are always influenced by political factors, and since Scott was a Georgian as was Governor Bibb, Dexter soon learned that his "Yankee Town" was not selected, and that Alabama Town would be the temporary county seat. Court convened on June 15, 1818 at the home of Judge Bibb, who was probably a relative of the governor.

Despite this setback, Dexter's town continued to prosper and became the location of many more businesses than

did Scott's town. Scott and his associates formed a new company that bought all of the land between New Philadelphia and Alabama Town. They decided to build another town, east of Alabama Town, and adjoining the Dexter property. This new town became known as East Alabama.

The streets in East Alabama were laid out on a plane in relation to the Alabama River. The main street, named Main Street, was 120 feet wide and led directly to wharves at the riverfront. All streets were oriented toward the river and intersected the streets of Dexter's town at a 135-degree angle. No doubt the skewed streets reflected the cross purposes of each town's founder. The angled intersection of streets where the two towns adjoined still exists in downtown Montgomery today.

By the fall of 1819, the town of East Alabama was becoming a financial success. Businesses wanted to locate close to where the two main arteries, Main and Market streets, intersected. The Dexter and Scott groups began to see the benefits of a merger into one larger

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town. The Scott group did not wish to give up the courthouse. However, the Dexter group noted that no permanent courthouse building had been constructed, courts were still held in pri-

an act of the legislature passed on December 3, 1819. At a later date, the village of Alabama Town would be added to the community.

The name chosen for the new city

he returned to America as a civilian. When the Revolutionary War erupted, he was appointed a brigadier general by the Continental Congress. He served as second in command of the American troops which invaded Canada. His force successfully captured Montreal, but he was killed on December 31, 1775 at the age of 39 during an attack upon Quebec. Montgomery was the first American general killed in the Revolutionary War.

Perhaps it is odd that a small town in Alabama would honor the memory of a Revolutionary War general who had died more than 40 years earlier.

However, in 1818, respect and even reverence for heroes of the Revolution was at its height as reflected in the erection of many monuments and memorials around this time. Also, in 1818, the State of New York had petitioned for and had removed Montgomery's body from Canada. He was re-interred with much fanfare in New York City. These events were fresh in the public mind, and so the name Montgomery for the united villages was considered appropriate.

It is interesting to note that Lemuel Montgomery's grandfather was Hugh



Montgomery, who also fought in the Revolutionary War and who was a cousin to Richard Montgomery for whom the City of Montgomery was named. Thus, the two Montgomeries, one who was the first general to die in the war for American independence, and the other, who was the first to die in a battle for American expansion, for

whom the city and county were named, were actually kinsmen.

In January 1820, Montgomery elected its first town council. One of the most pressing problems faced by the new council was sanitation: many deaths resulted from the "prevailing fever" during mosquito season. Appropriations were made for the draining of ponds,

marshes and swampland.

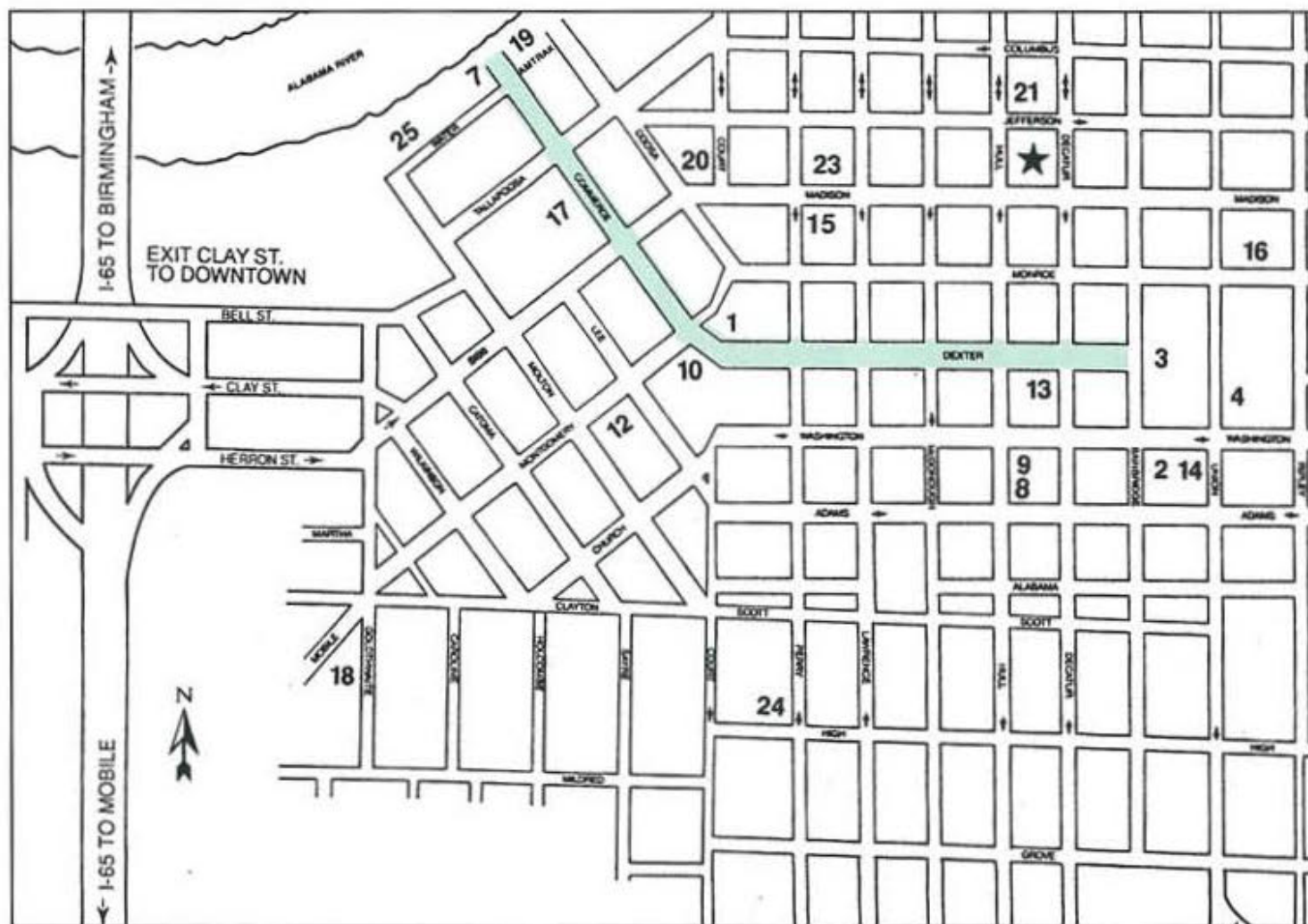
Another significant problem was the selection of a permanent county seat and courthouse. On December 16, 1820, the Alabama Legislature officially named Montgomery the temporary seat of justice. On December 17, 1821, the legislature again, as in 1818, appointed five commissioners to choose the court-



View today of Market Street – now Dexter Avenue



View today down Main Street – now Commerce Street



house site. The Montgomery town council had previously appropriated \$500 toward the erection of a courthouse and jail at the junction of the original towns of New Philadelphia and East Alabama. The legislature also appropriated funds for the erection of other necessary public buildings. The site where Market Street and Main Street intersected was officially chosen.

The first courthouse building was a two-story frame structure designed by General John Scott as a small replica of

of court in 1823 disposed of over 250 cases.

The biggest social event in Montgomery's early history took place on April 3 and 4, 1825. Lafayette was on his grand farewell tour of the United States. He was greeted by the largest crowd ever assembled in Montgomery after a procession to the top of Goat Hill. On the evening of April 4, he was honored at a grand ball. He departed that evening for the state capital at Cahaba.

Montgomery more visible when plans were made in the next few years for the selection of a new state capital.

The other event was an attempt to move the courthouse. When one views a map of Montgomery County, one can see that the city of Montgomery lies on the northern boundary. The residents of the southern part of the county lived a long distance from the county seat. On January 30, 1840, the legislature approved an act calling for a vote of the people in August of 1840 on the subject of moving the courthouse to the center of the county. When the geographic center was located, it proved to be in a swamp. Consequently, the attempt to move the county seat failed. Montgomery continued as a prosperous and prominent town, one that demanded to be considered a site for the state capital.

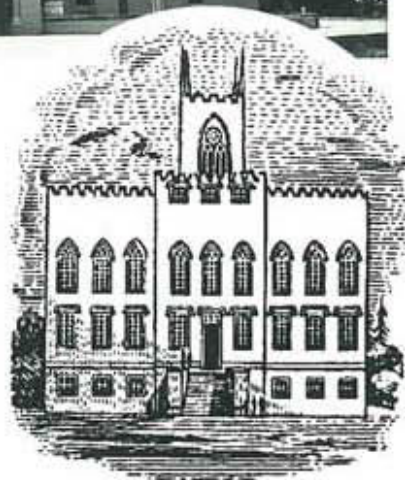
Andrew Dexter had left Montgomery and died in Mobile on November 2, 1837. John Scott remained in central Alabama, but he died on November 25, 1839. By 1830 the town which these two men had founded only a few years before was surpassed in population in Alabama by only four other places—Mobile, Tuscaloosa, Huntsville and Cahaba. By 1835, only Mobile was larger. In a very short time Montgomery had become the most important town in the cotton-producing Black Belt. By the 1840s, a major shift in political power to the south and east from Tuscaloosa would start the effort to move the state capital. Andrew Dexter's prophetic dream of a capitol building on his "Goat Hill" would soon become a reality.

(To be continued)



Above: Old State Capitol at Milledgeville, Georgia. (Model for first Montgomery County Courthouse)

Right: Reconstruction drawing of the first Montgomery County Courthouse, based on the foundation plan shown in Dexter's map, and on the old State House at Milledgeville, Georgia, from the central portion of which this courthouse was said to be copied.



the Georgia State capitol he had built at Milledgeville. The building was 40 feet square and was constructed by a Mr. Jepson who had worked on the Georgia building. It was completed in 1822. The building faced east up Market Street, later to be renamed Dexter Avenue, and on the northwest side, the town extended down Main Street, later to be renamed Commerce Street, toward the river. Court hearings, church services and community gatherings of all kinds took place in this courthouse. Even though Montgomery was small, the single term

Within 15 years after the construction of the first Montgomery courthouse building, a new structure was needed. John Figh, a contractor, was paid \$10,000 to build a brick courthouse on the site of the former structure. This building was completed around 1838.

Two significant events took place in 1840 that had long-term effects on the history of Montgomery and ultimately on the state of Alabama. One was the construction of the first railroad to reach the town. This event made



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.

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FOUNDATIONS IN PLURALISM: *A Learning Experience for Judges*

by Judge Dale Segrest

On November 19, 20, and 21, 1996, a group of Alabama judges will gather at the Kellogg Center on the campus of Tuskegee University for a highly innovative educational program. The following essay, written by Judge Dale Segrest, has been adapted from Judge Segrest's description of the project for a grant application to the State Justice Institute. The grant application has been tentatively approved, and the sponsors expect to move forward with the event. Judge Segrest is a circuit judge in Alabama's 5th judicial circuit, in which Tuskegee University is located. He was instrumental in assembling the materials and faculty for a seminar which occurred in October 1995, which was the predecessor of the "Foundations in Pluralism" project described here. Judge Segrest is a candidate for the Master of Judicial Studies degree at

the University of Nevada. He has completed all course work and is currently working on his thesis. The State Justice Institute has assisted in funding some of his educational endeavors. He has authored a book on jurisprudence entitled *Conscience and Command*, which was published by Scholar's Press of Atlanta, Georgia in 1994, and feels that the theories described in his book were influential in the vision for the "Foundations in Pluralism" project. He currently chairs of the Board of Trustees of Huntingdon College, a church related, liberal arts college located in Montgomery, Alabama. He was recently selected by the General Conference of the United Methodist Church to serve on the Connectional Process Team which will study and implement changes in the structure of the United Methodist Church during the next four years. He has served on the continuing education committee for circuit judges in the State of Alabama almost continuously since becoming a judge in 1983.

The American people are keenly aware of the fact that racial beliefs and racial tensions have an impact on the delivery of justice. But to understand that a problem exists is not to solve it. We have a great deal of difficulty devising strategies to cope with the difficulties that result from racial beliefs and tensions. Unfortunately, we are often very aware of the racial biases of others, but totally unaware of our own biases. We have difficulty openly facing the reality that each of us has an inevitable and indispensable frame of reference—a body of experience or background—on which we rely in the formation of our perceptions and judgments. Our perceptions are shaped by our backgrounds and experiences. Often, the groups to which we belong influence our perceptions. The groups consist of other persons with backgrounds and experiences similar to our own. Biases of which we are totally unaware are shared and supported by the groups of which we are a part.

Early legal realists such as Jerome Frank pointed out that judges are not immune from the influence of their backgrounds.¹ Like others, judges are influenced by background and experience. They are influenced by their groups. Judgment is the product of our personal experience and our education. Our experience and beliefs—often shaped by our groups—reflect in our judgment and decisions.

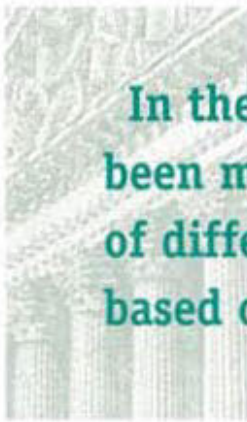
In the legal arena, we have always been more or less aware of the existence of differences of opinion and belief based on racial and ethnic background. These factors leave their imprimatur on the human psyche, just as religion and other powerful cultural forces have an impact on our personal identity. Our awareness of the existence of such differences has been intensified by recent media events such as the O. J. trial and the various cases arising from the Rodney King incident. These high profile media events not only have intensified our awareness of the *existence* of differing attitudes based on racial identity, they have made us uncomfortably aware of the *illusory reality* of the abstractions that form the foundation of the justice system. Abstractions such as justice, good, truth, evil, and even law itself, are the product of *consensus reality*. They exist because of widespread belief and acceptance. The problem is that we are now becoming aware of the possibility of lack of a consensus. If persons from different backgrounds and groups look at the same set of empirical facts that evidence a conflict, and the same set of possible remedies or conclusions, but disagree as to which conclusion is proper, the consensus about justice disappears.

After the verdict in the O. J. case CNN carried its cameras to the Emory University Law School, where they captured visual images and spoken words that reflected the racially differing reactions to the verdict. The reaction of future lawyers was typical of the reaction that the cameras found and recorded in the general population. In the general population, division along racial lines was not universal, but it was present enough

for media to capture and comment on it. The Rodney King cases displayed some of the same tendencies as the O. J. trial. The fact that the beating administered to King was captured on film and appeared to be brutal left less room for differences of opinion than the result in the O.J. trial. The looting and pillaging that followed the verdicts in the Rodney King cases were certainly not universally approved among blacks. Nevertheless, there were differences along racial lines in the *intensity* of feelings about these events. People divided along racial lines in their interpretation of the events even though they had watched the very same vignettes from media.

The O. J. trial and the Rodney King trials cause thoughtful persons to wonder where we get our abstractions of justice and injustice, of right and wrong, of good and evil. It is clear that these abstractions do not leap full grown from the events themselves. We obviously add some of the content of the abstractions in the process of interpretation.

Where are the notions about law and justice that seem indispensable to a justice system—and to civilization—stored and preserved? The idea underlying the "Foundations in Pluralism" project is that *history and literature* are important storage places for these critical abstractions.² History and literature embody our *collective* experience and are the substra-



In the legal arena, we have always been more or less aware of the existence of differences of opinion and belief based on racial and ethnic background.

ta for our interpretation of current events. Pluralism³, the existence of groups with differing opinions about justice, challenges the ability of the entire society to arrive at a consensus on core values.

The "Foundations in Pluralism" project recognizes pluralism's challenge to the viability of accepted meanings in the traditional "interpretive community." The phrase "interpretive community" was used by legal philosopher Ronald Dworkin to describe the aggregate community of lawyers, judges and legal scholars who collectively maintain beliefs and skills that enable them to discern the meaning of legal texts.⁴ The challenge presented by pluralism is clear. Each cultural group inculcates its own group values, interpretations of events and descriptive language into its members. The meaning of language is affected. Language itself is impaired in communicating assigned meanings to members of differing groups who do not share the meaning. The interpretive community of law then has difficulty accurately discerning meanings that apply with equal force in all groups. Hence the importance of the

study of authentic sources of the ideas and meanings posited by and within differing racial groups. Those meanings, derived from the stories—the parables and analogies—that give meaning for that group, deeply affect the thought processes of the group.³ For instance, if a speaker tells the story of a lynching, the story will have a profoundly different meaning and effect on those who hear, depending on their group perspective. The group perspective is shaped by interpretive event—narratives, received through families and closely knit groups—about past experience with lynchings. Even when actual events have faded into the remote past, the affective results remain, and are transmitted from generation to generation, through the internalization of attitudes of the group. Therefore, the impact of a particular narration of events can have considerably different force depending on the hearer's group identity.

Throughout the United States, the judiciary is confronted with very practical problems that arise from the powerful forces produced by racial attitudes and opinions. Examples are plentiful:

(1) The *Batson*⁶ case often requires judges to decide whether or not attorneys are discriminating against members of an identifiable group when they exercise peremptory strikes. To make such a judgment, the judge must penetrate to the heart of motivational force. Is the explanation that the lawyer offers for the strike really the reason for the strike, or merely a rationalization that masks the real reason? Is the real reason embedded in undisclosed, possibly unconscious, motives internalized from group attitudes and background?

(2) The percentage of blacks convicted of crimes and sentenced to incarceration far exceeds the percentage of blacks in the general population. Blacks often assert that this disproportionality clearly evidences racial bias within the justice system. Whites respond that blacks commit a disproportionate share of crime. Neither group concedes that its explanation is possibly consistent with that offered by the other group. Neither group considers other, more complex explanations. For instance, the lack of acceptance of the historically white justice system in the black community might cause blacks to resort more often to self-help remedies, which in turn create problems with the law. This explanation may not solve the perplexing problem of disproportionate black prison populations, but it demonstrates the kind of thinking that the

"Foundations in Pluralism" project will encourage.

(3) The integrity of the judiciary itself is brought into question by charges of racial bias in the selection of judges.⁷ Such charges can have an undesirable effect on the collegiality of judges and can destroy the interpretive community that is the custodian of law.

This brief description of issues that are very much alive, and fueled by racial motives, is purely illustrative, not exhaustive. The interpretive community clearly needs a stronger grasp of the background from which issues arise. The "Foundations in Pluralism" project approaches the educational task with an appropriate combination of daring and subtlety. It tackles the issues at multiple levels of consciousness, and is calculated to achieve emotional acceptance and harmony at the same time that it imparts valuable specific knowledge.

The Need in Alabama

Montgomery, Alabama is called—perhaps not as often as it once was—the "Cradle of the Confederacy." A star on the steps of the state capital marks the spot where Jefferson Davis took the oath of office. A couple of blocks down the street stands the Dexter Avenue Baptist Church where Dr. Martin Luther King, Jr. and his fellow workers gave real life to the modern Civil Rights movement. A couple of blocks over, the Civil Rights Memorial commemorates the heroes who died in the Civil Rights struggle. The Judicial Complex, which houses Alabama appellate courts and the Administrative Office of Courts, is surrounded by these historic sites. Forty miles to the west is Selma, from whence civil rights marchers proceeded to Montgomery and gave birth to the 1965 Civil Rights Act. Forty miles to the east is Tuskegee, home of Tuskegee University, founded by Booker T. Washington, and one the early meccas for black education.

Surrounded by these historic sites, which are national in significance, the courts of Alabama make decisions that involve emotional, racially charged issues. Trial judges in Alabama deal with *Batson* issues on a daily basis. Alabama recently successfully defended its method of selecting trial judges against a challenge filed by the Southern Christian Leadership Conference—founded by Dr. King himself—under the Voting Rights Act. The method of selecting appellate judges in Alabama is being challenged in federal court for alleged discrimination while this essay is being prepared. The percentage of blacks in Alabama's prisons is far greater than the percentage of blacks in the general population.

Alabama history dramatically displays the critical significance of the dichotomized culture and the impact of that dichotomy on the administration of justice. Alabama has been an archetype in the myriad problems that spring from racial division. If Alabama can draw on its own history, its own institutions, and its own cultural resources to create an educational vehicle specifically geared to assist the judiciary in dealing with racial issues, this will be a significant accomplishment indeed.

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The present project proposes to do just that. Not only will such a project be significant in Alabama, but it has potential application for judicial education throughout the United States.

The "Foundations in Pluralism" project will bring together a diverse group of approximately 40 judges from throughout the state of Alabama. It is sponsored by the Alabama Judicial College and the Continuing Education division of Tuskegee University. The sponsors expect to attract female, male, black, white, trial, and appellate judges from the state of Alabama. Enrollment will be limited in order to accomplish the educational objectives of the project. Portions of the event, such as lectures and video presentations, will include the total group of 40. The central focus of the project, however, will be discussion groups of approximately 20 judges each, with discussion led by highly qualified faculty. Limiting the size of the discussion groups will encourage full interactive participation by all participants.

Prior to the event, participants will read the *Autobiography of Malcolm X* and selected essays by Dr. Martin Luther King, Jr.⁸ In addition to the reading material, information about the historical context and background of the writings and authors will be presented by faculty members. Attorney Fred D. Gray, Sr. will share some of his experience in the civil rights movement with the entire group in a one-hour lecture, followed by a question-and-answer session. His presentation will add unquestionable authenticity to the event. He is a preeminent civil rights lawyer, and represented Mrs. Rosa Parks and Dr. King in the Montgomery Bus Boycott. He has recently authored his autobiography, entitled *Bus Ride to Justice*.⁹ He is past president of the National Bar Association.

Law and Literature Movement

While this project is far too issue-specific to fit squarely within the traditional law and literature genre, it draws heavily on the law and literature methodology. Discussion will center on specific texts and historic events. Current events, and the emotions that they naturally engender, will be wholly incidental to the discussion. Although current event issues will inevitably enter the discussions, the focus on specific texts and events will enable the leaders to avoid the kinds of debate that entrench participants in committed positions and break down the collegiality of events. The discussion of history and specific texts is likely to have more affective impact in the psychology from whence judgment emanates than a more heated debate of current issues. The discussions will subtly invite participants to see the relevance of the historical texts to the issues of today, similar to the way law and literature seminars invite participants to see the recurring themes of great literature that reflect the values, belief systems, and psychological forces that undergird the legal system.

The "Foundations in Pluralism" project grows out of a series of law and literature seminars that were sponsored by the Alabama Judicial College and Montevallo University for Alabama judges. The core of that program was the Brandeis

University series. A number of our judges have participated at least four or five of the law and literature seminars. The collegiality, the relaxed atmosphere—away from the harried day to day events of a judge's life—and the stimulating environment of a college campus all contributed to make those events very meaningful learning experiences. They allowed judges to relate to each other on bases other than the purely technical aspects of law and judging. The seminars related the work of judges to the larger context of the culture. The archetypal values on which culture is established are imbedded in the narratives of great literature.

In October 1995, the sponsors of the "Foundations in Pluralism" project, with a generous grant from the State Justice Institute, conducted a highly successful seminar that is the direct predecessor of the current project. Approximately 20 judges gathered on the campus of Tuskegee University to discuss four pieces of literature: *Up from Slavery*, by Booker T. Washington; *The Souls of Black Folk*, by W. E. B. Dubois; *Barn Burners*, by William Faulkner, and *Sonny's Blues*, by James Baldwin. The event was a successful adaptation of the Law and Literature series, and attracted a similar, but more



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inclusive, audience.

The sponsors hope that most of the 20 participants in the 1995 event will return for the present project. They will be divided between the two discussion groups, and will help to provide leadership in the discussions, as well as expanding their own base of knowledge and experience. Their enthusiasm for the earlier event will help to promote the present event and make it successful. Gradual expansion of the number of participants in a continuing series is a part of the plan for achieving long-term objectives of the project. The sponsors hope to make this an annual event and to develop a body of appropriate historical and literary texts for a series of seminars. The sponsors feel the time is now right to introduce the "Foundations in Pluralism" project as a free-standing educational project, similar to but distinguishable from the law and literature series. There is an abundance of material to form a core of historical literature that is issue-specific to topics of direct interest in jurisprudence. The project is a pilot project dealing with the difficult issues of racial pluralism. The sponsors are unaware of any similar approach in the United States to this sensitive and compelling area of interest to the judiciary.

The event will increase judges' specific knowledge of black history. The material has been chosen to include information important to the understanding of divergent beliefs about the nature of law in today's world. It will also bring about an

increased awareness and sensitivity among judges of pluralistic differences in belief concerning key abstractions, such as justice, law, equality and fairness. The chosen material will provide specific historical context for pluralistic differences in belief. The event will provide a congenial learning experience for a diverse group of judges. The format and environment have been deliberately chosen to build collegiality rather than accentuating differences among the judges. Nuts and bolts seminars—educational events that simply tell judges "how to do it"—do not produce cultural understanding that is the necessary basis for sound subjective judgment. Sound subjective judgment is necessary in dealing with racial issues. The "Foundations in Pluralism" project will help to meet that need.

As mentioned previously, the program will consist of an in depth treatment and discussion of the *Autobiography of Malcolm X*, and selected writings from Dr. Martin Luther King, Jr. The following points demonstrate the viability of the materials for jurisprudential discussions:

- (1) Dr. King's letter from the Birmingham jail is an eloquent appeal to natural law. Do law and rights exist independently of humanly created institutions?
- (2) Both Dr. King and Malcolm X spent time in jail. The participants will be invited to compare and contrast the reasons for their incarceration. What can we learn from their experience about incarceration? What view did each take about the reasons for his incarceration? What advantage, if any, did each obtain from incarceration? Would the incarceration of a white person likely produce the same effects? What, if anything, does their experience tell us about the usefulness of incarceration in combating crime?
- (3) Both Malcolm X and Dr. King were religious leaders. What was the effect of their religious views on their views about social policy? How important was religion to the work of these two individuals?
- (4) Dr. King received an earned doctorate degree. He was well educated in the classics and philosophy. Although Malcolm X dropped out of school at the eighth grade, he read extensively while in prison, and his reading included philosophy. What was the impact of education and philosophy on each? Did Dr. King find in philosophy a "received truth?" Did Malcolm X? Can we account for the differences?
- (5) Both Malcolm X and Dr. King were deeply affected by the legal system. Their feelings about the legal system were reflected in their writings. What are the similarities and the differences in their views concerning the legal system?
- (6) Both Dr. King and Malcolm X had views of the future of blacks in America. What were the differences in those views?
- (7) Dr. King's attitude toward whites was conciliatory. Malcolm X's attitude was hostile. Does either attitude represent the views of blacks in general? What can we learn from the attitude of Malcolm X toward whites and the legal establishment that will enable us to adopt sounder policies for the administration of justice? From Dr. King?
- (8) While Dr. King promoted integration, Malcolm X was

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New IOLTA Participants for May

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Carr, Alford, Clausen & McDonald, Mobile
Don A. Howard, Huntsville
Gaston & Gaston, Mobile
Luther D. Abel, Gadsden
Joe Yates, Florence
Najjar, Denaburg, Birmingham

New IOLTA Participants for June

Bingham D. Edwards, Decatur
Gregory A. Reeves, Decatur
Paul F. Meyers, Dothan
Phil D. Mitchell, Decatur
Lyons, Pipes & Cook, Mobile
Mitzi Sears-Steuer, Opelika

highly critical of integration. Do their viewpoints represent an ever-present dichotomy? Is there any way to escape the tendency for one of these viewpoints to draw out the other? To what extent is assimilation desirable? Does assimilation have drawbacks?

The "Foundations in Pluralism" project will provide a practical forum to test the theories described here. This project does not merely talk about race relations. It *does* race relations at ground level. It draws on resources that are readily available in Alabama, but seldom called on.

Tuskegee University and other historically black institutions can be highly instrumental in bringing about an understanding of the viewpoint of blacks. The judiciary should take advantage of this important cultural resource. Authenticity is inherent in the process. Such institutions are the natural repositories of valuable knowledge and insight that are not readily available with the same degree of authority elsewhere. Utilization of these talents and resources represents a closing of ranks in the interpretive community of law—in a very inclusive fashion. It also demonstrates a possible mission of institutions such as Tuskegee University for the 21st century.



Statue of Booker T. Washington on the campus of Tuskegee University

Education for judges in this kind of environment can impact on decision-making. The project humanizes the problem.

The faculty has been chosen with a high regard both for qualification and authenticity. Three of the four are faculty members at Tuskegee University with a wealth of experience both personally and as teachers of the subject matter to be considered. The fourth, Dr. Kathleen Cleaver, grew up in Tuskegee, but had substantial connection with the civil rights movement through involvement in the Black Panthers and other efforts. Currently a faculty member at the Emory University Law School, her academic credentials, both in both

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history and law, are impressive. The quality of discussions will be enhanced by the inclusion of judges who participated in the 1995 seminar. Interaction between the judges and faculty is an essential part of the plan.

The seminar will be conducted on the campus of Tuskegee University at the Kellogg Center. The Kellogg Center is a state-of-the-art conference center located in the heart of the Tuskegee campus. The latest electronic equipment includes the ability to connect with satellites, as well as both audio and video recording. Meeting on the campus of the university founded by Booker T. Washington adds to the authenticity of the experience. For a diverse group of judges from Alabama to meet in this setting is significant. ■



Judge Dale Segrest

Judge Dale Segrest has served on the Fifth Judicial Circuit since 1983. He is a graduate of Huntingdon College in Montgomery, Alabama and the University of Alabama School of Law. He currently chairs the board of trustees of Huntingdon and was recently selected by the General Conference of the United Methodist Church to serve on the Connectional Process Team, which will study and implement changes in the structure of the United Methodist Church during the next four years.

Endnotes

1. Frank, Jerome, *Law and the Modern Mind*, Coward, McCann, Inc., New York, 1930.
2. At least as far back as St. Augustine, students of the philosophy of history have realized that history is not what happened in the past. It is a present state of knowledge. It is an abstract account of the past.
3. The word *pluralism* is often used as a synonym for *diversity*. An adequate discussion of pluralism cannot be included in this short essay, but we must try to make our use of the term as clear as possible. We are using the term *pluralism* to signify diversity—differences—among or between groups, as opposed to diversity among individuals. To further illustrate the usage, there can be diversity within a group, but we would not apply the term *pluralism* as a synonym for diversity within a group.
4. Dworkin, Ronald, *Law's Empire*, Harvard University Press: Cambridge, MA, 1986.
5. Emile Durkheim provided a description of the way these group processes work in *The Elementary Forms of the Religious Life* (1912).
6. *Batson v Kentucky*, 106 S. Ct. 1712, 476 U.S. 79, 90 L.Ed.2d 69 (1986)
7. The perception that the judiciary is not representative leads quickly to the perception that it is not fair—because of the transmitted attitudes discussed previously, if not for more concrete reasons. The perception of unfairness leads to distrust, which may lead to self help, and the problems tend to perpetuate themselves.
8. The selections will be from *Testament of Hope*, edited by James M. Washington, which contains a substantial collection of Dr. King's writing. All the writings cannot be discussed, but judges are likely to read more than the selected essays if the book is placed in their hands.
9. Gray, Fred D., Sr., *Bus Ride to Justice*, Montgomery, AL: Blackbelt Publishers, 1995. Significantly, the subtitle is "Changing the System by the System."

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Interim Mediator Standards and Registration Procedures

Comments are encouraged on Interim Mediator Standards. The Interim Mediator Standards and Registration Procedures which accompany this note were drafted by the Alabama State Bar Committee on Alternative Methods of Dispute Resolution, and they were adopted with revision by the Alabama Supreme Court Commission on Dispute Resolution to become effective January 1, 1997. The intent is to develop and maintain a roster of at least minimally trained mediators without setting the initial standards so high as to exclude most persons willing to serve. It is expected that more stringent standards will be adopted, but with an effective date of no earlier than January 1, 1997. Written comments or suggestions are encouraged and should be sent to the Alabama Center for Dispute Resolution at P.O. Box 671, Montgomery, AL 36101.

I. Foreword: As court annexed mediation is relatively new in Alabama, and the availability of qualified mediators in this state remains limited, interim mediator standards for registration have been adopted. These interim standards should enable the state courts to continue with their current mediation programs while allowing these programs an opportunity to develop further into mature and organized systems. Toward this end, the interim measures described herein should be recognized as minimal under the present circumstances with the understanding by both mediation users and providers that more stringent standards will be forthcoming.

II. Definition: For the purpose of these interim provisions, the term "registration" and the related forms of this word shall mean only that the interim standards and procedures set forth herein have been met to the satisfaction of the Alabama Center for Dispute Resolution (hereafter "the Center"). This term does not imply any degree of mediation skills or competency on behalf of any mediator subject to these provisions.

III. Effective Date: Effective January 1, 1997, all state court-appointed mediators shall be registered on the State Court Mediator Roster (hereafter "the Roster") maintained by the Center. This requirement shall not apply to mediators who have been selected voluntarily by the parties in litigation, or to mediators for whom the parties have agreed to waive such standards.

IV. State Court Mediation Roster: The Center shall maintain a Roster which consists of those mediators who meet the interim mediator standards. This Roster shall be maintained geographically by counties and shall be made available to all state court judges, attorneys and the general public.

V. Interim Mediator Registration Standards: To be registered on the Roster, a mediator must meet certain minimal standards which are specified in Appendix I. To be registered specifically as a domestic relations mediator, an individual must meet the minimal standards specified in Appendix II.

VI. State Court Mediator Roster Registration: Individuals who meet the interim mediator standards, and who seek to be registered on the Roster, shall submit to the Center a completed application form. Should the individual meet the required interim standards, his or her name shall be registered on the Roster as a mediator. To remain a member of the Roster, the mediator must meet such additional or different standards which may be hereafter imposed for registration.

VII. Fees: Individuals applying for mediator registration by the Center shall pay a \$20 application fee. If registration is approved, an annual fee of \$100 for registration will be assessed. Failure to pay the annual assessment will result in the individual being removed from the Roster. ■

Appendix I

Interim Mediator Registration Standards

An individual registered by the Alabama Center for Dispute Resolution shall, at a minimum, meet all the following requirements:

1. Be licensed as an attorney by the state and in good standing, with four years of experience in the practice of law.
2. Have successfully completed a 20-hour mediator training program approved by the Center. To be approved, training programs must include as part of their curricula, at a minimum, mock mediation exercises and ethics education.
3. Agree to subscribe and adhere to the Alabama Code of Ethics for Mediators and the rules of the Center for mediator registration.
4. Be willing to provide, upon request, at least 20 hours annually of pro bono mediation services to the public.

Appendix II

Interim Domestic Relations Mediator Standards

Individuals registered with the Center specifically to engage in mediation in the area of domestic relations must meet the following requirements:

1. Be licensed as an attorney by the state and in good standing, with four years experience in the practice of law; or
Be licensed as a physician by the state and in good standing, and certified in the practice of adult or child psychiatry; or
Be licensed as a Certified Public Accountant by the state and in good standing, with four years' experience in the practice of accountancy; or
Be engaged in a practice for four years in social work, mental health or behavioral sciences, with a bachelor's or advanced degree in one or more of these fields.
2. Have successfully completed a 40-hour mediation course on domestic relations issues which has been (a) certified by the Academy of Family Mediators (AFM) or (b) approved by the Center as functionally equivalent or superior to an AFM 40-hour course.
3. Agree to subscribe and adhere to the Alabama Code of Ethics for Mediators and the rules of the Center for mediator registration.
4. Be willing to provide, upon request, at least 20 hours annually of pro bono mediation services to the public.



OPINIONS OF THE GENERAL COUNSEL

By J. Anthony McLain, general counsel

The Disciplinary Commission was asked to reconsider formal opinion RO-95-09 by a third party.

The Disciplinary Commission did modify this opinion as follows:

Question:

"This letter is written pursuant to our recent telephone conversation in which I had requested your advice concerning conflicts between the Sunshine Law and the obligation of attorneys to hold inviolate the attorney-client privilege. Our firm represents a number of public sector clients that are subject to the Sunshine Law and are also often involved in legal matters which require confidential discussions with the members of our firm.

"The only real guidance we have had in the past is an advisory opinion from the state bar association rendered in May, 1985, until the Supreme Court visited this issue in *Dunn v. Alabama State University Board of Trustees*, 628 So. 2d 519 (Ala. 1993). In *Dunn*, the Court appears to carve out an exception to the Sunshine Law which allows attorneys for public bodies to meet with their attorney concerning pending litigation where the public body is actually named as a party in the lawsuit.

"The *Dunn* decision appears to be at odds with certain comments to the Alabama Rules of Professional Conduct which provide that 'the confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.' Ala. R. Prof. Conduct, 1.6, Comment. The Comment further provides that, 'Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such supersession.' *Id.* (Emphases added.) These comments appear to indicate that an attorney has a duty to protect client confidentiality in regard to all matters and not

just those matters relating to present or pending litigation.

"I will appreciate any guidance you can give me regarding this apparent conflict that exists between the decision in *Dunn* and the comments to the Alabama Rules of Professional Conduct. Does a lawyer have to discuss trial strategy with a public body client in an open meeting? If the public body wants to discuss the possibility of filing a lawsuit with its attorney, does this discussion and relative strengths and weaknesses of the client's case have to be discussed in a public meeting since the lawsuit is not yet filed? In *Dunn*, the Court appears to hold that if there is any discussion of settlement of the case involving a public body that such discussion must occur in a public meeting. Does this mean that if the public body's attorney gives legal advice concerning the settlement in a closed meeting the meeting has to be opened to the public if one of the members of the public body asks the attorney a question relative to what he or she thinks of a body has facts concerning the proposed settlement that should be brought to the attorney's attention, should discussion of these facts occur in a public meeting? As you can see, the questions which arise in this area are too numerous to list, but I believe you get the flavor for the problems we encounter on a fairly regular basis. Again, I would very much appreciate any guidance you can give me."

Answer:

The Disciplinary Commission has previously determined, in RO-85-08 that:

"The provisions of §13A-14-2, Code of Alabama, 1975, to the contrary notwithstanding, if an attorney representing a public entity that comes within the scope of this statute makes a good faith professional judgment that a meeting with his client is for the purpose of imparting legal advice and discussing strategy concerning pending litigation, contemplated litigation or other purely legal matter, the attorney would not be guilty of violating any of the provisions of the Code of Professional Responsibility of the Alabama State Bar by insisting that the meeting be held in closed or executive session and if the attorney is of the opinion that it would be detrimental to the best interest of his client to allow public access to the meeting, he would be guilty of a violation of the Code of Professional Responsibility should he not insist upon a closed or executive meeting."

Preamble:

The determination of this ethical inquiry by the Disciplinary Commission is limited to the application of the Rules of Professional Conduct and a lawyer's responsibilities to his or her client pursuant to said rules. The Disciplinary

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Commission has no authority or jurisdiction to interpret statutes, nor render opinions which require an interpretation of law. The Commission further recognizes that in some instances a lawyer's ethical duty to his or her client may conflict with statutory or case law. The opinion of the Disciplinary Commission grants protection to the lawyer only as it relates to the disciplinary process and enforcement of the Rules of Professional Conduct.

Discussion:

Rule 1.6 (a), Alabama Rules of Professional Conduct, requires that a lawyer not reveal information relating to the representation of the client unless the client consents after consultation. This prohibition is carried forward in §12-21-161, Code of Alabama, 1975, which states:

"Testimony of attorney, etc., for or against client.

No attorney or his clerk shall be competent or compelled to testify in any court in this state for or against the client as to any matter or thing, knowledge of which may have been acquired from the client, or as to advice or counsel to the client given by virtue of the relation as attorney or given by reason of anticipated employment as attorney unless called to testify by the client, but shall be competent to testify, for or against the client, as to any matter or thing the knowledge of which may have been acquired in any other manner. (Code 1907, §§3962, 4012; Code 1923, §§7658, 7726; Code 1940, T. 7, §438.)" The Comment to Rule 1.6 states that, "The confidentiality rule applies not merely to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source." This position is an expansion of that previously adhered to under the former Code of Professional Responsibility, which more restrictively defined "confidence" and "secret" within the context of confidentiality of information in the attorney-client relationship.

In representation of a public agency, the attorney should adhere to the provisions of §13A-14-2, Code of Alabama, 1975, which provides:

"Executive or secret sessions of certain boards.

No executive or secret session shall be held by any of the following named boards, commissions or court of Alabama, namely: Alabama Public Service Commission; school commissions of Alabama; board of adjustment, state or county tax commissions; any county commission, any city commission or municipal council; or any other body, board or commission in the state charged with the duty of disbursing any funds belonging to the state, county or municipality, or board, body or commission to which is delegated any legislative or judicial function; except, that executive or secret sessions may be held by any of the above named boards or commissions when the character or good name of a woman or man is involved."

In reviewing the attorney's responsibility in such a situation, wherein the ethical requirement of confidentiality appears to conflict with the statutory provision on open meetings, the Commission is of the opinion that the reasons for the confidentiality rule outweigh the statutory requirement as to public meetings. To hold otherwise would abrogate the long-recognized cornerstone of the attorney-client relation-

ship, that being confidentiality of information which is imparted by a client to the attorney during the attorney-client relationship.

In *Dunn v. Alabama State University Board of Trustees*, 628 So. 2d 519 (Ala. 1993), the Supreme Court of Alabama adopted the holding of the Supreme Court of Tennessee in the case of *Smith County Education Association v. Anderson*, 676 S.W. 2d 328 (Tenn. 1984). Therein, the Supreme Court of Tennessee carved out an exception to the Tennessee "Open Meetings Act." The court held that discussions between a public body and its attorney concerning pending litigation were not subject to the open meetings act, with the caveat that the exception applied only to those situations wherein the public body was a named party in the lawsuit.

A further review of the Supreme Court of Tennessee opinion recognizes the possibility that an overboard exception to the open meetings act could be abused whereby the public body could meet with its attorney for the ostensible purpose of discussing pending litigation and instead conduct public business in violation of the open meetings act.

In *Dunn*, supra, the Supreme Court of Alabama determined that the "inherent, continuing, and plenary" control of the court over attorneys as officers of the court could not be abridged by legislative action. At p. 529. Relying upon *Smith* once again, the Supreme Court of Alabama determined that the legislature had no authority to enact a law which would impair an attorney's ability to fulfill his ethical duties as an officer of the court.

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relationship is further recognized in the Comment to Rule 1.6:

"In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession." (Emphasis added.)

The Commission would encourage strict adherence to the confidentiality provisions of the Alabama Rules of Professional Conduct. In order for an attorney to effectively represent a client, the client must feel that any and all information imparted to the attorney in the attorney-client relationship will remain inviolate, absent consent of the client or order of tribunal of competent jurisdiction.

With regard to public meetings and attorneys who should represent public agencies covered by the open meetings law, said attorneys should insure compliance with the confidentiality requirement, and recognize the long-established principle of privileged communications by the client to the attorney. The attorney must make a determination as to whether a particular situation constitutes a true attorney-client discussion and take whatever steps are necessary to guarantee the confidentiality of such communications.

The Commission notes that the Supreme Court of Alabama in the *Dunn* case, adopting the Tennessee Supreme Court's rationale, dealt with the specific issue involving "present or

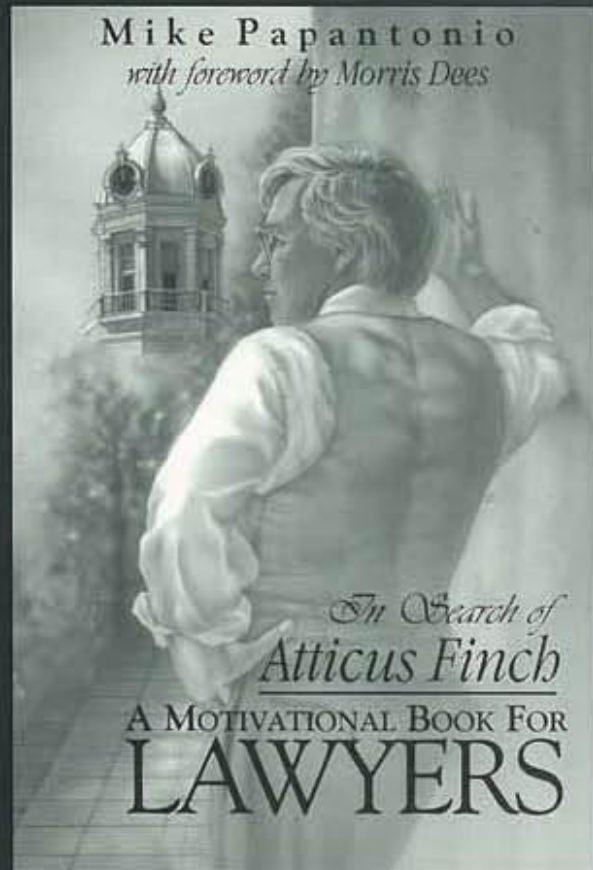
pending litigation". The Commission concludes that, pursuant to Rule 1.6 and Comment thereto, this protection would also cover any discussions with the client which would otherwise be deemed attorney-client communications, and thereby privileged.

Finally, the Commission would also note that the *Dunn* opinion and the statute applied therein concerned a governmental entity and its responsibilities under the statute. The Rules of Professional Conduct deal specifically with the lawyer's responsibility to the client which should not in any way be diminished by statutory or case law provisions to the contrary. As the province of the Commission deals only with the ethical responsibilities of the lawyer to the client, the Commission's opinion limits itself to an application of the Rules of Professional Conduct to the factual scenario posed in this inquiry.

The Disciplinary Commission urges lawyers confronted with this dilemma to ensure that the client is aware of the requirements of the statute as well as the lawyer's ethical responsibilities under the Rules of Professional Conduct. The client must be adequately informed in order to make a decision on what action it will pursue. Disclosure by the lawyer of his or her ethical obligations under the Rules to the client allows the client to better understand the ramifications of the lawyer's advice and counsel, and should involve a discussion of the requirements of the statute as enunciated in *Dunn*. ■

[RO-95-09]

Mike Papantonio
with foreword by Morris Dees



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YOUNG LAWYERS' SECTION

By Andy D. Birchfield, Jr.

Annual Meeting

The annual meeting of the Alabama State Bar Young Lawyers' Section was held July 25, 1996 at the state bar's annual meeting in Orange Beach. The officers elected for the upcoming term were: **Robert Hedge, president-elect; Gordon Armstrong, secretary; and Tom Albritton, treasurer.**

I take this opportunity to thank immediate past **President Buddy Smith** for all of his hard work. Buddy's leadership abilities and organizational skills guided the Young Lawyers' Section through a successful and productive year.

Bar Admission Ceremony

In May, admittees participated in the spring admission ceremony that was coordinated by Tom Albritton in conjunction with the staff of the Alabama State Bar. The ceremony included addresses by Warren Lightfoot, then president-elect of the Alabama State Bar; Keith Norman, executive director of the Alabama State Bar; and members of the Alabama Supreme Court, Court of Criminal Appeals and Court of Civil Appeals. U.S. Magistrate Judge John Carroll conducted the swearing-in ceremony for admission to the U.S. Middle District of Alabama.

Following the admission ceremony a luncheon was held for admittees, their friends and family members. The keynote speaker was U.S. Magistrate Judge Vanzetta McPherson, who delivered an inspiring speech concerning the responsibilities of young lawyers.

Minority High School Pre-Law Conference

Each spring the Young Lawyers' Section sponsors the Minority High School Pre-Law Conference, which is designed to provide minority high school students considering a legal career an inside look into the profes-

sion. **Fred Gray, Jr. and Elizabeth Smithart** worked diligently to produce a tremendous conference on May 3, 1996. Over 130 high school students gathered at Alabama State University where they divided into small groups for instruction and discussion with successful and distinguished minority members of the bar. One highlight of the conference was the mock trial where the high school students participated alongside minority attorneys and judges. Keynote speaker **Circuit Judge Charles Price** delivered an enlightening speech with his usual flare. This project is one of the more meaningful programs sponsored by the Young Lawyers' Section, and the participation is increasing each year. The target for next year's conference is 200 high school students.

Lawyer Mentoring

The Young Lawyers' Section is developing a lawyer mentoring program to address the concern that many recent law school students are not taught the practical aspects of practicing law. The object of this program is to pair new attorneys with "silent" experienced attorneys throughout the state. This program is in the developmental stage and the executive committee welcomes and encourages your input concerning this program or any new and better ways the section can serve Alabama's young lawyers.

Sandestin Seminar

Judson Wells, Robert Hedge and Gordon Armstrong orchestrated an outstanding CLE seminar. Approximately 200 lawyers attended. Excellent speakers, superb entertainment and good weather combined to make an excellent weekend at the beach. ■



Andy D. Birchfield, Jr.



RECENT DECISIONS

By Wilbur G. Silberman

Bankruptcy

Supreme Court holds that equitable subordination may not be used to change priorities enacted by Congress

U.S. v. Noland, Trustee for First Truck Lines, 116 S.Ct. 1524; 64 U.S.L.W. 4328 (May 13, 1996). This case concerned the power of a bankruptcy court to equitably subordinate a tax penalty claim which otherwise would have a first priority position as an administrative claim. The debtor filed a chapter 11 petition in April 1986. In its chapter 11 operation, it failed to pay taxes to the IRS. In August 1988, the case converted to chapter 7. The IRS filed tax claims accrued in the chapter 11 prior to the conversion claiming them as administrative expenses. The trustee did not contest the tax, but contended that the penalties should not be given priority. The bankruptcy court agreed. It determined that although penalties were administrative expenses, Bankruptcy Code Section 510(c) authorized the bankruptcy court to equitably subordinate the penalty to the claims of general creditors. Both the District Court and the Sixth Circuit affirmed stating that to accord the penalty priority treatment would penalize the creditors who supported the business during its reorganization efforts.

The Supreme Court reversed referring to the Fifth Circuit (Alabama) case of *Mobile Steel* which required misconduct resulting in injury to creditors or conferring an unfair advantage on the claimant. It confirmed the general equitable principle that equity cannot affect the rights of an innocent party merely because an inequitable result ensued. In this instance, the court reasoned that it was clear that Congress intended that a post-petition tax penalty should have administrative priority. The court did not decide whether creditor misconduct must be found before a claim may be subordinated but held that "(in the absence of a need to reconcile conflicting congressional choices) the circumstances that prompt a court to order equitable subordination must not occur at the level of policy choice at which Congress itself operated in drafting the Bankruptcy Code." It said Congress did not deny non-compensatory post-petition tax penalty the first priority as an administrative expense, and, therefore, bankruptcy courts could not change the statute under the guise of equitable subordination.

Comment: It will take time to determine the significance of this case. The Supreme Court did not actually say that the requirements of *Mobile Steel* would have to be met in order for equitable subordination to be allowed, but it did rule that it should not occur on the mere determination of the trial court that equitable subordination was necessary to avoid an inequitable result.

General unsecured creditors should be alert on debtor assuming an expensive lease; Second Circuit holds that claims arising out of assumed lease are not limited under Section 502(b)(6) of one-year rent limitation

In re Klein Sleep Products, 78 F.3d 18, 28 B.C.D. 816 (2nd Cir. Feb. 16, 1996). After filing a chapter 11 reorganization, debtor assumed the lease. A year and a half later, the trustee rejected the lease. The landlord attempted to recover the entire future rent. The bankruptcy court decided that the landlord was entitled only to accrued rent to the date of rejection. The district court affirmed, but the Second Circuit reversed. The bankruptcy court had ruled that to allow an administrative claim for future rent would be unfair to general creditors. The Second Circuit ruminated on the clash between two competing bankruptcy philosophies—obtaining a return for unsecured pre-petition creditors and that of protecting administrative creditors who by cooperating with a reorganizing debtor will help in the grand scheme of rehabilitation. The Second Circuit, in reviewing past practice, referred to the Bankruptcy Act in holding that damages arising from an assumed lease must be treated as an administrative expense. In basing its decision on pre-Code law, the court cited the *Dewsnup* case (502 U.S. at 419) for its authority. It also held that because the limitation under §502(b)(6) to one year's future rent applies only to a "claim or interest, proof of which is filed under section 501", the limitation did not apply to administrative claims under §503. Therefore, the administrative expense claim based upon the assumed lease was not subject to the one-year limitation.

Comment: The court, after setting out its holding, discussed what could be done to prevent the inequitable result. It suggested that: (1) the bankruptcy court may find that assumption of a long-term lease is not in the best interests of the estate; and (2) the

(Continued on page 314)



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.

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Recent Decisions

(Continued from page 312)

bankruptcy court could delay its order until confirmation, which could facilitate a re-negotiation of the lease.

In this subordination case, the Supreme Court holds that a ten percent "tax" added to an ERISA deficiency payment was not an excise tax entitled to 507(a)(7)(E) priority, but followed *U.S. v. Noland* in not allowing it to be subordinated below other general creditors

U.S. v. Reorganized CF&I Fabricators of Utah, Inc., et al., 64 U.S.L.W., 4548 U.S. Supreme Court (June 20, 1996). CF&I Steel and nine subsidiaries failed to make \$12.4 million in ERISA payments due December 31, 1989, and in November 1990, filed chapter 11. In 1991, the IRS filed tax claims, including one for \$1.24 million, which was claimed to be a ten percent tax on the deficiency of the ERISA amount. The IRS

claimed priority as an excise tax under §507(a)(7)(E), or as a penalty under §507(a)(7)(G). The bankruptcy court allowed the claim without priority and then subordinated it to general creditors because of its "non-compensatory penalty" character. While this issue was on appeal to the district court, the bankruptcy court confirmed a plan which placed the penalty claim in a separate lowest priority class to receive nothing or, if the court found subordination inappropriate, in the next higher class to receive some funds. Through appeals, the issue reached the Supreme Court.

The Supreme Court first said that Congress could have termed the ten percent penalty an excise tax which would place it in the ninth priority category, but it did not do so. Mr. Justice Souter then expounded on precedent in determining whether an exaction was a tax or penalty, and defined a tax as an enforced contribution to operate the government, while a penalty is punishment for an unlaw-

ful act or omission. Under such definition, the exaction of the ten percent for failing to maintain the plan is a penalty, and not entitled to priority, but is only an unsecured claim. The court then relying on *U.S. v. Noland* (previously reviewed in this column) stated that "categorical re-ordering of priorities that takes place at the legislative level of consideration is beyond the scope of judicial authority to order equitable subordination under §510(c). The order in this case was as much a violation of that principle as *Noland's* order was."

Comment: The court specifically refrained from passing on the question of whether the result sought by the Debtor could have been realized under 1122(a) or chapter 7 liquidation provisions, as such provisions were not considered by the lower courts. Thus, it has left that method of "subordination" for future consideration. ■

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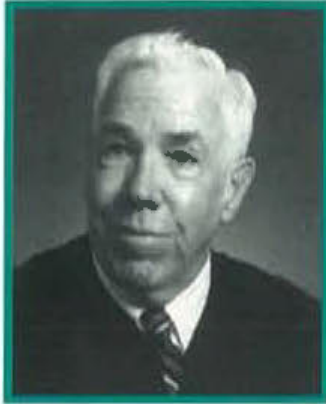
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MEMORIALS



William D. Bolling, Sr.

Whereas, the Honorable William D. Bolling, Sr., a distinguished member of this association, died on November 17, 1995, and the Mobile Bar Association desires to remember his name and recognize his contributions both to our profession and to this community;

Whereas, the Honorable William D. Bolling

was born on October 3, 1919, in Mobile where he attended Murphy High School, and followed to undergraduate studies;

Whereas, Judge Bolling's undergraduate studies were interrupted by World War II where he served as a navigator in the Air Corps, was shot down over the former Yugoslavia and avoided capture, and was later honorably discharged;

Whereas, Judge Bolling returned to his studies and received his undergraduate and law degrees from the University of Alabama and began practice in Mobile in 1948 as a sole practitioner before being elected and serving as Mobile County Circuit Court Judge from 1962 to 1979;

Whereas, Judge Bolling practiced law specializing in probate law, was appointed Mobile County conservator, and sat on the bench for more than 17 years and was recognized and admired by his fellow lawyers as being skilled and able in this and other areas of the practice;

Whereas, Judge Bolling was a man with strong devotion to family and church;

Whereas, Judge Bolling was predeceased by

his daughter, Virginia Ross Bolling; and is survived by his wife of 48 years, Laurie Malone Bolling; his two daughters, Elizabeth Bolling Hamner and Catherine Bolling Ramey; his son, William Dunn Bolling, Jr.; his two sisters, Mrs. Douglas Williams and Mrs. Evelyn Hixson; three grandchildren; and numerous other relatives; and

Now, therefore, be it resolved, by the members of the Mobile Bar Association in this meeting assembled on the 15th of March 1996, that the Association mourns the passing of the Honorable William D. Bolling, Sr. and does hereby honor the memory of our friend and fellow member who exemplified throughout his long career the highest professional principles to which the members of this Association aspire, and requests this Resolution be spread upon the minutes of this Association and of the Alabama State Bar and that a copy be presented to his family.

—William A. Kimbrough, Jr.
President, Mobile Bar Association

Preston Copeland Clayton

Eufaula

Admitted: 1931

Died: June 20, 1996

Earl Gillian, Sr.

Montgomery

Admitted: 1951

Died: May 16, 1996

Robert Edward Hodnette, Jr.

Mobile

Admitted: 1935

Died: April 30, 1996

James Love

Birmingham

Admitted: 1939

Died: April 14, 1996

Charles Watson McKay, Jr.

Sylacauga

Admitted: 1946

Died: May 24, 1996

Daniel Moran

Huntsville

Admitted: 1965

Died: April 21, 1996

Ray Oscar Noojin, Jr.

Birmingham

Admitted: 1970

Died: June 17, 1996

Joseph D. Phelps

Montgomery

Admitted: 1958

Died: June 22, 1996

Harold Eugene Walden

Columbiana

Admitted: 1962

Died: June 15, 1996



Reginald Harrison Stephens

Whereas, Reggie Harrison Stephens, a distinguished member of the Mobile Bar Association, having passed away on February 23, 1996, at the age of 62, and the Association desiring to remember his name and recognize his contributions to our profession and to this community, now, therefore, be it remembered:

Reggie Harrison Stephens was born in Meridian, Mississippi and graduated from the University of Alabama in 1958. After spending several years working in the banking industry, Reggie completed his studies at the Cumberland School of Law, Samford University, and earned his LL.B. degree in 1968. He entered the private practice of law and became a member of the Alabama State Bar and the Mobile Bar

Vann Waldrop

Whereas, H. Vann Waldrop, a lifelong resident of Tuscaloosa County, was abruptly taken from our midst on December 21, 1995, at the age of 66; and,

Whereas, he earned his bachelor's and law degrees from the University of Alabama where he distinguished himself as a member of the Alabama Law Review and charter member of the Farrah Law Society; and,

Whereas, he served the legal profession well during his more than 40 years in the practice of law in Tuscaloosa, sharing his time and talents as president of the Tuscaloosa County Bar Association; and,

Whereas, Vann Waldrop honorably served his nation in the United States Air Force from 1951 to 1953; and,

Whereas, he rendered exemplary service to his community by taking leadership roles in the United Way, the Tuscaloosa Exchange Club, the Boy Scouts of America, and the Industrial Development Board of the City of Tuscaloosa by helping prepare a county-wide

Association. Reggie was a member of the Alabama Trial Lawyers Association and the Mobile Homebuilders Association. He was a veteran of the United States Navy and served during the Korean War. He was also a Mason.

He was survived by his sister, Jean S. Buell, of Mobile, and a brother, Dr. Joseph William Stephens, of Waverly, Tennessee. He is also survived by his two nieces, Courtney Stephens, of Waverly, Tennessee, and Dr. Elizabeth Horn, of Valdosta, Georgia, and two nephews, William P. Horn, of Valdosta, Georgia, and Joseph S. Stephens, of Waverly, Tennessee.

Reggie maintained a general practice during his career. Calvin Clay, who had been a friend of Reggie's since law school days, said, "Reggie went to law school after a successful career in banking. He was a man determined to better himself and to be a professional person." He was characterized by his two longtime friends, Carl Devine and Gerald Roper, both of Mobile, as "a positive influence to be around, always ready to laugh and to help a friend."

Now, therefore, be it further resolved that the Association mourns the passing of Reggie Harrison Stephens and does hereby honor the memory of our friend and fellow member and request that this resolution be spread upon the minutes of this association and of the Alabama State Bar and that a copy be presented to his family.

—William A. Kimbrough, Jr.
President, Mobile Bar Association

recreation plan that resulted in the Tuscaloosa County Park and Recreation Authority, and as a member and past president of the Greater Tuscaloosa Chamber of Commerce; and,

Whereas, Vann Waldrop was a leader in the business community, having been a founder and president of Security Federal Bank and a member of the board of directors of First Alabama Bank; and,

Whereas, his contributions to the community were honored in 1972 when he was presented the Citizenship Award by the Tuscaloosa Civitan Club; and,

Whereas, Vann Waldrop endeavored all his life to be not only a leader in his community but a servant as well, and has touched the lives of the citizens of Tuscaloosa County in innumerable ways;

Therefore, be it resolved that the Tuscaloosa County Bar Association wishes through these means to honor the life of service of H. Vann Waldrop, and further express our sympathy and loss at his death.

—G. Stephen Wiggins
Secretary, Tuscaloosa Bar Association

Judge J. Paul Meeks

Whereas, the Birmingham Bar Association lost one of its distinguished members through the death of Judge J. Paul Meeks on December 5, 1995, at the age of 89 years; and,

Whereas, Judge J. Paul Meeks was born in the state of Georgia but moved with his family to Birmingham, Alabama as a small boy. He was educated in the Birmingham School System. As a young man, he worked for Alabama By Products Company and attended the Birmingham School of Law at night; and,

Whereas, after his admission to the Alabama State Bar and the Birmingham Bar Association in 1937, he served as one of the original members of the Jefferson County Board of Equalization until 1946; and,

Whereas, in 1946, while engaged in the practice of law in Birmingham, Judge Meeks was elected to the Alabama House of Representatives. His service in the state legislature distinguished him as one of the state's outstanding legislators and led to his serving many years as chairman of the Jefferson County Legislative Delegation; and,

Whereas, in 1956, J. Paul Meeks was elected to the office of judge of probate for Jefferson County, Alabama. He served this office with great dignity and honor for 20 years. His tenure as probate judge of Jefferson County ended in 1976 when he was precluded from further service due to age; and,

Whereas, Judge Meeks' distinguished service to the people of Jefferson County was marked with his kindness and love for all its citizens; and,

Whereas, Judge Meeks left behind a loving wife, two daughters, a son, numerous grandchildren, and an innumerable host of colleagues and friends who mourn his passing; and,

Whereas, this Resolution is offered as a record of our admiration and affection for Judge J. Paul Meeks and of our condolences to his devoted wife, son, daughters, grandchildren, and other members of his family.

Now, therefore, be it resolved by the Executive Committee of the Birmingham Bar Association in its regular meeting assembled:

That the surviving members of the family of Judge J. Paul Meeks are hereby assured of our deep and abiding sympathy.

That a copy of this Resolution be spread upon the records of the Birmingham Bar Association as a permanent memorial to this departed brother.

That copies of this Resolution be furnished to his wife, son and daughters as our expressions to them of our deepest sympathy.

—M. Clay Alspaugh
Birmingham Bar Association



Alice Manry Meadows

Whereas, the Mobile Bar Association wishes to honor the memory of Alice Louise Manry Meadows, a prominent member of this Association who died on October 29, 1995;

Now, therefore, be it remembered:

Alice Manry Meadows was born on June 15, 1923, in Montgomery, Alabama. She was a 1939 graduate of Murphy High School in Mobile. Upon graduation from high school, Alice began working as a legal secretary for T. O. Howell, who encouraged her to go to law school herself. She began college in 1946 and graduated from the University of Alabama School of Law in 1951. In law school she made a total of two Bs, with the rest all As. While in law school Alice founded the first legal sorority in Alabama and served as business manager of the *Law Review*.

While working for the Alabama State Legislature in Montgomery, she met and married Jack Meadows, a member of the Alabama Highway Patrol, the forerunner of the Alabama State Troopers.

Five children were born of their marriage: Judith, Sandra, Rebecca, James Jack, Jr., and Willard.

In 1970, shortly after getting the youngest of her children off to public school, Alice returned to the private practice of law. Along with Keener Blackmarr, Alice brought the first law firm to west Mobile, hanging out her shingle in the then new Bel Air Mall. Her practice was primarily in the family law field. She ran for the newly created domestic relations judgeship against the Honorable Michael Zoghby. Although she was not elected, Alice continued to "do her civic duty." Alice served as an officer of the PTAs of John Will and Scarborough elementary schools. She also served as PTA president and band parent president of Shaw High School in the 1970s and '80s. Beginning in the late 1970s and for the rest of her life, she devoted her "free time" to two civic endeavors: doing something about domestic violence and mental health/mental retardation.

She was a founding mother of Penelope House, the battered women's shelter in Mobile, because, as she said, "...I got so tired of seeing women in my law practice who have been beaten by their husbands, and all I could tell them to do was to go back home..."

Additionally, from 1979 through 1983, she served as a member of the board of directors and in 1984 as president of the Mobile Mental Health Center. Through her leadership, Mobile Mental Health grew to be a driving force in the Mobile community for improving the lives of so many families suffering from the disease of mental illness. Her favorite "civic memento" is an engraved plaque she received in 1984, bearing the 100-plus signatures of all the Mobile Mental Health Center employees with whom she had contact as a board member.

In 1984, she was selected by the Governor to serve as a member of the Greater Mobile-Washington County Mental Health Board. Meadows traveled to Montgomery to lobby on behalf of the two counties and their mental health programs and she oversaw a budget as board president of millions of dollars annually.

She was chosen by the state organization of the National Association of Social Workers as its "Public Citizen of the Year."

A sudden illness gripped Alice in late October 1995, and she died peacefully on Sunday morning, October 29, 1995, after having watched her beloved Atlanta Braves win the World Series with her family at her side.

Alice Manry Meadows is survived by her husband, James J. Meadows, Sr., of Mobile; three daughters, Judith S. Meadows of Murphy, North Carolina; Sandra (Sandi) K. Meadows, a member of this association; and Rebecca Hess, both of Mobile; two sons, James J. Meadows, Jr. and Willard J. Meadows, both of Mobile; eight grandchildren; and two great-grandchildren.

Now, therefore, be it resolved, by the Mobile Bar Association that the Association mourns the passing of Alice Manry Meadows and does hereby honor the memory of our friend and fellow member who exemplified throughout her long career the highest professional principles to which the members of this Association aspire, and requests that this resolution be spread upon the minutes of this association and of the Alabama State Bar and that a copy be presented to her family.

—William A. Kimbrough, Jr.
President, Mobile Bar Association

James Love

Whereas, the Birmingham Bar Association lost one of its distinguished members through the death of James Love on April 14, 1996, at the age of 83 years. James Love was a graduate of Birmingham Southern College and the Birmingham School of Law. He was an active member of McCoy Memorial United Methodist Church where he taught Sunday School for many years; and,

Whereas, serving his country as a World War II member of the United States Army, he gave tirelessly of himself. A member of two of the pioneer families of Birmingham, Owen and Nicholson, James Love attended college at Birmingham Southern on land donated by his grandfather, Roes Wellington Owen. The

area where the college was relocated from Hale County, Alabama, was known as Owenton; and,

Whereas, James Love left surviving a niece, Bonnie Sue Love Svirskas of Phoenix, Arizona, and other members of the pioneer family; and,

Whereas, this Resolution is offered as a record of our admiration and affection for James Love and our condolences to his family.

Now, therefore, be it resolved, by the Executive Committee of the Birmingham Bar Association in its regular meeting assembled:

The Birmingham Bar Association greatly mourns the passing of James Love and is profoundly grateful for the example that his long and useful life has brought to the membership, both individually and collectively.

That the surviving members of the family

of James Love are hereby assured of our deep and abiding sympathy.

That a copy of this Resolution be spread upon the records of the Birmingham Bar Association as a permanent memorial to its departed brother.

That copies of this Resolution be furnished to his family as our expression to them of our deepest sympathy.

—M. Clay Alspaugh
President, Birmingham Bar Association



Richard H. Allen

Whereas, R.H. Allen, a distinguished member of this Association, passed from this life on February 24, 1996, and the Association desires to remember his name and recognize his contribution to our profession and to this community;

Now, therefore, be it resolved that Pete Allen was a native of Stuttgart, Arkansas and a graduate of the University of Arkansas Law School, practiced law early in his career in Blytheville, Arkansas and Little Rock, Arkansas, and arrived in Mobile, Alabama shortly after World War II to work for International Paper Company as a compliance officer on governmental regulations and affairs. He retired as an executive with International Paper Company. He was past

Ernest W. Weir

Whereas, Bud Weir was a highly respected and enthusiastic member of the Birmingham Bar Association. He was a graduate of Howard College and the University of Alabama School of Law. He practiced law in Birmingham for 54 years; and,

Whereas, he was a 33rd degree Mason and a life-long member of the East Lake United Methodist Church; and,

Whereas, Bud cared about life, his family, friends, church, community, his profession, and his country. Bud's life was important to all who came in contact with him. He was always ready to help whether it be legally, community or church. Bud was a person of great energy and enthusiasm for life. He lived life with a passion. Your day was brighter if you encountered him. His friendly, outgoing style enriched all who came into contact with him. His legal advice was practical and logical; and,

Whereas, the Apostle Paul wrote in his second letter to Timothy, "I have fought the good fight, I have finished the race, I have kept the Faith. Hence forth there is laid up for me the crown of righteousness, which the

president of Associated Industries of Alabama; chairman of the Mobile County Board of the American Red Cross; and served on the board of the Mobile Infirmary Medical Center; and,

Whereas, Pete was founder and chairman of the board of Westminster Village;

Whereas, Pete Allen was a constant and solid contributor to the community while he worked in many capacities not limited to those listed above; and,

He was a devoted father and family man, leaving surviving him three sons, Richard H. (Betty) Allen, III, of Orange Beach, Alabama; Charles Gleason (Carolyn) Allen, of Dalton, Georgia, and Ronald Thomas (Grace) Allen, of Atlanta, Georgia; seven grandchildren; two great-grandsons; nieces, nephews; and other relatives.

Now, therefore, be it further resolved by the Association that the Association mourns the passing of Pete Allen, who always took time to help others personally and professionally, therefore, the Association does hereby honor the memory of a true civic leader who exemplified the highest professional principles to which the members of this Association aspire and requests that this resolution be spread upon the minutes of this Association and of the Alabama State Bar and that a copy be presented to his family.

—William A. Kimbrough, Jr.
President, Mobile Bar Association

Lord will award to me on that Day, and not only to me but also to all who have loved his appearing"; and,

Whereas, this Resolution is offered as a record of our admiration and affection for Bud Weir and of our condolences to his wife, his sons and daughters and members of his family.

Now, therefore, be it resolved by the Executive Committee of the Birmingham Bar Association in its regular meeting assembled;

The Birmingham Bar Association greatly mourns the passing of Ernest W. Weir and is profoundly grateful for the example that his long and useful life has brought to the members of the Birmingham Bar Association, both individually and collectively.

That the surviving members of the family of Ernest W. Weir are hereby assured of our deep and abiding sympathy.

That a copy of this Resolution be spread upon the records of the Birmingham Bar Association as a permanent memorial to this departed brother and that copies of this Resolution be furnished to his widow and his children as our expression to them of our deepest sympathy.

—M. Clay Alspaugh
President, Birmingham Bar Association

Richard Dale Durden

Whereas, the Birmingham Bar Association lost one of its youthful members through the death of Richard Dale Durden on December 17, 1975, at the very young age of 37 years. A product of Montgomery and a 1976 graduate of the Jeff Davis High School there, Richard Dale Durden graduated from Auburn University at Montgomery in 1980 and received his law degree from Cumberland Law School in 1983; and,

Whereas, he served as a senior staff attorney with the Southern Company Services, holding membership in the Alabama State Bar, the Birmingham Bar Association, the Masonic Lodge and the Baptist Church; and,

Whereas, Richard Dale Durden left surviving his widow, Mrs. Ginger Patterson Durden, his sons, Zachery Dale Durden and Mason Warren Durden, along with his parents, Colonel M. Durden and Shirley Glenn Durden; and,

Whereas, this Resolution is offered as a record of our admiration and affection for Richard Dale Durden and of our condolences to his wife, sons and his parents, and the other members of his family.

Now, therefore, be it resolved by the Executive Committee of the Birmingham Bar Association at its regular meeting assembled;

The Birmingham Bar Association greatly mourns the passing of Richard Dale Durden and is profoundly grateful for the example that his useful life has brought to the membership, both individually and collectively.

That the surviving members of the family of Richard Dale Durden are hereby assured of our deep and abiding sympathy.

That a copy of this Resolution be spread upon the records of the Birmingham Bar Association as a permanent memorial to this departed brother.

That copies of this Resolution be furnished to his wife, his sons and his parents as our expression to them of our deepest sympathy.

—M. Clay Alspaugh
President, Birmingham Bar Association



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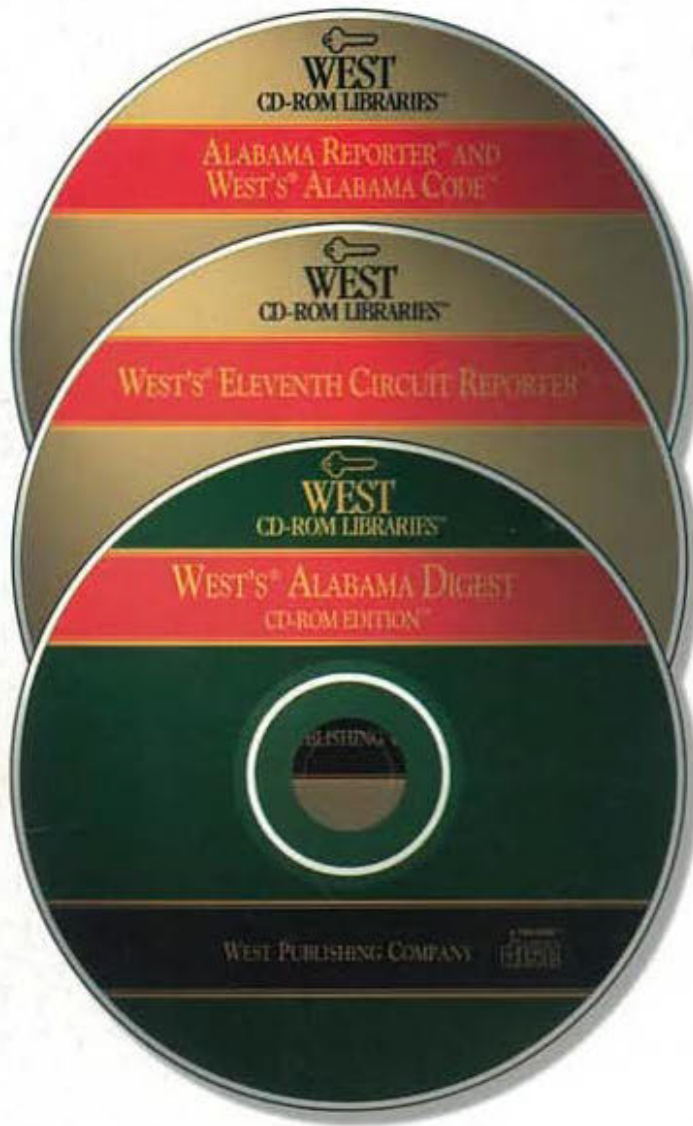


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