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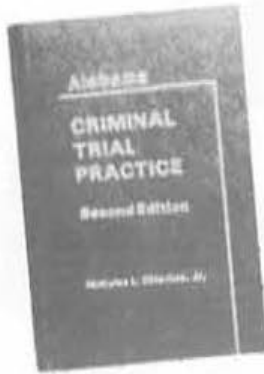
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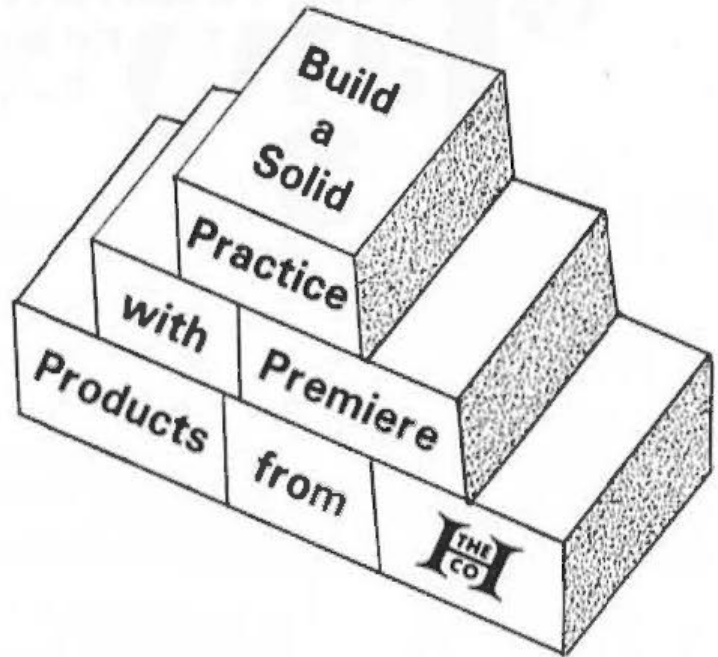
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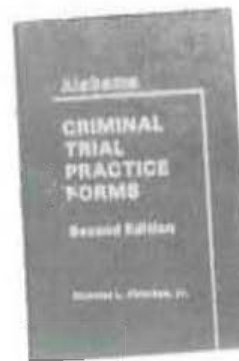
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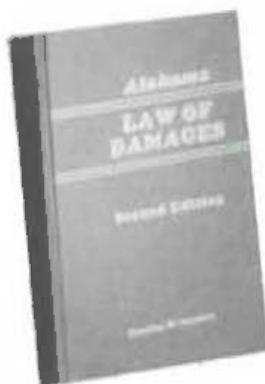
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In Brief

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ON THE COVER

Autumn heralds a colorful change of seasons in the rugged terrain of the DeSoto Caverns Park in Childersburg, Alabama. Photograph by Montgomery attorney Tom McGregor of Webb, Crumpton, McGregor, Sasser, Davis & Alley

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With growing frequency legal disputes are often resolved in an administrative setting. In the first of a two-part series, Professor Andreen of the University of Alabama School of Law traces the history of federal administrative law.

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Drunk driving cases have spawned a fertile area for legal specialization. Dram shop liability subjects bar owners and others dispensing alcohol to potential liability for the conduct of their patrons.

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President's Page



CAINE

I use this opportunity to further share with my fellow lawyers some of my goals and ideals. In my initial President's Page, I joined my voice with so many others (including our recent past bar president's) in decrying the perceived trend away from professionalism. For the past two decades or so, Alabama and the nation have experienced an accelerating trend toward specialization and fragmentation of the practicing bar.

Specialization is probably a logically necessary result of our increasingly more complicated society. Specialization of legal tasks is not my concern or worry; my apprehension is that the process of specialization has increased and entrenched a wholly unhealthy attitude of divisiveness among lawyers. There is a time and place for advocacy on behalf of a client, of one's political and legal beliefs and of one's own self-interest. However, I question whether leaders and "opinion makers" within the bar are instilling in our younger lawyers the nobler ideals of the profession or the overriding necessity of thinking about the bar as an effective single entity, rather than as some kind of required social organization.

My highest hope for my tenure as your bar president is that this year will be viewed later as a watershed in intra-bar relations. We can reverse this trend toward rancorous division and find areas of common concern where the bar, working as a whole, can make a positive difference in our profession and in the lives of all of our state's citizens. Individual lawyers and subgroups of the bar (corporate counsel), government lawyers, plaintiffs' lawyers, insurance defense firms, etc.) still can pursue their particular interests without setting aside the higher interest of unity of the profession.

With the help of the staff at the state bar headquarters and all the selfless committee volunteers, I hope to accomplish the laying of foundations for better cooperation within the bar and for getting the bar more actively in-

involved in the public issues of the day. As a public profession, acting with one voice, we can and should be a positive influence in society's attempts to ameliorate problems such as illiteracy, education funding, drug use and the crime it engenders, prison overcrowding, court delay, etc. A fragmented bar, comprised of lawyers unwilling to cooperate even among themselves, will not be able to influence the crucial public issues of our day.

I use this forum to praise the work of two lawyers who embody the spirit of professionalism and service we all should strive to emulate. Lewis W. Page, Jr., of Birmingham has sacrificed untold hundreds of hours over the past several years working on the proposed revisions of our ethics rules. The final report and

recommendation of the Permanent Code Commission was probably more detailed and carefully drafted than any other such state bar report in the country. In the spirit of consensus, Lewis worked overtime to redraft compromise proposals. By the time this page goes to press, the Alabama Supreme Court may have taken final action on the proposed rules of professional conduct. But no matter the outcome, and whether you personally approve of the proposals, we all should be grateful for lawyers such as Lewis who give so much of their time to such important projects.

Another public-spirited lawyer who deserves our appreciation is Bert S. Nettles, now of Birmingham. About three years of study and drafting recently came to fruition when the board of bar commissioners approved the report and recommendations of the Task Force on Possible Restructuring of Alabama's Appellate Courts. As chairperson of this task force, Bert had to consider literally dozens of plans and suggestions from around the country to determine what to recommend for Alabama's courts. Most of us probably are not sensitive to a growing problem at the top of our judicial system: our nine justices (forced to split into two panels to manage the caseload) must contend with

(Continued on page 290)

Executive Director's Report

The Alabama State Bar headquarters' library resembled a United Nation's conference room August 11, 1989. We hosted a group of legal scholars from Nicaragua along with their United States State Department simultaneous interpreters. The translation microphones and receivers placed on the table gave one the feeling of a true international conference.

The United States Information Agency (USIA) sponsored the visit of our guests in conjunction with the Academy for Educational Development. Our guests were Minerva Argentina Gutierrez Arguello, director, Central American University Law School; Sonia Munoz, legal advisor and professor, Central

American University; Victor Manuel Ordonez, lawyer and vice-dean, Legal and Social Sciences Faculty, Central American University; and Orlando Centeno, teacher, Calasanz High School. They were accompanied by interpreters Consuelo Barranca and Mario Montenegro.

This group, in addition to visiting Montgomery where the stop was to highlight state-level judicial and legislative activity in a state capital, visited Washington, DC; New York; New Haven, Connecticut; the American Bar Association headquarters in Chicago; and the National Judicial College in Reno. They examined local efforts at crime control in Riverside, California, and concluded their one-month visit at Tulane Univer-



HAMNER



Nicaraguan legal scholars visit and study the state bar headquarters.

Report

sity in New Orleans with a comparative law study.

The purpose of the meeting with the bar was to discuss the certification of lawyers, professional standards, the bar examination process and other issues pertinent to the organization of the legal profession.

They had the opportunity to review our registration and examination process, as well as our professional responsibility activities. While describing their visit to the American Bar Association headquarters as superficial due to many personnel being in Honolulu at the ABA Annual Meeting, our visitors wrote that our session provided them with "a much clearer impression of the role of bar associations in setting standards for the legal profession." They particularly appreciated the copies of old bar examinations. They likewise expressed amazement at the similarities between the Alabama and Nicaragua systems.

Since the 1979 Nicaraguan revolution, Western democracies have been critical of the ability of the Sandinista-led government to end civil conflict and to fulfill pledges to rebuild Nicaragua as a mixed economy and establish a pluralist political system. Recent events have raised hopes for an end to the armed struggle and restoration of opportunities for a democratic system. Building resilient legal institutions and developing well-trained judicial personnel are viewed as essential elements of any democratic future in Nicaragua.

The project design incorporated among its communication goals the exposure of participants to U.S. legal principles and their historic and contemporary applications to the democratic process at the national, state and local levels, through first-hand exposure to the operation of the legal, judicial and penal systems; the practice of legal education in the U.S.; and the opportunity to learn about milestones in U.S. legal/constitutional history and how our past might apply to Nicaragua's future.

I was pleased that Alabama's court system and state bar were selected as show-cases in this international relations effort. ■

CLE REMINDER

1989 CLE Transcripts Will Be Mailed
The First Week In December

All CLE Credits Must Be Earned By
December 31, 1989

All CLE Transcripts Must Be Received By
January 31, 1990

President's Page

(Continued from page 288)

almost 1,700 supreme court filings per year, a burden that prevents the court from giving truly collegial, in-depth attention to the difficult and important issues which require great study and care. (The major recommended changes would reduce the supreme court from nine to seven justices, increase the size of the courts of appeal and make the supreme court primarily a court of discretionary "cert" jurisdiction.)

Space does not allow the mention of all the Alabama lawyers who similarly have served our bar. A lawyer who epitomizes this group and illustrates the cooperative spirit of service is Robert L. Potts, general counsel of the University of Alabama Systems. Robert is putting an enormous amount of effort into revitalizing our Task Force on Bench and Bar Relations. Just as the practicing bar has been splintering into subgroups, judges and lawyers seem to have grown apart. You will be reading more here and elsewhere about progress in this area. There are obviously many areas of common concerns relating to both the bench and bar, and Robert's committee is working hard to open additional avenues for cooperation between judges and lawyers.

As a step toward pulling the bar back together and focusing energies on constructive endeavors, a bar leadership conference was held in Montgomery in late August. Keith Norman and Diane

Weldon deserve the credit for making this a successful event, and what I hope will be the first of many annual conferences. Approximately 15 local bar presidents attended, along with about 45 committee and task force leaders. In plenary sessions, we heard from several speakers who educated us on our state bar's history, current organization, everyday functions and ongoing projects. We also spent time getting to know each other and formulating plans for individual committees as well as possibilities for inter-committee cooperation. Thanks to the hard work of the folks at state bar headquarters, we now have in place more effective procedures for year-to-year continuity of committee work, and specific goals and deadlines for committees are being formulated and refined.

Lastly, I urge you all to mark your calendars for Friday, February 2, 1990. On that date in Birmingham, there will be a combination mid-winter bar meeting and celebration of the bicentennial of the Bill of Rights. Daytime activities will be at the civic center: committees will meet in the morning; a luncheon will be open to all bar members; and professors A. E. Dick Howard and Dan Meador of the University of Virginia School of Law will offer addresses on the Bill of Rights during the afternoon. A special evening at the civic center will include a reception and banquet featuring United States Supreme Court Justice Anthony Kennedy. Join us in Birmingham for a fun and interesting way to celebrate and contemplate a major event in our legal history. ■

Task Force Update

Justice Anthony Kennedy and professors Dick Howard and Dan Meador will join forces in Birmingham Friday, February 2, 1990, as the Alabama State Bar, the Birmingham Bar Association, Cumberland School of Law and the University of Alabama School of Law present a celebration of the Bicentennial of the Bill of Rights. The February 2 program is part of a three-day celebration and is the result of planning by a task force of the Alabama State Bar.

The task force hopes that the first two days of the celebration will be of particular interest and accessibility to law students, high school students and members of the public. The third day should be of particular interest to members of the bar, as the celebration will be combined with the mid-winter meeting of the Alabama State Bar.

The celebration begins in Tuscaloosa on the evening of January 31, 1990, when Justice Kennedy arrives at the University of Alabama School of Law. The morning of Thursday, February 2, Justice Kennedy will speak to members of the faculty, invited guests, law students and the public. He will arrive in Birmingham in time for a luncheon at Cumberland School of Law. That afternoon, he will be on the Samford University campus, addressing the law faculty and students, as well as invited guests. Approximately 1,500 of those invited guests will be high school students from the many systems in the Birmingham area. Following his address students will have a rare opportunity for a question-and-answer session with the justice.

On Friday, February 2, the Alabama State Bar Mid-Winter meeting will be

combined with the celebration activities. Recently, there has been a great deal of interest in rejuvenating the mid-winter meeting, and the Bicentennial Celebration was deemed an excellent way for committee meetings, continuing education and social activities to be combined.

In the morning, state bar committees will meet from approximately 10 a.m. until 11:50 in law offices throughout downtown Birmingham.

The afternoon celebration program begins at noon, with a luncheon at the Birmingham-Jefferson Civic Center. The two afternoon speakers are both distinguished scholars with ties to Alabama—they were both law clerks to U.S. Supreme Court Justice Hugo L. Black.

BICENTENNIAL OF THE BILL OF RIGHTS



Their presentations are designed to appeal to the scholarly and the practical, the historian and the modernist, the civil attorney and the criminal attorney.

Professor Dick Howard is the White Burkett Miller Professor of Law and Public Affairs at the University of Virginia School of Law and is a well-known historian and scholar on constitutional law and jurisprudence. The second speaker is Professor Daniel J. Meador, a former dean of the University of Alabama School of Law. Professor Meador is cur-

rently the James Monroe professor and director of the Graduate Program for Judges at the University of Virginia School of Law.

The afternoon session will adjourn at approximately 3:30 p.m., following a question-and-answer session. This session should allow audience attorneys to raise other Bill of Rights concerns and will not be limited to the content of each professor's speech.

Participants in the celebration also may want to attend the dedication of the Hugo Black rotunda and bust in the new federal courthouse in Birmingham. The dedication ceremony will take place later that afternoon.

The finale of the Bicentennial Celebration begins at 6:30 p.m., with a reception for Justice Kennedy at the Birmingham-Jefferson Civic Center followed by a banquet beginning at 7:30 p.m. Justice Kennedy will be the after-dinner speaker, and as the author of the most recent first amendment case, his remarks are sure to be of interest.

Tickets for the luncheon and banquet will be sold separately and are available through the state bar. The task force is endeavoring to keep costs to attorneys as low as possible. Pre-registration will be required, and brochures will be mailed soon.

Task force members include Thomas N. Carruthers, Jr., chairperson; Alva C. Caine; Charles D. Cole; J. Mason Davis, Jr.; Fournier J. Gale, III; Charles W. Gamble; N. Gunter Guy; Reginald T. Hamner; Dean Nathaniel Hansford; Vanzetta Penn McPherson; Keith B. Norman; Judge Sam C. Pointer, Jr.; Judge C. Lynwood Smith, Jr.; and Dean Parham H. Williams, Jr. ■

Letter to the Editor

Like other states, Alabama faces an acute problem in obtaining counsel for the defense of capital cases. The following thought-provoking commentary was contained in a letter sent to the Action Group on Post-Conviction Capital Representation.

Members, Action Group on Post-Conviction Capital Representation Board of Directors, Alabama Capital Resource Center, Inc.

RE: Civil Trial Lawyers in Death Penalty Cases

As you might have read in the newspaper, my client Michael Lindsey was executed on May 26. That, along with the execution of my client Wayne Ritter in 1987 (the last man executed in Alabama), puts me in the unique and unenviable role of having represented, at the time of execution, 50 percent of all the people executed in Alabama in the last 23 years, a fact I do not plan to list in *Martindale-Hubbell*. Considering my personal history, it is remarkable.

After a Memorial Day weekend of rest, fishing and skiing, I am moving on in my life, never to take another death penalty case even if they disbar me for my refusal (there are 105 on death row there, I think, and one or two more from Mobile alone are convicted every week, it seems, but there are lots more lawyers than that). Like those who served both in WWII and Korea, I figure I've done my duty, and the next war can be fought by somebody else.

Before I move on in my life, though, I owe it to those 105 or more civil trial lawyers who will be drafted in the next two years or so, to do what I can to pass on my lessons to somebody, so their role will be easier, and for that limited purpose I send this letter. I couldn't think of anybody to send it to other than the bar's Task Force on Post-Conviction Capital Representation, and the board members and executive director of the Alabama Capital Representation Resource Center, Inc., the organ that Albert Brewer and the task force kicked into life to work on this stuff.

Here are my lessons:

1. Appointing civil trial lawyers in death penalty cases is a bad mistake—I have believed this all along, and I believe it more strongly now than ever. Those of you who have been on this project from the start know that I have never made a secret of it. Lest you think I have kept my mouth shut when I should not have, I should add that in the last two months I have filed motions and mandamus petitions and appeals in five different courts (three different ones in the Eleventh Circuit alone) based on federal and state statutes which I believed (and still believe, though the judges don't) to require the appointment of lawyers with three years' (federal) or five years' (state) criminal experience.

My strong opinion is that the public needs to hire some death penalty public defenders. If they burn out, then replace them, or pay them enough to keep them.

Obviously, this is not likely in the short run, at least until 105 or more middle-aged civil trial lawyers get galvanized by the experience I have had, at which point the politics of it may change. The rest of this letter proceeds on the assumption

that ordinary civil trial lawyers will continue to be appointed in death penalty habeas cases.

2. Your opponent—Your opponent will be Ed Carnes of the Attorney General's office. He is very, very bright, he has a narrow specialty, and he knows it cold. He could beat anybody in the country on this subject (he is also, in my experience, entirely fair and ethical). On your first solo flight you will not meet a German farmhand, you will meet the Red Baron. Good luck.

3. What your opponent knows that you do not know—There are four applicable bodies of law that your opponent and the federal judges know perfectly and you do not know at all, and you will never know as well as your judges or your opponent. They are (1) general substantive criminal law and criminal procedure needed for the non-death issues (*Brady*, *Massiah*, *Sandstrom*, etc.), (2) the operation and constitutional overlay of the Alabama death penalty statute, (3) the rules of "procedural default" and the ways to get around it and to stop lawyers from getting around it, and (4) the doctrines of "abuse of the writ."

To some extent in the "original habeas" case you will have time to do adequate research to try to catch up, but your lack of depth will clearly hurt at oral argument in the Eleventh Circuit.

Where your ignorance will clearly hurt you is in "the subsequent habeas case," discussed next.

4. The "Subsequent Habeas Case"—You and all civil trial lawyers will say, "I plan to give it my best shot at first, and not file those last-minute appeals like those Godless commie civil rights lawyers." Sure, so did I.

What happens is that after you have filed and litigated your first habeas corpus case, there will be some new development in the law in the supreme court or in some other circuit which, on the merits, would entitle you to relief. You may learn about it on your own, or more likely some "death penalty expert" will tell you about it maybe the week be-

fore the execution. (Or, you may be unlucky like I was, and get appointed for the first time after the first habeas, and only the week before the execution). My experience is that a second habeas case is simply a normal and expectable part of the process for a good lawyer. Just as a spring bass fisherman who does not get his lure caught in the stumps and bushes is not casting in the right places, so too the habeas lawyer who does not get involved in a subsequent habeas case may not be serving as effectively as possible.

A subsequent habeas case (with an outstanding execution warrant and date) is to a first habeas case as "Space Mountain" is to riding to church with your father. In both my cases it involved taking a brand new issue—cold and with absolutely no time for preparation—from the district court through the court of appeals to the U.S. Supreme Court in less than three and a half days, the days immediately preceding the execution. Spicing up the process are the unexpected calls from the AP, UPI, the local press and the television and radio stations, the ACLU, Amnesty International in London, women in Maine who want to make sure you really believe your client is innocent and that you are working hard enough and—the most fun yet—funeral homes.

Here is where your lack of depth will kill you, on the doctrines of "procedural bar," "successive habeas" and "abuse of the writ," the common battlefields of successive habeas. In addition, since you will be going cold on a new case involving an unfamiliar area, your lack of depth will hurt.

You will spend all of your available time physically moving papers to and from increasingly high courts, one each day (if you are lucky). You will be battling with unfamiliar precepts, and everybody else involved—the judges and your opponent—will know the rules cold.

At the end, the court will enter an order saying that your failure to have either known about or even to have anticipated that new development in the unfamiliar area of death penalty law makes your filing the case "an abuse of the writ." Therefore you lose, and your client dies. That day, usually within hours.

At least, that is what happened to me in both cases, and it will likely happen to most of you.

4. What can be done to help civil trial lawyers in death penalty cases—Just from seeing what I needed, I have a pretty good idea what can be done to help civil trial lawyers in death penalty habeas corpus cases.

a. Review of record to spot issues—The first thing that is needed is a review of the record by somebody who knows what he/she is doing, simply to spot the issues. What was *not* raised in state court by the trial or appellate lawyer often is even more important than what was raised, and only an experienced death penalty hand can spot that. Anybody who thinks a middle-aged civil trial lawyer can do that is just wrong.

Somebody (not me) needs to provide an experienced death penalty hand at the outset to read the whole record and to spot and list the issues to be followed up by the civil trial lawyer.

As far as I know, nobody is doing that.

b. Newsletter—Expecting middle-aged civil trial lawyers to be able to keep up with death penalty developments is a serious mistake. Somebody (not me) needs to compile and send a newsletter every two weeks or month to point out hot new death cases and hot new death

issues. This is the only way to help avoid the "abuse of the writ" trap. If nobody will undertake such a task, at a minimum somebody ought to suggest that the lawyer's firm subscribe for one year to the *Criminal Law Reporter*, or whatever else passes in the trade as a newsletter.

Even better, but more labor intensive, would be for somebody to maintain a current listing of the issues in each pending death case, with bullet memos to all lawyers involved in a particular issue.

c. Abuse of the writ advice—Somebody needs to *tell* the appointed lawyer that there is a high (though unquantifiable) probability that he/she will be involved in a subsequent habeas case on short notice based on some new development, and that a high priority during the *original* habeas phase should be mastering the "abuse of the writ" and "successive habeas" and procedural bar issues and, particularly, every loophole and exception and ground in them.

This cannot be learned in the last minute, when every second counts just to get the paperwork on the last Federal Express plane to Atlanta, or the last fax to the supreme court clerk's office.²

Good luck to you if you are next. I am not.

Very truly yours,

David A. Bagwell,
Mobile, Alabama

¹ My practice is entirely civil. I never volunteered for such cases. When appointed, I politely resisted appointment. I do not consider it the duty of civil trial lawyers in big firms to handle such cases, any more than it is the personal duty of metropolitan dermatologists to fill the gap of obstetrics in rural counties (both are public problems requiring public solutions). Almost alone among "death penalty lawyers," I don't even care much whether we have the death penalty or not (I generally favor it because mad dogs

ought to die, but I have occasional qualms that Jesus might not agree with that, and I am supposed to consider every now and then what he might do and try to do roughly the same).

² Just to let you know the rush, I actually faxed a handwritten note (a "supplemental brief" I guess) to the U.S. Supreme Court while my stay motion was pending at 5:30 CDT (6:30 EDT) with an execution set that evening. The motion to stay was denied one minute later. There is no time for research then. ■

The following amendments to the Alabama Rules of Appellate Procedure have been adopted by the Alabama Supreme Court:

Appendix A Alabama Rules of Appellate Procedure Rule 11(a)(3)

Rule 11(a)(3), Alabama Rules of Appellate Procedure

"(3) Record on Appeal—The clerk shall assemble the record on appeal, consisting of the clerk's record and the reporter's transcript, within 7 days (1 week) from the date of the reporter's transcript is filed in the trial clerk's office, unless the time is shortened or extended by an order entered pursuant to subdivision (c) of this rule. Within the time fixed above, the clerk shall file a certificate of completion of the record on appeal with the clerk of the appellate court, and shall simultaneously serve copies of the certificate of completion on each party to the appeal. The certificate of completion shall state that the record on appeal is assembled and shall state the date the certificate was forwarded to the clerk of the appellate court. See Form 6 for certificate of completion.

"The record on appeal shall be bound at the left side, and separated into volumes not to exceed 200 pages each. All clasps and staples used to bind the record on appeal shall be covered by tape so as to prevent any injury to those handling the record, and any other fastener that may cause injury shall likewise be covered with tape.

"The clerk shall make the record on appeal available to the parties for preparation of briefs and the appendix. If a party so orders, the clerk of the trial court shall supply photocopies of the record

on appeal upon payment of the cost of photocopying to the clerk.

"At the time of filing and service of his brief, appellee shall also give notice of the filing of such brief to the clerk of the trial court. See Rule 31(a).

"The clerk of the trial court shall file the record on appeal with the clerk of the appellate court within 14 days (2 weeks) after the filing of appellee's brief in the appellate court or its due date therein, or at such earlier time as the parties may agree, or the appellate court may order. See Form 10.

"The filing of the certificate of completion of the record on appeal is effectuated when it is received in the office of the clerk of the appellate court, except that it shall be deemed filed on the day of mailing if certified or registered mail is utilized in the transmittal.

"(Amended eff. October 6, 1986; September 11, 1989.)"

Appendix B Alabama Rules of Appellate Procedure Rule 11(b)

Rule 11(b), Alabama Rules of Appellate Procedure

"(b) Mechanics of Completion and Transmission of Record—Criminal. The court reporter shall prepare and file with the clerk of the trial court an original and three photocopies of the proceedings on letter-size paper within 56 days (8 weeks) from the date of the notice of appeal, unless the time is shortened or extended by an order entered pursuant to subdivision (c) of this rule. If authorized in

writing by the clerk of the court of criminal appeals, the court reporter may deliver three carbon copies instead of three photocopies in a particular case. The court reporter shall serve upon the attorney for the appellant, the Attorney General, district attorney, and the clerk of the appellate court, a notice that the transcript of proceedings has been filed with the clerk of the trial court. See Form 13. The clerk of the trial court shall assemble, number, complete and bind the transcript of the proceedings with a photocopy of the papers, documents, written charges, exhibits, etc. on file in his office on letter-size paper so that there is a numbering system for the entire record on appeal.

"In addition thereto, the clerk of the trial court shall also prepare three certified copies of the record on appeal and shall transmit one of said certified copies to the Attorney General, another certified copy to the defendant, or his attorney, and retain the other certified photocopy in his office. See Form 14.

"All clasps and staples used to bind the transcript or the record on appeal shall be covered by tape so as to prevent any injury to those handling the transcript or the record on appeal and any other fastener that may cause injury shall likewise be covered with tape.

"The clerk of the trial court shall file the record on appeal with the clerk of the appellate court within 7 days (1 week) from the date of the filing of the reporter's transcript in the clerk's office unless the time is shortened or extended by an order entered pursuant to subdivision (c) of this rule. The clerk of the trial court

shall also file with the record on appeal a certificate of completion of the record on appeal, and shall simultaneously serve copies of the certificate of completion on the defendant, or his attorney, and the Attorney General of Alabama. The certificate of completion shall state that the record on appeal has been forwarded to the clerk of the appellate court and shall state the date said certificate was forwarded to the clerk of the appellate court.

"The filing of the record on appeal in the office of the clerk of the appellate court is effectuated when it is received in the office of the clerk of the appellate court, except that it shall be deemed filed on the date of mailing if certified or registered mail is utilized in the transmittal. The clerk of the appellate court shall notify the defendant, or his attorney, and the Attorney General, of the date that the record on appeal was filed in the appellate court.

"The clerk of the trial court shall include in the record on appeal, and each

certified copy thereof, an index of the entire record, including an index of the documents, papers, charges and exhibits therein contained and an index of documents and exhibits incapable of being legibly or otherwise photocopied.

"(Amended eff. January 16, 1977; October 6, 1986; September 11, 1989.)"

Appendix A Alabama Rules of Appellate Procedure Rule 31(b)

"(b) Number of Copies to Be Filed and Served. Copies of the brief shall be filed with the clerk of the appropriate appellate court as follows:

Supreme Court: Ten (10) copies

Court of Criminal Appeals: Five (5) copies

Court of Civil Appeals: Three (3) copies

The clerk of the appropriate appellate court in a particular case may direct a larger or lesser number of briefs to be

filed. One copy of the brief shall be served on counsel for each party separately represented, or if the party does not have counsel, upon the party personally. In cases involving indigent parties, the clerk of the court may permit filing of a lesser number of copies.

"(Amended eff. August 29, 1989.)"

Appendix B Alabama Rules of Appellate Procedure Rule 32(a)(2)

Rule 32(a)(2), Alabama Rules of Appellate Procedure

"(2) Briefs and the appendix may be produced by typewriter or any duplicating or copying process which produces a clear black image on white paper. Carbon copies of briefs and the appendix may not be submitted without permission of the court, except in behalf of parties allowed to proceed in forma pauperis. Typewritten briefs shall be on white paper, 8 1/2 x 11 inches (letter-size), with

NOTICE

1989-90

OCCUPATIONAL LICENSE/SPECIAL MEMBERSHIP DUES WERE DUE October 1, 1989

This is a reminder that all 1988-89 Alabama attorneys' occupational license and special memberships **EXPIRED** September 30, 1989.

Sections 40-12-49, 34-3-17 and 34-3-18, *Code of Alabama*, 1975, as amended, set forth the statutory requirements for licensing and membership in the Alabama State Bar. Licenses or special membership dues are payable between October 1 and October 31, without penalty. These dues include a \$15 annual subscription to *The Alabama Lawyer*.

The occupational license (for those engaged in the active practice of law and not exempt from licensing by virtue of a position held, i.e., judgeships, attorneys general, U.S. attorneys, district attorneys, etc.) should be purchased from the probate judge or revenue commissioner in the city or town in which the lawyer has his or her principal office. The cost of this license is \$150 plus the nominal county issuance fees.

Special membership dues (for those not engaged in the active practice of law but desiring to maintain an active membership status) should be remitted directly to the Alabama State Bar in the amount of \$75. The special membership does not entitle you to practice law.

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

a margin of 1 ½ inches and typewritten on one side of the paper only. The typewriting shall be double spaced except for citations and quoted material, which may be single-spaced. The brief shall be bound on the left side of the page, and pagination shall appear in the lower right corner of the page. The appendix shall be bound in a volume having pages not exceeding 8 ½ x 14 inches (legal-size) and typed matter not exceeding 6 ½ x 12 inches, with double spacing between each line of text. Binding of such legal size appendix shall be at the top of the page, with page numbers in the lower right corner. All clasps and staples used to bind a brief or an appendix shall be covered by tape so as to prevent any injury to those handling the brief, and any other fastener that may cause injury shall likewise be covered with tape. Copies of the reporter's transcript and other papers reproduced in such a manner may be inserted in the appendix.

"(Amended eff. August 29, 1989.)"

Appendix C Alabama Rules of Appellate Procedure Rule 32(a)(3)

"The cover of the brief of the appellant shall be blue; that of the appellee, red; that of the intervenor or amicus curiae, green; that of any reply brief, gray. The cover of the appendix, if separately printed, should be white. The front covers of the briefs and of the appendix, if separately printed, shall contain: (1) the name of the court and the number of the case; (2) the title of the case (Rule 12(a)); (3) the nature of the proceeding in the court (e.g., appeal; petition for certiorari) and the name of the court, agency or board below; (4) the title of the document (e.g., Brief for Appellant, Appendix); and (5) the name and address of counsel representing the party on whose behalf the document is filed."

"(Amended eff. August 29, 1989.)"

Comment to Amendment to Rule 32(a)(3) Effective August 29, 1989

"The August 29, 1989, amendment to Rule 32(a)(3) provided that the colors of briefs set out in this paragraph would be mandatory. The rule had previously provided that the colors were mandatory if the briefs were 'produced by commercial printing or duplication,' but required those colors in other situations if those colors were 'available.'"

Appendix A Alabama Rules of Appellate Procedure Rule 32(a)(2)

Rule 32(a)(2), Alabama Rules of Appellate Procedure

"(2) Briefs and the appendix may be produced by typewriter or any duplicating or copying process which produces a clear black image on white paper. Car-

Proposed Rules for District Court, 13th Judicial Circuit, Mobile County, Alabama

We, the undersigned judges, propose the following local rules governing certain civil procedures in the District Court of Mobile County:

I. Pre-trial discovery as provided in rules 33 (dc) & 34 (dc) as modified by Rule 26 (dc) ARCP shall be limited to interrogatories or requests for admission. The total of interrogatories and requests for admission, if admissions are requested, shall not exceed 15 including sub-parts or sub-headings.

II. On all pleadings, including post-judgment proceedings, the attorney must include the following:

- a. Name of attorney;
- b. Mailing address;
- c. Street or building address; and
- d. Telephone number.

Proposed this the 8th day of September 1989.

**Dominick J. Matranga
Presiding District Judge
Nicholas Kearney, Judge
Lionel L. Layden, Judge
Michael E. McMaken, Judge**

Copies are available of the Continuing Legal Education program materials from the 1989 annual meeting.

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bon copies of briefs and the appendix may not be submitted without permission of the court, except in behalf of parties allowed to proceed in forma pauperis. Typewritten briefs shall be on white paper, 8 ½ x 11 inches (letter-size), with a margin of 1 ½ inches and typewritten on one side of the paper only. The typewriting shall be double spaced except for citations and quoted material, which may be single-spaced. The brief shall be bound on the left side of the page, and pagination shall appear in the lower right corner of the page. The appendix shall be bound in a volume having pages not exceeding 8 ½ x 11 inches (letter-size) and typed matter not exceeding 6 ½ x 9 inches, with double spacing between each line of text. Binding of such letter size appendix shall be on the left side of the page, with page numbers in the lower right corner. All clasps and staples used to bind a brief or an appendix shall be covered by tape so as to prevent any injury to those handling the brief, and any other fastener that may cause injury shall likewise be covered with tape. Copies of the reporter's transcript and other papers reproduced in such a manner may be inserted in the appendix.

"(Amended eff. August 29, 1989; March 1, 1990.)"

Appendix B
Alabama Rules of Appellate
Procedure
Rule 32(b)

Rule 32(b), Alabama Rules of Appellate Procedure

"(b) Form of Other Papers. Applications for rehearing shall be produced in a manner prescribed by subdivision (a). Motions and other papers may be produced in like manner, or they may be typewritten upon opaque, unglazed paper 8 ½ x 11 inches in size. Lines of typewritten text shall be double-spaced. Consecutive sheets shall be attached at the top left corner. Carbon copies may be used for filing and service of motions if they are legible.

"(Amended eff. March 1, 1990.)"

Comment to Amendments to Rule 32(a)(2) and (b)
Effective March 1, 1990

"The March 1, 1990, amendments to Rule 32(a)(2) and (b) provided for a change in paper size, substituting '8 ½ x 11 inches' in place of '8 ½ x 14 inches' and substituting references to 'letter-size' paper for those prior references to 'legal size' paper, and changing the dimensions of typed matter in the briefs and appendices from '6 ½ x 12 inches' to '6 ½ x 9 inches.'"

Appendix C
Alabama Rules of Appellate
Procedure
Rule 39(d)

Rule 39(d), Alabama Rules of Appellate Procedure

"(d) Form of Petition. The petition shall be on letter-size paper and shall contain:

"(1) The style of the case (the same as in the court of appeals), the name of the petitioner, the circuit court from which the cause is on appeal, and the name of the court of appeals to which the petition for certiorari is directed;

"(2) The date of the decision sought to be reviewed and the date of the order overruling the application for rehearing; and

"(3) A concise statement of the grounds, (c)(1)-(5), supra, on which the petition is based.

"A copy of the opinion of the court of appeals shall be attached to the petition as an exhibit.

"(Amended eff. March 1, 1990.)"

Comment to Amendment to Rule 39(d)
Effective March 1, 1990

"The March 1, 1990, amendment to Rule 39(d) substituted the term 'letter-size paper' for the term 'legal-size paper' in the first sentence of that section." ■

The Alabama Supreme Court has adopted the following rule to the Alabama Rules of Judicial Administration:

Rule 36. Paper Size of Documents Filed with Court

"All pleadings, motions, briefs, depositions, discovery requests and responses thereto, and if practical, all other documents filed in any clerk's office in any proceeding other than traffic cases, shall be filed on paper 8 ½ x 11 inches in size."

Comment

"This rule is not intended to prevent the filing of exhibits such as tables, charts, plats, photographs, and other materials that cannot be reasonably reproduced on 8 ½ x 11 inch paper."

Rule 36 shall be effective March 1, 1990.

About Members, Among Firms

ABOUT MEMBERS

Harold I. Apolinsky, of the Birmingham firm of **Sirote & Permutt**, recently was selected vice-chairperson of the Regional Liaison Meetings Committee for the Tax Section of the American Bar Association. The Regional Committee coordinates and assists with bar liaison meetings with IRS personnel across the country.

Earle F. Lasseter of **Pope, Kellogg, McGlamary, Kilpatrick & Morrison** of Atlanta and Columbus, Georgia, was elected vice-chairperson of the 17,000-member Section of General Practice of the American Bar Association at the annual meeting of the ABA held in Honolulu, Hawaii. He is a member of the Georgia, Alabama and District of Columbia bars.

The firm of **Walter Gregory Ward** announces the relocation of his offices to 305 A North Lanier Avenue, Lanett, Alabama 36863. Phone (205) 642-6008.

Stephanie K. Alexander withdrew from the private practice of law July 15, 1989, and is employed as a career law clerk with the **Honorable Gordon B. Kahn**, chief United States Bankruptcy Judge for the Southern District of Alabama. Her new mailing address is United States Bankruptcy Court, 201 St. Louis Street, Mobile, Alabama 36602.

Carney H. Dobbs, CPCU, announces that after over 35 years with **State Farm Insurance** he is retiring as a divisional claim superintendent. Dobbs' address is 4009 Little Branch Road, Birmingham, Alabama 35243. Phone (205) 967-2765.

J. David Robinson announces the opening of his office at 204 S. Daleville Avenue, Daleville, Alabama. The mailing address is P.O. Box 6, Daleville,

Alabama 36322. Phone (205) 598-8500.

Linda L. Nobles, formerly of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Pensacola, Florida, announces the formation of **Linda L. Nobles, P.A.**, with offices at 180 North Palafox Street, Pensacola, Florida 32501. Phone (904) 432-1089.

The American Board of Criminal Lawyers announces that **T. Jefferson Deen, III**, of Mobile has been elected as a fellow in the American Board of Criminal Lawyers.

The American Board of Criminal Lawyers announces that **Donald E. Holt** of Florence also has been elected as a fellow in the American Board of Criminal Lawyers, a group of criminal attorneys from throughout the United States, Canada and the Philippines.

Michael S. Lusk, former assistant district attorney for Calhoun and Cleburne counties, announces the opening of his office for the practice of law, located at Suite 407, AmSouth Bank Building, 931 Noble Street, Anniston, Alabama 36201. Phone (205) 237-5105.

Jeffery A. Foshee, formerly general counsel to the Alabama State Board of Education, announces the opening of his office for the practice of law at 900 South Perry Street, Montgomery, Alabama 36104. Phone (205) 265-1960.

AMONG FIRMS

The firm of **McInnish, Bright & Chambless, P.C.** announces that **Kathy Perry Brasfield**, formerly law clerk to Judges Greenhaw, Bright and Miller, has become associated with the firm. Offices are located at 540 South Perry Street, Montgomery, Alabama 36104. Phone (205) 263-0003.

Tanner, Guin, Ely, Lary & Neiswender, P.C. announces a change in their mailing address to P.O. Box 032206, Tuscaloosa, Alabama 35403. The firm office remains at Suite 700, Capitol Park Center, 2711 University Boulevard, Tuscaloosa, Alabama 35401. Phone (205) 349-4300.

J. Cecil Gardner announces his withdrawal from **Lattof & Gardner, P.C. Middlebrooks & Fleming, P.C.** announces that J. Cecil Gardner has become a member of the firm, and the firm name has been changed to **Gardner, Middlebrooks & Fleming, P.C.** Offices are located at the 16th Floor, SouthTrust Bank Building, Mobile, Alabama 36652. Phone (205) 433-8100.

William E. Friel, II, and **Mark L. Gaines** announce the relocation of their offices to 1117 22nd Street, South, Birmingham, Alabama 35205. Phone (205) 939-0000.

James S. Lloyd, R. Larry Bradford, James C. Gray, III, and **J. Allen Schreiber** announce the formation of a partnership under the firm name of **Lloyd, Bradford, Schreiber & Gray, P.C.** Offices are located at One Perimeter Park, S, Suite 410, Birmingham, Alabama 35243. Phone (205) 967-8822.

The Mobile firm of **Pittman & Pittman** announces **John Gregory Carwie** has become an associate with the firm. The firm also announces the opening of its Enterprise, Alabama, office.

Harris, Caddell & Shanks, P.C. announces the consolidation of its offices, effective August 14, 1989, at 214 Johnston St., SE, P.O. Box 2688, Decatur, Alabama 35602-2688. Phone (205) 340-8000.

The firm of **Johnston, Barton, Proctor, Swedlaw & Naff** announces that **William D. Jones, III**, has become a partner with the firm, and that **James G. Linderholm** and **William K. Hancock** have become associated with the firm. Offices are located at 1100 Park Place Tower, Birmingham, Alabama 35203. Phone (205) 322-0616.

The firm of **Wilson & King** announces the relocation of their Jasper office to 315 West 19th Street, Jasper, Alabama 35502-1488. Phone (205) 221-4640.

Yearout, Myers & Traylor, P.C., announces that **C. Jeffery Ash** and **Phillip Ted Colquett** have become associated with the firm. Offices are located at 2700 SouthTrust Tower, Birmingham, Alabama 35203. Phone (205) 326-6111.

Balch & Bingham announces that **Frank I. Brown** and **Will Hill Tankersley** have joined the firm as associates. Birmingham offices are located at 700 Financial Center, Birmingham, Alabama 35203. Phone (205) 251-8100.

Tobin K. Clark, formerly with Sirote & Permutt in Huntsville, has joined the legal department of **American Airlines, Inc.**, MD 2E30, P.O. Box 619616, Dallas/Fort Worth Airport, Texas 75261-9616.

Joel M. Nomberg announces the relocation of his office to 125 West Main Street, The Crossings, Fourth Floor, Dothan, Alabama 36301, and mailing address of P.O. Box 6713, Dothan, Alabama 36302. Phone (205) 793-6493. He also announces that **Joseph J. Gallo** has become associated with his firm.

Harry P. Long and **John W. Norton** of **Long & Norton** announce the relocation of their offices to Suite 2A, Security Bank Building, 10 West 11th Street, Anniston, Alabama 36201. Phone (205) 237-3266.

The firm of **Webb, Crumpton, McGregor, Sasser, Davis & Alley** announces that **Michael M. Eley** has become a partner of the firm as of July 1, 1989, and **Daryl L. Masters, Gregory D. Crosslin, J. Mark Greer** and **Carolyn McFatridge** have become associated with the firm. Offices are located at One Commerce Street, Suite 700, P.O. Box 238, Montgomery, Alabama 36101-0238. Phone (205) 834-3176.

The firm of **Cherry, Givens, Tarver & Aldridge** announces that **Robert E. Burney, II, J.D., M.D.; Thomas N. Nickles, J.D., M.D.; Rodney D. Dorand, J.D., M.D.; Kevin J. Hawkins;**

and **Lois R. Beasley, J.D., R.N.**, have become members of the firm with offices located in Birmingham at 2100-A SouthBridge Parkway, Suite 570, Birmingham, Alabama 35209, phone (205) 870-1555, and in Dothan at 125 West Main Street, P.O. Box 927, Dothan, Alabama 36301, phone (205) 793-1555.

The firm of **Scholl & Scholl** announces the relocation of its law offices, formerly at #2 Office Park Circle, Suite 200, in Birmingham, Alabama, to its new offices located at #4 Office Park Circle, Suite 315, Birmingham, Alabama 35223. Phone (205) 871-6004. The firm also announces that **Stephen M. Middleton** was associated with the firm effective August 15, 1989.

Roy Wesley Miller and **Bruce Alan Gardner**, former Madison County assistant district attorneys, announce the formation of a partnership for the general practice of law. Offices are located at 221 East Side Square, Suite 1B, Huntsville, Alabama 35801. Phone (205) 533-4004.

Wayne L. Williams and **Craig L. Williams** announce the formation of a partnership to be known as **Williams & Williams**, 600 Lurleen Wallace Boulevard, S, Courthouse Plaza, Suite 140, Tuscaloosa, Alabama 35401. Phone (205) 345-7600.

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Bar Briefs

Huckaby elected Alabama State Delegate to ABA

Gary C. Huckaby, a partner in the Huntsville firm of Bradley, Arant, Rose & White and immediate past president of the Alabama State Bar, has been elected Alabama State Delegate to the American Bar Association House of Delegates.



Huckaby

As state delegate, Huckaby heads the Alabama contingent to the ABA's House of Delegates, its policy-making body. He will serve a three-year term as state delegate.

Huckaby has been a member of the house since 1982, until now representing the state bar. He also is a member of the ABA Standing Committee on Lawyers Public Service Responsibility, and is a past chairperson of both the Standing Committee on Lawyer Referral and Information Service and the Special Committee on Delivery of Legal Services. He is a past member of the Consortium on Legal Services and the Public, the Task

Force on Public Education about the Law and the Standing Committee on Lawyers in the Armed Forces. He is a Fellow of the American Bar Foundation.

Huckaby also is a past president of the Huntsville-Madison County Bar Association. He has served on the Board of Bar Commissioners of the Alabama State Bar, and as chairperson of the Farrah Law Society. He is a member of the Board of Directors of the Alabama Law School Foundation and of the council of the Alabama Law Institute, and serves on the Board of Directors of the American Judicature Society.

Huckaby was graduated from the University of Alabama in Tuscaloosa with a bachelor of arts degree in 1960, and from the University's School of Law in 1962.

Alabama State Bar reaches out to schools

The Alabama State Bar recently was selected by the American Bar Association's Special Committee on Youth Education for Citizenship for participation in their Bar-School Partnership Program. This program seeks to promote the teaching of law-related education to both elementary and secondary school students. Law-related education incorporates interactive teaching methods and involvement of outside resource leaders in the classroom. It helps motivate students of all levels and abilities, and teaches them citizenship skills necessary for becoming involved, responsible citizens in their schools and communities.

Under this program, the Alabama State Bar is one of only 12 states throughout the country which will receive a mini-grant of \$900 for teacher and resource leader training workshops and for the purchase of materials in three selected

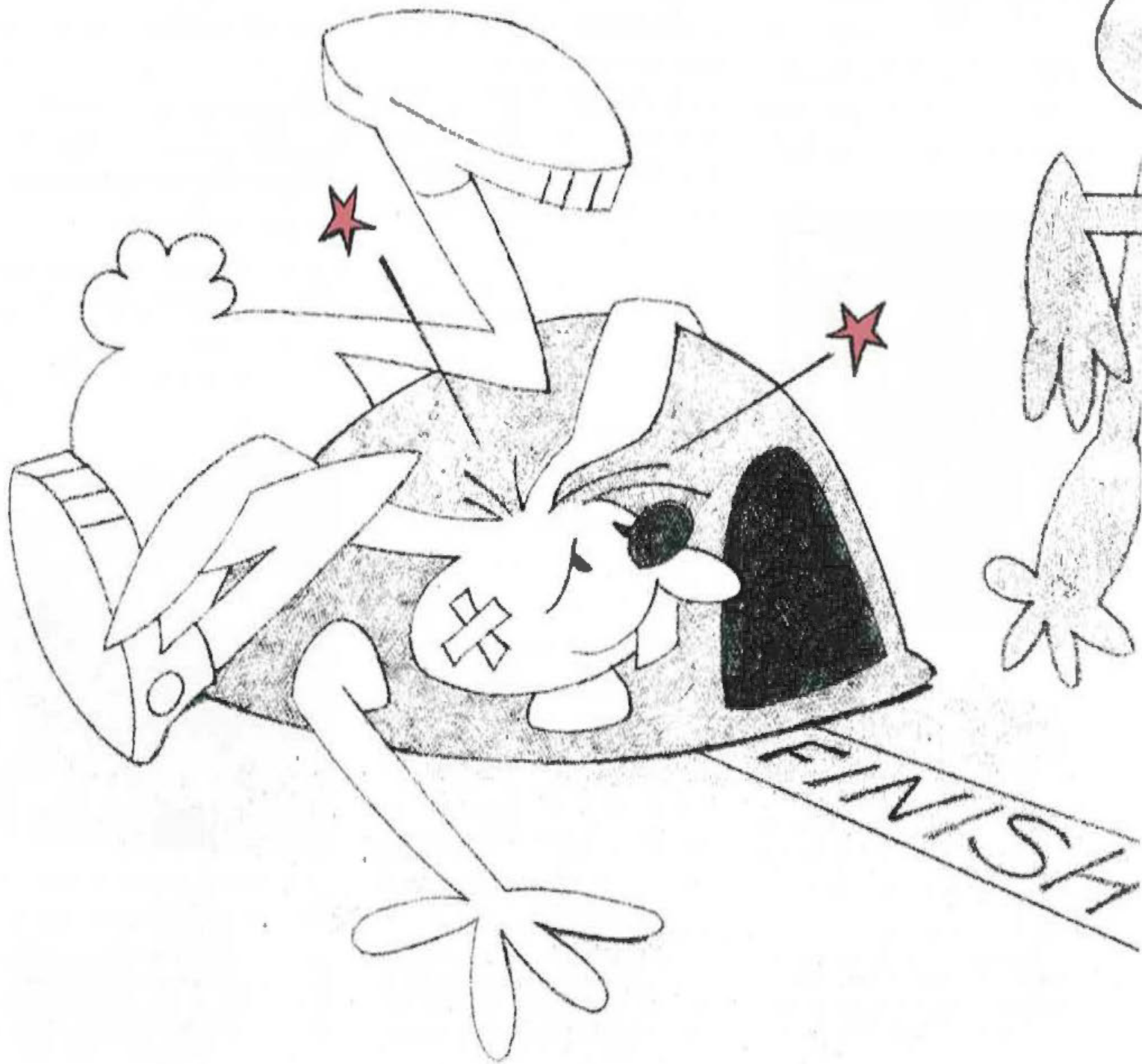
sites within the state—Birmingham, Mobile and Opelika.

The ABA also will provide a wide variety of free law-related education materials and on-going technical assistance to help educate teachers and lawyers in these three cities on how to teach law-related education to students. The ABA will work closely with the state bar, the Alabama Department of Education and the local bar associations and school boards in Birmingham, Mobile and Opelika to establish on-going law-related education programs and promote law-related education for students throughout the state. Committee chairperson is Chris Christ of Birmingham and vice-chairperson is Michael Odom of Mobile. ■

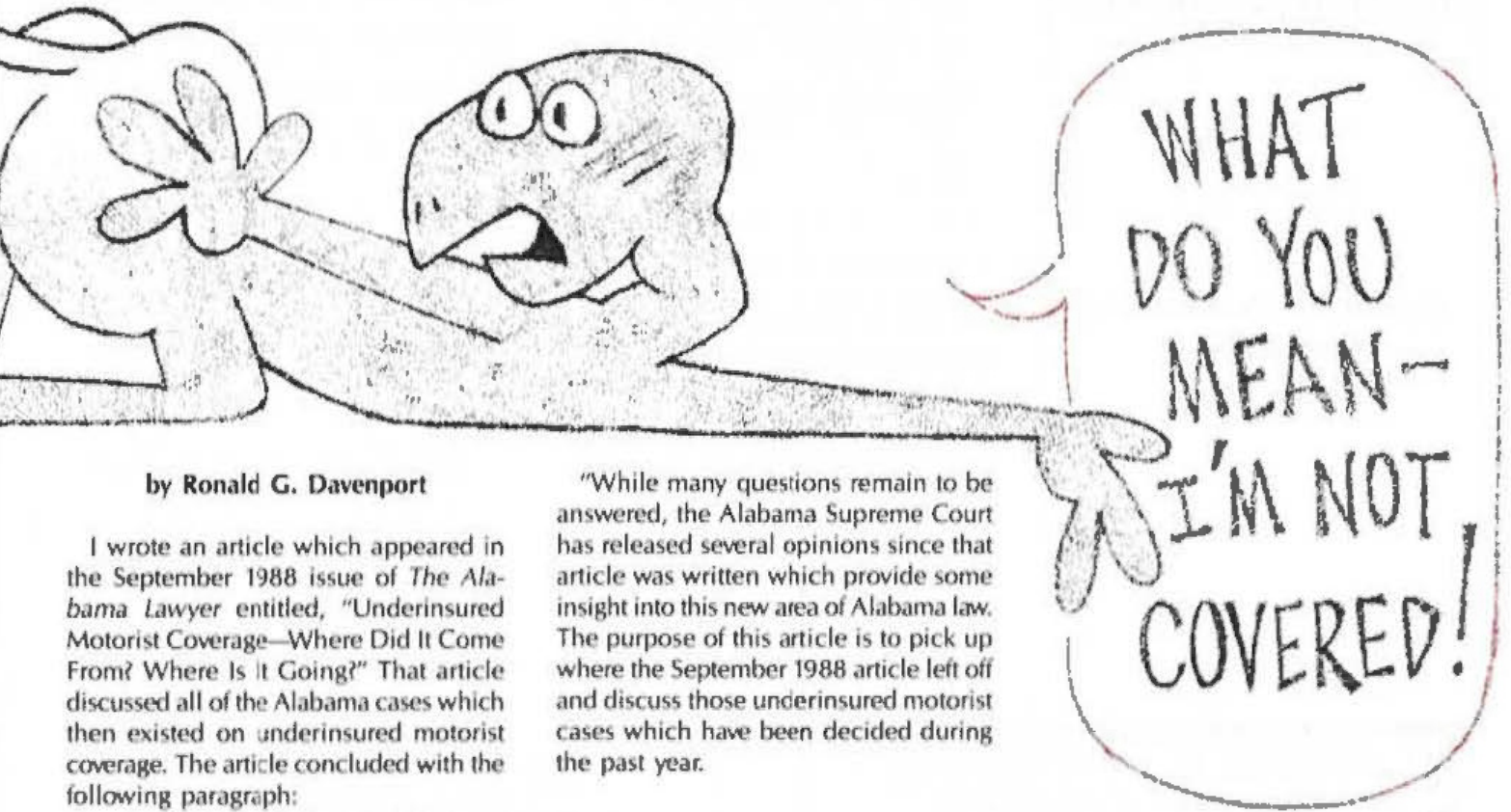


Pictured above is Edward M. Rogers, Jr. Rogers, assistant to President Bush and his chief of staff John Sununu, attended Harvard University and is a 1980 graduate of Samford University. He received his law degree in 1984 from the University of Alabama School of Law and was admitted to the Alabama State Bar in 1985.

Underinsured Motorist



Coverage—an Update



by Ronald G. Davenport

I wrote an article which appeared in the September 1988 issue of *The Alabama Lawyer* entitled, "Underinsured Motorist Coverage—Where Did It Come From? Where Is It Going?" That article discussed all of the Alabama cases which then existed on underinsured motorist coverage. The article concluded with the following paragraph:

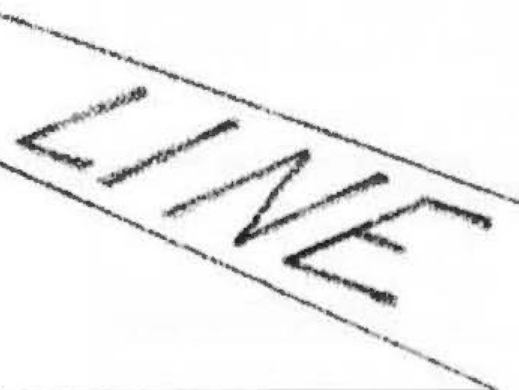
"Although underinsured motorist coverage is beginning to take shape, there remain many issues concerning its application. Insurance companies, plaintiffs' attorneys and defense attorneys will continue to agonize and joust over these issues for the next couple of years until the Alabama Supreme Court can resolve the questions involving subrogation, settlement and trial of this new area of insurance coverage.

"While many questions remain to be answered, the Alabama Supreme Court has released several opinions since that article was written which provide some insight into this new area of Alabama law. The purpose of this article is to pick up where the September 1988 article left off and discuss those underinsured motorist cases which have been decided during the past year.

Stacking

In the case of *Travelers Insurance Company, Inc. v. Jones*, 529 So.2d 324 (Ala. 1988), the Alabama Supreme Court, in an opinion authored by Justice Maddox,

held that a passenger can stack up to three uninsured motorist coverages on the owner's policy if the coverages for the additional vehicles are contained within



Ronald G. Davenport is a partner in the firm of Rushton, Stakely, Johnston & Garrett, P.A., in Montgomery. He is the author of *Alabama Automobile Insurance Law*, which has been published recently by The Harrison Company. He received his undergraduate degree from Huntingdon College and law degree from the University of Alabama School of Law.



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the same contract. The court's decision turned on the 1984 amendment to the uninsured motorist statute. In the amendment, the Legislature adopted §32-7-23(c), *Code of Alabama*, 1975, which provides as follows:

"The recovery by an insured person under the uninsured provisions of any one contract of automobile insurance shall be limited to the primary coverage plus such additional coverage as may be provided for additional vehicles, but not to exceed two additional coverages within such contract." (emphasis added).

The court held that the plain meaning of the amendment extended stacking of uninsured motorist coverage to all persons who are insureds, whether they are named insureds or not, and entitles them to recover the primary coverage plus such additional coverages as may be provided up to two additional vehicles. In order for a passenger to stack, the additional coverage must be within the same contract of insurance.

In the case of *State Farm Mutual Automobile Insurance Company v. Fox*, 541

So.2d 1070 (Ala. 1989), the court again looked at the language of §32-7-23(c) and held that there was no limit on the number of uninsured motorist policies an insured might stack if each of the policies was issued under a separate contract. The court held that the phrases "any one contract" and "within such contract" referred to one contract or policy of insurance. Therefore, the stacking limitation contained in §32-7-23(c) does not apply if the contracts are issued under separate policies.

Justice Jones dissented and said as follows:

"In my opinion, the Legislature could not have intended to create a 'Russian roulette' game of chance. The operative effect of the statute can be carried out with some degree of consistency and predictability only if the statute treats all like coverages between the same parties (the insurer and the insured) as one contract of insurance. Otherwise, sophisticated insurers (and insureds, as well), in considering each application for coverage, must go through the mental exercise of deciding whether to issue separate policies to cover each ve-

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hicle owned by the insured, and thus avoid the risk of stacking uninsured motorist coverages as to passengers (as in *Travelers*) but at the same time, assume the risk of stacking, without limitations, such coverage for other insureds for each insured vehicle (as in the instant case)."

Subrogation

The court has severely limited the ability of insurance companies to protect their subrogation rights in underinsured motorist situations. The first hint of the court's direction came in the case of *Hardy v. Progressive Insurance Company*, 531 So.2d 885 (Ala. 1988). Hardy had a policy with Progressive Insurance Company which provided uninsured (underinsured) motorist coverage to her. Hardy was injured by Brown, an underinsured motorist, at the time of the accident. Hardy received payment from USF&G, Brown's liability carrier, and executed a release relieving Brown from all further claims arising out of the automobile accident. The trial court found that Hardy's claim against Progressive on her underinsured motorist's coverage was barred by her release from liability of the tortfeasor.

The Alabama Supreme Court, in an opinion written by Justice Houston, reversed on the grounds that there was inadequate documentation to support the trial court's action.

However, the Alabama Supreme Court, *in dicta*, went on to discuss underinsured motorist coverage and subrogation in general. In doing so, it cited the following language from *Progressive Cas. Ins. Co. v. Kraayenbrink*, 370 N.E.2d 455 (Minn. Ct. App. 1985), with approval:

"The general rule is that a settlement and release of an underinsured tortfeasor will not automatically preclude recovery of underinsured benefits. (citations omitted). When an insured party has given his underinsurance carrier notice of a tentative settlement prior to release, and the insurance carrier has the opportunity to protect its subrogation rights by paying the underinsurance benefits before the insurance carrier makes payment to its insured, however, subrogation rights do not arise."

The dicta of *Hardy* became law in the

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recent case of *Auto-Owners Insurance Company v. Hudson*, 23 ABR 2721. Hudson was involved in an automobile accident with an underinsured motorist. The plaintiff and Auto-Owners stipulated that the accident was caused by Finklea's (the underinsured motorist) negligence and that the plaintiff, Hudson, suffered injuries in the amount of at least \$70,000. Finklea's insurance policy with State Farm had limits of \$50,000; thus, Finklea was considered underinsured.

The plaintiff was insured by Auto-Owners Insurance Company at the time of the accident with uninsured/underinsured motorist coverage of \$20,000 per person. Hudson notified Auto-Owners that he was negotiating a settlement with State Farm, whereby State Farm would pay him its \$50,000 coverage in return for a written release of State Farm and State Farm's insured. Auto-Owners replied with a letter which warned Hudson that if he executed a release, he would be forfeiting his right to the \$20,000 underinsured motorist coverage. Auto-Owners did say that it would give

permission for Hudson to litigate. Despite Auto-Owners' warning, Hudson released State Farm and its insureds. Auto-Owners then refused to pay Hudson the \$20,000 underinsured motorist benefits.

Auto-Owners filed a declaratory judgment and Hudson counterclaimed for the \$20,000 in underinsured motorist coverage. The trial court held that Auto-Owners had to pay Hudson his \$20,000 in underinsured benefits. Auto-Owners appealed.

The Alabama Supreme Court affirmed the judgment against Auto-Owners and held as follows:

"When the tortfeasor's liability insurer has offered to pay the maximum of its liability limits, and it is undisputed that the damages exceed that amount and, further, exceed the amount of underinsured coverage available, the insured should give its underinsured motorist insurance carrier notice of this offered settlement and the underinsured motorist carrier should consent to the settlement and forego any right of subrogation for any underinsured

motorist coverage it may subsequently pay, or else pay to its insured the amount offered by the tortfeasor's insurer and preserve its right of subrogation."

The court did not address the question of whether the same holding would apply when it is not undisputed that the damages exceed the amount of underinsured coverage available. It certainly appears, however, that the supreme court would probably make the same ruling in that fact situation.

Justice Maddox, joined by Justice Steagall, authored a dissent which gave an excellent history of underinsured motorist coverage and a survey of the law in other jurisdictions. Justice Maddox, in dissenting, suggested that the following general rules should apply:

"The injured party, or his counsel, should give notice of his or her claim to the underinsured motorist insurance carrier as soon as it appears that the insured's damages exceed the tortfeasor's liability limits. If there is no question about liability, and the liability carrier wants to pay its policy limits and get

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a release, the proposed settlement should be submitted to the underinsured motorist insurance carrier. If the insured desires that the underinsured motorist insurance carrier waive its subrogation rights, the insured or his or her counsel should request, in writing, that such a waiver be given and that the underinsured motorist carrier agree not to invoke as a defense any release or any covenant not to sue. The underinsured motorist carrier's decision to waive or not to waive its subrogation rights or to consent or not to consent to a settlement by its insured with the tortfeasor should depend upon whether the facts showed that its insured was 'legally entitled to recover damages' under the provisions of §32-7-23, and whether, as a practical consideration, the right of subrogation has value. All negotiations should be conducted in good faith, and any releases or covenants not to sue should be drafted to meet the approval of both the tortfeasor's liability carrier and the carrier of the underinsured motorist coverage. If they cannot agree, and such disagreement presents a justiciable controversy, then the injured party should sue to have his or her legal rights determined." (citations omitted).

Concerning the facts of *Hudson*, Justice Maddox proposed the following:

"I would hold that the release Hudson executed was subject to Auto-Owners' subrogation rights. This would be an equitable result, because the release executed by the plaintiff in favor of the tortfeasors specifically reserved to the plaintiff the right to recover the benefits payable under the terms of the Auto-Owners policy."

Bad faith

In the case of *Sanford v. Liberty Mutual Insurance Company*, 536 So.2d 941 (Ala. 1988), the court reversed the trial court's granting of the defendant's motion to dismiss the plaintiff's tort claims for bad faith refusal to pay an uninsured motorist claim and bad faith refusal to in-

vestigate the claim. The trial court had relied upon the cases of *Quick v. State Farm Mutual Automobile Insurance Company*, 429 So.2d 1033 (Ala. 1983); *Bowers v. State Farm Mutual Insurance Company*, 460 So.2d 1288 (Ala. 1984); and *Aetna Casualty & Surety, Inc. v. Beggs*, 525 So.2d 1350 (Ala. 1988). Many considered the decision in *Sanford* to be a reversal of these earlier cases. However, the majority of the court denied that it was reversing itself but suggested that the trial court simply misread its three earlier cases.

The court, in a *per curiam* decision, said:

"We perceive no public policy reason to distinguish between a 'bad faith' claim in an uninsured motorist context

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and a 'bad faith' claim in other two-party insurance contexts.

Justices Maddox and Steagall dissented:

"Our opinions in *Quick v. State Farm Mut. Auto. Ins. Co.*, 429 So.3d 1033 (Ala. 1983), *Bowers v. State Farm Mut. Auto. Ins. Co.*, 460 So.2d 1288 (Ala. 1984), and *Aetna Cas. & Sur. Co. v. Beggs*, 525 So.2d 1350 (Ala. 1988), are direct authority for holding that 'there can be no breach of an uninsured motorist contract, and therefore no bad faith, until the insured proves that he is legally entitled to recover damages from an uninsured or underinsured motorist.' *Quick*, 429 So.2d at 1035. In the instant case, liability and the amount of damages has not been determined, and plaintiff alleged no facts indicating that his insurer might be liable without such determination."

Conflict of laws—*Best v. Auto-Owners Insurance Company*, 540 So.2d 1381 (Ala. 1989)

In June 1985, Best was involved in an automobile accident in Blount County, Alabama. Best was, at all times relevant to this case, a resident of South Carolina. His vehicle was principally garaged in South Carolina, and he and his son were returning to their home in South Carolina after a visit with Best's son's fiancée.

Best and his son were seriously injured. A settlement was reached with the responsible driver, and his insurance company paid the limits of the driver's liability policy.

At the time of the accident, Best was covered by a policy of insurance issued by Auto-Owners in South Carolina. The

application for the policy was completed in South Carolina and expressly did not include coverage for underinsured motorist bodily insurance damage. Auto-Owners never received a premium for underinsured motorist coverage.

The issue before the court was whether the contractual obligations of the parties were governed by the policy, which was issued in South Carolina, or were governed by the law of the State of Alabama.

Best contended that his policy created underinsured motorist coverage because there was a clause which said, in essence, that when he operated his automobile in another state the policy would meet the requirements of any financial responsibility law of that state. The Alabama Supreme Court pointed out that Alabama is not a compulsory insurance state. Best voluntarily elected not to obtain underinsured motorist coverage in South Carolina and could not now receive such coverage in Alabama, which has no compulsory insurance requirement.

Timeliness of withdrawal by underinsurance carrier

In the case of *Ex Parte Edgar*, 543 So.2d 682 (Ala. 1989), the court held that an underinsurance carrier cannot make its withdrawal from a case conditional.

Dean was involved in an automobile accident January 14, 1987. On January 21, 1988, she filed a complaint against her liability insurance carrier, ALFA. ALFA was served with a complaint January 22, 1988. Dean subsequently amended her complaint February 1, 1988, stating a claim against ALFA for underinsured motorist benefits. She amended her complaint at the same time to name Edgar as a defendant, alleging that he negligently or wantonly caused the accident. ALFA was served with the amendment February 3, 1988, and filed a motion to dismiss the complaint February 7, 1988. ALFA amended its motion to dismiss February 25, 1988. Alternatively, it moved, pursuant to Rules 42(b) and 18(c) of the Alabama Rules of Civil Procedure, to have Dean's claim against it for insurance coverage resolved in a separate trial.

On May 2, 1988, ALFA filed a motion seeking to exercise its option not to participate in the trial of Dean's claims



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against Edgar. ALFA later amended this motion August 29, 1988. In the amendment, it stated that it was reserving its right to intervene in the case at a later date. Dean filed an objection to the court's allowing ALFA to withdraw from the case, stating that there was no authority to grant its motion to participate in discovery and to reserve the right to join the litigation at some future date. The trial court denied ALFA's requested withdrawal on September 27, 1988, stating that it was doing so because ALFA had failed to make a timely election. ALFA then petitioned the Alabama Supreme Court for a writ of mandamus, asking for an order directing the trial court to allow it to exercise its option to withdraw from the case. (The writ of mandamus also addressed another issue which does not concern uninsured motorist coverage).

The Alabama Supreme Court acknowledged that *lowe v. Nationwide Insurance Company*, 521 So.2d 1309 (Ala. 1988), provides a liability insurer with the absolute right to elect not to participate in the trial of its insured's claim against an underinsured motorist, provided the election is timely. The court went on to note that although an insurer may elect to withdraw very early in the case, as ALFA did in this case, *Lowe* does not require that it do so. The insurer has the option to withdraw from the case within any reasonable time after service of process. Whether the insurer's motion to withdraw is timely made is left to the discretion of the trial court. The court stated that it believed "that it would not be unreasonable for the insurer to participate in the case for a length of time sufficient to enable it to make a meaningful determination as to whether it would be in its best interest to withdraw."

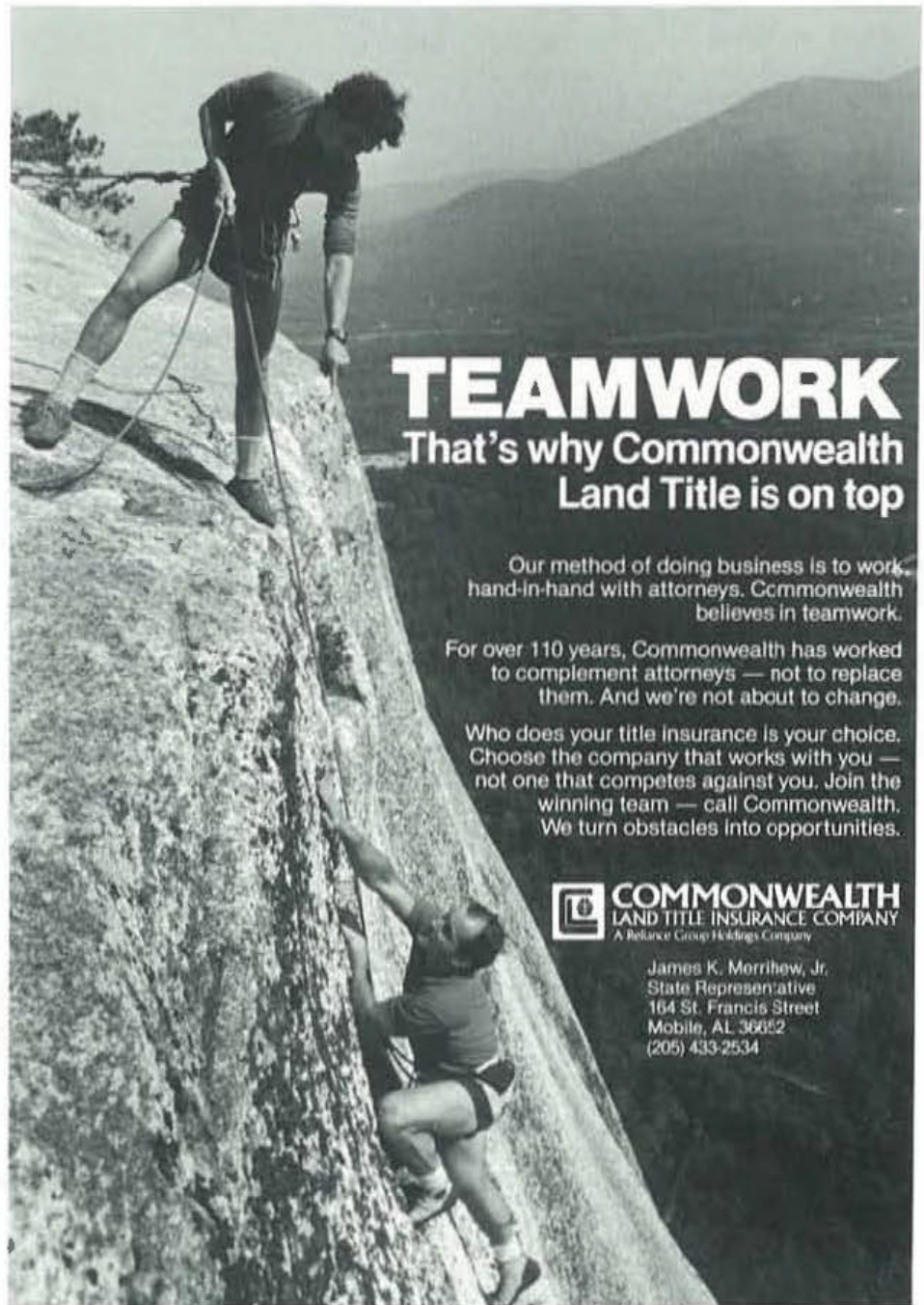
The court noted that in this instance, ALFA wanted out of the case, but only if it could monitor the progression of the case through the discovery process and later intervene if it desired to do so. The supreme court held that the trial court had no authority to grant the motion as postured by ALFA. The petition for writ of mandamus was denied.

Justice Jones concurred specially, noting that the opinion of the supreme court did not preclude ALFA from withdrawing as a party to the litigation even as of

the date of the supreme court's opinion, provided it no longer insists upon the conditions attached to its previous withdrawal attempt. Justice Jones further stated his opinion that the discretion of the trial court, with respect to the timeliness of the underinsured carrier's withdrawal, should be liberally exercised in favor of allowing the insurer a reasonable time within which to conduct the necessary discovery and exercise an informed discretion concerning staying in the litigation or withdrawing from the litigation.

Conclusion

While the Alabama Supreme Court has resolved several of the puzzling issues involving underinsured motorist coverage, this area of Alabama law remains in its adolescence. It is the fastest growing body of civil law in Alabama at the present time, and undoubtedly it will continue to take form in the months and years to come. ■




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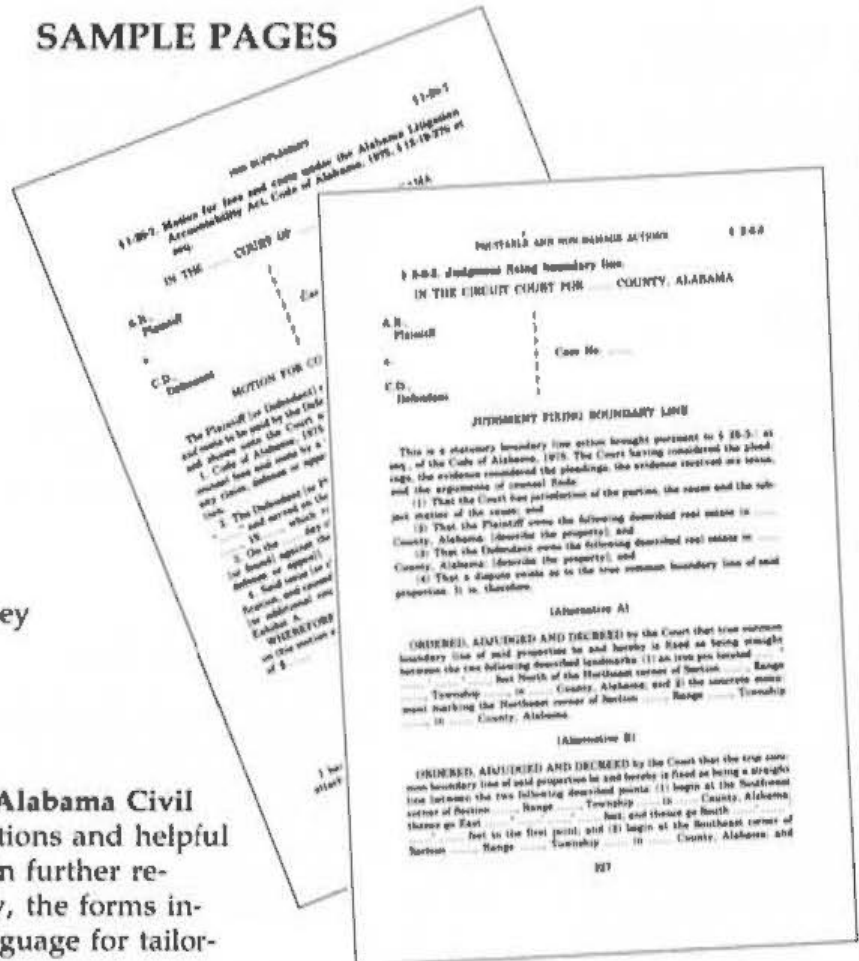
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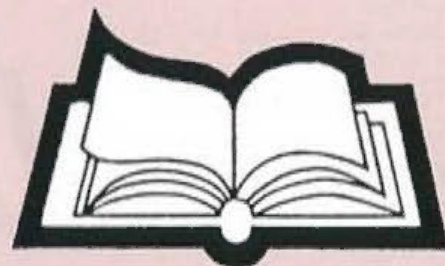
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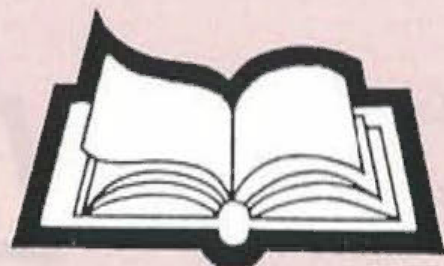
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Building Alabama's Courthouses

by Samuel A. Rumore, Jr.

The following continues a history of Alabama's county courthouses—their origins and some of the people who contributed to their growth. *The Alabama Lawyer* plans to run one county's story in each issue of the magazine. If you have any photographs of early or present courthouses, please forward them to:

Samuel A. Rumore, Jr.
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Winston County

The people of Winston County have a proud and unique heritage. At the time of the Alabama Secession Convention in 1861, they voted to remain loyal to the federal government. After Alabama left the Union, a meeting was held to discuss whether Winston County should secede from Alabama. Though no formal action was taken, the county forever received the sobriquet "Free State of Winston." (This story is the subject of an annual outdoor theatrical production entitled "The Incident at Looney's Tavern," performed near Double Springs.)

Winston County is located in the rural hill country of northwest Alabama. Because of the hills, the county was primarily composed of small farms rather than large plantations, and slave ownership was rare. These farmers had little in common with the Black Belt planters to the south. Politically they were Jacksonians and believed that no state could legally secede. Basically, they desired to be left alone and remain neutral.

However, after a conscription act was passed in 1862, Confederate recruiters came into the county seeking new military recruits. Many young men of military

age were forced into service. Those who refused were taken prisoner or even shot on the spot. Some fled to the caves and hills of the surrounding territory. Some met at Natural Bridge (still a local landmark) to escape to federal lines. Many Winstonians volunteered to serve in the Union Army. Ever since that time, Winston County has remained a predominantly Republican political stronghold.

Winston County was created February 12, 1850, out of territory taken primarily from Walker County. Its original name was Hancock County for John Hancock of Revolutionary War and signature fame.

The county name was changed January 22, 1858, to honor John A. Winston, governor of Alabama from 1853 to 1857. Winston, who was born in Madison County in 1812, is considered the first native-born Alabamian to have become governor, even though at the time of his birth Madison County was part of the Mississippi Territory. Winston was an independent leader who gained the title of "veto governor" because of his numerous disagreements with the Legislature. His legacy as governor clearly reflects the intense independence of the hill country Winston County citizenry, making his name an appropriate choice.

The first county seat was established at a site called Houston. One source attributes the name to Sam Houston of Texas. Another claimed that the town was named for a local family. County leaders soon concluded that the location was too isolated and they moved the county seat, which they continued to call "Houston," three miles south shortly after the county name change. "New" Houston was located on more level land and was more accessible than the former town site. The courthouse, like its predecessor, was made of hewn logs, but was larger and had two stories. No trace remains of this courthouse, although the original log jail at Houston still stands.

Due to its opposition to the Confederate cause, a bill was introduced in the state Senate in 1862 to abolish Winston County. The boundaries of the adjoining counties would be extended to take in all of the territory of Winston. This bill passed by a vote of 21 to 1. A similar resolution was proposed in the House, but Winston County was spared dissolution by a vote there of 43 to 26. In later years the Legislature did remove a por-



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.



Winston County Courthouse

tion of Winston County land. Cullman County was created in 1877 out of portions of Blount, Morgan and Winston counties.

After the creation of Cullman County, Houston was no longer centrally located in Winston. In 1884, the Legislature called for a county seat election. The people were to decide if they wanted their courthouse at Houston or the geographical center of the county. As usual in these elections, "center" won. The county commissioners then chose a site at the "double springs" of Clear Creek, a longtime camping ground. Though this site was one and a half miles west of the exact center of the county, the selection was approved. Streets and lots were laid out surrounding the courthouse site, and the town became Double Springs.

The first courthouse built in Double Springs burned August 5, 1891. A new one was constructed on the same site in 1894. It was built of locally quarried sandstone. Andrew Jackson Ingles, the legislator who had proposed the public election for a centrally located county seat, was the contractor. The courthouse cost \$12,444. In 1911 an annex was added for \$4,000.

In 1929 substantial remodeling expanded this courthouse. Additions were made to the front and rear portions of the building. These new wings were also constructed of locally quarried sandstone and reinforced with concrete. The architectural firm for the project was Warren, Knight & Davis of Birmingham, and the contractor was Burdick & Woodruff. The cost was \$70,000.

A one-story addition was made to the eastern side of the building in the 1950s, filling in the area between the 1929 wings. A jail wing was added to the rear in 1962. And in the 1980s, a second-story wooden addition was added to the 1950's construction.

The Winston County Courthouse is a good example of the Neoclassical Revival style of architecture. The structure contains a classical pediment with a four-columned portico, and the columns are Tuscan. The main courthouse section contains a clock tower with a cupola topped by a finial. This building was named to the National Register of Historic Places August 27, 1987. ■

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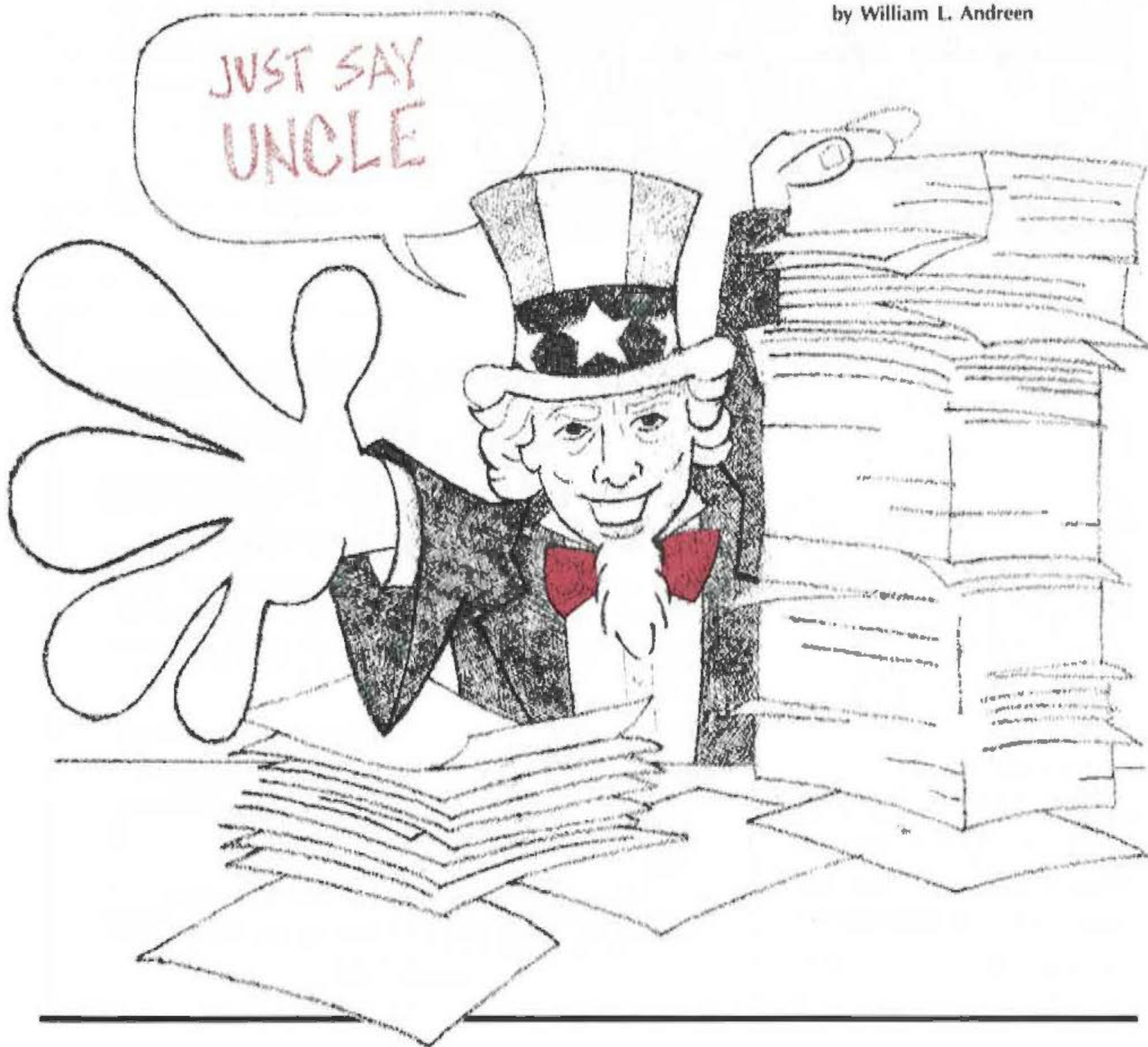
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An Introduction to Federal Administrative Law Part I: The Exercise of Administrative Power and Judicial Review

by William L. Andreen



(Part one of a two-part series; the second article will appear in the January 1990 *Alabama Lawyer*.)

This century has witnessed the rise of an enormous federal bureaucracy. The impact of this bureaucracy on contemporary life and affairs is staggering. From the provision of social security benefits to the distribution of highway funds to the regulation of air and water pollution, the presence of the federal government is felt at virtually every conceivable level of American society. It would be no exaggeration, therefore, to say that our nation is an administrative state. Moreover, the most salient feature of that administrative state lies in the sheer number, power and diversity of federal administrative agencies.

The administrative state, however, did not suddenly blossom forth during the 20th century. Its roots are much older. As early as 1789, Congress passed two statutes which placed significant administrative responsibility in the hands of federal agencies.¹ Nevertheless, the administrative branch of the federal government grew slowly until the pace of industrialization began to quicken during the latter half of the 19th century.² As the need to control monopolies, protect public health and regulate trade grew, Congress increasingly turned to administrative bodies to which it could delegate authority to care for the day-to-day details of governing. Thus, the first modern administrative agency, the Interstate Commerce Commission, was created in 1887. Building upon that model, Congress broadened its regulatory oversight during the early 20th century to include food and drugs, shipping, unfair competition and nascent industries such as radio.

The New Deal led to a tremendous expansion of regulatory power at the federal level. Regulation was extended to the securities markets, labor relations, trucking and the airlines. The 1960s and 1970s, furthermore, saw another leap in regulatory activity, this time focusing primarily on environmental protection, consumer safety and social welfare. As a re-

sult of all of these developments, the role of federal administrative agencies looms large today in the articulation and implementation of public policy in the United States.

Legal theory, however, was rather slow in responding to the rise of the administrative state. It was not until the Administrative Procedure Act (APA) of 1946³ that a uniform set of legal principles was adopted for application to federal agencies. The APA has become the foundation on which the field of federal administrative law stands. From that basic foundation, Congress and the federal courts have continued to struggle with the question of how to control the vast and pervasive authority placed in the hands of executive branch agencies.

This article is the first in a two-part series on federal administrative law that is designed as a primer for the general practitioner. Part I in this series will focus upon the exercise of rulemaking and adjudicatory power by federal agencies and the standards used by the federal judiciary in reviewing administrative decision-making. Part II, in turn, will discuss the threshold problems involved in obtaining judicial review of agency action.

1. The exercise of administrative power

A. The distinction between rulemaking and adjudication

The conventional way to introduce the methods by which agencies act is to distinguish administrative rulemaking from adjudication. Rulemaking is often de-

scribed as quasi-legislative action since it resembles the manner in which a legislature enacts a statute. Rulemakings are aimed at developing policy standards and norms for future application. The procedures for rulemaking therefore are designed to solicit general facts and a broad range of opinion. Administrative adjudication, on the other hand, is commonly termed quasi-judicial due to its affinity for judicial process. Adjudications often involve a determination of whether a party acted in accordance with an existing legal norm and, therefore, are typically retrospective in nature and accusatory in flavor.

1. Under the Constitution

Two early Supreme Court decisions indicate, at least in a general way, when an agency may use quasi-legislative procedures or must use quasi-adjudicative procedures. In *Londoner v. Denver*,⁴ a city agency ordered the paving of a street and assessed the cost to the neighboring landowners. Since some of the lots were irregular in shape, the agency was not able to consistently apply a simple rule relating cost to front-footage. The agency, however, relied upon a quasi-legislative model to apportion the costs and thus gave the landowners notice and an opportunity to comment only in writing. Their request for an oral hearing was denied.⁵ Without much analysis, the Court held that the refusal to grant an oral hearing constituted a violation of due process.⁶ Rather than relying upon quasi-legislative procedures, the situation demanded quasi-adjudicative proce-

William L. Andreen currently serves as professor of law at the University of Alabama School of Law where he specializes in environmental law and administrative law. He received his undergraduate degree in 1975 from the College of Wooster and his law degree in 1977 from the Columbia University School of Law. Prior to joining the law faculty at the University of Alabama in 1983, Professor Andreen was assistant regional counsel for the U.S. Environmental Protection Agency in Atlanta.



dures that would afford the landowners an opportunity for oral argument and the presentation of evidence.

On the other hand, *Bi-Metallic Investment Co. v. State Board of Equalization*⁷ involved an order by a state agency that increased the value of all taxable property in Denver by 40 percent. Although the agency gave the taxpayers no opportunity to be heard and the order clearly deprived the taxpayers of property through increased taxation, the Court found no constitutional infirmity. Justice Holmes distinguished *Londoner* by saying that in that instance a relatively small group of persons was involved, who were affected in individually unique ways.⁸ The agency, therefore, was actually engaged in adjudicatory action judging different persons on the basis of divergent and disputed facts. By contrast, *Bi-Metallic* concerned a general rule that applied to all landowners in the same way. Thus, the agency was making a policy-oriented decision which was more legislative in character.

2. Under the Administrative Procedure Act

Building upon this constitutional distinction, administrative action under the Administrative Procedure Act⁹ is characterized as either rulemaking or adjudication. The object of rulemaking, of course, is the establishment of standards for future application rather than the evaluation of a particular person's past conduct or eligibility for a license or permit. Consequently, the issues in a rulemaking do not generally relate to specific evidentiary facts, but focus upon policy-type conclusions which are drawn from a wide variety of sources. Adjudication, on the other hand, usually involves a factually-oriented determination as to whether a party's past conduct was lawful or whether a party is entitled to a permit or license.

B. Rulemaking under the Administrative Procedure Act

1. Informal rulemaking

Informal rulemaking is the most common way in which regulations are promulgated at the federal level. Informal rulemaking, also known as notice-and-comment rulemaking, requires an agency to publish a notice of proposed

rulemaking in the Federal Register setting forth, *inter alia*, the terms or substance of the proposal.¹⁰ Following this notice, the agency must "give interested persons an opportunity to participate in the rule-making through submission of written data, views, or arguments with or without opportunity for oral presentation."¹¹ An agency is under no obligation to hold oral hearings with regard to an informal rulemaking, although, in its discretion, an agency may decide to do so.

After considering the relevant material presented by the public, the agency must publish both the final rule and "a concise general statement" of the rule's basis and purpose which is generally referred to as a preamble.¹² In many instances, the final rule is then subject to judicial review.

Most preambles, in recent years, have been much more detailed than the words "concise general statement" would suggest. This has occurred because the federal courts during the 1970s began to demand a reasoned elaboration of an agency's thinking to aid the judiciary in reviewing complicated rulemakings.¹³ Furthermore, the preamble also must respond to well-supported, material arguments made by the public during the comment period.¹⁴ Thus, the courts can determine whether an agency is truly considering the comments made by the public.

Informal rules promulgated pursuant to notice-and-comment procedures are substantive law, binding on agencies, courts and private parties.¹⁵ However, an agency may adopt interpretive rules, procedural rules and general statements of policy without satisfying the requirements of notice-and-comment rulemaking.¹⁶ Such rules, though, do not have the force of law and are not binding.¹⁷

2. Formal rulemaking

Under the APA, informal rulemaking procedures apply to all substantive rules unless a rule is "required by statute to be made on the record after opportunity for an agency hearing."¹⁸ An agency, therefore, must use formal rulemaking procedures when its enabling statute so requires.

Formal rulemaking begins the same way as informal rulemaking—with public notice of the proposed rule.¹⁹ After

notice, however, the requirement for public comment is replaced with procedures which are nearly identical to those called for in a formal adjudication.²⁰ Thus, the agency, must hold an evidentiary hearing where the parties have the right to present oral and documentary evidence and cross-examine witnesses.²¹ Unlike most formal adjudications, however, the agency may decide to receive all or part of the evidence in written form as long as a party would not be prejudiced.²² At the conclusion of the hearing, the agency must base its findings and conclusions solely upon the evidentiary record produced during the course of the proceeding.²³

Formal rulemaking generally involves broad, complicated questions of policy which will affect substantial numbers of people. Formal trial-type procedures, however, are better designed to resolve factual disputes between a few parties rather than to promulgate rules. Hence, formal rulemakings typically grind on very slowly with dozens of parties presenting witnesses and dozens of parties conducting cross-examination. The requirement of formal rulemaking, thus, often will result in a procedural morass and, eventually, the abandonment or relaxation of a regulatory program.

Perhaps as a reaction to these difficulties, the presumption in rulemaking cases favors the use of informal procedures. Formal rulemaking, therefore, is triggered solely by a statutory provision that (1) refers to a hearing and (2) recites the words "on the record" or some equivalent that clearly reveal the intent of Congress to require formal procedures.²⁴

C. Adjudication under the Administrative Procedure Act

1. Formal adjudication

The APA requires the use of formal adjudication only in cases of an "adjudication required by statute to be determined on the record after opportunity for an agency hearing."²⁵ Affected persons must be given notice of the hearing, which includes: (1) the time, place and nature of the hearing, (2) the legal authority for the hearing, and (3) the matters of law and fact asserted.²⁶ Following notice, the opposing parties are given a chance to respond by submitting legal arguments and statements of fact.²⁷

Formal adjudications are presided over by the agency, one or more members of the body that comprises the agency, or an Administrative Law Judge (ALJ).²⁸ In most cases, however, the presiding officer is an ALJ. Although ALJs are agency employees, they possess a great deal of independence. Their compensation is fixed, not by the agency, but by the Office of Personnel Management, independent of agency recommendations.²⁹ Furthermore, ALJs can be disciplined only for "good cause" by the Merit Systems Protection Board.³⁰ ALJs are assigned to cases in rotation and may not perform duties which are incompatible with their judicial responsibilities.³¹ Finally, ALJs may not be supervised by an agency official who has an investigative or prosecutorial role.³²

A party to a formal adjudication may appear in person or through counsel³³ and may present oral or documentary evidence.³⁴ A party may also cross-examine opposing witnesses to the extent required "for a full and fair disclosure of the facts."³⁵ ALJs are not required, in most instances, to adhere to the same rules of evidence which apply in federal courts. The APA, in fact, directs an ALJ to receive "[a]ny oral or documentary evidence" as long as it is not "irrelevant, immaterial or unduly repetitious."³⁶

Following the evidentiary hearing, the ALJ generally issues an initial decision, which contains the "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record."³⁷ The initial decision becomes the final decision of the agency unless an appeal is taken to the agency.³⁸ On appeal, the agency has the power to undertake *de novo* review of the ALJ's initial decision.³⁹

2. Informal adjudication

Informal adjudication (or informal action) describes all agency decisions not encompassed by rulemaking or formal adjudication. It often includes the processing of applications and claims, tests and inspections, advice, and similar routine decisions. In fact, the vast bulk of federal decisionmaking can be termed informal adjudication. Due to the wide variety of informal administrative decisions, the APA establishes no procedural

framework for informal adjudication. The procedures governing informal adjudication, therefore, will be those, if any, established by statute or by the agency, required by the Constitution or imposed by the judiciary.

D. Agency discretion in choosing a procedural mode

Many agencies often confront a choice between adopting a substantive rule through informal rulemaking or announcing a general principle of law through formal adjudication. Such a choice only will arise, of course, when an agency is vested with the statutory authority to both promulgate substantive rules and adjudicate cases dealing with the same subject matter.

While the federal courts have expressed a strong preference for the rulemaking model when it comes to the creation of law, they recognize that not every new principle of law can be cast in the form of a regulation. Many problems, for example, cannot be anticipated until presented in the context of a real

case. Or an agency may not have had enough experience with a problem to establish a rigid rule prior to the adjudication of a concrete controversy. Consequently, the federal courts have not imposed any inflexible requirement that agencies establish general rules of law solely through rulemaking.⁴⁰ In short, agencies have discretion to announce a new principle by means of rulemaking or to announce and apply a new principle via adjudication.⁴¹

II. Judicial review of administrative decisions

A. Questions of law and policy

The APA clearly states that a reviewing court shall decide all relevant questions of law.⁴² Thus, if an agency's statutory interpretation is inconsistent with the language of a statute, as viewed in light of its legislative history and its purposes, a court must give effect to the intent of Congress.⁴³ However, if an agency's interpretation of a statute it administers does

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not contradict the statute's language or frustrate its purpose, the role of a reviewing court is limited. The agency's construction will be upheld if it is sufficiently reasonable, even if it is not the most reasonable interpretation in the eyes of the court.⁴⁴ The amount of deference shown to an agency's interpretation increases in cases where an agency interpretation was made contemporaneously with the statute's passage, has been consistently adhered to, or involves questions of scientific or technical expertise.⁴⁵

The Supreme Court recently articulated one rationale for this principle of deference. In cases where a statute is silent or ambiguous with respect to a particular issue, the Court believes that Congress has delegated to the administrative agency, rather than the courts, the task of filling the gap. Thus, the agency must make a policy choice, and the federal courts have a duty to respect the legitimate and reasonable policy choices made by an agency.⁴⁶

B. Questions of fact and the exercise of discretion

1. De novo review

De novo review of agency findings of fact to determine whether they are "unwarranted" is authorized by 5 U.S.C. §706(2)(F) in two limited situations. Such independent judicial factfinding is called for (1) when an action is adjudicatory and the agency's procedures for factfinding are inadequate, or (2) when new issues are raised in a proceeding to enforce nonadjudicatory action.⁴⁷

2. Substantial evidence

Reviewing courts will examine an agency's factual findings under the substantial evidence test whenever the agency acted pursuant to sections 556 and 557 of the APA.⁴⁸ It is, therefore, applied to the review of formal rulemakings and formal adjudications.⁴⁹

The Supreme Court has defined substantial evidence as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁵⁰ The Court later amplified this definition by holding that a reviewing court may determine whether evidence is substantial only after examining "whatever in the record fairly detracts from its weight."⁵¹

A court, therefore, must consider the record as a whole, taking into account not only the evidence which supports the agency's finding, but any evidence that conflicts with it.

Consistent with the liberal rules of evidence in agency proceedings, hearsay evidence is deemed sufficient to constitute substantial evidence as long as the hearsay is of a type relied upon by reasonably prudent persons in conducting their own affairs.⁵²

3. The arbitrary/capricious test

In situations where an agency took action through informal rulemaking or informal adjudication, the APA requires a reviewing court to decide whether the agency's factual decision was arbitrary, capricious, or an abuse of discretion.⁵³ This standard of review is, theoretically at least, the most deferential form of review. According to the Supreme Court, a court must consider whether the decision was based on a:

"consideration of the relevant factors and whether there has been a clear error of judgment Although this inquiry into the facts is to be searching and careful, the ul-

timate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency"⁵⁴

In applying this standard, the "focal point for judicial review" is the administrative record that was created at the agency level.⁵⁵ Therefore, the validity of the agency's determination rests solely on the administrative record which is already in existence.⁵⁶

C. Hard look review and informal rulemaking in an era of high technology

During the 1970s, informal notice-and-comment rulemaking evolved into a highly visible and significant force in the administrative process. A host of new statutes, many of which involved environmental or consumer protection, were enacted that predicated their regulatory schemes upon a plethora of standards to be established through informal rulemaking procedures. Those rulemakings are often quite complicated, scientifically and technically, and likely involve significant economic and social impacts. Reacting to this development, the federal courts have fashioned a rigorous form of review that is commonly referred to as a hard look.⁵⁷

The origins of this hard look review may be traced to *Citizens to Preserve Overton Park, Inc. v. Volpe*,⁵⁸ which called for judicial review under the arbitrary and capricious test that would be "narrow" and yet "searching."⁵⁹ While elaborating upon the nature of this test, the D.C. circuit has stated that, although the standard is "highly deferential" to agency findings, it does not require a court to "rubberstamp the agency decision."⁶⁰ Thus, especially in highly technical cases, a reviewing court must probe deeply into the administrative record to discern whether the agency has exercised its discretion in reasonable fashion. This heightened type of scrutiny is not intended to allow the court to supplant the agency's technical expertise, but merely to allow the court to understand whether the agency has based its decision upon a consideration of the relevant factors.⁶¹

In order to perform this task, the courts have required agencies to articulate the grounds for an informal rulemaking (in

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the preamble) in far more detail than had been required before 1970.⁶² The courts basically want an agency to explain the reasons why it chose one course of action over another, the facts that choice is based upon, and the considerations the agency found persuasive.⁶³ In addition, the courts have held that agencies possess an obligation to respond to significant comments made during the public comment period.⁶⁴

Potential challengers to agency informal rulemaking have a concomitant obligation in the courts' view. They must realize that the success of open and participatory procedures depends upon them as well as upon the agencies. Consequently, the courts have required challengers to make substantial and good faith use of the opportunities to comment. Therefore, technical, factual or policy concerns should be raised during the comment period. If they are not raised at that time, reviewing courts will give the complaining party rather limited latitude to raise those issues during the course of subsequent judicial review.⁶⁵

The hard look doctrine has also appeared in the context of deregulation. In *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*,⁶⁶ the Supreme Court held that the Department of Transportation had not supplied a sufficiently reasoned analysis for rescinding a rule which required the installation of passive restraint systems in all automobiles. In the decision, the Court summarized the hard look doctrine in the following fashion:

"The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made' . . . Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be

ascribed to a difference in view or the product of agency expertise."⁶⁷ Thus, the judiciary may be seen not only as a mechanism which guards against the unauthorized expansion of regulatory power, but also as a bulwark against the unjustified dilution or elimination of regulatory standards.

Conclusion

The final article in this series will address the various threshold questions that confront parties seeking judicial review of agency action such as obtaining jurisdiction, statutory preclusion of review, standing and timing. ■

FOOTNOTES

- 1 Stat. 29 (1789) (providing for the collection of import duties); 1 Stat. 95 (1789) (dealing with the provision of benefits to veterans of the Revolutionary War).
2. See J. Landis, *The Administrative Process* 6-8 (1918).
3. 5 U.S.C. §§ 551-559, 701-706 (1982).
4. 210 U.S. 373 (1908).
5. *Id.* at 385-86.
6. *Id.*
7. 239 U.S. 441 (1915).
8. *Id.* at 446.
9. 5 U.S.C. §§ 551-559, 701-706 (1982).
10. 5 U.S.C. § 553(b).
11. 5 U.S.C. § 553(c).
12. *Id.*
13. See, e.g., *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 850 (D.C. Cir. 1972).
14. See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 392-95 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).
15. See, e.g., *United States v. Nixon*, 418 U.S. 683, 695 (1974); *Pacific Gas & Electric Co. v. FPC*, 306 F.2d 33, 38 (D.C. Cir. 1974).
16. 5 U.S.C. § 553(b).
17. See, e.g., *General Motors Corp. v. Ruckelshaus*, 724 F.2d 979, 985 (D.C. Cir. 1983); *Pacific Gas & Electric Co.*, 306 F.2d at 38-39.
18. 5 U.S.C. § 553(c).
19. 5 U.S.C. § 553(b).
20. See 5 U.S.C. § 553(c).
21. 5 U.S.C. § 556.
22. 5 U.S.C. § 556(d).
23. 5 U.S.C. §§ 556(e), 557.
24. *United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 241 (1973).
25. 5 U.S.C. § 554(a).
26. 5 U.S.C. § 554(b).
27. 5 U.S.C. § 554(c).
28. 5 U.S.C. § 556(b).
29. 5 U.S.C. § 5372 (1982).
30. 5 U.S.C. § 7521 (1982).
31. 5 U.S.C. § 3105 (1982).
32. 5 U.S.C. § 554(d).
33. 5 U.S.C. § 555(b).
34. 5 U.S.C. § 556(d).

35. *Id.*
36. *Id.*
37. 5 U.S.C. § 557(b), (c).
38. 5 U.S.C. § 557(b).
39. *Id.*
40. See, e.g., *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).
41. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).
42. 5 U.S.C. § 706 (1982).
43. *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 155, 170-71 (D.C. Cir. 1982).
44. *National Wildlife Fed'n.*, 693 F.2d at 171.
45. *Id.* at 182.
46. *Chevron*, 467 U.S. at 865-66.
47. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).
48. 5 U.S.C. § 706(2)(E).
49. *Citizens to Preserve Overton Park*, 401 U.S. at 414.
50. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229.
51. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).
52. See *Richardson v. Perales*, 402 U.S. 389 (1971).
53. 5 U.S.C. § 706(2)(A).
54. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416.
55. *Camp v. Pitts*, 411 U.S. 130, 142 (1973).
56. *Id.* at 143.
57. See, e.g., *National Lime Ass'n v. EPA*, 627 F.2d 416, 429-30 (D.C. Cir. 1980).
58. 401 U.S. 402 (1971).
59. *Id.* at 416.
60. *Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C. Cir. 1975), *cert. denied*, 426 U.S. 941 (1976).
61. 541 F.2d at 35-37.
62. See, e.g., *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 851-52.
63. See *Industrial Union Department, AFL-CIO v. Hodgson*, 499 F.2d 467, 477 (D.C. Cir. 1974); *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1147 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 1042 (1980).
64. See, e.g., *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 392-95.
65. See *Wyeth-Hausser Co. v. Costle*, 590 F.2d 1011, 1028 (D.C. Cir. 1978).
66. 463 U.S. 29 (1983).
67. *Id.* at 43.



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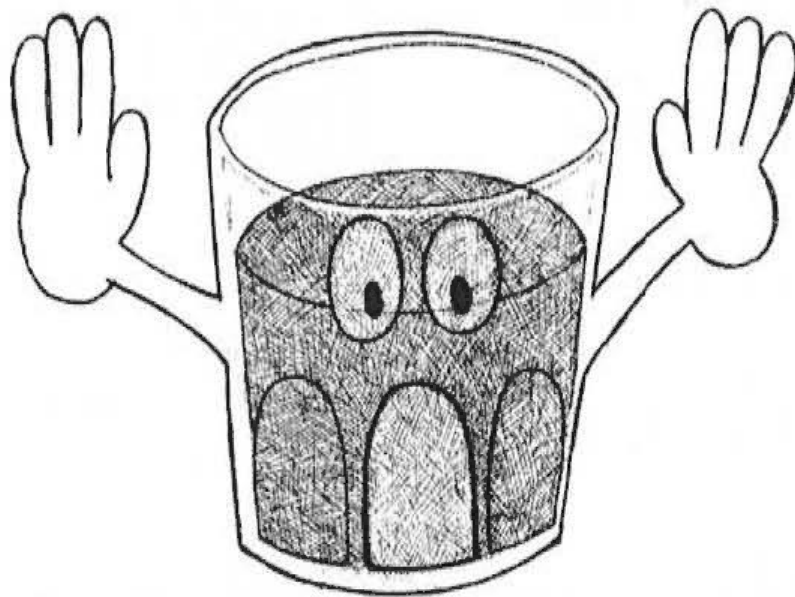
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Dram Shop Liability

by Kenneth J. Mendelsohn



I. History

In the 19th century, patrons of English taverns often would order drinks by the "dram," which was a unit of measurement. This is similar to people today who may order whiskey by the "shot." Consequently, English taverns were referred to as "dram shops."

Under the English common law, liquor liability essentially did not exist. A tavern owner could not be held liable if an intoxicated patron injured another person. 1 *Mosher Liquor Liability Law*, §2.01[2].

In 1876, Alabama adopted this common law approach and held that a claim for negligence could not be maintained against anyone for the negligent dispensement of alcohol. *King v. Henkie*, 80 Ala. 505 (1876). Consistent with the common law and the other cases being decided in the United States, *King* was based upon the concept that the consumption of alcohol, and not the serv-

ing of alcohol, was the proximate cause of the intoxication.

In the late 19th century, public drunkenness was becoming a problem. The prohibition movement began and many states enacted "dram shop" statutes designed to discourage the consumption of alcohol. The protection of those injured by intoxicated persons was only a minor concern. 1 *Mosher Liquor Liability Law*, §2.01[2].

In 1907 and 1909 Alabama enacted statutes that allowed private causes of action for the illegal disbursement of alcoholic beverages. These statutes, now codified as Alabama Code §6-5-70 and §6-5-71, also were intended to enforce prohibition. *Webb v. French*, 152 So. 215 (Ala. 1934). They showed "a policy on the part of the law-making body to discourage the illegal sale of alcoholic beverages." *Phillips v. Derrick*, 54 So.2d 320

(Ala.Civ.App. 1951). And they were intended to "suppress the evils of intemperance." *Martin v. Watts*, 508 So.2d 1136 (Ala. 1987).

Lawyers and the public often refer to both statutes as the Dram Shop Act. Actually, there are two separate statutes, and each must be considered separately. Section 6-5-70, known as the Civil Damages Act, essentially provides that a parent or guardian of a minor child may bring a cause of action against someone who unlawfully provides alcoholic beverages to the minor child. Section 6-5-71, known as the Dram Shop Act, allows certain third persons who have been injured by an intoxicated person to bring suit against the one who furnished the alcoholic beverages contrary to the provisions of law.

Until the 1980s, few cases were filed under these statutes. The dramatic increase in alcohol-related motor vehicle accidents, coupled with the increased public awareness and distaste for drinking and driving, led to a dramatic increase in the number of filings under these statutes and under common law theories of negligence. The recent decisions have eliminated some of the confusion related to this area of law. Unfortunately, there still remain many questions pertaining to these types of cases. This article will attempt to review the history of this area of law, clarify the previously uncertain areas, and identify those areas that still pose questions to the practicing attorney.

II. Common law negligence

In *King v. Henkie*, 80 Ala. 505 (1876), the Alabama Supreme Court held that there was no common law cause of action for negligently dispensing alcohol. In 1979, the Alabama Supreme Court reviewed this issue and again chose to follow the *King* decision. *DeLoach v. Mayer Electric Supply Company*, 378 So.2d 733 (Ala. 1979). In doing so, the court noted that the majority of jurisdictions also had refused to recognize such a common law cause of action.

In 1984, the Alabama Supreme Court distinguished those cases and recognized a common law cause of action for the negligent sale of alcohol to a person who was visibly intoxicated. *Buchanan v. Merger Enterprises, Inc.*, 463 So.2d 121 (Ala. 1984). The court noted that the

Dram Shop Act requires that the furnishing of alcohol be "contrary to the provisions of law." The court determined that the Dram Shop Act did not apply, under the facts of that case, because the Alabama Legislature inadvertently had repealed the statutory provision prohibiting the sale of alcoholic beverages to a visibly intoxicated patron. Subsequently, the Alabama Alcoholic Beverage Control Board promulgated Regulation 20-X-6-02 making it unlawful to serve alcohol to individuals "acting in a manner as to appear to be intoxicated." Nevertheless, at the time the cause of action arose, there was no prohibition against the sale of alcoholic beverages to adult intoxicated patrons and the Dram Shop Act could not apply.

The supreme court noted that the times had changed drastically since the *King* decision. As an example, the court pointed out that, "during *King's* day most people walked or rode in horsedrawn carriages, but today, lounge patrons typically drive motor vehicles." *Id.* at 125.

In a very thorough and well-reasoned opinion, the court based its decision on the concept of "foreseeability" and stated the following:

"The ultimate test of the existence of a duty to use due care is found in the foreseeability that harm may result if care is not exercised Common experience dictates that when a person is imbibing alcoholic beverages that person reaches a level of toxicity after which continued imbibing will render him unable to operate an automobile safely." *Id.* at 126.

The court found that it was reasonable to conclude, under the facts of this case, that at some point during the day, the defendant's employee should have foreseen that the customer was becoming "so intoxicated that to continue serving him alcohol would create an unreasonable risk of harm to third persons." *Id.*

As to the proximate cause issue, the court stated:

"In situations such as the one at bar, where liquor is sold under a license for on-premises consumption to one who (sic) the seller knows or should know will later attempt to drive, if Courts cling steadfastly to the myth that the continued selling of alcohol to a visibly intoxicated patron cannot be the proximate cause of the third party's injuries, they are wearing blinders when it comes to observing the ordinary course of events.

"The modern view and probably the majority view, in cases involving a liquor vendor's liability to third persons is that furnishing of intoxicants may be the proximate cause of the injuries." *Id.* at 126.

In *Putnam v. Cromwell*, 475 So.2d 524 (Ala. 1985) the Alabama Supreme Court expanded the holding in *Buchanan* and found that a common law cause of action could be maintained against a liquor licensee for the distribution of alcoholic beverages by its employee. At the time this cause of action arose, it was only illegal for a liquor "licensee" to sell alcoholic beverages to a minor. The Code did not specifically provide that it was illegal for an agent of the licensee to make the sale. The Legislature subsequently amended the law, specifically making it unlawful for any licensee to directly or by his agents provide alcoholic beverages to a minor. Alabama Code, §28-3A-25 (a)(3).

In that case, the trial court granted summary judgment on the grounds that the sale was made by an employee of the licensee and not by the licensee itself. The trial court concluded that there was no "sale" contrary to the provisions of law, and, thus, the dram shop statute did not apply. The Alabama Supreme Court reversed the trial court. In doing so, it adopted the common law doctrine of respondeat superior and held the defendant liable for the unlawful act by its agent within the line and scope of his employment.

In 1987, the Alabama Supreme Court reviewed the *Buchanan* and *Putnam* decisions in *Ward v. Rhodes, Hammonds & Beck, Inc.*, 511 So.2d 159 (Ala. 1987). The court held that the plaintiff did not have a direct common law cause of ac-

tion against a server of alcoholic beverages "under the facts of this case." *Id.* at 164. The supreme court rejected the plaintiff's contention that *Buchanan* "created a new cause of action for negligent dispensing of alcoholic beverages by a licensed vendor." *Id.* at 165.

On the same day, the supreme court decided the case of *Martin v. Watts*, 508 So.2d 1136 (Ala. 1987). In that case, the court, without going into detail, also held that a common law cause of action did not "lie in this case."

Some attorneys theorize that the *Ward* and *Martin* cases abolished the common law cause of action. Certainly, *Ward* and *Martin* indicate that if a common law cause of action exists, it only exists in the narrow exceptions created by *Buchanan* and *Putnam*. On the other hand, in *Ward* and in *Martin* the supreme court specifically provided that there was no common law cause of action "under the facts of those cases." Historically, this language by the supreme court indicates that it has not foreclosed the possibility of such a cause of action in a proper case. Accordingly, it is this writer's opinion that under the appropriate set of facts, the supreme court will ultimately recognize a common law cause of action for the negligent distribution of alcohol. To do otherwise would be contrary to the announced public policy of the state and that is to discourage drunken driving.

More importantly, the *Buchanan* and *Putnam* cases stand for the proposition that there is a common law cause of action whenever there is a hiatus in the law. As stated by the supreme court in both cases:

"Legislative-created principles of dram shop liability, not fully implemented by

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the acts themselves, can be effectuated by a common law negligence action."

It must be noted that upon review of all of the dram shop related cases, the supreme court has hesitated to adopt a common law approach in light of the fact that the majority of jurisdictions, thus far, also have refused to recognize such a cause of action. There is a growing trend among the jurisdictions adopting common law negligence. If the minority of jurisdictions eventually shifts to become the majority, then the Alabama Supreme Court likely will follow the majority and adopt a common law cause of action.

III. Statutory law

The Dram Shop Act, §6-5-71, provides as follows:

"(a) Every wife, child, parent or other person who shall be injured in person, property or means of support by any intoxicated person or in consequence of the intoxication of any person shall have a right of action against any person who shall, by selling, giving or otherwise disposing of to another, contrary to the provisions of law, any liquors or beverages, cause the intoxication of such person for all damages actually sustained, as well as exemplary damages.

(b) Upon the death of any party, the action or right of action will survive to or against his executor or administrator.

(c) The party injured, or his legal representative, may commence a joint or separate action against the person intoxicated or the person who furnished the liquor, and all such claims shall be by civil action in any court having jurisdiction thereof."

The Civil Damages Act, §6-5-70, provides as follows: "Either parent of a minor, guardian or a person standing in loco parentis to the minor having neither father nor mother shall have a right of action against any person who unlawfully sells or furnishes spirituous liquors to such minor and may recover such damages as the jury may assess, provided the person selling or furnishing liquor to the minor had knowledge of or was chargeable with notice or knowledge of such minority. Only one action may be commenced for each offense under this section."

As can be seen, each statute requires an illegal distribution of alcohol. Specifically, the Dram Shop Act requires that the alcohol be sold or otherwise disposed of "contrary to the provisions of law." The Civil Damages Act allows a suit to be filed against any person who "un-

lawfully" sells or furnishes alcoholic beverages.

Title 28 of the Alabama Code regulates intoxicating liquor, malt beverages and wine. The violations of a provision of Title 28 clearly would be an unlawful distribution of alcoholic beverages within the meaning of the Dram Shop Act and Civil Damages Act.

Section 28-3-49 grants to the Alabama Alcoholic Beverage Control Board the authority to promulgate rules and regulations. Such rules and regulations have the full force and effect of law. Accordingly, the violation of any such rule or regulation would support a cause of action under the Dram Shop Act and the Civil Damages Act.

The most frequently used provision under the Code and the Regulations relates to furnishing alcoholic beverages to visibly intoxicated individuals. Rule 20-X-6-.02(4) provides as follows:

"No on-premise licensee may serve a person any alcoholic beverage if such person is acting in such a manner as to appear to be intoxicated."

A violation of this rule will support a dram shop claim. *Ward v. Rhodes, Hammonds, & Beck, Inc.* 511 So.2d 159 (Ala. 1987).

Another frequently used violation relates to minors. Alabama Code §28-3A-25(a)(3) makes it unlawful for any licensee, either directly or by its employees, to furnish alcoholic beverages to a minor. Similarly, Rule 20-X-6-.10 makes it unlawful for any person to furnish alcoholic beverages to a minor. Accordingly, the furnishing of alcoholic beverages by anyone to a minor would be "contrary to the provisions of law" and, thus, support a cause of action under the Dram Shop Act. As of this date, there have been no decisions by the Alabama Supreme Court relating to other violations under other sections of the Code or the Regulations. It seems clear that the violation of any other regulation that proximately causes an injury also will support a dram shop claim. For example, Regulation 20-X-6-.14 placed a limitation on "happy hour" sales. Prior to this regulation, many bars offer "two-for-one" or "three-for-one" drinks during certain hours of the day. The Alcoholic Beverage Control Board promulgated this rule pursuant to its "responsibility to promote a temperance, to suppress the evils of intemperance, and

to regulate and control the distribution and drinking" of alcoholic beverages. If a licensee serves alcoholic beverages contrary to this rule and a patron becomes intoxicated and subsequently is involved in an automobile collision, this writer is convinced that the innocent injured party would have a valid cause of action under the Dram Shop Act against the provider of alcohol.

The supreme court also has not addressed the question as to whether the violations of any other laws could also support a cause of action. In particular, many municipalities across the state have city codes which, among other things, regulate the sale of alcoholic beverages within their municipality. Trial courts routinely recognize violations of these municipal codes as being sales "contrary to the provisions of law" under the Dram Shop Act. This writer is convinced that if the issue is ever presented to the supreme court, it will hold that such a violation can be the basis of a dram shop claim.

The Civil Damages Act not only allows a claim against one who sells spirituous liquors to minors but also against one who "furnishes" spirituous liquor. The term "furnish" recently was reviewed by the supreme court in *Laymon*. In that case, an adult purchased "wine coolers" from a convenience store on three occasions on the night of the incident. On the third occasion, a minor, who was with the adult, went into the store. During the first two occasions, the minor remained in the automobile. The adult testified that she shared the wine coolers that she purchased on the first two occasions. There was no evidence, or reasonable inference, to indicate that the minor consumed any of the wine coolers purchased on the third visit. The minor was driving the vehicle with the adult and caused a one-vehicle collision.

The parents of the minor brought suit claiming that although the "sale" was to the adult, the defendant did "furnish" the wine coolers to the minor child. The trial court found that there was no "furnishing" within the Civil Damages Act and directed a verdict in favor of the defendant.

In affirming the trial court's decision, the supreme court stated as follows:

"We interpret the word 'furnishes' and 'furnishing' in §6-5-70 to extend liability

under §6-5-70 to a seller or furnisher of spirituous liquor, who, from the totality of the circumstances, must reasonably infer that the person to whom the spirituous liquor is sold or furnished will permit a minor to consume some of the spirituous liquor." *Id.* at 492.

The court found that there could be no liability on the first two purchases because the minor was in the vehicle. With respect to the third sale, there was no evidence that any of those wine coolers were shared with the minor. The court stated, however, "if there had been evidence that (the defendant) sold spirituous liquor to (the adult) and that (the adult) shared it with (the minor), it would have been error for the trial court to direct a verdict."

As to damages, under the Civil Damages Act, a parent has the right to recover "such damages as the jury may assess." This language is identical to that used in the Wrongful Death statute which has consistently been interpreted as providing for punitive damages. In a dram shop case, the plaintiff is entitled to recover "all damages actually sustained, as well as exemplary damages." This section has never been directly addressed, but clearly indicates that the plaintiff is entitled to recover both compensatory and punitive damages.

IV. Proper plaintiffs

There has been considerable confusion as to who may bring a cause of action under either section. Fortunately, the supreme court recently eliminated some of the confusion.

It is now settled that the intoxicated person does not have a cause of action under §6-5-71 against anyone who unlawfully serves him alcoholic beverages. *Ward v. Rhodes, Hammonds & Beck, Inc.*, 511 So.2d 159 (Ala. 1987). This also would be true in the case of a minor. *Maples v. Chinese Palace, Inc.*, 388 So.2d 120 (Ala. 1980). Thus, although it is illegal to serve alcoholic beverages to a minor, the minor does not have a cause of action under §6-5-71 for any injuries that he or she may sustain as a result of the sale or furnishing of the alcoholic beverages.

In addition, the minor does not have a cause of action under §6-5-70. *Maples v. Chinese Palace, Inc.*, 388 So.2d 120

(Ala. 1980). That statute specifically grants a cause of action to the minor's parents, guardian or other person who may be standing in the relationship of a parent when no parent is alive.

In a case where a minor is furnished alcohol and dies as a proximate consequence, the parent is the proper party to bring the lawsuit. See, *Laymon v. Braddock*, 23 ABR 1487 (Ala. 1989). According to the *Maples* decision, the claim is brought pursuant to §6-5-70 and not under the wrongful death statute.

It generally has been accepted by the bench and bar that an innocent person injured by an intoxicated patron of a bar has a cause of action against the provider of alcoholic beverages. The supreme court eliminated any confusion in *Ward v. Rhodes, Hammonds & Beck, Inc.*, 511 So.2d 159 (Ala. 1987). In *Ward*, the supreme court specifically held that the party injured by a drunk who had become intoxicated as a result of an unlawful sale of alcoholic beverages has a cause of action against the server of alcohol.

Determining who else can sue under the dram shop cases poses much more confusion. As early as 1934, the Alabama Supreme Court noted in *Webb v. French*, 152 So.2d 215 (Ala. 1934) that construction of this statute was extremely difficult. Justice Jones noted in a separate opinion in *Maples* that confusion is caused by the first words of the statute—"every wife, child, parent, or other person . . ." Justice Jones recognized that the terms wife, child and parent are words of relationship, but questioned to whom the persons were related. The Supreme Court has separated these parties into two classes. The first class relates to "every wife, child [and] parent." The second class relates to "other person[s]."

With respect to the first class, the *Maples* decision suggests that the terms "wife, child and parent" refer to those that stand in a relationship with the person to whom the liquor is sold, given or furnished.

In *Ward*, however, the court concluded that "the 1909 Legislature must have intended that wife, child, (and) parent refer to those of the party injured in person by the intoxicated person." 511 So.2d at 164. It is not clear whether *Ward* overruled *Maples* on this point or whether it merely extended the application of the

terms "wife, parent, and child." At least arguably, if an individual becomes intoxicated in a bar, contrary to the law, and such individual is involved in a one-vehicle collision, the dependant spouse and children should have a right of action against the licenses who unlawfully furnished the alcoholic beverages. There appears to be a disagreement among the circuit judges as to whether such a spouse or child would have a cause of action under these circumstances and this question will ultimately have to be resolved by the Alabama Supreme Court.

With respect to the second class, the "other person," the Alabama Supreme Court held that "this category of plaintiffs includes anyone who is proximately injured in person, property or means of support by any intoxicated person or in the consequence of the intoxication of any person." (emphasis added). *Ward v. Rhodes, Hammonds & Beck, Inc.*, 511 So.2d at 164. The court noted that "this category of plaintiffs is as broad as proof of proximate cause will permit." *Id.* Quoting from the old case of *Brooks v. Cook*, 44 Mich. 617, 7 NW 216 (1880), the supreme court recognized that even a creditor of an intoxicated person who has been unlawfully furnished alcoholic beverages may fall within the "other" person category.

As stated above, this writer believes that family members of an intoxicated person fall within the first class of protected persons in the Dram Shop Act. If not, such persons should fall within the second class of "other persons." Certainly, if a creditor has a cause of action for financial harm to him as a result of a drunk driver's being injured or killed because of an illegal sale by a liquor licensee, then a widow and child also should have a cause of action for the financial damages to them under the same situation.

The wrongful death of an individual in a dram shop context also has caused confusion. The statute gives a cause of action to a person who "shall be injured in person." It does not specifically provide a cause of action for death. Many attorneys erroneously concluded that this language only allows a claim for personal injuries and not for death.

Although there is some confusion as to the technical cause of action, there is no doubt that a death claim is proper in

the dram shop/civil damages context. The confusion merely lies in whether the claim is to be brought under the Wrongful Death Statutes, the Dram Shop Act or the Civil Damages Act.

Several recent cases clearly prove that a death claim can be maintained. See e.g. *Lackey v. Health America, L.P.*, 514 So.2d 883 (Ala. 1987); *Beeson v. Scoles Cadillac Corp.*, 506 So.2d 999 (Ala. 1987). In addition, the very recent *Laymon* case allowed the parents of a minor child to bring a death claim. Whether the causes of action in these cases were under the Wrongful Death Act, the Dram Shop Act or the Civil Damages Act is not clear. The cases prove, however, that a claim for death may be maintained.

The main purpose behind the Dram Shop Act and Civil Damages Act was to control the distribution of alcoholic beverages. Certainly, the law could not recognize such an anomaly that would allow a person to recover damages if he was injured but would not allow his estate to recover damages if he was killed under the same set of facts. Frankly, it appears that most members of the bar and the trial courts around the state recognize a death action in the dram shop context. This writer firmly believes that if the issue is ever presented directly to the supreme court, the court will clearly allow such a cause of action.

V. Social host liability

As of this date, the Alabama Supreme Court has refused to recognize a cause of action against a social host for dispensing alcoholic beverages to an adult. It must be noted that there are no code provisions or regulations that make it illegal for a social host to "give" alcoholic beverages to a visibly intoxicated adult. Therefore, the furnishing of alcoholic beverages under such circumstances is not "contrary to the provisions of law" and cannot support a dram shop claim. *Beeson v. Scoles Cadillac Corp.*, 506 So.2d 999 (Ala. 1987).

In *Beeson*, an employee of Scoles Cadillac became highly intoxicated at a company party. After leaving the party the employee was involved in a two-car collision which resulted in the deaths of the passenger of his car and the driver of the other car. The supreme court noted that the employee was not charged to attend the party and not charged for the alcoholic beverages. Accordingly, the

court noted that there was no "sale" and found that the Dram Shop Act did not apply.

The supreme court's ruling, however, should not be deemed to provide immunity to social hosts in the adult situation. First, it appears that the court's rationale for refusing to recognize a common law cause of action against a social host is the fact that most jurisdictions have not recognized this cause of action. If other jurisdictions start accepting this cause of action, then the Alabama Supreme Court may well follow. Second, the social host must keep in mind that if he charges for the alcoholic beverages, such conduct may be deemed a "sale." It is unlawful for any person to sell alcoholic beverages without a license. Alabama Code §28-3A-25(a)(15). Thus, the "sale" of alcoholic beverages by a social host without a license would be unlawful and could subject him to the Dram Shop Act.

The Alabama Code has defined "sale" as "any transfer of liquor, wine or beer for a consideration, and any gift in connection with, or as a part of, a transfer of property other than liquor, wine or beer for consumption." Alabama Code §28-3-1(25). In *Smoyer v. Birmingham Area Chamber of Commerce*, 517 So.2d 585 (Ala. 1987), the chamber of commerce hosted a reception. One of the members volunteered to sell drink tickets at the reception. In return, he was provided with free drinks. The member left the party and was involved in an automobile collision with the plaintiff. The plaintiff sought to hold the chamber of commerce liable in the dram shop action, contending that the chamber of commerce had unlawfully "sold" alcoholic beverages to the committee member.

The Alabama Supreme Court found that there was no consideration and, thus, no sale. In doing so, the court stated the following:

"In order to constitute consideration for a promise, there must have been an act, a forbearance, a detriment, or a destruction of a legal right, or a return promise, bargain for and given in exchange for the promise The evidence is undisputed that the (committee member) volunteered his services to the Chamber of Commerce without regard to whether alcoholic beverages would be served to him The evidence establishes [the committee member]

had no intention of volunteering his services in exchange for alcoholic beverages; therefore there was no sale of alcoholic beverages . . ." *Id.* at 587.

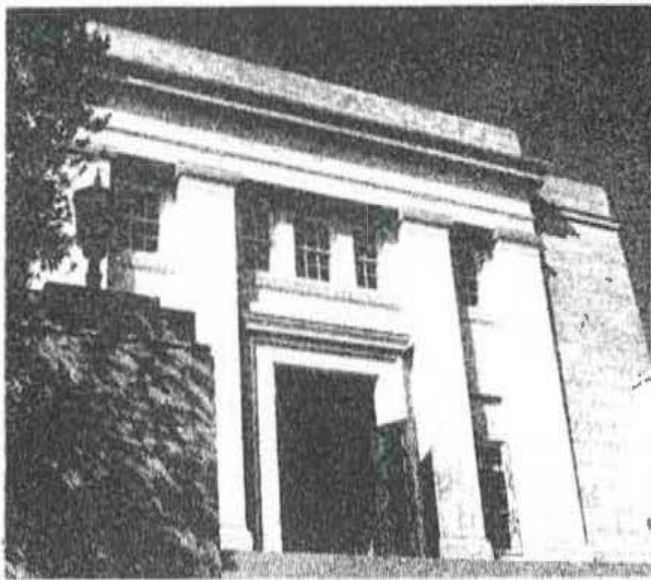
This opinion, however, suggests that if the intoxicated employee had bought the alcohol then the social host/employer would have been liable to the plaintiff under the Dram Shop statute.

A social host, however, can be held liable for furnishing alcoholic beverages to a minor. *Martin v. Watts*, 508 So.2d 1136 (Ala. 1987). In *Martin*, the Huntsville Jaycees sponsored a party for high school students. While at the party, several of the students became highly intoxicated. After leaving the party one of the students drove his car into the oncoming traffic and killed the driver of a vehicle and severely injured her two daughters. The family filed suit against the Jaycees and others. The Alabama Supreme Court reversed summary judgment on behalf of the Jaycees and held that it could be liable under the Dram Shop Act. In doing so, the court noted that the ABC Board Regulations make it unlawful for any person to give alcoholic beverages to a minor. Thus, the disposition of alcohol to the minor in this case was "contrary to the provisions of law" and a statutory dram shop claim could be maintained.

VI. Conclusion

According to the National Highway Traffic Safety Administration, 23,632 people died in the United States in alcohol-related traffic accidents last year. In addition, approximately one person a minute was injured in such crashes. Many of these injuries and deaths were caused by the unlawful sale of alcoholic beverages. Such staggering statistics strongly suggest that more lawsuits will be filed in the future.

The Dram Shop Act and Civil Damages Act were enacted in the early 1900s. Very few cases were brought under those statutes, however, until the 1980s. The majority of the supreme court decisions on these cases have been decided within the last five years. These cases have eliminated some of the confusion but there still remains confusion within the law. There are a significant number of cases currently pending before the trial courts of this state as well as the supreme court, and it is hoped most of the problem areas ultimately will be clarified. ■



Recent Decisions

by John M. Milling, Jr.,
and David B. Byrne, Jr.

Recent Decisions of the Alabama Court of Criminal Appeals

Prejudicial comments by the prosecutor—denial of fair trial

Gillespie v. State, 3 Div. 24 (August 25, 1989)—Judge Bowen, writing for a unanimous Alabama Court of Criminal Appeals, reversed and remanded the conviction of Gillespie for sexual abuse in a stinging opinion.

Gillespie was charged by separate indictments with four instances of first degree sexual abuse and one instance of first degree sodomy. The jury found the defendant guilty on three of the first degree sexual abuse offenses.

Gillespie raised a single issue on his appeal, contending that he was denied a fair trial because of the misconduct of the prosecutor throughout the trial.

The court of criminal appeals reversed Gillespie's conviction because of (1) the prosecutor's repeated questions and innuendo implying that Gillespie had committed other acts of sexual misconduct and (2) the prejudicial questions propounded to Gillespie during cross-examination concerning the Ku Klux Klan.

Judge Bowen observed that the primary duties of the office of district at-

torney are to see that justice is done and to see that the state's case was properly presented to the court and jury as made by the evidence.

Judge Bowen critically focused the issue with the following words:

"We are of the opinion that the cumulative effect of the repeated questions and insinuations by the prosecutor created in the minds of the jurors the impression that Gillespie had engaged in other acts of sexual misconduct."

In this case, the prosecutor did not have evidence of such misconduct which further exacerbated the problem faced by the appellate court. The

law is clear that during a trial of a person for the alleged commission for a particular crime, evidence of his doing another act, which itself is a crime, is not admissible if the only probative value is to show his bad character, inclination or propensity to commit the type of crime for which he is being tried. *C. Gamble, McElroy's Alabama Evidence*, §69.01(1) (3d Ed. 1977).

Judge Bowen concluded that the only conceivable purpose for the prosecutor's questions and insinuations was to "prejudice the accused by suggesting that he was more likely to be guilty of the crime[s] charged." *Allen v. State*, 478 So.2d 326, 330 (Ala.Crim.App. 1985). In this regard, Judge Bowen observed:



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demnee has a leasehold interest in condemned land and the interest involves an enterprise or business directly or intimately connected with that particular land, the lessee is entitled to present evidence of the market value of his interest at the time of the condemnation; that value is properly considered part of the value of the land. In determining the value of the leasehold interest, the court set out seven factors which can be considered:

- (1) The length of the unexpired term of the lease;
- (2) The fair market value, if any, of the unexpired term of the lease;
- (3) In the context of the case at bar, the quantity and quality of the remaining coal and its fair market value per unit;
- (4) In the context of this case, income derived by the leaseholder from the property;
- (5) The highest and best use of the property;
- (6) The utility, if any, of any portion of the land in which the leaseholder has an interest remaining after the condemnation;
- (7) Any other actual damages sustained by the leaseholder.

Contracts . . .

exculpatory pre-race release void as it relates to wanton conduct

Barnes v. Birmingham International Raceway, Inc., 22 ABR 2766 (June 16, 1989). Barnes entered a stock car race at Birmingham International Raceway (BIR). Prior to the race, Barnes signed a pre-race release which released BIR and others from all liability for damage and injury while participating in the race. Barnes was involved in an accident during the race and sued BIR and others alleging negligence and wantonness. The trial court granted defendants' motions for summary judgment based on the exculpatory pre-race release on authority of *Young v. City of Gadsden*, 482 So.2d 1158 (Ala. 1985). Barnes appealed. The supreme court affirmed the summary judgment as to the negligence count but reversed as to the wanton count.

The supreme court recognized that *Young* held that pre-race releases exculpating one for liability of negligence and wanton conduct have been upheld in Alabama as valid and not void as against public policy. The supreme court, however, noted that *Young* is the only case in the United States upholding pre-race releases for wanton and willful conduct.

In Alabama, willfulness or wantonness imports premeditation or knowledge and consciousness that the injury is likely to result, while negligence involves inadvertent action. After looking at the issue again, the supreme court expressly overruled that portion of *Young* that holds that pre-race releases are valid and not against public policy as they relate to wanton or willful conduct. They are valid as to negligent conduct.

Contracts . . .

ambiguities not always construed against drafter

Western Sling and Cable Company, Inc., etc. v. Hamilton, etc., 23 ABR 2428 (May 26, 1989). Hamilton entered into a stock sale agreement with Western which contained an indemnity agreement. After the sale, a dispute arose, and Western was sued. During this suit, a dispute arose as to the meaning of the indemnity provision, and Hamilton filed this declaratory judgment action. The trial court found that the indemnity provision was ambiguous and that although both parties entered into the contract with advice of counsel, the agreement was drafted by the purchaser, and, therefore, the ambiguity must be resolved in favor of the Hamiltons. The purchasers appealed and argued that the general rule regarding ambiguities has an exception where sophisticated persons represented by legal counsel are involved. The purchasers urged the court to adopt the exception.

On appeal the supreme court found the logic of the exception persuasive and stated that where both parties to a contract are sophisticated business persons advised by counsel and the contract is a product of negotiations at arms length between the parties, there is no reason to automatically construe ambiguities in the contract against the drafter.

Domestic relations . . .

***English v. English* overruled**

Ex parte Bayliss (Re: Bayliss v. Bayliss), 23 ABR 2560 (June 9, 1989). Mr. and Mrs. Bayliss divorced when Patrick, their son, was 12 years old. When Patrick was 18, his mother petitioned the court to modify the judgment of divorce asking the court to require the non-custodial father to contribute to Patrick's college education after Patrick attained his majority. Since

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Patrick was neither mentally or physically disabled, the trial court and the court of civil appeals, relying on *English v. English*, 510 So.2d 272 (Ala.Civ.App. 1987), denied the mother's petition. *English* held that a parent is under no legal obligation to educate a son or daughter after he or she attains majority unless the child is physically or mentally disabled or they have agreed to do so.

On certiorari, the supreme court overruled *English* and held that a trial court in a proceeding for dissolution of marriage or a modification of a divorce judgment may award sums of money out of property and income of either or both parents for the post-minority education of a child of that dissolved marriage, when application is made therefor before the child attains the age of majority. In doing so, the court shall consider the financial resources of the parents and the child and the child's commitment to and aptitude for the education. The court also may consider the standard of living the child would have enjoyed if the marriage had not been dissolved.

Torts . . .

court rejects 14-year age limitation stated in *Central of Georgia*

Lyle v. Boulter, 23 ABR 2787 (June 16, 1989). Appellant was 16 years old when he entered appellee's property without permission. He went to the edge of a clay pit and climbed onto a ledge. The ledge collapsed, and he fell and injured himself. He filed suit, and the court entered summary judgment for the defendant on authority of *Central of Georgia R.R. v. Robbins*, 209 Ala. 6, 95 So. 367 (1923), which held that children over 14 are "presumed to be capable of the exercise of judgment and discretion." The child appealed, and the supreme court reversed.

The supreme court noted that it recently adopted §339 of the *Restatement (Second) of Torts* (1965) which does away with the 14-year age presumption. Subsection (c) and the comment to §339 provide guidance in determining when a child assumes responsibility for his injuries. Most jurisdictions have held that a child beyond the age of 14 may recover for injuries sustained when trespassing on the land of another. Recovery will be less likely as the age of the child increases, and age is an important factor. Elements that merit examination are:

- (1) the intelligence of the child;
- (2) the capacity of the child to understand the potential danger of the hazard;
- (3) the child's actual knowledge of the danger;
- (4) the child's ability to exercise discretion;
- (5) the educational level of the child;
- (6) the maturity of the child;
- (7) the age of the child.

Worker's compensation . . . §§25-5-11, -52, -53 and -59 discussed

Lowman v. Piedmont Executive Shirt Manufacturing Company and Hart, 23 ABR 2542 (June 2, 1989). Lowman hurt her back while working for Piedmont and filed a worker's compensation claim. Hart, a co-employee, was supposed to process her claim. While in the hospital, Lowman was visited by Hart, and Hart threatened her and said worker's compensation was not going to pay the bill. Lowman sued Piedmont and Hart for fraud and outrage. The trial court granted defendants' motions for summary judgment, and Lowman appealed. The supreme court affirmed in part and reversed in part.

The supreme court found that there was no evidence to support the tort of outrage and affirmed the trial court. The court, however, found that there was evidence to support the intentional fraud claim. Therefore, the court had to consider whether the exclusive remedy provisions of the Alabama Worker's Compensation Act bar her tort claim for intentional fraud. The court held that the intentional fraud claim in the handling of the worker's compensation claim was not barred and stated that the exclusive remedy provisions only apply to limit the liability of an employer or its insurer to the statutorily prescribed claim for job-related injuries. If the claim is not compensable because it is outside the coverage of the act, then the exclusive remedy provisions are also inapplicable. The supreme court also stated that mere delay in payment of worker's compensation benefits is not actionable as a separate tort. The court also addressed the standard of proof for this intentional fraud claim. In view of the exclusive remedy provision, the plaintiff must make a

stronger showing than that required by the "substantial evidence rule." In regard to a fraud claim against an employer, a co-employee or an employer's insurer, the plaintiff must present evidence that would qualify as clear and convincing proof of fraud.

Recent Decisions of the Supreme Court of Alabama

Other acts' evidence—impact of remoteness on relevance

Tomlin v. State, 24 ABR 2154 (May 5, 1989)—The Alabama Supreme Court granted certiorari to determine whether the trial court erred in allowing the State to introduce evidence of prior felony convictions (one for possession and one for sale of marijuana), both of which occurred ten years before the charged offense.

Tomlin was charged with unlawful possession of marijuana. Prior to trial, the defendant filed a motion *in limine* for an order instructing the district attorney to refrain from making any direct or indirect reference to his prior convictions. Specifically, the motion *in limine* sought to suppress the following prior crimes of the defendant: (a) August 1974—possession of marijuana; (b) January 1975—possession of marijuana; (c) April 1975—possession of marijuana; (d) May 1977—sale of marijuana. The April 1975 and May 1977 convictions were admitted into evidence. In addition, the State, in both its opening statements and as a part of its case-in-chief, presented evidence to the jury of the defendant's prior crimes.

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Justice Jones, writing for a unanimous court, reversed. Justice Jones focused the issue as follows:

"... While we agree that the general rule against admissibility of prior offenses has its exceptions and that one such exception is the rule that, if relevant, evidence of prior offenses is admissible to show intent and guilty knowledge, we conclude that the challenged evidence in this case does not meet the test of relevancy which is a prerequisite to admissibility under each of the exceptions. *Ex parte Killough*, 438 So.2d 333 (Ala. 1982). See also, C. Gamble, *McElroy's Alabama Evidence* §69.01 (3d Ed. 1977)."

Ultimately, the supreme court concluded that the state's use of the evidence was to prove propensity of the defendant to commit the charged offense. Justice Jones noted that propensity evidence is inadmissible:

"The only possible inference that can be drawn from such evidence is that this defendant was more likely to commit the offense charged than might otherwise have been the case. This impermissible purpose is the very reason for the rule prohibiting such evidence."

DUI—under the influence— what does it mean?

Ex parte Buckner, 24 ABR 2820 (June 1989)—Buckner was convicted for driv-

ing under the influence of alcohol. He appealed his conviction to the court of criminal appeals which affirmed the judgment without an opinion. The Alabama Supreme Court granted certiorari and ultimately reversed and remanded the case.

At trial, Buckner vigorously defended based upon proof that he was not "under the influence" at the time he was stopped by Huntsville city police. Following his arrest, Buckner was transported to the city jail. No breathalyzer was given.

Specifically, Buckner objected to the trial court's instruction to the jury in pertinent part as follows:

"If you determine that the defendant was under the influence of alcohol, then the degree of intoxication is immaterial, and it is not necessary that the degree of intoxication must be so advanced or the influence of alcohol be so advanced as to interfere with the proper operation of the vehicle . . ."

The Alabama Supreme Court reversed, holding that the trial court erred in instructing the jury that the degree of the influence of alcohol does not have to be so advanced as to interfere with the proper operation of the vehicle.

Alabama's DUI statute provides that "a person shall not drive or be in actual physical control of any vehicle while: (1) There is 0.10 percent or more by weight of alcohol in his blood (2) Under the influence of alcohol . . ." The Supreme Court of Alabama has held that subsections (1) and (2) are *not* separate offenses, but are two methods of proving the same offense—driving under the influence of alcohol. See *Sisson v. State*, 528 So.2d 1159 (Ala. 1988).

Thus, in attempting to prove that Buckner was guilty of driving under the influence, the prosecution could either prove that Buckner's blood alcohol content was .10 percent or more or that he was "under the influence" of alcohol. Because no test was administered to Buckner, the prosecution had the burden of proving that he was "under the influence of alcohol."

Section 32-5A-191(a)(2) makes it illegal to drive or be in actual physical control of a vehicle while under the influence of alcohol. However, the statute does not

define "under the influence of alcohol." The court of criminal appeals had previously held that a person is guilty of violation §32-5A-191(a)(2) if he drives a vehicle under the influence of alcohol regardless of the degree of that influence. See *Pace v. City of Montgomery*, 455 So.2d 180, 185 (Ala.Crim.App. 1984).

This opinion is extremely significant because it overrules the holding of *Pace*. The supreme court critically noted that the Alabama courts have said that paragraphs (a)(1) and (a)(2) of §32-5A-191 define the same offense, but their application can lead to opposite results under the same facts. The court's analysis concluded that the Legislature intended to prohibit a person from driving a vehicle only after consuming such an amount of alcohol as would impair his ability to drive safely. Thus, the prosecution's burden is to prove that the defendant was under the influence of alcohol to the extent that it affected his ability to operate his vehicle in a safe manner.

Ex parte LaFlore reaffirmed

State v. Neal, 24 ABR 2809 (June 16, 1989)—The Supreme Court of Alabama granted Neal's petition for certiorari to consider the question of whether he was entitled to a jury trial on the issue of his competency to stand trial for capital murder. The Supreme Court of Alabama, in a *per curiam* opinion, affirmed the holding of *Ex parte LaFlore*, 445 So.2d 932 (Ala. 1983), which held that the criminally accused, pursuant to the Alabama Constitution of 1901, Section 11, and the procedure provided by §15-16-21, *Code of Alabama* (1975), is entitled to a jury trial on the issue of mental competency.

In its opinion reaffirming the *LaFlore* decision, the Supreme Court of Alabama was careful to point out that it was not voiding the trial court's exercise of its discretion to order the defendant committed to a state hospital pursuant to §15-16-22. The supreme court simply held that the statutory discretion afforded the trial court to seek a psychiatric examination of the accused could not be substituted as an alternative determination in depriving the defendant's constitutional right to a jury trial on the issue of competency to stand trial. See also, *Seibold v. Daniels*, 337 F.Supp. 210 (M.D.Ala. 1972). ■

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Legislative Wrap-up

by Robert L. McCurley, Jr.

Supreme Court adopts Alabama Rules of Criminal Procedure

The Alabama Supreme Court has approved the Rules of Criminal Procedure with a scheduled effective date of June 1, 1990.

Final editorial work on the rules and commentary following each rule is being completed. A copy of these criminal rules will be included in the *Southern Reporter* in December 1989 with time given for response. These rules are the result of a study by a committee of the Alabama Law Institute jointly appointed by the Alabama Supreme Court. This study began in June 1974. In June 1977, after five drafts, the committee presented their initial work to the supreme court. Each person practicing law in Alabama at that time was sent a complimentary copy of these rules by the Michie Publishing Company.

Subsequently, the court adopted and placed in effect 14 rules. After review by the court and a subsequent review by the drafting committee, the proposed rules were revised further in 1983. The court has adopted eight more rules for the present total of 22 temporary Rules of Criminal Procedure. It is basically this 1983 draft of the rules that the court now has adopted.

The drafting committee has served under three chairpersons, the late Charles Tarter, a Birmingham attorney, Judge Robert E. Hodnette of Mobile and Judge Billy Burney of Moulton.

The following is a synopsis of these rules, the text of which will be available next month in the *Southern Reporter*.

Summary of pending Alabama Rules of Criminal Procedure

Rule 1. Scope, Purpose, Objectives and Construction, Computation and Enlargement of Time, Definitions, Effective Date

The scope of the rules is to govern practice and procedure in all criminal proceedings. Definitions are delineated for use throughout the rules. The effective date is June 1, 1990.

Rule 2. Commencement and Prosecution of Criminal Proceedings

All criminal proceedings shall be commenced either by indictment or by complaint.

Rule 3. Arrest Warrant or Summons Upon Commencement of Criminal Proceeding; Search Warrants

An arrest warrant shall command the defendant to be arrested and brought before the issuing judge or magistrate and will state in the warrant the conditions of the defendant's release which will be on his own recognizance or the amount of the bond.

A summons will be in the same form as a warrant but it will command the defendant to report at a designated time and place within a reasonable time from the date of issuance for photographing and fingerprinting.

Arrest warrants are to be served by arresting the defendant. A summons may be served as in civil actions except not by publication. In addition a summons may be served by registered mail.

Arrest warrants may be amended to remedy a mere defect in form. The rule also enumerates who may issue the search warrants, the grounds, the contents and who may execute them.

Rule 4. Arrest and Initial Appearance

A person arrested on a warrant shall be released on his own recognizance or on an amount set in Rule 2 of Alabama Rules of Judicial Administration. The conditions of release are set forth on the warrant or if none is set forth,



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.

the defendant shall be taken before a magistrate without undue delay except in no event less than 72 hours of arrest.

A person arrested without a warrant shall be taken without undue delay before the nearest or most available magistrate for a probable cause determination but in no event later than 72 hours after the arrest unless the crime is not a bailable offense.

At the initial appearance the magistrate shall:

1. ascertain the defendant's true name and address;
2. inform the defendant of charges against him;
3. inform the defendant of his right to counsel and to remain silent;
4. determine the conditions of release; and
5. if a felony, inform the defendant of his right to demand a preliminary hearing and, if demanded, set a time for the hearing.

An initial appearance is not required when the defendant has been released from custody.

Rule 5. Preliminary Hearing

A defendant charged with a felony may demand a preliminary hearing within 30 days of arrest. If demanded, a preliminary hearing shall be held within 21 days unless waived or an indictment supervenes.

Either party or the court may summons witnesses. The state must present evidence relevant to establishing probable cause. Cross examination is allowed and the defendant may introduce evidence. Upon a finding of probable cause the defendant is held in custody or released on conditions proscribed by the court. The complaint then must be presented to the next grand jury.

Evidence may be hearsay in whole or in part, when based on written reports and documentary evidence, provided there is a substantial basis for believing that the evidence is credible and otherwise competent.

Rule 6. Attorneys, Appointment of Counsel

The defendant has the right to counsel in all criminal proceedings. If a defendant cannot afford an attorney one will

be provided. This rule does not require a public defender but each judicial circuit must establish its own system of appointment of counsel.

Once an attorney notifies the court of his or her representation of a defendant it continues until the court allows the counsel to withdraw. However, the counsel may limit his or her period of employment. The court may appoint a new attorney for an indigent on appeal if the original attorney is allowed to withdraw. The judge will set compensation for the appointed counsel. The court may order a defendant to pay to the state all or a part of the cost of his or her defense when the court finds the defendant has financial resources.

Rule 7. Release

A defendant charged with a bailable offense shall be released on his or her own recognizance before conviction unless the court determines such a release will not assure the defendant's appearance or that the defendant poses a real and present danger to others or the public at large.

After conviction a person sentenced for a term punishable by death or in excess of 20 years shall not be released. For terms less than 20 years, the defendant may be released on his or her own recognizance, or on conditions and bond set by the judge.

The rule sets forth requirements for professional bondsmen.

Each circuit judge must obtain a monthly list of all prisoners being held in jail. The judge must review the conditions of release for all persons in jail for more than 90 days.

Proof must be presented specifying the breach of conditions of release and a hearing must be held on a petition to revoke the release.

Once conditions of release are set by the court these conditions continue and bond remains in effect until amended by the judge.

Rule 8. Speedy Trial

Insofar as practicable, trials of criminal cases shall have priority over civil cases. There are no prescribed time limits for speedy trials.

Rule 9. Presence of Defendant, Witnesses and Spectators

The defendant has the right to be present at trial but with counsel the defendant, by written consent, may waive this right provided it is not a capital case. A disruptive defendant may forfeit his or her right to be present until he or she agrees to return with good behavior. When expelled the defendant shall have the right to hear, observe or be informed of the proceedings.

Spectators may be excluded if they engage in disorderly or disruptive conduct or constitute a threat to the court or any parties. Taking photographs or movies in the courtroom may be permitted by court rule.

Rule 10. Change of Place of Trial

Defendants in circuit court are entitled to a change of place of trial to the nearest county free from prejudice if a fair trial cannot be had for any reason or if there is a threat of mob violence. The burden is on the defendant to show that a fair and impartial trial could not be held in the initial county.

Rule 11. Incompetency and Mental Examinations

Rule 12. Selection of Venire: Grand Jury and Petit Jury Panels

Venire shall be qualified on the opening day of the term. Eighteen grand jurors must be drawn by lot. Petit jurors may be empaneled in panels of 12 and available for trial without further oath or qualification except with respect to each particular case.

Grand jury duties and powers are set forth as well as the duties of the grand jury foreman. No one is allowed in the grand jury room during deliberation and voting except jurors. District attorneys, their witnesses and a grand jury reporter or stenographer shall be allowed in the grand jury room while the district attorney is presenting his or her evidence but no defense counsel is allowed in the grand jury room. On written motion of the district attorney, the court may grant immunity from prosecution to any prosecuting witness.

The concurrence of 12 jurors is needed to return an indictment. Anyone incarcerated whose case is presented to a grand jury and is not indicted shall be released immediately from custody.

Grand jury proceedings may be challenged only on a written motion to dismiss by stating the grounds.

Rule 13. Charges: Indictment, Information and Complaint

Charges may be commenced by indictment, information or complaint. Offenses and defendants may be joined and consolidated for trial. Likewise they may be severed if such joinder is prejudicial to a defendant or the state. See A.R.Crim.P. Temporary Rule 15.

Rule 14. Arraignment and Pleas

Plea bargaining is recognized. The district attorney, defendant and defense counsel may reach a plea agreement and present the agreement in open court. The court may accept or reject the agreement. In the event the agreement is not accepted the agreement is inadmissible.

Before accepting a guilty plea the court must ascertain in the presence of counsel that the defendant understands the consequences, the nature of the charge, the mandatory minimum sentence, whether the defendant's sentence will run consecutively or concurrently if more than one guilty plea is entered, defendant's right to remain silent, and if the defendant waives a right to jury there will be no further trial.

Upon accepting a guilty plea that court must be satisfied there is a factual basis for the plea.

See A.R.Crim.P. Temporary Rule 19.

Rule 15. Preparation for Trial

The pleas available to a defendant are pleas of (1) guilty, (2) not guilty, (3) not guilty by reason of mental disease or defect, and (4) not guilty and not guilty of reason of mental disease or defect. See A.R.Crim.P. Temporary Rule 16.

An appeal may be taken by the state from a pre-trial ruling. See A.R.Crim.P. Temporary Rule 17.

Rule 16. Discovery

Discovery is allowed by the defendant and the state. See A.R.Crim.P. Temporary Rule 18.

Rule 17. Depositions (omitted by the court)

Rule 18. Trial by Jury: Waiver: Selection and Preparation of Petit Jurors

Defendants in all criminal cases shall have the right to trial by jury. A defendant may waive this right with the consent of the district attorney and the court. For offenses originally triable in municipal or district courts the defendant may demand a *de novo* jury trial on appeal to the circuit court.

Any time before verdict all parties may agree to a jury of less than 12 but in no case less than five persons. In all cases the verdict must be unanimous.

Prior to voir dire examination each party shall be given a list of names and addresses with biographical information of each prospective juror. Challenge to the venire must be by pre-trial motion and in writing specifying facts on which the challenge is based.

Voir dire examination may be by the court or when the court permits by attorneys. The number of names on the list shall not be less than 36 in a capital case, 24 in a non-capital felony and 18 in a misdemeanor case. The state and the defense shall have equal strikes alternating until 13 jurors remain. Additional jurors are added to the list when there are multiple defendants.

Alternate jurors may be allowed but are discharged when the jury retires to consider its verdict.

Rule 19. Trial

The procedure for the trial remains essentially the same as the present procedure.

Rule 20. Motion for Judgment of Acquittal

The motion for judgment of acquittal subsumes the motion for directed verdict, the motion for the affirmative charge and demurrer to the evidence. See A.R.Crim.P. Temporary Rule 12.

Rule 21. Instructions to the Jury: Objection

At the close of the evidence or at other times as directed by the court either party may file written jury requests. See A.R.Crim.P. Temporary Rule 14.

Rule 22. Deliberations of Jury

The jury may take with it to the jury room a copy of the forms of the verdict. The court may allow jurors to take exhibits to the jury room unless it is impractical or dangerous. Jurors may have evidence and testimony reread.

Rule 23. Verdict

Verdicts shall be unanimous, in writing and signed by the foreman. Verdicts shall be rendered on each count or offense charged with respect to each defendant. A guilty verdict must specify the degree or if to a lesser included offense specify the offense. The jury still may be polled before it is discharged.

Rule 24. Post-trial Motions

A motion for a new trial or motion in arrest of judgment may be made within 30 days after pronouncement of sentence. See A.R.Crim.P. Temporary Rule 13.

Rule 25. Procedure after Verdict or Finding of Not Guilty by Reason of Insanity

When the defendant is found not guilty by reason of insanity or not guilty by reason of mental disease or defect the court on its own motion or on motion of the district attorney shall determine whether the defendant shall be involuntarily committed.

This rule parallels *Ala. Code* §15-16-41 and §§15-16-60 to 71, "The Criminal Psychopath Release Restriction Act."

Rule 26. Judgment, Pre-Sentence Report, Pre-Sentence Hearing, Habitual Felony Offender, Sentence See A.R.Crim.P. Temporary Rules 1-11.

Rule 27. Probation and Probation Revocation

Probation may contain conditions and regulations. Probation automatically terminates upon completion of the sentence term. The probation officer may petition the court to revoke probation. A revocation hearing must be held within a reasonable time after service of summons of revocation.

Rule 28. Retention and Destruction of Records and Evidence

Records are retained according to the records retention schedule.

Rule 29. Correction of Clerical Mistakes

Clerical mistakes in judgments, orders or other parts of the record may be corrected by the trial court.

Rule 30. Appeals from Municipal and District Court

Appeals from municipal court judgments must be made within 14 days to the circuit court or 42 days to the appellate court. Appeals from district court judgments to the circuit court must be brought within 14 days and to the court of criminal appeals within 42 days.

Rule 31. Appeals

Reference is made to the Rules of Appellate Procedure.

Rule 32. Post-Conviction Remedies

Any person convicted may seek appropriate relief on any of the enumerated grounds. See A.R.Crim.P. Temporary Rule 20.

Rule 33. Criminal Contempt

Direct contempt is misconduct committed by a person in the actual presence of the court. The court shall tell the person of the specific conduct on which contempt is based and allow him or her to present mitigating circumstances. Contempt may be either civil or criminal contempt.

Rule 34. Subpoenas

The clerk of the court shall issue subpoenas including subpoena duces

tecums. Subpoenas are served in a similar manner as in civil cases. See A.R.Crim.P. Temporary Rule 22.

Rule 35. Form, Content and Service of Motions and Requests

All motions shall be in writing, state the relief sought and shall be served on the other party. Oral motions made during trial need not be in writing. Each party has seven days to respond, and the moving party then has three days to reply to an answer. Upon entry of an order the clerk must furnish all parties a copy.

Rule 36. Local Rules (omitted) ■



Disciplinary Report

Disbarment

● The Supreme Court of Alabama entered an order July 17, 1989, disbaring Alabama lawyer **Herbert P. Massie**, effective May 19, 1989. By failure to file an answer to formal disciplinary charges that were pending against him, Massie admitted that he engaged in conduct that adversely reflects on his fitness to practice law, that he failed to observe and comply with each clause and portion of the oath of office of an attorney, that he engaged in conduct involving dishonesty, fraud, deceit, misrepresentation or willful misconduct, and engaged in conduct prejudicial to the administration of justice. [ASB Nos. 88-476 & 88-603]

Public Censures

● On July 19, 1989, Dothan lawyer **Brian W. Dowling** was publicly censured for having engaged in conduct involving misrepresentation, and for having made a false or misleading communication consisting of a material misrepresentation of fact about himself, in violation of the *Code of Professional Responsibility of the Alabama State Bar*. Dowling was a candidate for the office of Houston County District Judge in the 1986 election, and caused to be distributed a certain campaign card bearing the words, in all capital letters, "Judge Brian Dowling for District Judge Houston County." Despite the wording on this card, Dowling was not and never had been a district judge in Houston County or any other county in Alabama, and had not been a judge on any other court in Alabama or in any other state. [ASB No. 86-352]

● On July 6, 1989, Birmingham lawyer **Edward M. Coke** was censured for unethical conduct in having accepted from a client \$300 of an agreed-upon fee of \$600 to assist the client's prison-inmate son in connection with disciplinary action that had been taken against the son while in prison. Coke took no

legal action on behalf of the client's son, and failed to deposit the partial fee to a trust account, but rather deposited it to a general checking account, and used all or some of it for his own benefit. [ASB No. 86-504]

● On Wednesday, July 19, 1989, Montgomery attorney **John Huddleston** received a public censure for violation of Disciplinary Rule 1-102(A)(6) of the *Code of Professional Responsibility*. The Disciplinary Commission found that Huddleston had, as a notary public, falsely acknowledged signatures on a deed of conveyance and that such conduct adversely reflected upon his fitness to practice law. [ASB No. 88-774]

● On July 19, 1989, Jackson, Alabama, lawyer **James A. Tucker, Jr.**, was censured for having intentionally failed to seek the lawful objectives of a client through reasonably available means, in violation of DR 7-101(A)(1), *Code of Professional Responsibility* of the Alabama State Bar. Tucker was retained to handle the probating of a will and the settlement of an estate, but failed and neglected for many months to have the will proved before the probate court by the witnesses who had signed it. [ASB No. 88-773]

Private Reprimands

● On July 19, 1989, a lawyer was privately reprimanded for having engaged in conduct adversely reflecting on his fitness to practice law, and having willfully neglected a legal matter entrusted to him. The lawyer agreed to defend certain clients in a civil suit in federal court, but failed to file any answer or other defensive pleading, resulting in a default judgment being entered against his clients. He did not communicate this fact to the clients for over a year and a half, at which point one of the clients inquired about the status of the suit. The lawyer then paid the clients the sum of \$40,000 in exchange for a release executed by them in favor of the lawyer and his firm. [ASB No. 88-647]

● On July 19, 1989, a lawyer was privately reprimanded for conduct adversely reflecting on his fitness to practice law, in violation of DR 1-102(A)(6). The lawyer ignored the bar's request that he provide a supplemental response to a complaint that a client had filed against him. [ASB No. 88-729]

● On Wednesday, July 19, 1989, an Alabama attorney received a private reprimand for violation of Disciplinary Rules 5-101(A) and 5-106(A). It was determined that the attorney, while representing a party injured in a slip and fall case, entered into representation of a subrogated insurance carrier, without the knowledge or consent of the first client and that the attorney settled the claims of both clients in an aggregate settlement without the knowledge or consent of both clients. [ASB No. 87-286(A)]

● On July 19, 1989, a lawyer was privately reprimanded for having engaged in conduct adversely reflecting on his fitness to practice law, in violation of DR 1-102(A)(6). The lawyer failed to initiate garnishment proceedings on behalf of a client for whom he had agreed to take such action, and then failed to respond to the bar's request that he provide a written response to the complaint that his client filed against him. [ASB No. 87-184]

● On July 19, 1989, a lawyer was reprimanded for willful misconduct, in violation of DR 1-102(A)(4). During the course of a jury trial, and in open court, the lawyer challenged the opposing party to go out into the hallway with the lawyer, after the opposing party had used the word "jerk" in referring to the lawyer. As the opposing party was following the lawyer toward the door, the trial judge called out the lawyer's name. At that point, the lawyer stopped, the opposing party bumped into him, and the lawyer then grabbed the opposing party and knocked or threw him to the floor, and got on top of him. [ASB No. 87-294]

● On July 19, 1989, a lawyer was privately reprimanded for publishing advertisements in newspapers without including therein the disclaimer required under Temporary DR 2-102(E). [ASB No. 88-682]

● On July 19, 1989, a lawyer was privately reprimanded for conduct adversely reflecting on his fitness to practice law. The lawyer was retained and paid to initiate a divorce action for a client, but delayed in initiating any action on behalf of the client for an unreasonably long period of time. [ASB No. 87-575]

● On July 19, 1989, an Alabama lawyer received seven private reprimands for violations of Disciplinary Rules 1-102(A)(4), 1-102(A)(6), 6-101(A), 7-101(A)(3), 9-102(A), 9-102(B)(1), 9-102(B)(3) and 9-102(B)(4). During the period September 30, 1982, until early 1983, when the lawyer became a circuit judge, the lawyer failed to maintain a trust account in his private practice of law. He also failed to maintain any books or records concerning clients' funds or property which came into his possession during that same period. As a direct result thereof, there were seven separate instances wherein the attorney received clients' monies, and made deposits of said monies to non-trust accounts maintained by the lawyer. In testimony before the Judicial Inquiry Commission, the attor-

ney admitted that he did not maintain a trust account, that he failed to maintain complete records or books concerning clients' funds which came into his possession, and that in certain instances, he failed to promptly notify clients of receipt of their funds. He further admitted that he failed to promptly pay to certain clients funds received by him as their lawyer. The lawyer was thereby found guilty of engaging in conduct involving dishonesty, fraud, deceit, misrepresentation or willful misconduct; of engaging in conduct that adversely reflects on his fitness to practice law; of willfully neglecting legal matters entrusted to him; of prejudicing or damaging his client during the course of the professional relationship; of failing to deposit funds of a client received by him in an insured depository trust account; of failing to promptly notify a client of the receipt of the clients' funds; of failing to maintain complete records of all funds of a client coming into his possession; and, of misappropriating the funds of his client, either by failing promptly to pay over money collected by him for his clients or by appropriating to his own use funds entrusted to his keeping. [ASB No. 85-653]

● On July 19, 1989, a lawyer was privately reprimanded for having engaged in conduct adversely reflecting on his fitness to practice law. The lawyer was retained to represent a woman in initiating a divorce action, and was asked by her to seek a temporary restraining order against her husband, and to obtain possession for her from the husband a certain automobile that the court had awarded to her *pendente lite*. The lawyer delayed an unreasonable period of time in taking these actions on behalf of his client. [ASB No. 87-329]

● On July 19, 1989, a lawyer was privately reprimanded for conduct adversely reflecting on his fitness to practice law, intentionally failing to seek the lawful objectives of his client, failing to carry out a contract for professional services and prejudicing his client during the course of the professional relationship [DR 1-102(A)(6) and DR 7-101(A)(1), (2) and (3)]. The lawyer failed to close an estate by consent settlement as desired by the client and reviewed an agreement disposing of estate assets in a cursory manner, encouraging the client to execute the agreement after deficiencies in it that were detrimental to the client had been pointed out to the lawyer by the client's accountant. When a fee dispute arose, the lawyer made unseemly threats to the client in the event litigation was necessary to collect the fee, including the threat to disclose client confidences. [ASB No. 88-604]

● On Friday, September 15, 1989, an Alabama attorney received a private reprimand for violation of Disciplinary Rules 5-105(C) and 5-106. The Disciplinary Commission found that the attorney, while representing the plaintiffs in a cause of action, also undertook to represent a subrogated insurance carrier, without informing the principal clients, and entered into a settlement of the cause of action without the consent of all parties. The attorney also deducted, without the consent of all parties, a contingency fee from the subrogated settlement. The Commission determined that the attorney undertook multiple representation without proper disclosure and settled the matter without the knowing consent of all parties regarding the participation of each person or entity to the settlement. [ASB No. 89-54] ■

Opinions of the General Counsel

by Robert W. Norris, general counsel

QUESTION ONE:

"Is it ethically permissible for a lawyer to obtain court cost and litigation expense financing through the financial services plan of Lawyers Capital, Inc. (LCI)? LCI is a financial services plan that provides case financing and accounting services to its members. All firms pay a one-time application fee to establish a membership account. Thereafter, an administrative fee of \$60 is paid to open and \$60 to close an individual case file. As expenses are accrued (court reporters, experts, etc.) they are financed by forwarding the service bill to LCI for payment. Each month the firm receives an accounting of case financing expenses and pays only the monthly interest. The client, of course, agrees to ultimately be responsible for the payment of the interest incurred. Payment of the principal in each case occurs upon settlement of the case or upon a negative determination."

QUESTION TWO:

"Would it be ethically permissible for a group of lawyers to organize a company similar to LCI and finance client advances? As a hypothetical, a company would be organized outside of the parameters of the law firm, but would have shareholders who are members of the law firm. This company would then do the same type of financing as LCI for the law firm and for other selected law firms."

QUESTION THREE:

"LCI is endorsed and marketed by the Alabama Trial Lawyers Association (ATLA) as a service to its members. For this support, LCI pays the ATLA a royalty of \$80 for each case funded under the plan. Are there any ethical improprieties with this arrangement?"

ANSWER, QUESTION ONE:

It is not improper for a lawyer to finance court cost and litigation expenses and to receive accounting services through LCI as long as the client is fully informed, agrees in advance to the arrangement, and interest charged is not unscrupulous. Additionally, a lawyer or law firm that has a financial interest in LCI must disclose that interest to the client and must insure that the financial arrangements are not only not unscrupulous, but are fair under the circumstances.

ANSWER, QUESTION TWO:

It would be similarly proper for a lawyer or group of lawyers to form an organization and provide services similar to LCI as long as the conditions in the answer to question one are met.

ANSWER, QUESTION THREE:

It is ethically permissible for a lawyer to participate in the LCI plan even though LCI pays a marketing royalty to ATLA. This is based on the premise that the fees charged by LCI to ATLA members are not increased to cover the royalty paid to ATLA. On the other hand, if a non-ATLA member could obtain the services of LCI cheaper because a royalty did not have to be paid to ATLA then it would be improper for the participating ATLA member to pass the royalty charge to the client.

DISCUSSION:

The prohibition against impermissible advances in litigation is rooted in the common law prohibitions against champerty and maintenance. However, most courts permit various types of advances despite champerty and maintenance, the rationale being that advances are not likely in connection with non-meritorious claims and the condition giving rise to common law rules no longer exists (see ABA Annotated Model Rules, Rule 1.8[e], Financial Assistance to Client, Page 96 [1984]).

The *Alabama Code of Professional Responsibility* has expressly adopted this position with respect to court costs and expenses of litigation as long as the client remains ultimately liable (DR 5-103[B]). In the event proposed Model Rule 1.8(e)(1) is adopted by the Alabama Supreme Court, the prohibition against advancements would be further liberalized to permit the advancement of litigate court costs and litigation expenses that are contingent on the outcome of the litigation.

In RO-88-88 it was held to be proper for a lawyer to advance litigation costs and expenses to a client from his own funds or to finance the funding of these expenses with a financial institution and pass the normal interest charges to the client as part of the litigation expense. That opinion also quoted with approval prior opinions permitting the charging of interest on past due accounts, and the adding of service charges on fees and advance cost of litigation.

The limitations cited in RO-88-88 applicable to all of the various credit arrangements are (1) that the credit charge not be unscrupulous; (2) that the client be fully informed as to the terms of the arrangements; and, (3) that the client agrees to them in advance of the rendering of services or the advancement of cost. In addition, if the lawyer or law firm has a financial interest in the lending institution or will gain financially in any way from the credit arrangement, then that fact must be made known to the client.

The fact that LCI or any other entity is organized for the sole purpose of financing court cost and litigation expense does not make it unlike any other financial institution. If a client is unable to pay court cost and litigation expense, it would seem to make little difference whether the funds are obtained from the lawyer or law firm, from a commercial bank, from LCI or any other financial entity.

In addition to the limitations listed above, there is another important consideration and that is loyalty. The obligation of loyalty to a client by his or her lawyer is all encompassing. There should be no competing loyalties in the professional

relationship between lawyer and client. Consequently, in making financial arrangements for the advancement of court cost and litigation expense, the cost of which ultimately would be borne by the client, loyalty would require the lawyer to seek, if not the best deal, at least a fair deal under the circumstances. If the lawyer gains financially from the credit arrangement it is not enough to charge a rate that is not unscrupulous. The rate also must be fair and competitive under the circumstances prevailing at that time. Client loyalty, at least, would require a complete explanation to the client of all available means by which court cost and litigation expenses could be financed.

There is nothing ethically impermissible in the payment of royalties by LCI to the ATLA as long as this royalty is not passed on to the client as an expense of litigation. It appears that LCI's income would be derived from the application fees, opening and closing fees and interest. The payment of this income, as a promotional royalty, to ATLA and the acceptance of less income by LCI is not an ethical consideration. However, it would be a factor in determining the overall cost of financing court cost and litigation expense in a particular case and must be considered in determining whether such financing is fair and competitive under the circumstances. [RO-89-64 & 75] ■

Memorials

Daniel Gavin Austill—Mobile

Admitted: 1986

Died: August 1, 1989

Leigh Mallet Clark—Birmingham

Admitted: 1923

Died: August 11, 1989

Walter Charles Hayden, Jr.—Clanton

Admitted: 1954

Died: January 15, 1989

Nicholas Kearney—Mobile

Admitted: 1970

Died: September 28, 1989

James DeValse Mann— Washington, DC

Admitted: 1932

Died: July 22, 1989

Moncure Camper O'Neal— Birmingham

Admitted: 1946

Died: August 5, 1989

Ewell Cornelius Orme—Troy

Admitted: 1925

Died: July 21, 1989

Claude Denson Pepper—Miami, FL

Admitted: 1924

Died: May 30, 1989

James Lawrence Pugh, Sr.— Birmingham

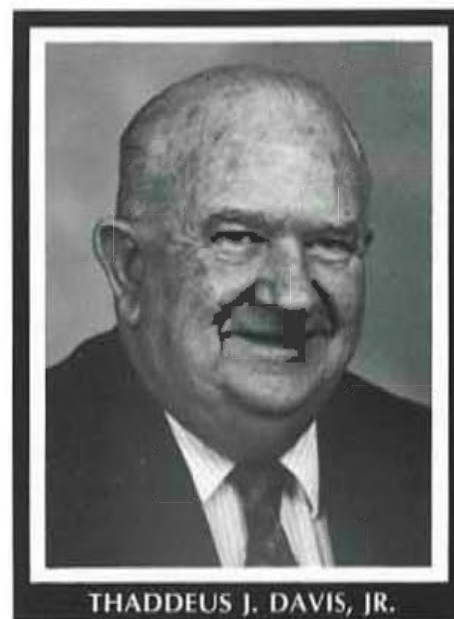
Admitted: 1934

Died: May 11, 1989

Walter D. Sowa—Birmingham

Admitted: 1955

Died: August 19, 1989



After an illness of several weeks, Marion attorney Thaddeus J. Davis, Jr., died March 30, 1989, at the age of 72. He was a native of Marion and attended

These notices are published immediately after reports of death are received. Biographical information not appearing in this issue will be published at a later date if information is accessible. We ask you to promptly report the death of an Alabama attorney to the Alabama State Bar, and we would appreciate your assistance in providing biographical information for *The Alabama Lawyer*.

Marion Military Institute during 1935-38, where he was an outstanding cadet in both academics and athletics, playing varsity football and baseball. After graduation, he attended the University of Alabama where he received an undergraduate degree in education in 1938, being admitted to Phi Delta Kappa educational honorary fraternity.

He served in the Army Air Force from August 16, 1940, to December 1, 1945. He held the rank of major in the 10th Air Force in India (Asiatic Pacific Theatre) and was promoted to lieutenant colonel on separation, remaining with the Air Force Reserve until 1958.

After the war, he entered the University of Alabama School of Law from which he graduated and was admitted to the Alabama State Bar in 1948. He was president of the law school during his senior year and was a member of Phi Alpha Delta Law Fraternity.

In 1949, he entered practice in Marion with D.K. Mason, Jr., in the firm of Mason & Davis. The firm was dissolved on the death of Mason April 15, 1979. He continued his own practice, and had a wide and varied practice in Perry and adjoining counties representing the City of Marion during his 40 years of practice. He also was attorney and a director of the Marion Bank & Trust Company and represented Marion Military Institute. He was an active and loyal alumnus of Marion Military Institute, serving as a member of its board of trustees and as a past president of its alumni association.

He was a past president of the Marion Lions Club and for 40 years was a Sunday School teacher in the Marion United Methodist Church, also serving on its administrative board. He was an active member of the state bar and a loyal and supportive alumnus of the University of Alabama School of Law.

He was married to the former Mildred Wagnon from Atlanta, Georgia, who survives him along with four children, CWO Thaddeus J. Davis, III, USA-Ret, of Clarksville, Tennessee; Lucy D. Willis, of Goldsboro, North Carolina; Mary Anna Davis,

of Memphis, Tennessee; and Dorothy D. Hollingsworth, of Johnstown, Pennsylvania.

A close friend and colleague, former state bar President Hugh W. Roberts of Tuscaloosa, paid tribute to Thad Davis as a skilled practitioner, a tenacious fighter for the interest of his clients and a warm, delightful and true friend to his colleagues at the bar.

The undersigned was his law school classmate whose firm enjoyed a close association during his entire practice, but particularly during the latter years. Thad Davis will be missed by his clients, his colleagues, his community, his church and his family, but all will be consoled by the fact that he lived life to its fullest and was eminently successful and productive in all of his endeavors.

—Sam Earle Hobbs
Selma, Alabama



The state bar lost one of its most respected and renowned trial lawyers with the death of James Garrett May 8, 1989, at the age of 75.

Garrett began his legal career in Montgomery in 1939 after receiving his undergraduate and law degrees from the University of Alabama. At his death he was a senior partner in the Montgomery firm of Rushton, Stakely, Johnston & Garrett. He was best known as a skilled courtroom orator who was deft in the use of humor as a tool to disarm unsuspecting opposing parties and counsel. In one case, tried before Judge Frank M. Johnson, his spirited laughter led to national recognition in an article which appeared in *New Yorker* magazine. In preparing the appellate records in the case the court reporter was perplexed about how to characterize in printed form Garrett's



JAMES W. GARRETT

frequent laughter. The reporter ultimately decided that every time that Garrett laughed it would be shown in the record as, "Garrett: Ha Ha Ha." From that point on Garrett was affectionately known in legal circles as the "Ha Ha" lawyer.

Because of his courtroom skills Garrett was elected to membership in the American College of Trial Lawyers. His service to the local and state legal community included membership in the Alabama State Bar, American Bar Association, Alabama Defense Lawyers' Association and International Association of Insurance Counsel. He was a past president of the Montgomery County Bar Association. He is survived by his wife, Margaret, and seven children, two of whom are attorneys who practice in the firm in which he was a member at his death.

— Robert A. Huffaker
Montgomery, Alabama





STERLING F. SToudenMIRE, JR.

WHEREAS, on the 6th day of July 1989, Sterling F. Stoudenmire, Jr., departed this life in Mobile, Alabama; and

WHEREAS, it is the desire of the Mobile Bar Association to recognize and memorialize his accomplishments and his record as an attorney;

NOW, THEREFORE, BE IT KNOWN that Sterling F. Stoudenmire, Jr., was born in Sumter, South Carolina, May 20, 1915, where he spent his formative years, graduating from Sumter High School. He graduated from Furman University, Greenville, South Carolina, with a bachelor of arts degree, and George

Washington University, Washington, D.C., with bachelor of laws and juris doctor degrees. He also was a graduate of the Federal Bureau of Investigation Academy in Quantico, Virginia.

He commenced the practice of law 48 years ago in Washington, D.C., specializing in transportation law. While in Washington, he was a special agent for the FBI from 1943 through 1946. He left his private law practice in Washington in 1953, and moved his family to Mobile where he joined Waterman Steamship Corporation as assistant general counsel and later became general counsel and vice-president of that corporation. After retiring from his affiliation with Waterman in 1971 he engaged in the private practice of law here in Mobile until January 1989.

During his legal career he was a member of the Mobile County Bar Association, the Alabama State Bar, the South Carolina State Bar and the District of Columbia State Bar. From 1977 through 1979 he served as vice-chairperson and chairperson of the Alabama State Bar's Section of Administrative Law and was one of nine members on the Executive Committee instrumental in the preparation of the Alabama Administrative Procedure Act adopted into law in 1981.

Stoudenmire was a member of the Society of Former Special Agents of the FBI and was the charter president of the Mobile Chapter of the American Association of Retired Persons during 1974 and

1975, serving the local chapter of AARP as a board member during the years of 1977, 1978 and 1981. Other organizations in which he had membership were the Maritime Bar Association of New York; Maritime Administrative Bar Association, Washington, DC; Propeller Club of the United States; the Mobile Area Chamber of Commerce; and the Country Club of Mobile. He attended Grace Lutheran Church.

BE IT FURTHER KNOWN that Sterling F. Stoudenmire, Jr., is survived by his wife, Betty S. Stoudenmire; two sons, William W. Stoudenmire, a member of the Mobile Bar Association, and Sterling F. Stoudenmire, III, a certified public accountant in Pensacola Beach, Florida; and two grandchildren, Paula Scott Stoudenmire and Sterling F. Stoudenmire, IV.

NOW THEREFORE, BE IT RESOLVED by the Mobile Bar Association in regular meeting assembled, that the life of Sterling F. Stoudenmire, Jr., be recognized as one of a prominent attorney, distinguished citizen and civic leader and that his passing represents a great loss to his family, to the legal profession and to this community.

—William B. McDermott
President, Mobile Bar Association



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