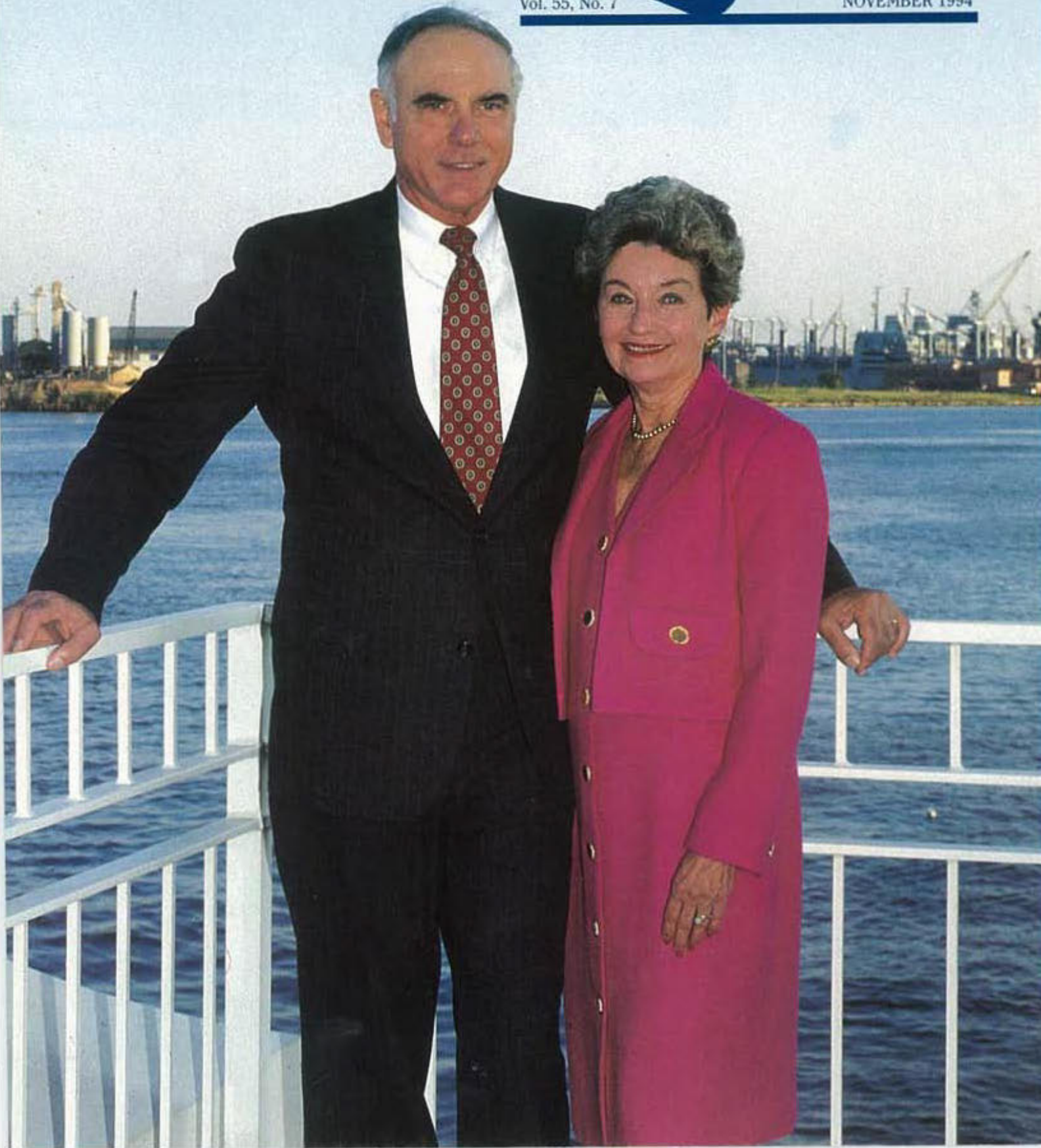
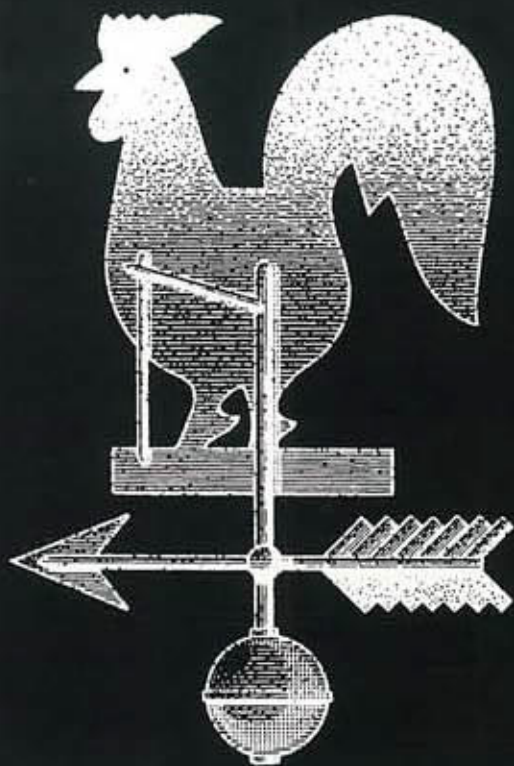


# The Alabama Lawyer

Vol. 55, No. 7

NOVEMBER 1994





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# IN BRIEF

November 1994

Volume 55, Number 7

## ON THE COVER:

Photographed on the Mobile River, the balcony of the new Mobile Convention Center serves as a picturesque setting for 1994-95 Alabama State Bar President Broox G. Holmes and his wife, Laura. President Holmes assumed this office at the conclusion of this year's annual meeting at Orange Beach, Alabama.

*Photo by Ashley Inge Photography of Mobile*

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The Alabama Lawyer, (ISSN 0002-4287), the official publication of the Alabama State Bar, is published seven times a year in the months of January, March, May, June (bar directory edition), July, September, November. Views and conclusions expressed in articles herein are those of the authors, not necessarily those of the board of editors, officers or board of commissioners of the Alabama State Bar. Subscriptions: Alabama State Bar members receive The Alabama Lawyer as part of their annual dues payment; \$15 of this goes toward subscriptions for The Alabama Lawyer. Other subscribers do not receive the directory edition of the Lawyer as part of their subscription. Advertising rates will be furnished upon request. Advertising copy is carefully reviewed and must receive approval from the Office of General Counsel, but publication herein does not necessarily imply endorsement of any product or service offered. The Alabama Lawyer reserves the right to reject any advertisement. • Copyright 1994, The Alabama State Bar. All rights reserved.

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

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## Bar Commissioners Adopt Report Of Long Range Planning Task Force

**O**ne of the most significant recent accomplishments of our many committees and task forces was the work of the Long Range Planning Task Force in developing a long range plan for our bar. The task force was appointed by President Spud Seale when he took office last year. The Alabama State Bar had not had a true long range planning committee and Spud "felt that it would be both beneficial and informative if we had a task force to take a long, hard look at where we have been in the past and where we want to be in the future."

The task force was very ably chaired by Camille Wright Cook of Tuscaloosa and was made up of some 40 distinguished lawyers from across the state with diverse practices and viewpoints. It included several appellate and circuit judges and five former presidents of the state bar. The work of the committee was divided into four areas for consideration and study. These were: (1) Review of the bar's role as a licensing and regulatory agency, chaired by David Boyd; (2) Demographics of the bar (quality of life), chaired by Jim Barton; (3) Professionalism, chaired by Gorman Jones and Bill Hairston; and (4) Purposes of the organized bar, chaired by Alice Pruett and Tennent Lee.

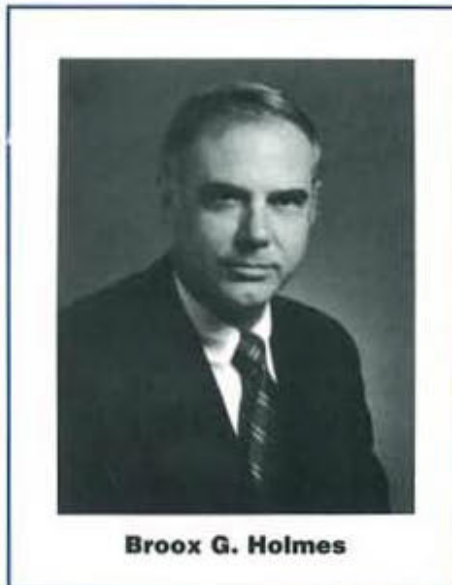
The task force worked very hard in developing a comprehensive plan and report for guidance of our bar into the next century.

The report in its mission statement states that "the Alabama State Bar is dedicated to promoting the professional responsibility and competence of its members, improving the administration of justice, and increasing the public understanding of and respect for the law." This is an excellent and succinct statement of what we should be about in the work of this bar.

In keeping with the most important single goal for the bar of encouraging professionalism, the task force also adopted the definition of professionalism recommended by the bar's Task Force on Professionalism as, "The pursuit of the art of the law as a common calling, with a spirit of service to the public and the client, and undertaken with competency, integrity and civility."

The entire report of the task force will not be set out here, but I want to give you the following broad recommendations set forth in the report as the role of the Alabama State Bar in fulfilling its obligations:

1. To provide leadership in enhancing the quality of justice and access to legal services;
2. To support an independent and quality judicial system;
3. To assure highest standards of ethical conduct and professional competence;
4. To expand the opportunities for women and minorities in the law;
5. To work with the supreme court in undertaking periodic review of bar admission and the bar examination process;
6. To study the delivery of legal services by non-lawyers and make recommendations that would best serve the public;
7. To promote the use of alternative dispute resolution;
8. To be aware of the public perceptions of the legal profession and work toward emphasizing the correction of "erroneous perceptions" that reflect unfavorably on the profession;
9. To enhance the performance of all components of the bar organization and structure; and
10. To urge that a standard policy of inclusion be institutionalized and communicated to members of the profession as the paramount response to separatism and fragmentation.



The plan was disseminated to your bar commissioners last July and at the board meeting on September 23, 1994, following an excellent presentation by Camille Cook, the board unanimously adopted the plan.

While the plan is only a guideline, it does provide your board of bar commissioners and the members of our bar with direction and guidance as we go about our work.



The board also voted to create a Long Range Planning committee. This committee will provide us with a means to improve and modify the long range plan when and where the legal profession and the public will be best served.

As a matter of interest, Keith Norman reports that the California State Bar budgeted \$250,000 for development of its long range plan and the result is likely to be similar to the excellent work of our task force. Thanks to the dedication of our task force members, we received an excellent product with no significant cost to the bar. We are indeed indebted to Camille Cook and all the members of the Long Range Planning Task Force for this very worthwhile accomplishment.

Now it is up to us—this year and in the future—to implement the plan by making the right decisions and effort to fulfill the ten stated obligations we have formally undertaken.

### **Bar Leadership Conference**

On September 9, 1994 the Annual Bar Leadership Conference was held at bar headquarters. The conference was well attended by committee chairpersons and members, section leaders and local bar presidents. Very informative reports were made on the work of the Alabama State Bar, and the work of the various committees serving the profession such as specialization, advertising and solicitation and alternative dispute resolution. Also on the agenda were reports on programs which serve the public such as the Volunteer Lawyers Program, the Alabama Law Foundation and Kids Chance Scholarship Program. The conference was very successful and will give us impetus in carrying out the plans of the sections, committees and task forces this year. ■

## **Delinquent Notice Licensing/Special Membership Dues 1994-95**

### **All Alabama Attorneys:**

The dual invoice for licenses or special memberships was mailed in mid-September and was to be paid between October 1 and October 31. If you have not purchased an occupational license or paid special membership dues, you are now delinquent!

### **In Active Private Practice:**

Any attorney who engages in the active private practice of law in Alabama is required to purchase an occupational license. The practice of law is defined in Section 34-3-6, *Code of Alabama, 1975*, as amended. (Act #92-600 was passed by the Alabama Legislature and amended Section 40-12-49, *Code of Alabama, 1975*, effective October 1, 1992.)

**Occupational License...\$287.50 (includes automatic 15 percent late penalty)**

### **Not in Active Private Practice:**

An attorney not engaged in the active private practice of law in Alabama may pay the special membership fee to be a member in good standing. Judges, attorneys general, United States attorneys, district attorneys, etc., who are exempt from licensing by virtue of a position held, qualify for special membership. (Section 34-3-17 & 18, *Code of Alabama, 1975*, as amended)

**Special Membership Dues...\$125 (penalty not applicable)**

### **Direct any questions to:**

*Christie Tarantino, Membership Services Director, at 1-800-354-6154 (in-state WATS) or (205) 269-1515 Immediately!*



# EXECUTIVE DIRECTOR'S REPORT

## THE FIRST MORNING OF MY FIRST DAY

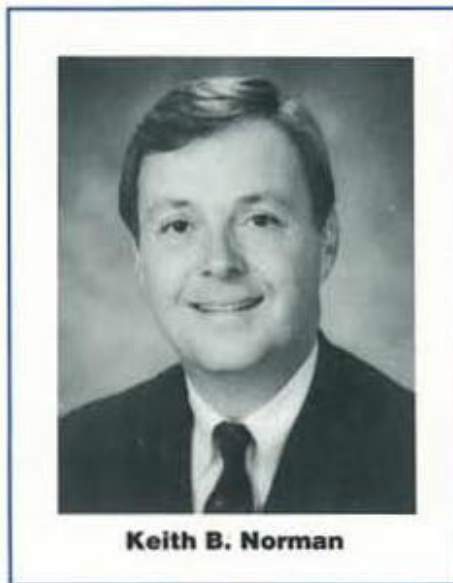
**I**f I had any illusions of self-importance upon becoming executive director, they were brief ones. The first morning of my first day, I pulled up to the parking deck of the bar building at 7:15 a.m. to discover that the entrance gate was jammed. I got out of my car, entered the building through an alternate entrance, and retrieved the handle for the crank to manually open the gate. I fiddled with the apparatus for ten minutes or so and was able to get the gate to open and close electronically, as it is supposed to do. Next, I went to the break room to make coffee. We have an unwritten rule that the first to arrive makes the coffee. Making coffee using pre-measured packets is no big deal, but, as I was opening the trash compactor to dispose of the empty package, I sadly learned that the cleaning crew had failed to empty the compactor the previous evening and the compactor bag had broken, spilling the previous day's contents. Consequently, I had to clean out the compactor and put all the garbage into a new plastic bag. Needless to say, my first day as executive director had a rather inauspicious beginning.

This experience reminded me of something one of my earlier mentors, Jack Smollen, had said many years before. Jack was the general manager of WJHO Radio where in high school I worked part-time selling radio advertising. He was always ready and willing to share his insights on topics ranging from the radio business to politics. I can remember his telling me on more than one occasion that being a chief executive officer was not just sitting in an office and making executive decisions, but that it sometimes required getting your hands dirty and doing things that no one else on the staff thinks is part of his or her job description. As I was washing my hands after putting the garbage into a new bag and cleaning out the compactor that first morning of my first day, I marveled at the sagacity of Jack's observations so many years ago.

### **International reputation of the Alabama State Bar grows**

You may recall that in August 1989, the Alabama State Bar

hosted a group of legal scholars visiting from Nicaragua. The bar had been selected as a showcase for the scholars to learn about the certification of lawyers, professional standards, the bar examination process and other issues pertinent to the organization of the legal profession.



**Keith B. Norman**

This past August, the Alabama State Bar once again served as host to a foreign delegation. Visiting us this time were the president and honorary treasurer of the Jamaican Bar Association, Dr. Lloyd Barnett and Crafton S. Miller. We were also fortunate to host their wives who were accompanying them. Dr. Barnett and Mr. Miller were visiting the United States under the auspices of a United States Aid Grant in an effort to strengthen their bar association's organizational structure, increase membership and develop a formal CLE program. The American Bar Association had recommended that they study the programs of the Alabama State Bar in addition to those of the Maryland and New Hampshire bars.

Our guests spent the better part of a day talking with staff members about professional responsibility and lawyer discipline, how to organize a mandatory CLE program and ways to enhance their bar association's magazine and publications. In the process, we learned something about their professional licensing and regulatory operations as well as their court system. I discovered that as members of the legal profession, Jamaican attorneys experience problems that are not unlike the ones experienced by Alabama attorneys. Indeed, this similarity of issues led to the initial discussion of future cooperation with the Jamaican Bar Association that may lead to the development of a comparative law seminar for Alabama lawyers to be held in Kingston. The last comparative law seminar organized by the bar was almost ten years ago in Bermuda.

While it was an honor for our bar to be recommended as a model for the Jamaican Bar Association to study and learn from, more importantly, we had the opportunity to learn about the legal profession of another country and make new friends. ■

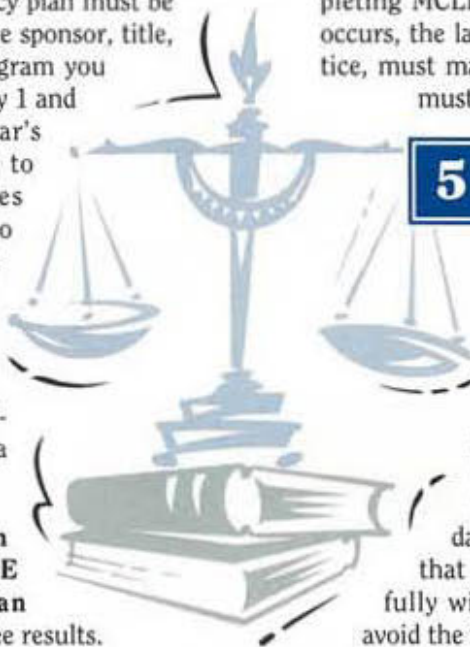


# How to Avoid MCLE Problems

**1 Stay current.** The deadline for completing each year's MCLE requirement is December 31. An extension until March 1 may be requested if a deficiency plan is submitted by January 31. The deficiency plan must be requested in writing and must state the sponsor, title, date, location, and credits of the program you are planning to attend between January 1 and March 1. Early selection of each year's seminars enhances the opportunity to select the CLE that best matches lawyers' areas of practice. Those who wait until the last minute find decreased availability of the seminars they would prefer to attend.

**2 File the Annual Report of Compliance timely.** The deadline is January 31. Otherwise, a \$50 late filing fee results.

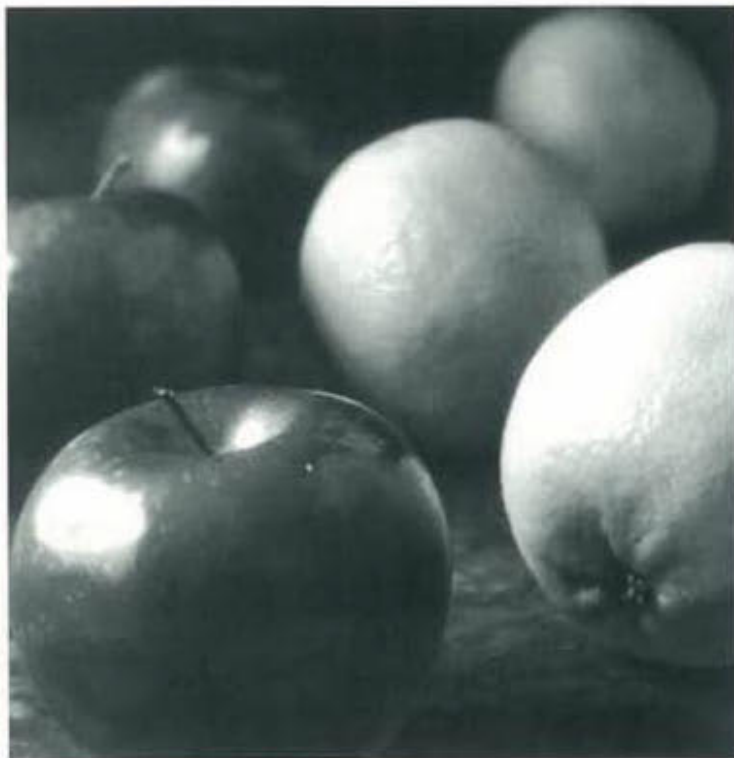
**3 File the deficiency plan on time and complete all CLE before the deficiency plan deadline.** Otherwise, a \$100 late CLE fee results.



**4 Correct non-compliance at once.** The MCLE Commission regrets that the Supreme Court of Alabama has to suspend some lawyers each year for not completing MCLE requirements or not paying late fees. If this occurs, the lawyer loses at least one or more months of practice, must make up all seminar and late fee deficiencies and must pay a reinstatement fee.

**5 Verify the accuracy of the Annual Report of Compliance.** As a service to lawyers, the MCLE Commission obtains attendance records from sponsors and lists each lawyer's record on the transcript. However, each attorney is responsible for filing an accurate record of his or her CLE attendance. Any needed correction to the Annual Report of Compliance should be made before the attorney signs it and thereby attests to its accuracy. It is the policy of the MCLE Commission to report to the disciplinary board all instances of false affidavits. The MCLE Commission is pleased to report that a vast majority of Alabama lawyers do comply fully with their MCLE requirements and thereby do avoid the foregoing problems. ■

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# LEGISLATIVE WRAP-UP

By ROBERT L. McCURLEY, JR.

## Unincorporated non-profit associations

An Institute committee has recommended to the Council of the Alabama Law Institute a new Unincorporated Non-Profit Association Act. The committee was chaired by L.B. Feld of Birmingham, while Dr. Richard Thigpen, retired faculty member of the University of Alabama School of Law, served as chair. Members of the committee were:

Malcolm N. Carmichael,  
Montgomery

Manley L. Cummins, III,  
Spanish Fort

Mark L. Gaines, Birmingham

Bill Hinds, Birmingham

Virginia Hopkins, Anniston

Mary Ellen Lamar, Decatur

Jim Main, Montgomery

Bob Pearson, Theodore

Thomas D. Samford, III, Auburn

Leah Scalise, Birmingham

Alyce Spruell, Tuscaloosa

L. Vastine Stabler, Jr.,  
Birmingham

James W. Webb, Montgomery

James Jerry Wood, Montgomery

Professor Richard Thigpen, in his preface to the committee's draft, has summarized the Act as follows:

This Act reforms the common law concerning unincorporated, non-profit associations in three basic areas—authority to acquire, hold, and transfer property, especially real property; authority to sue and be sued as an entity; and contract and tort liability of officers and members of the association. It also provides a default provision for the governance of such associations. It is based generally on the 1992 Uniform Unincorporated Non-Profit Association Act adopted by the Commission on Uniform State Law, and referred to hereafter as the "Uniform Act". The commentary is taken primarily from the Uniform

Act with changes and additions to reflect Alabama law.

At common law an unincorporated association, whether non-profit or for-profit, was not a separate legal entity. It was an aggregate of individuals. In many ways it had the characteristics of a business partnership.

This approach obviously created problems. A gift of real property to an



unincorporated association failed because no legal entity existed to receive it. For example, a gift of Blackacre to Somerset Social Club (an unincorporated, non-profit association) would fail because in law there is no legal entity to receive title. Some courts in time became uncomfortable with this result. Some construed such a gift as a grant to the officers of the association to hold the real estate in trust and manage it for the benefit of the members of the association. Later, some legislatures provided various solutions, including treating the association for these purposes as an entity. Alabama will allow the gift but the association is without authority to sell or convey the real property. The Association may incorporate and convey the property from the corporation.

Proceedings by or against an unincorporated association presented similar problems. If it were not a legal entity, each of the members needed to be joined as party plaintiffs or defendants. Class action offered another approach. Again, courts and legislatures, especially the latter, provided solutions. "Sue and be sued" statutes found their way on the lawbooks of most states. In Alabama, the statute providing for actions by an unincorporated organization or association is at *Ala. Code* §6-7-80, and the statute authorizing actions against, and in the name of, an unincorporated association is at *Ala. Code* § 6-7-81(a).

Unincorporated associations, not being legal entities, could not be liable in tort, contract, or otherwise for conduct performed in their names. On the other hand, their members could be. Courts borrowed from the law of partnership the concept that the members of the association, like partners, were co-principals. As co-principals they were individually liable. Again, courts and legislatures, responding to concerns of their constituents about this result, modified these rules. Courts found that, in large membership associations, some members did not have the kind of control or participation in the decision process that made it reasonable and fair to view them as co-principals. Legislatures also took steps. Perhaps most striking are the statutes adopted in many states in the last decade excusing officers, directors, members, and volunteers



**Robert L. McCurley, Jr.**

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



of non-profit organizations from liability for simple negligence. There is great variety in the details; a few statutes condition the immunity on the association's carrying appropriate insurance or qualifying under Internal Revenue Code Section 501(c). The Alabama statutes are at §§10-11-3 and 6-5-336 and grant immunity, respectively, to uncompensated "officers" for all but willful misconduct where they act in good faith and in the scope of official functions and duties.

Related to liability is the question of enforcement of a judgment obtained against an unincorporated association, its members and its property. If fewer than all members are liable in contract or tort, the property that members own jointly or in common may not be seized in execution of a judgment without severing the interest of those who are liable from those who are not. Again, courts using "joint debtor", "common property" and "common name" statutes fashioned more workable solutions. *Ala. Code* §6-7-81(b), for example, provides

that "where a judgment in such (an) action (against an unincorporated organization or association) is entered in favor of the plaintiff against such organization or association, the property of such organization or association shall be liable to the satisfaction of such judgment." Some legislatures have also addressed the problem directly. For these purposes, unincorporated associations have been treated as legal entities—like a corporation.

This Act deals with a limited number of the major issues relating to unincorporated, non-profit associations in an integrated and consistent manner. Statutes dealing with particular types of unincorporated associations, including those in Title 10, Chapter 4 of the *Alabama Code* and those dealing with agricultural cooperatives in Title 2, Chapter 10 of the *Alabama Code* are not affected by the Act.

The American Bar Association first issued its Model Non-Profit Corporation Act in 1964; it was most recently revised in 1987. The 1984 Alabama Non-Profit Corporation Act was based

on the ABA Act of 1964, and deals comprehensively with questions of governance and membership. This Act, on the other hand, addresses these issues in a cursory fashion only, and does not address other issues such as the dissolution of an unincorporated, non-profit association.

Adoption of this Act will leave other matters relating to unincorporated, non-profit associations to the state's common law or to statutes on the subject, where they exist. Alabama has statutes at Title 10, Chapter 4 dealing with special kinds of associations, such as churches, mutual benefit societies, fraternal orders and cooperatives. Statutes such as *Ala. Code* §6-3-4, dealing with venue for actions against an unincorporated organization or association, will remain applicable.

This Act applies to all unincorporated, non-profit associations. Non-profit organizations are often classified as public benefit, mutual benefit or religious. For purposes of this act, it is unnecessary to treat differently



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by  
**Penny A. Davis**  
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these three categories of unincorporated, non-profit associations. Unlike some state laws, it is not confined to the non-profit organizations recognized as non-profit under § 501(c)(3), (4) and (6) of the Internal Revenue Code. There is no principled basis for excluding any non-profit association. Therefore, the Act covers unincorporated philanthropic, educational, scientific, and literary clubs; unions; trade associations; political organizations; cooperatives; churches; hospitals; condominium associations; neighborhood associations; and all other unincorporated, non-profit associations. Their members may be individuals, corporations, other legal entities, or a mix.

The Act is designed to cover all of these associations to the extent possible. To the extent that Title 10, Chapter 4 of the *Code of Alabama* and other *Code* provisions deal with special types of non-profit associations, this Act supplements existing legislation.

The basic approach of the Act is that an unincorporated, non-profit associa-

tion is a legal entity for the purposes that the Act addresses. It does not make these associations legal entities for all purposes. It is left to the courts of Alabama to determine whether to use this Act by analogy to conclude that an association is a legal entity for some other purpose.

It should be noted, too, that a non-profit corporation or unincorporated, non-profit association is not the only choice. Alabama provides by statute for burial societies through the means of a charitable trust under *Ala. Code* §§11-16-12 through 11-17-15. It should be emphasized also that this Act is needed for the informal non-profit organizations that do not have legal advice and so may not consider whether to incorporate.

#### **New Alabama Code publisher**

Representative Jim Campbell, president of the Alabama Law Institute and chair of the Legislative Council of the Legislature, announced that Lawyers Co-op had submitted the lowest bid and will become the printer

of the *Alabama Code* beginning October 1, 1995.

The current code books will continue in use with supplements and new replacement volumes after October 1995 being supplied by Lawyers Co-op. Currently, a full set of the *Code* with supplements costs \$638. The new contract price to purchase a *Code* with supplements will be \$295. Current supplements are \$92 per year, with the new price to be \$43 per year. Replacement volumes presently are \$30 each; they now will be \$12 per volume. Lawyers Co-op will also be offering the *Code* CD-ROM for an initial price of \$895 with updates of \$495 per year. The CD-ROM will also include the *Administrative Code*.

The director of the Legislative Reference Service, Jerry Bassett, will continue as *Code* Commissioner.

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

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# ABOUT MEMBERS, AMONG FIRMS

## ABOUT MEMBERS

**Melody S. Brooks** announces the opening of her office at 117 S. Ross Street, Heflin, Alabama 36264. Phone (205) 463-7805.

**Larry R. Mann** announces the relocation of his office to 701 New South Federal Building, 215 N. 21st Street, Birmingham, Alabama 35203. Phone (205) 326-6500.

**Joel C. March** announces the relocation of his office to 3000 Riverchase Galleria, Suite 1111, Birmingham, Alabama 35244. Phone (205) 985-3696.

**R. Stan Morris** announces the relocation of his office to 651 Beacon Parkway West, Suite 214, Birmingham, Alabama 35209. Phone (205) 945-9994.

**D. Charles Holtz** announces the opening of his office at 1506 First Alabama Bank Building, Mobile, Alabama 36602. Phone (205) 431-6700.

**Oscar W. Adams, III** announces a change of address to 529 Beacon Parkway, West, Suite 213, Birmingham, Alabama 35209.

**Law Offices of Marion F. Walker** announces a change of address to 2000-A SouthBridge Parkway, Suite 406, Birmingham, Alabama 35209. Phone (205) 871-5355.

**Terri Willingham Thomas** announces the opening of her office at Suite 110, Downtown Plaza, Cullman, Alabama 35055. Phone (205) 737-9940.

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## AMONG FIRMS

**BellSouth Telecommunications** announces that **Michael Abbott Tanner** has joined the company, with offices at 675 W. Peachtree Street, NE, Suite 4300, Atlanta, Georgia 30375-0001. Tanner is a 1976 admittee to the Alabama State Bar.

**Boone, Quigley & Engelthaler** announces that **James R. Engelthaler**, formerly a supervisor of the child support unit of the Lauderdale County District Attorney's Office and law clerk to Senior U.S. District Judge E.B. Haltom, Jr., became a member of the firm July 1, 1994. Offices are located at First Federal Building, 102 S. Court Street, Suite 314, Florence, Alabama 35630. Phone (205) 760-1002.

**Tingle, Murvin, Watson & Bates** announces that **I. Ripon Britton, Jr.** has become a shareholder of the firm. Offices are located at 900 Park Place Tower, 2001 Park Place, North, Birmingham, Alabama 35203. Phone (205) 324-4400.

**Pierce, Carr & Alford** announces that **W. Pemble DeLashmet** has joined the firm. The mailing address is P.O. Box 16046, Mobile, Alabama 36616. Phone (205) 344-5151.

**Anita Tucker Smith** and **Rayford L. Etherton, Jr.** announce the formation of **Etherton Smith**. Offices are located at 31 N. Royal Street, Suite 1506, Mobile, Alabama 36602. Phone (205) 432-1636.

**Boyd F. Campbell, Patricia D. Warner** and **Roy E. McBryar** announce the formation of **Campbell Warner McBryar, L.L.C.** Offices are located at 4162 Carmichael Court, Montgomery, Alabama 36106. The mailing address is P.O. Box 230238, Montgomery 36123-0238. Phone (205) 272-7092, 244-7007.

**S. Mark Burr**, formerly senior staff attorney with Protective Life Corporation, has joined **Commonwealth Land Title Insurance Company**. Offices are located at 1300 Parkwood Circle, Suite 580, Atlanta, Georgia 30339. Phone (404) 952-1146. Burr is a 1991 admittee to the Alabama State Bar.

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**WestPoint Stevens** announces that **M. Clayton Humphries, Jr.** has been promoted to general counsel. The mailing address is 400 W. 10th Street, P.O. Box 71, West Point, Georgia 31833. Phone (706) 645-4879. Humphries is a 1978 admittee to the Alabama State Bar.

**Terry Carlisle & Associates** announces a change of address to 1621 Pinson Street, Tarrant, Alabama. The mailing address is P.O. Box 170766, Tarrant 35217-0766. Phone (205) 841-4063.

**The Trust Company of Sterne, Agee & Leach, Inc.** announces that **Kathryn W. Miree** has joined as president and CEO. Offices are located at 1901 Sixth Avenue, North, Suite 2130, Birmingham, Alabama 35203. Phone (205) 716-2680.

**Glassroth & Associates** announces that **Joseph P. Van Heest**, formerly law clerk to Honorable W. Harold Albritton, U.S. District Judge for the Middle District of Alabama, has become associated

with the firm. Offices are located at 615 S. McDonough Street, Montgomery, Alabama 36104. The mailing address is P.O. Box 910, Montgomery 36101-0910. Phone (205) 263-9900.

**McDonald Land & Oil, Inc.** announces that **Kelly McDonald Jordan**, formerly of Lanier, Ford, Shaver & Payne of Huntsville, has become associated with the company. Offices are located at 1705 Gusmus Drive, Muscle Shoals, Alabama 35661. The mailing address is P.O. Box 68, Florence 35631. Phone (205) 383-8655.

**Colquett & Associates** announces that **Virginia F. Holliday**, formerly with Woodall & Maddox, has joined the firm. Offices are located at Chase Corporate Center, One Chase Corporate Drive, Suite 205, Birmingham, Alabama 35244. Phone (205) 987-1223.

**Michael J. Gamble** announces the association of **Amy M. Shumate**. Offices are located in the Attorney Professional Building, 200 E. Main Street, Dothan, Alabama 36301. Phone (205) 793-2889.

**Hand, Arendall, Bedsole, Greaves & Johnston** announces that **Patricia J. Ponder** has joined the firm. Offices are located at 3000 First National Bank Building, Mobile, Alabama. The mailing address is P.O. Box 123, Mobile 36601. Phone (205) 432-5511.

**Thomas Troy Ziemann, Jr.; Jerome E. Speegle; Thomas P. Oldweiler; Robert Gerald Jackson, Jr.; and Anthony M. Hoffman** announce the formation of **Ziemann, Speegle, Oldweiler & Jackson, L.L.C.** Offices are located at First National Bank Building, Suite 3200, Mobile, Alabama. The mailing address is P.O. Box 11, Mobile 36601. Phone (205) 694-1700.

**The University of Alabama School of Law** announces that **Cynthia Lee Almond** has been named director of law development and alumni relations. Almond served as assistant director for annual giving since June 1993. She was admitted to the Alabama State Bar in 1990.

**McGlinchey Stafford Lang** announces that **Elena A. Lovoy** has joined the firm. Offices are located at 643 Magazine Street, New Orleans, Louisiana 70130-3477. Phone (504) 596-2865. Lovoy was admitted to the Alabama State Bar in 1987.

**Otto A. Thompson, Jr.** announces his reassignment in October 1994 to the position of counsel, **Naval Regional Contracting Center**, Washington, D.C. He previously served as counsel, U.S. Naval Regional Contracting Center in Singapore. Thompson was admitted to the Alabama State Bar in 1979.

**Harris & Brown** announces that **J. Michael Cooper** has become an associate with the firm. Offices are located at 2000A SouthBridge Parkway, Suite 520, Birmingham, Alabama 35209.

**Michael W. Carroll and B. Scott Tyra**, formerly with Yearout, Myers & Traylor, announce the formation of **Carroll & Tyra**. Offices are located at the Frank Nelson Building, 205 20th Street, North, Suite 615, Birmingham, Alabama 35203. Phone (205) 328-2600.

**The Law Office of George A. Nasaney, Jr.** announces that **Carol L. Griffith** has become an associate. Offices are located at 1452 22nd Avenue, Tuscaloosa, Alabama 35401. Phone (205) 345-2272.

**Hardwick, Hause & Segrest** announces that **Tina Whitehead Stamps**, formerly a law clerk for Justice Charles Thigpen, has become associated with the firm. Offices are located at 212 N. Lena Street, Dothan, Alabama 36303. The mailing address is P.O. Box 1469, Dothan 36302. Phone (205) 794-4144.

**The Law Office of Horace G. Williams** announces that **Courtney R. Potthoff** has become associated with the firm. Offices are located at 125 S. Orange Avenue, Eufaula, Alabama 36027. Phone (205) 687-5834.

**Auburn University** announces that **Lee Armstrong**, a staff attorney since 1989, has been appointed acting general counsel for the University, effective October 1.

**The Alabama State Banking Department** announces that former Deputy Attorney General **Scott Corscadden** has been appointed to the department as legal counsel. Offices are located at 101 S. Union Street, Montgomery, Alabama 36130. Phone (205) 242-3452.

**Johnston, Barton, Proctor, Swedlaw & Naff** announces that **Spencer A. Kinnerman** has become associated with the firm. Offices are located at 2900 AmSouth/Harbert Plaza, Birmingham, Alabama 35203-2618. Phone (205) 458-9400. ■

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# BUILDING ALABAMA'S COURTHOUSES

## MARENGO COUNTY COURTHOUSE

By SAMUEL A. RUMORE, JR.

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



Marengo County's fifth and present courthouse, located in Linden, was completed in 1968.

### MARENGO COUNTY

**M**arengo County is located in west central Alabama. Like its neighboring Black Belt counties, the soil in Marengo is quite rich. However, unlike so many of its neighbors, whose beginnings are linked to Alabama's Indian history and Anglo pioneers, the source of Marengo County's name and the story of its earliest settlers are unique.

The history of Marengo County begins with the end of the Napoleonic era. Napoleon seized power in France in 1799, led his men through numerous campaigns, conquered much of western Europe, and was finally defeated and exiled in 1815. Many of his former generals, courtiers and political supporters fled France and came to the United States in search of a new life and to avoid retribution at the hands of Louis XVIII, the new ruler. A number of these distinguished refugees found themselves in Philadelphia during the winter of 1816-1817.

These French expatriates sought to establish a French colony somewhere in the United States. They sent a representative to Congress seeking a tract of land for settlement. Perhaps due to the early



French influence at Mobile, or due to the existence of former French outposts, such as Fort Tombebee in present-day Sumter County, a decision was made that the colonists could settle near the confluence of the Warrior and Tombigbee rivers in the Alabama Territory.

On March 3, 1817, Congress granted the French exiles four townships. The Frenchmen formed a company which has been variously called the Society for the Cultivation of the Vine and Olive, the French Agricultural and Manufacturing Society, the Tombebee Association, the French Emigrant Association, and, simply, the Vine and Olive Colony. Its purpose was the cultivation of grapes and olives at their new homesteads in America.

The French emigrants, led by Count



The White Bluff at Demopolis

Charles Lefebvre Desnouettes, set sail from Philadelphia in May 1817. They were almost shipwrecked in Mobile Bay, but were able to travel up to St. Stephen's, the territorial capital, which was at the head of navigation during low water times. Then their goods were transferred to flat boats. They eventually established their settlement at the White Bluff, on the eastern side of the Tombigbee River.



To say that the French settlers were unprepared for their new life in the Alabama wilderness is an understatement. These people were accustomed to the urban conditions of Paris and Philadelphia. They had no wagons or animal teams, yet their farmlands had to be cleared of an immense forest. Unfriendly Indians occupied the west side of the river. Despite the primitive conditions, they cleared the land, built cabins and proceeded to plant their vines and olives. The settlement at the White Bluff became known as "Demopolis"—Greek for "the city of the people".

In early February 1818, the Alabama Territorial Legislature created 13 new counties, adding these to the seven existing counties of Alabama that had been a part of the Mississippi Territory. One of these new counties embraced the French settlement. Abner Lipscomb, a legislator who would later become a member of the state supreme court as well as chief justice, suggested the name "Marengo" for this county. Marengo was one of Napoleon's greatest victories against the Austrian army. The battle had taken place on June 14, 1800 at Marengo in northern Italy.

The presence of the French in Marengo County led to some speculation about their true purpose. Rumors circulated that the French refugees were an advance party with the goal of establishing a Napoleonic Confederation. There were also rumors that Joseph Bonaparte, Napoleon's brother, would one day come to America with his objective to become King of Mexico. None of these rumors proved true, but Congress, seemingly in reaction to them, set relatively harsh terms for the French settlers in their

land grants. Title to their lands would not pass from the United States to the French until all contract terms by each settler had been fulfilled through the cultivation of the grape and olive.

To compound the problems of the

claimed by Americans. The settlers moved a mile to the east where they founded the village of Aigleville. This name referred to Napoleon's standard, or ensign, the eagle.

The French were forced to move once again when it was later determined that Aigleville was still not a part of their lands as shown by drawings at Philadelphia. They then moved to northern Marengo County on the south bank of the Warrior River at a place they called Arcola. This was also the name of a Napoleonic victory against the Austrians in northern Italy.

After several years it became apparent that the Vine and Olive Colony was a failure. The soil and climate were not suitable to those commodities. Many settlers were forced to sell their lands to Americans who brought in slaves and cultivated cotton. Some of the French left for Mobile and New Orleans. After the death of Napoleon in 1821, some were allowed to return to Europe. In 1823, Count Desnouettes learned that his wife had received permission for him to reside in Belgium. On his return, his ship was wrecked off the coast of Ireland, and he was lost at sea.

The direct involvement of the French in Marengo County was short-lived. However, their influence lives on today in the names of Marengo, Demopolis and the county seat town of Linden.

When Marengo County was created in 1818, the territorial act establishing it designated the "White Bluff" or such place contiguous thereto as might be deemed proper as the place for holding court. It has already been recounted how the White Bluff was later renamed "Demopolis" by the early French set-



*Courthouse number four, located in Linden, was destroyed by fire in 1965.*



*Third courthouse located in Demopolis*

French settlers, an official government survey established that the lands which they had cleared and planted were located in the wrong township. Their settlement was not in the French land grant. They were forced to move to the lands originally assigned to them, and the homes they had built were quickly



tlers. Thus, this area became the first territorial county seat. The first court was held at the home of Samuel Easley, and was presided over by Judge John Lockhart of McKinley, Alabama.

When Alabama achieved statehood on December 14, 1819, a legislative act also provided that the house of Mrs. Irby on the south side of Chickasaw Bogue would be the temporary seat of justice in Marengo County under the new state government. Mrs. Irby's husband, James, had been one of the original French emigrants, and they had settled on top of a hill approximately one mile north of the present Marengo County Courthouse site. Irby had died on October 10, 1819, barely two months before statehood was achieved.

The following year, on December 6, 1820, five commissioners were appointed to select a site for the permanent county seat. The same act setting up this commission provided that the "Town of Marengo" would serve as the next temporary seat of justice, and that the county would levy a tax sufficient to purchase or erect a plain log courthouse.

The town of Marengo was centrally located in Marengo County, and had been named for the county. Abner Lipscomb, who had originally suggested the name "Marengo" for the county in 1818, likewise proposed a new French-related name for the temporary county seat at Marengo. He put forth the name "Hohenlinden", which was a battle site in Bavaria not far from Munich. The French general Moreau had defeated Austrian Archduke John there on December 3, 1800. The name of the town was later shortened to Linden.

On August 22, 1823, the commissioners met at Linden to select the site for the Marengo County Courthouse. They chose the southeast quarter of Section 32, Township 16, Range 3 East which was in Linden. A legislative act passed on December 17, 1823 appointed commissioners to sell and convey town lots in order to erect public buildings at the county seat.

Despite this authorization for its construction, a permanent courthouse was not immediately built in Marengo County. On May 25, 1825, a new commission met and decided to build a courthouse. Proposals were received and adopted on November 7, 1825, but

it was not until September 1827 that the building was completed and accepted by the county.

The builders for this first true courthouse in Marengo County were Smith and Warner. They built a two-story log structure and were paid \$3,500. This building served the county for more than 20 years until it was destroyed by a fire in 1848.

A new building, more appropriate for the prosperity of Marengo County, was



Marker outside courthouse number two in Linden

constructed in 1848 at Linden. This building still stands today at the corner of West Cahaba and Mobile streets. It was named to the National Register of Historic Places on January 18, 1974.

According to the National Register inventory, the old courthouse at Linden is a two-story rectangular structure with a stucco facade and a brick exterior on the remainder of the building. It has a portico featuring two Doric columns. A second-story balcony connects the columns with the walls, and stairs at either end of the portico lead up to the balcony. There are three entrances on the ground floor under the portico. The two side doors enter large rooms and the central door leads into the hallway. The second story contains the former courtroom which

serves as an auditorium today. This building is significant in Alabama history because outside its doors the notorious train robber, Rube Burrows, was killed on October 9, 1890.

For a short period of time following the War Between the States, during Reconstruction, the county seat of Marengo County was moved to Demopolis. This took place in 1868. The brick building used as a courthouse was originally built in 1843 as a Presbyterian church. During Reconstruction, federal military authorities stationed at Demopolis commandeered the church building for a courthouse.

On December 4, 1869, an act of the Legislature again named Linden the county seat. However, much controversy arose over the decision and an election was held to settle the matter in 1870. Three towns were considered by the voters—Linden, Demopolis and Dayton. Linden won the election, again became the county seat, and has remained the permanent county seat of Marengo County ever since.

Following Reconstruction and the return of the seat of justice to Linden, the "courthouse" at Demopolis was used as a public auditorium, an opera house and an office building. The building still stands today on the northeast corner of the Demopolis public square. It is owned by the City of Demopolis, and is used by the fire department.

In 1901, the county commissioners decided that the old courthouse at Linden was no longer sufficient for the needs of the county. They decided that a new courthouse would be built at a site to be selected. However, the site chosen was outside the original town limits of Linden. A lawsuit arose and in the case of *Marengo County, et al v. Matkin*, 134



**Samuel A. Rumore, Jr.**

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

Birmingham with the firm of Miglionico & Rumore. Rumore serves as the bar commissioner for the 10th Circuit, place number four.



Ala 275, the state supreme court held that any courthouse in Marengo County must be located within the original town limits of Linden.

The county had previously entered into a contract with F.M. Dodson and W.T. Hand of Brewton, Alabama for \$30,750 for the construction of a courthouse, but the site had not been chosen. Finally, on Monday, January 13, 1902, a decision had to be made. Judge Cunningham offered to donate two acres on the southwest corner of his lot to the county. E.C. Coats also offered a lot. Two members of the commission voted for the Cunningham property. Two members voted for the Coats property. Probate Judge J.P. Prowell cast the deciding vote in favor of the Coats lot, and the courthouse was built there in 1902.

The decision to relocate the courthouse site was significant because for a period of time Linden had an old town and a new town. The construction site was on the southern limit of the original town site. When the courthouse was moved, business activity moved with it. Perhaps this was a reason for the generous offers by landowners whose remaining holdings would increase in value. The next year the town boundary was extended southward, and the courthouse was then located approximately in the center of the new town limits.

Following the move to a new courthouse, the old courthouse continued to serve the citizens of Linden and Marengo County. The building was used as a public school from 1903 to 1915. Also, it has served intermittently as a skating rink, horse stable, dance hall and National Guard armory. In March 1915,

the county sold the building for \$500 to the Ladies Aid and Women's Missionary Society of the Linden Baptist Church. The building was used for church services for more than 30 years. In 1947, the property was sold to the American

B.B. Smith. It contained a soaring clock tower typical of courthouse construction during that era. The building also had a basement and an attic. In 1916, the courthouse was struck by lightning. And, in 1924, the courthouse suffered

considerable tornado damage. But, in neither event were court records lost.

On October 14, 1965, disaster struck the Marengo County courthouse when a fire gutted the old building. Fortunately, most records were in fire-proof vaults and were saved. The county received \$300,000 from fire insurance on the loss. Plans were immediately made for a new courthouse on the same site. Pending construction, the county took over a vacant building, the former Linden bowling alley, for use as a courthouse. This building is now used for a private school.

The county commissioners visited a number of courthouses in Alabama to borrow the best ideas for the needs of Marengo County. They chose Sherlock, Smith and Adams of Montgomery to design the building. C.F. Halstead of Montgomery was the contractor.

This latest courthouse is a two-story brick structure with a basement. It is best described as contemporary with a subdued reference to the traditional by the use of a portico with pillars. The total cost of the building was \$675,000. The building was dedicated on Sunday, September 15, 1968. ■



Artist's conception of Marengo County's first courthouse. The structure, located in Linden, was destroyed by fire in 1848.



Linden served as the site of the second courthouse from 1848 to 1902.

Legion and Veterans of Foreign Wars, and the building became known as Veterans Hall. The Town of Linden now owns the building and plans are being formulated for restoration and possible use as a museum.

The new courthouse of 1902 was a two-story brick and stone structure of Romanesque design. The architect was

The author acknowledges the assistance of Circuit Judge Claud D. Neilson for information used in preparing this article and for obtaining illustrations.

Sources: *A Directory of Marengo County for 1860-61*, W.C. Tharin, 1861; *History of Marengo County*, Joel D. Jones, 1958; *Dedication Brochure, Marengo County Courthouse*, 1968.



• The Public Service Committee of the Birmingham Bar Association recently recognized the firm of **Balch & Bingham** for excellence in its corporate community work. The firm, which has been nominated by the Association for the national Points of Light Foundation Excellence in Corporate Community Service Award, was recognized for its programs with PATH, its adopted school, Banks Middle School, and the Boy

Scouts Explorer Post. The PATH assistance programs serve homeless women in transition, the Law Explorer Post is the largest in Birmingham, with over 100 students, and the firm has established many programs for Banks Middle School.

• **Edward J. Rice, Jr.**, a partner with the firm of Adams & Reese in its Mobile office, is the new president-elect of the International Association of Defense Counsel. The IADC is the

oldest and largest professional association of defense trial attorneys in the world.

• **Edgar M. Elliott, III** recently was inducted as a Fellow of the International Academy of Trial Lawyers. Elliott was nominated by William J. McDaniel of Birmingham. Elliott is with the Birmingham firm of Rives & Peterson, and a graduate of Birmingham-Southern College and the University of Alabama School of Law. ■

## ***Position Available***

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The Alabama Bar Institute for Continuing Legal Education (ABICLE) provides post-graduate programs of continuing legal education for members of the Alabama legal profession. ABICLE presents approximately 50 seminars a year and publishes a variety of instructional materials for the legal profession. The associate director is responsible for the planning, development, implementation and evaluation of the ABICLE's programs and publications.

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# OPINIONS OF THE GENERAL COUNSEL

By *ROBERT W. NORRIS, general counsel*



**QUESTION:** "Recently, the Judges of the ——— Judicial Circuit entered an Order governing the manner in which indigent defendants shall be represented by appointment. The prior procedure utilized in the Circuit was on a voluntary basis.

The new procedure subjected a large number of lawyers to these appointments who do not desire to represent indigents, and who would like to ethically shift their responsibility to another lawyer.

"My question is as follows: Would it be ethically permissible for lawyer A to enter into a contract with lawyer B, or law firm B, whereby lawyer A would accept and agree to be substitute counsel for lawyer B for a negotiated monthly or annual sum B would pay to A for A's seeking substitution of counsel for B's indigent appointments? The negotiated sum would not be on a per individual case basis, but would be a general contract. Assume further that A would file a Fee Declaration for work he did on the case without deduction of any of the

contract amount paid by B to A for services rendered by A after the Court appoints A as the Defendant's representative. Assume further that B does not file a Fee Declaration with the Court for approval, and A does not include any of B's time on A's Fee Declaration. The purpose of the contract entered into is for A to handle B's case load of indigent appointments, and A receives a flat retainer from B to serve as substitute counsel for B, and, additionally, A receives compensation from the State as appointed counsel under his appointment without regard to the payments paid by B under the A-B contract.

"The provision of 1.5(f) speaks to this area, but it is not sufficiently clear for me to act on comfortably. I have had discussions of an offer of employment such as I have described, and both sides want a written opinion from the Bar before venturing further in this regard."



**ANSWER:** There do not appear to be any ethical prohibitions against this proposal provided approval of the appointing court is obtained prior to implementing the contract and prior to substitution of counsel.



**DISCUSSION:** As stated in your opinion request, the ethical considerations involved in acceptance of a fee by an attorney appointed by the court to represent an indigent criminal defendant are addressed in Rule 1.5(f) of the Rules of Professional Conduct. That rule provides in pertinent part as follows:

Without prior notification to and approval of the appointing court, no lawyer appointed to represent an indigent criminal defendant shall accept any fee in the matter from the defendant or anyone on the defendant's behalf.

The language of this rule indicates that the only condition precedent to indigent criminal defense counsel accepting a fee from a third party is notification and approval of the appointing court. It is, therefore, the opinion of the Disciplinary Commission that an attorney or law firm may pay an annual or monthly fee to another attorney to handle all court appointed indigent criminal cases to which the attorney or firm may be appointed, provided the appointing court gives its consent prior to execution of the contract between the attorneys or firms and prior to substitution of counsel.

Please be aware that the state bar has no jurisdiction to address the question of whether this proposal may be in violation of any statutes, procedural rules or local rules of court relating to indigent representation and we expressly make no determination in regard to such issues. ■

[RO-91-34]



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# Alabama State Budgets And Appropriations

by Albert P. Brewer

**A**ppropriations are essential to the operation of Alabama state government. The Alabama Constitution states: "No money shall be paid out of the treasury except upon appropriations made by law...."<sup>1</sup>

The appropriation bills enacted by the legislature are the culmination of a lengthy process that involves the executive and legislative departments of state government. The steps in the budget process are spelled out in detail in the state constitution and in the statutory law of the state.

## The Governor's budget

The process is initiated by the executive department. The Constitution provides:

The governor shall, from time to time, give to the legislature information of the state of the government, and recommend for its consideration such measures as he may deem expedient; and at the commencement of each regular session of the legislature, and at the close of his term of office, he shall give information by written message of the condition of the state; and he shall account to the legislature, as may be prescribed by law, for all moneys received and paid out by him or by his order; and at the commencement of each regular session he shall present to the legislature estimates of the amount of money required to be raised by taxation for all purposes.<sup>2</sup>

## The Budget and Financial Control Act

The governor's report and recommen-

dations to the legislature are formulated through the statutory budget process. The Budget and Financial Control Act of 1932<sup>3</sup> requires the governor, within five days after the convening of each regular session of the legislature, to transmit to the legislature his budget for the next fiscal year.<sup>4</sup> The budget consists of three parts: (1) the budget message in which is set forth the governor's recommended expenditures and the funds from which such expenditures are to be made; information on the condition of the treasury and estimates of revenues for the budget year; and recommended revenue measures if the estimated revenues for the budget year are less than the appropriations; (2) the governor's recommended appropriations from each fund, general or special, for the departments, agencies, and institutions of state government; and (3) a proposed appropriation bill and a proposed revenue bill for the purpose of enacting the governor's recommendations.<sup>5</sup>

The budget process begins with the preparation by the budget division of the department of finance of a tentative budget for "every department, board, bureau, commission, agency, office and institution of the state."<sup>6</sup> Each department is required to submit an estimate of its expenditure requirements for the budget year to the department of finance, such information to be furnished three months before the beginning of the regular session of the legislature.<sup>7</sup> The department of finance is required to prepare an estimate of the total income for the budget year,<sup>8</sup> and utilizing the estimates of expenditure

requirements and the estimates of income, the department of finance prepares a tentative budget which is submitted to the governor.<sup>9</sup>

The governor must then make provision for public hearings on the tentative budget at least two weeks prior to the convening of the regular session of the legislature.<sup>10</sup>

After the public hearings, the governor finalizes his budget which is submitted to the legislature after the legislature convenes in regular session.<sup>11</sup> It should be noted that the Budget Isolation Amendment<sup>12</sup> requires the governor to submit his proposed budget on or before the second legislative day of each regular session of the legislature.

## The Budget Management Act

In 1976 the Budget Management Act<sup>13</sup> undertook "to establish a comprehensive system for budgeting and financial management which furthers the capacity of the governor and the legislature to plan and finance the services which they determine the state will provide for citizens."<sup>14</sup> This statute reaffirms the governor's responsibility for the preparation and administration of the state budget, for "the evaluation of the long range program plans," and for recommending to the legislature a "comprehensive program and financial plan which shall cover all estimated receipts and expenditures of the state government" with the proscription that "proposed expenditures shall not exceed estimated revenues and resources."<sup>15</sup>

The responsibility for the preparation of the budget is vested in the department of finance,<sup>16</sup> and the various state



agencies and departments are directed to furnish financial information to the department of finance in order that it may carry out its responsibility.<sup>17</sup> The department of finance submits to the governor a summary of the information which it has compiled from the state departments,<sup>18</sup> and the governor formulates his program and financial plan which he is required to present to the legislature on or before the fifth legislative day of each regular session.<sup>19</sup>

Statutory responsibility is placed on the legislature to consider the governor's program and financial plan, to adopt alternatives to the governor's plan where the legislature deems such appropriate, and to adopt legislation to authorize the implementation of a comprehensive program and financial plan.<sup>20</sup> Each department of state government is required to submit performance reports to the department of finance for "the work accomplished and the services provided," the costs of such, and recommendations for changes in the programs.<sup>21</sup>

The Budget Management Act did not repeal the Budget and Financial Control Act of 1932 and thus must be considered *in pari materia*. The substantive change in the budget process by the Budget Management Act of 1976 was to effect a system of program review and evaluation.

#### **Budget Management Improvement Act of 1992**

The next governor, and subsequent governors, are required to develop a four-year strategic plan for presentation to the legislature during the first legislative session of each term of office.<sup>22</sup> The plan shall include the governor's program, long range revenue and expenditure plans for the quadrennium, capital outlay requirements, and recommendations to reduce the cost of state government.<sup>23</sup>

#### **Legislative Committee on Finances and Budgets**

While the governor is formulating his budget proposals, the Permanent Joint Legislative Committee on Finances and Budgets will also have conducted budget hearings. This committee was created in 1991.<sup>24</sup> This committee is authorized to meet during the interim of the regular sessions of the legislature.<sup>25</sup> It has the responsibility to make

a careful investigation and study of the financial condition of the state, to hold budget hearings, to inquire into ways and means of financing state government, and to report its findings and recommendations to the legislature not later than the seventh legislative day of each regular session.<sup>26</sup> Thus, the governor's budget formulation and hearings and the legislature's hearings may go on simultaneously, but the presentation of the formal budget is the responsibility of the governor.<sup>27</sup> The legislature may, of course, amend the appropriation bills to reflect some or all of the findings and recommendations of the joint legislative committee.

#### **Legislative Fiscal Office**

The legislature is aided in fiscal matters by the legislative fiscal office.<sup>28</sup> The fiscal office has the duty and function to provide the legislative members and committees with information respecting the budget, appropriation bills and other legislation as well as information with respect to revenues, estimated future revenues, and changing revenue conditions.<sup>29</sup> Prior to the creation of the leg-

islative fiscal office, the legislature had no independent source of fiscal information and was completely dependent on the executive department for data relating to fiscal matters.

The act creating the office further provided that every general bill which requires the expenditure of county or municipal funds, or decreases or increases revenues to any county or municipality, must have endorsed thereon an estimate made by the director of the legislative fiscal office of the amount of money involved and the effect of the proposed legislation.<sup>30</sup> Fiscal notes are also required by the House and Senate rules.<sup>31</sup> The purpose of the fiscal note is to advise the legislature of the bill's fiscal impact. The fiscal note allows the members of the legislature to make informed judgments about passage of legislation requiring the expenditure of public funds or the raising of revenues.

#### **The Appropriation bills**

The Constitution sets out the limitations on appropriations:

The general appropriation bill shall embrace nothing but appropriations

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for the ordinary expenses of the executive, legislative, and judicial departments of the state, for interest on the public debt, and for the public schools. The salary of no officer or employee shall be increased in such bill, nor shall any appropriation be made therein for any officer or employe unless his employment and the amount of his salary have already been provided for by law. All other appropriations shall be made by separate bills, each embracing but one subject.<sup>32</sup>

Appropriation bills allocate funds available to the state for expenditure during the fiscal year for which appropriations are being made. These available funds include revenues from taxes, unencumbered funds in the state treasury, and income from other sources such as federal funds. Most of Alabama's revenue is earmarked for specific purposes.<sup>33</sup> Legislative appropriations of earmarked revenues must be for the designated purposes.

#### **Alabama Special Educational Trust Fund**

The special educational trust fund is a special fund which was created in 1927 in a general revenue bill which levied license and privilege taxes on railroads; telegraph companies; telephone companies; express companies; hydro-electric power companies; coal mines; iron ore mines; quarries, sand and gravel pits; sleeping car companies; and sellers of tobacco products.<sup>34</sup>

Act No. 163<sup>35</sup> provided that the revenues collected from these taxes would be "set apart as a trust fund for educational purposes only, to be designated as the Alabama special educational trust fund... and shall be paid out by the treasurer on lawful appropriations" by the legislature for educational purposes.<sup>36</sup> Thus, the specified revenues were "earmarked" for educational purposes.

#### **Limitations on legislation**

The appropriation bills are subject to a wide range of limitations on legislation contained in the Alabama Constitution. Examples are the requirements that each bill be referred to a committee, acted upon by the committee, and returned to the house;<sup>37</sup> that each bill be read on three separate days in each house before passage;<sup>38</sup> that each bill

contain but one subject, except the general appropriation bill;<sup>39</sup> that each house keep a journal of its proceedings;<sup>40</sup> that the vote on each bill be entered in the journal;<sup>41</sup> that votes on amendments be set out in the journal;<sup>42</sup> that the original purpose of a bill cannot be changed by amendment;<sup>43</sup> that the general appropriation bill include only appropriations for the ordinary expenses of government;<sup>44</sup> and that the presiding officer of each house sign bills passed by that house in the presence of that house.<sup>45</sup>

The framers of the constitution did not prohibit appropriations to non-state agencies but did make such appropriations subject to the restrictions of §73 of the Constitution:

No appropriation shall be made to any charitable or educational institution not under the absolute control of the state, other than normal schools established by law for the professional training of teachers for the public schools of the state, except by a vote of two-thirds of all the members elected to each house.<sup>46</sup>

#### **Conditional appropriations**

Though not specifically authorized in the Constitution, the legislature frequently makes "conditional" appropriations in appropriation bills. These appropriations usually contain terminology in substance that "there is hereby conditionally appropriated from the state general fund (or the special educational trust fund as the case may be) the sum of \_\_\_\_\_ dollars for (name of department or agency and purpose) to be conditioned upon the availability of funds in the state general fund (or the special educational trust fund) and the approval of the governor."<sup>47</sup> Such appropriations are paid from surplus funds upon the approval of the governor.

#### **Balanced budget provision**

Alabama's Constitution contains a "balanced budget provision" which prohibits the payment of appropriations in excess of available revenues.<sup>48</sup> Alabama's balanced budget amendment was ratified at the same time as the state income tax amendment<sup>49</sup> and provides in part:

To prevent further deficits in the state treasury, it shall be unlawful from and after the adoption of this amendment for the state comptroller... to draw any warrant... for

the payment of money ... upon the state treasurer, unless there is in the hand of such treasurer money appropriated and available for the full payment of the same.<sup>50</sup>

To the extent that funds are insufficient to pay the appropriations in full, the amendment provides for prorating the funds.<sup>51</sup> It further provides that at the end of each fiscal year all unpaid appropriations become null and void.<sup>52</sup>

The Justices of the Alabama Supreme Court have stated the purpose of Amendment 26 as follows:

The provisions of §213 of the Constitution, as amended [by Amendment 26], are expressly intended to prevent further deficits in the state treasury. To this end, available funds for the payment of claims, in case of a deficit, are to be prorated, and all excess unpaid appropriations are declared null and void.<sup>53</sup>

#### **Restrictions on appropriations**

Questions about the construction of §71 of the Alabama Constitution have been raised regarding the validity of certain appropriations. The first such question was posed in 1934 when Governor Miller requested an advisory opinion from the justices of the Supreme Court of Alabama on the constitutionality of an appropriation in the general appropriation bill from the general fund to the Alabama special educational trust fund.<sup>54</sup> The justices observed that the term "public schools" as used in §71 means the system of common schools existing under §256 of the Constitution and concluded that "to the extent that it [the



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a public policy think tank located at Samford. He practiced law in Decatur prior to his accepting his Samford appointment. He served three terms in the Alabama House of Representatives, and during his third term he served as Speaker of the House. He also served as Lieutenant Governor and Governor of Alabama. He is the only person who has served in these three highest offices in state government.



appropriation bill] appropriates funds out of the general treasury to the use of the Alabama special educational trust fund [the Act] does not make an appropriation authorized by §71, Constitution, to be included in the general appropriation bill, but that it is expressly prohibited from inclusion, and such an appropriation can only be made by a separate bill containing no other subject.<sup>55</sup>

*Childree v. Hubbert*<sup>56</sup> presented the issue whether appropriations to state agencies could be made from the Alabama special educational trust fund in a general appropriation bill. Applying §§45 and 71 of the Alabama Constitution, the court first noted that the acts creating and allocating revenues to the Alabama special educational trust fund specified that those revenues would be used for educational purposes only to be paid out "on lawful appropriations hereafter made specially from such funds by the legislature of Alabama for educational purposes."<sup>57</sup> The court reviewed the taxes earmarked for education including the income tax for teachers' salaries, sales and use taxes, public utilities, gross receipt taxes, and others.<sup>58</sup> The court held that the funds in the educational trust fund were earmarked for educational purposes, that before the funds could be appropriated for non-educational purposes the earmarking of those funds would have to be repealed, and that the repeal of earmarking is not a matter properly included in an appropriation bill. To disregard the earmarking provision would, in effect, repeal the earmarking in an appropriation bill and would be violative of §§71 and 45.<sup>59</sup>

One may thus conclude that appropriations from the special educational trust fund, for purposes other than public schools, may not be made in the *general appropriation bill*. Appropriations can be made from the *general fund* for any educational purposes, but they must be made by separate bills to comply with §71.

It is equally well established that appropriation bills cannot be used as vehicles to enact substantive legislation. In *Wallace State Community College v. Alabama Commission on Higher Education*,<sup>60</sup> the legislature passed the educational appropriation bill which had been altered by a joint house-senate conference committee to include a pro-

vision creating a physical therapy assistant program at Wallace State Community College.<sup>61</sup> The court held the addition violative of §§45 and 71 of the Alabama Constitution. The bill was entitled: "A bill to be entitled an act to make annual appropriations for the support, maintenance and development of public education in Alabama and for debt service and capital improvements for the fiscal year ending September 30, 1988."<sup>62</sup> The court noted that the title made no reference to the physical therapy provision, that this provision was not an appropriation, and that the act dealt with more than one subject, and thus violated §§45 and 71.<sup>63</sup>

The same result was reached in *Alabama Education Association v. Trustees of the University of Alabama*,<sup>64</sup> where the legislature included in the educational appropriation bill a provision prohibiting institutions from being eligible to receive appropriations unless the institution provided a dues check-off for certain professional organizations.<sup>65</sup> The court held the provision violative of §§45 and 71 because the title of the bill did not reflect the dues check-off provision, and the provision bore no relation to the amount and purpose of the appropriation.

To summarize, §71 places strict limitations on the general appropriation bill limiting appropriations therein to the ordinary expenses of the executive, legislative and judicial departments, for interest on the public debt, and for the public schools. If the appropriations are for the "public schools" as that term has been defined, the bill meets constitutional muster. But if an appropriations bill includes appropriations to technical schools, junior colleges and universities, the bill cannot be a general appropriation bill and is governed by the single subject requirement of §45.

Thus, the general appropriation bill appropriates money from the general fund for the agencies enumerated in §71.<sup>66</sup> Appropriations from the Alabama special educational trust fund of funds which are earmarked for educational purposes may not allocate such revenues for non-educational purposes, and funds in the Alabama special educational trust fund may not be appropriated in a general appropriation bill since such action would, in effect, un earmark such funds and would thus violate §§71 and 45.



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The justices of the Alabama Supreme Court have further expressed the opinion that a bill allocating funds to non-state agencies is not a general appropriation bill and, therefore, each appropriation to a non-state institution must be in a separate appropriation bill for that particular institution.<sup>67</sup> In *Eagerton v. Gulas Wrestling Enterprises*,<sup>68</sup> the Alabama Supreme Court held invalid legislation which distributed to the American Legion, a non-state agency, one-half the fees collected by the state athletic commission. The vote in the Alabama House of Representatives was 67 in favor of the legislation with none opposed. The court held that this vote did not meet the requirements of §73<sup>69</sup> since it was not a two-thirds vote of all the members elected to each house.

### The Governor's approval

After the legislature completes its budget responsibility by passing the appropriation bills,<sup>70</sup> the bills are delivered to the governor for the next step in the budget process.<sup>71</sup> As part of the system of checks and balances in the Alabama Constitution, the governor has the right to approve, disapprove, and propose amendments to bills which have passed both houses of the legislature.<sup>72</sup> The Alabama Constitution provides that every bill which has passed both houses of the legislature is presented to the

governor where he may take one of several courses: (1) he may approve the bill by signing it; (2) he may permit it to become law without his signature; (3) he may return the bill to the house in which it originated with one or more executive amendments; or (4) he may veto the bill.<sup>73</sup>

### Item Veto

Special provision for appropriation bills is made in the Alabama Constitution:

The governor shall have power to approve or disapprove any item or items of any appropriation bill embracing distinct items, and the part or the parts of the bill approved shall be the law, and the item or items disapproved shall be void, unless repassed according to the rules and limitations prescribed for the passage of bills over the executive veto; and he shall in writing state specifically the item or items he disapproves, setting the same out in full in his message, but in such case the enrolled bill shall not be returned with the governor's objection.<sup>74</sup>

This section expressly empowers the governor to disapprove any item or items of appropriation bills. This is the "item veto" power which has been the subject of national interest during the past two decades as numerous proposals

have been made for delegating item veto power to the President of the United States. Most state constitutions grant this power to their governors.

The general appropriation bill and the educational appropriation bill contain many items. These are the specific dollar amounts which are appropriated for specific purposes to the various state agencies, departments and institutions.<sup>75</sup> Section 126 allows the governor to disapprove any of those items. The part or parts which he approves shall become law, and the disapproved item or items must be returned to the legislature where they are reconsidered as in the case of an executive veto.<sup>76</sup> The distinction between the item veto and the exercise of his general veto power by the governor is that the approved portion of the appropriation bill becomes law while the items which have been disapproved must be returned to the legislature.<sup>77</sup>

Only one Alabama case has construed the item veto power of §126. In 1991 Governor Guy Hunt sought to veto certain items of the appropriation bill after the legislature's final adjournment, thus attempting to "pocket" item veto parts of the appropriations bill.<sup>78</sup> Suit was filed contesting Governor Hunt's right to pocket item veto parts of the appropriation bill. In *Hunt v. Hubbert*,<sup>79</sup> the Alabama Supreme Court strictly construed §126 holding that it "does not authorize an Alabama governor to item veto an appropriations bill after the legislature has adjourned *sine die*." The court reasoned that the legislature had to be in session in order that the provisions of §126 could be satisfied. The court said:

The plain language of §126 contemplates that upon the legislature's receipt of the Governor's message, disapproving an item or items of a bill and expressing his objections thereto, those items may be repassed by the legislature according to the rules prescribed in §125 of the passage of bills over the Governor's veto...unless the legislature is in session, the legislature may not....(1) receive a "message" from the Governor (2) have the bill "returned" to it (3) consider the Governor's "objection" or (4) repass the bill over the Governor's veto.<sup>80</sup>

With the usual practice of having the appropriation bills passed late on the



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last day of the session, one might argue that the governor is deprived of the authority granted by §126 and that under these circumstances §126 has no field of operation. However, the Alabama Supreme Court has consistently strictly construed and applied the constitutional provisions relating to the governor's veto power.<sup>81</sup>

### Budget Isolation Amendment

The passage of the appropriation bills late in the session prompted the adoption of the Budget Isolation Amendment to the Alabama Constitution.<sup>82</sup> This amendment requires the governor to transmit his proposed budget to the legislature on or before the second legislative day of each regular session.<sup>83</sup> This amendment conflicts with the statutory mandate that the budget be submitted on or before the fifth legislative day, but obviously the constitutional provision controls.<sup>84</sup> The amendment further provides that no bill, other than the appropriation bills, shall be signed by the presiding officers of the two houses until the appropriation bills have been signed by the presiding officers.<sup>85</sup> The commendable objective of the amendment was to have the appropriation bills considered and passed before other legislation. However, the effect of the amendment has been nullified by a bypass provision which allows either house, by a three-fifths vote of a quorum present, to suspend the application of amendment 448.<sup>86</sup> Both houses of the legislature now routinely invoke the bypass provision so that the intent of amendment 448 has been thwarted.

### Allocation of appropriations

After the appropriation bills have become law, there are yet other considerations which affect the budget process. The "balanced budget" requirement compels the state to live within the financial resources available to it. The Budget and Financial Control Act of 1932,<sup>87</sup> adopted before the ratification of amendment 26, placed upon the governor the responsibility for allotting appropriations. Allotments of appropriations must be made incrementally for periods not exceeding three months, by the department of finance with the approval of the governor.<sup>88</sup> The governor must restrict allotments "to prevent an overdraft or deficit in any fiscal

year" by prorating the available revenues among the various departments and agencies.<sup>89</sup> The stated purpose of this provision is "to ensure that there shall be no overdraft or deficit in the several funds of the state at the end of any fiscal year, and the governor is directed and required so to administer this article to prevent any such overdraft or deficit."<sup>90</sup>

### Proration

The governor's duty to prorate "without discrimination against any department" the available revenues to prevent deficits has raised questions about which appropriations are subject to proration. In *Abramson v. Hard*<sup>91</sup>, the supreme court held that those appropriations which did not require allocation were not within the purview of the Budget and Financial Control Act. Among these appropriations to which proration was not applicable the court included: fixed salaries and other fixed expenses such as per diem for travel; expense for fuel, light and water; postage and post office box rent; repairing and insuring state property; public

printing; telephone and telegraph service; and numerous others in the nature of fixed expenses.<sup>92</sup>

In the recent case of *Folsom v. Wynn*,<sup>93</sup> the Supreme Court of Alabama held that Governor Hunt acted unconstitutionally in imposing proration on appropriations for the judiciary without considering whether the remaining appropriations were adequate and reasonable to allow the judiciary to perform its constitutionally mandated duties. The court did hold that the judiciary, even as a separate and independent branch of government, is within the operation of the proration statute but only to the extent that, after its appropriation is reduced by proration, its remaining appropriations are adequate to allow it to perform its constitutional functions.

Thus, certain appropriations, particularly salaries, have been immunized from the proration statute, thereby causing other appropriations to bear the entire burden of a shortfall in state revenues. Whether this is the intent of Amendment 26 to the Alabama Constitution is open to debate.

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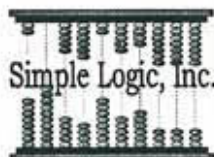
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## Conclusion

The budget process may be summarized as follows:

1. Ninety days before the beginning of the legislative session, state departments and agencies submit budget requests to the Department of Finance;
2. The Department of Finance makes recommendations and proposes a tentative budget to the governor;
3. After public hearings on the budget, the governor formulates his recommendations for the legislature;
4. The governor submits his recommended budget to the legislature;
5. The legislature conducts hearings, both by the interim committee and by the standing committees, and approves the appropriation bills;
6. The governor approves the appropriation bills;
7. The governor allocates the funds to the various state departments and agencies.
8. In the event of a shortfall in anticipated revenues, the governor declares proration.

The detailed constitutional and statutory provisions relating to the budget process, and the strict interpretation of those provisions by the courts, compel the conclusion that no other function of government is given higher priority than the spending of public funds. ■

## Endnotes

1. Ala. Const. art. IV, §72
2. Ala. Const. art. V, §123
3. 1932 Ala. Acts 37 (codified as amended at Ala. Code §§41-4-80 to -96 (1991))
4. Ala. Code §41-4-82 (1991)
5. Ala. Code §41-4-83 (1991). One should distinguish between a general revenue bill and a bill to raise revenue. A general revenue bill deals with the general levy, assessment and collection of taxes. *Southern Railway Company v. Mitchell*, 139 Ala. 629 (1903). For an example of a general revenue bill, see 1927 Ala. Acts 163. A bill to raise revenue has been defined as any bill whose chief purpose is to generate revenue from new sources, or to increase or decrease revenue. *Glasgow v. Aetna Insurance Company*, 284 Ala. 177, 223 So. 2d 581 (1969).
6. Ala. Code §41-4-80 (1991)
7. Ala. Code §41-4-84 (1991)
8. Ala. Code §41-4-85 (1991)
9. Ala. Code §41-4-86 (1991)
10. Ala. Code §41-4-87 (1991). The governor's staff usually attends the legislative budget hearings (*infra*, p. 5) and thus satisfies this requirement.
11. Ala. Code §41-4-82 (1991)
12. Ala. Const. amend. 448.
13. 1976 Ala. Acts 614 (codified as amended at Ala. Code §§41-19-1 to -12 (Supp. 1994))
14. Ala. Code §41-19-3 (Supp. 1994)
15. Ala. Code §41-19-4 (1991)
16. Ala. Code §41-19-5 (1991)
17. Ala. Code §41-19-6 (1991)
18. *Id.*
19. Ala. Code §41-19-7 (1991)
20. Ala. Code §41-19-8 (1991)
21. Ala. Code §41-19-11 (1991)
22. 1992 Ala. Acts 348 (codified as amended at Ala. Code §41-19-3 (Supp. 1994))
23. *Id.*
24. 1991 Ala. Acts 1229 (codified at Ala. Code §§29-2-80 to -83 (Supp. 1994)). Legislative joint committees, authorized by resolutions of the legislature, had been in effect since 1979. (See 1979 Ala. Acts 50, 1983 Ala. Acts 75 and 1987 Ala. Acts 19) Those joint committees each had terms of four years. A resolution to create another joint committee in 1991 was vetoed by the governor, and the legislature then enacted the present statute.
25. Ala. Code §29-2-80 (Supp. 1994)
26. Ala. Code §29-2-83 (Supp. 1994)
27. One may question how the governor can introduce appropriation bills when he is not a member of the legislature. He, of course, does not personally introduce the bills. This function is carried out by his floor leaders.
28. Ala. Code §29-5-1
29. Ala. Code §29-5-7
30. 1983 Ala. Acts 556 (codified as amended at Ala. Code §29-5-12 (1989))
31. House Rule 71, Senate Rules 74, 75
32. Ala. Const. art. IV, §71
33. In fiscal 1989 89 percent of Alabama's revenue was earmarked for specific purposes. The PARCA Report No. 2 (Winter 1989). There are many earmarked funds such as the Alabama Special Educational Trust Fund, the Public Road and Bridge Fund, the Special Mental Health Fund, the Game and Fish Fund, the Public School Fund, etc.
34. 1927 Ala. Acts 163
35. *Id.*
36. *Id.*
37. Ala. Const. art. IV, §62
38. Ala. Const. art. IV, §63
39. Ala. Const. art. IV, §45
40. Ala. Const. art. IV, §55
41. Ala. Const. art. IV, §63
42. Ala. Const. art. IV, §64
43. Ala. Const. art. IV, §61
44. Ala. Const. art. IV, §71
45. Ala. Const. art. IV, §66
46. Ala. Const. art. IV, §73
47. See 1989 Ala. Acts 350
48. Ala. Const. amend. 26
49. Ala. Const. amend. 25
50. Ala. Const. amend. 26
51. *Id.*
52. *Id.*
53. *Opinion of the Justices No. 156*, 265 Ala. 501, 503, 92 So. 2d 429, 431 (1957)
54. *In re Opinion of the Justices No. 31*, 229 Ala. 98 (1934)
55. *Id.* at 101
56. 524 So. 2d 336 (Ala. 1988)
57. *Id.* at 339.
58. *Id.*
59. *Id.* at 341
60. 527 So. 2d 1310 (Ala. Civ. App. 1988)
61. 1987 Ala. Acts 1261
62. *Id.*

63. 527 So. 2d at 1313
64. 374 So. 2d 258 (Ala. 1979)
65. *Id.* at 259.
66. The general appropriation bill also appropriates money from earmarked funds, except those funds which are earmarked for the special educational trust fund.
67. *Opinion of the Justices No. 325*, 511 So. 2d 174 (Ala. 1987)
68. 406 So. 2d 366 (Ala. 1981)
69. *Supra* note 37
70. There are a large number of appropriation bills including the general appropriation bill, the education appropriation bill, and numerous appropriation bills to specific institutions and agencies, separate bills being required by the mandate of Const. §71.
71. Which is also the next step for all other legislation.
72. Ala. Const. art. V, §125
73. *Id.*; for an excellent discussion of the governor's veto power, the computation of time, the manner and effect of executive amendments, the procedure for legislative reconsideration after veto, and "pocket" veto, see *Building Commission v. Jordan*, 254 Ala. 433, 48 So. 2d 565 (1950).
74. Ala. Const. art. V, §126
75. See 1993 Ala. Acts 1542 and 1993 Ala. Acts 1639 for the general appropriation bill and the education appropriation bill, respectively, for the fiscal years 1993-94. The question of what constitutes an "item" has been the subject of litigation in other states. In Wisconsin, the supreme court upheld the governor's contention that a single letter in a word could be considered an item. See *State ex rel. The Wisconsin Senate v. Thompson*, 424 N.W.2d 385 (Wis. 1988). A constitutional amendment was ratified by the people of Wisconsin in 1990 to clarify the definition of "item."
76. Ala. Const. art. V, §126
77. *Id.*
78. "Pocket" veto refers to the provision in §125 of the Alabama Constitution with reference to bills presented to the governor within five days before the final adjournment of the legislature. Such bills may be approved by the governor at any time within ten days after such adjournment, and if he approves and deposits the bills with the secretary of state within that time, the bills become law. If the governor does not approve such bills within ten days after such adjournment, the bills do not become law. The term "pocket veto" arose when it was said that the governor could simply put a bill in his pocket and thus prevent its becoming law. See *Hunt v. Hubbert*, 588 So. 2d 848, 852 (1991).
79. 588 So. 2d 848 (Ala. 1991)
80. *Id.* at 859.
81. *Ex parte Coker*, 575 So. 2d 43 (Ala. 1990)
82. Ala. Const. amend. 448.
83. *Id.*
84. *Alexander v. State*, 274 Ala. 441, 150 So. 2d 204 (1963)
85. Ala. Const. amend. 448
86. *Id.*
87. *Supra*, note 2
88. Ala. Code §41-4-90
89. *Id.*
90. *Id.*
91. 229 Ala. 2 (1934).
92. *Id.* at 11.
93. 631 So. 2d 890 (Ala. 1993).



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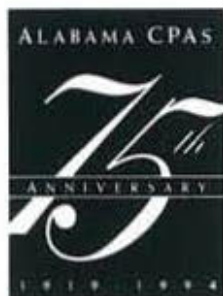
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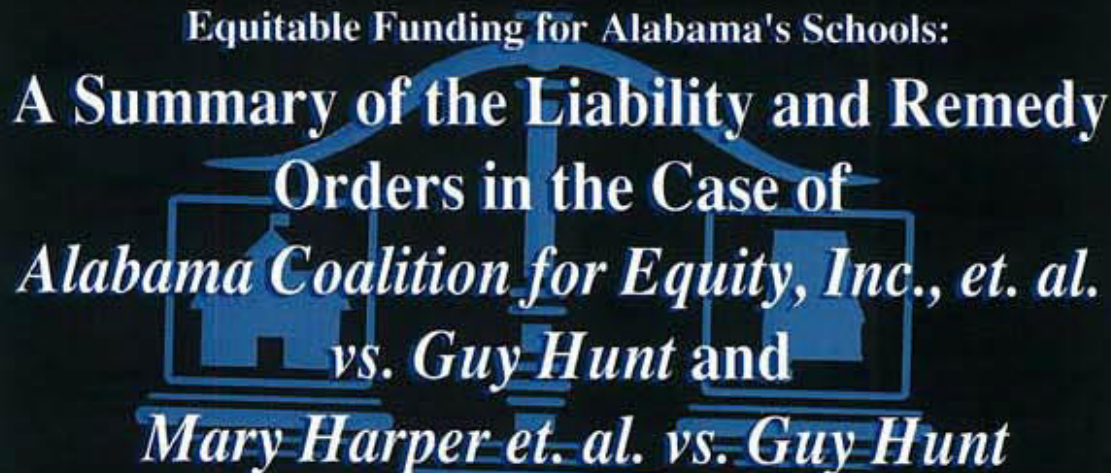
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**Equitable Funding for Alabama's Schools:  
A Summary of the Liability and Remedy  
Orders in the Case of  
*Alabama Coalition for Equity, Inc., et. al.*  
*vs. Guy Hunt and*  
*Mary Harper et. al. vs. Guy Hunt***

By Ira W. Harvey

**B**y omission from the United States Constitution, responsibility for education is one of the powers reserved to the states under the Tenth Amendment. The financing and operations of public school systems are under the control of the state and its legislature, subject only to any restrictions imposed by the individual state's constitution. A state's constitutional and legislative powers to control public education also implies the authority to raise money for education through public taxation. While a state may delegate to local school systems or other governmental units the power to finance public education through taxation, such funds remain state, not local funds, and are therefore subject to state direction and control. There is no inherent power in local school systems to levy taxes (Gee and Sperry, 1978). Acknowledgment of these basic principles has been slow in developing in Alabama.

Based upon the adoption of Amendment 111 in 1956 to the Alabama Constitution of 1901, §256 as amended became the basis for the common argument for asserting that there are no constitutional guarantees for public education in Alabama:

...but nothing in this constitution shall be construed as creating or recognizing any right to education or training at public expense, nor as limiting the authority and duty of the legislature, in furthering or providing for education, to require or impose conditions or procedures deemed necessary to the preservation of peace and order.

Under this viewpoint, whatever the legislature chooses to provide for the respective local school systems of the state was purely legislative prerogative and not subject to any constitutional standard. If funding was inadequate in any local school system, it was due to the failure of the local governmental unit to levy a sufficient rate of taxation. And if this was what the local people wished, well and good! The state was thus absolved from responsibility.

However, this was not the interpretation of the plaintiffs. In April of 1990, based upon constitutional claims, suit was filed in Montgomery County Circuit Court by the Alabama Coalition for Equity with the following Prayer for Relief:

1. A declaration that Amendment 111 to the Constitution of Alabama violates the Equal Protection Clause of the Constitution of the United States;
2. A declaration that the funding structure for public education in the State of Alabama violates Sections 1, 6, and 22 of the Constitution of Alabama, which guarantees equal protection of the law;
3. A declaration that the funding structure for public education in the State of Alabama violates plaintiffs' rights to equal protection and due process as guaranteed by the Fourteenth Amendment of the Constitution of the United States;
4. A declaration that the funding structure for public education in the State of Alabama violates plaintiffs' rights as guaranteed by Sections 6 and 13 of the Constitution of Alabama, which protects citizens against the deprivation of life, liberty, or property, except by due process of law;
5. A preliminary and permanent injunction enjoining defendants from implementing or maintaining, for any year subsequent to the present fiscal year, any public school funding system which perpetuates the unconstitutional inequities described herein;
6. A permanent injunction requiring defendants to design, offer to the Legislature for implementation, and maintain a constitutional system of public school finance which assures equal educational opportunities in local school systems without regard to their wealth;
7. The retention of jurisdiction by this Court until defendants



have designed and permanently implemented a school finance system that assures equal educational opportunities in local school systems without regard to their wealth;

8. Award of plaintiffs' attorneys' fees and costs from appropriate sources, including any state funds created, increased, protected or benefitted as a result of plaintiffs' efforts; and
9. Such other, further, and different relief as the Court deems appropriate, necessary and proper, including supplemental and general relief (*ACE vs. Hunt*, pp. 28-30).

A similar suit was filed in January of 1991 by attorneys presenting claims for students with disabilities styled as *Harper vs. Hunt*. These two claims were consolidated for trial.

#### Order declaring Amendment 111 unconstitutional

Prayer for Relief first requested that Amendment 111 be declared unconstitutional, and that the language of Section 256 of 1901 be declared in force. On August 13, 1991, Judge Reese, granted a partial judgment that Amendment 111, Section 256 was "void ab initio and in its entirety under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution."

The mandate of Section 256 of Alabama Constitution of 1901 is declared, and hereby is, in effect to the extent that it provides: "The legislature shall establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof between the ages of seven and twenty-one years (*Order of August 13, 1991*, p. 2)."

#### Liability Order, March 31, 1993

Despite the arguments of the defendant in this case, Governor Guy Hunt, that this litigation was an unnecessary intrusion of the judiciary into executive and legislative matters, and that the issue of funding should not be decided by a judge, Judge Reese concluded that the judiciary did have the ultimate power in this regard:

This is particularly true when, as in the instant case, the evidence is clear that the legislative and executive branches have repeatedly failed to address the problems of which the plaintiffs complain despite many opportunities to do so (*Order of March 31, 1993*, p. 77).

The Court neither taxes nor spends, but simply decides the case before it, declares constitutional rights and, where necessary, enjoins their violation, as it must in our constitutional system (*Order of March 31, 1993*, p. 77).

Fiscal effects are controlled by "... policymakers, who estab-

lish budgetary and tax policy in the first instance, and who must reckon the potential cost of unconstitutional acts in that balance (*Order of March 31, 1993*, p. 78)." Judge Reese concluded that the legislature cannot offer as an excuse budgetary excuses for the failure to offer a social service in a manner consistent with an individual's constitutional rights. Such constitutional obligations cannot be avoided due to a lack of funding. Judge Reese ruled for the plaintiffs on all constitutional claims.

#### SECTION 256: A Constitutional Right

Section 256, the constitutional statement in Article XIV, provides as follows: "The legislature shall establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof between the ages of seven and twenty-one years." Judge Reese agreed with the plaintiffs that "This provision is clearly mandatory . . . (*Order of March 31, 1993*, p. 81)."

The Court notes in particular that the duty imposed is a *state* rather than a *local* duty, rendering a defendant's argument that localities are responsible for inadequate or inequitable opportunities untenable as a matter of law (*Order of March 31, 1993*, p. 81).

This discarded the common argument of both the executive and legislative branches to avoid fundamental changes in Alabama's system of public schools; that this is a local problem rather than a state problem. Precedent for this conclusion was found in a previous Alabama court decision in 1935: "Every public school is a state school, created by the state, supported by the state, supervised by the state, through statewide and local agencies, taught by teachers licensed by the state, employed by agencies of the state (*Order of March 31, 1993*, p. 82)." Judge Reese concluded that "Under these circumstances, there can be no question that Alabama schoolchildren have an enforceable constitutional right to an education as guaranteed by §256 (*Order of March 31, 1993*, p. 82)."

Another common argument has been that if there are funding disparities, they are not the state's responsibility but rather the result of *local* mismanagement or *local* choice not to fund schools (*Order of March 31, 1993*, p. 17). Judge Reese was not persuaded by this argument:

Thus, the Court finds that state school funds are clearly part of the problem, not part of the solution, and the state simply cannot pin the blame for current funding inequalities on local school revenues.

In any case, the distinction urged by defendant between local and state funding for schools is an artificial one. By

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law, all public school taxes are state taxes, and all public school funds are state funds, whether collected at the state or local level (public school funds are state funds whether they come from the state treasury or local taxation).

For this reason, the appropriate funds to consider in evaluating state funds for education are funds raised for schools from both state and local sources (*Order of March 31, 1993*, p. 23).

A final common argument in this regard is that federal funds should be used in evaluating the relative disparity among school systems. Judge Reese accepted the testimony at trial which demonstrated that

... a large portion of this aid is used for non-instructional purposes such as school breakfast and lunch programs. Testimony at trial showed that much of the federal aid that is employed for instruction is categorical aid, targeted toward specific population groups (e.g., Indian education) or programs (e.g., ROTC) (*Order of March 31, 1993*, pp. 14-15).

The inclusion of such funds in any equity analysis was further discounted by the realization that "... these funds may be used only to supplement, not to supplant, the public schools' regular program (*Order of March 31, 1993*, p. 15)." Judge Reese concluded:

Perhaps most importantly, the state of Alabama does not collect or, for the most part, control these revenues, which are not available to advance state educational goals but rather serve (sometimes transitory) federal mandates. The issue before the Court is whether the *state* meets constitutional mandates in providing public schools, not the federal government. Accordingly, the Court finds that plaintiff's equity analyses are proper in excluding federal aid (*Order of March 31, 1993*, p. 15).

Finally, Judge Reese referred to the effort placed by the legislature in creating Amendment 111, approved in 1956, which was designed to modify the original education provision to eradicate any implication of a constitutional right to a free public education:

This Court will not presume that the legislature and the people ratifying Amendment 111 did a futile act; clearly, they believed, and this court agrees, that §256 guaranteed Alabama schoolchildren a constitutional right to an education—a guarantee which is now in effect (*Order of March 31, 1993*, p. 83).

#### **Right To Equal Educational Opportunity**

Was it the intent of the framers of the Constitution of 1901 to provide for equal educational opportunities for Alabama's schoolchildren? The plaintiffs contended this was the intent. Judge Reese cited a 1938 American Law Reports (A.L.R.) annotation to define public or common schools "as meaning schools which are free and open to all *on equal terms*." He noted "the fact that public schools are to be provided *throughout the state for the benefit of the children thereof* suggests that not just some, but all children are meant to enjoy the advantages offered by these schools (*Order of March 31, 1993*, pp. 84-85)."

Judge Reese further noted that the state "Supreme Court in *Tucker v. State ex rel. Poole*, 165 So. 249 (Ala. 1935), reaffirmed in a *non-advisory* opinion that the system of public schools mandated by §256 must operate in favor of all children equally

(*Order of March 31, 1993*, p. 90)." Judge Reese concluded the issue as follows:

Accordingly, the Court holds that Alabama's present system of public schools violates the constitutional right of plaintiffs to equal educational opportunity as guaranteed by *Ala. Const.*, art. XIV, §256 (*Order of March 31, 1993*, p. 91).

#### **Right To Adequate Educational Opportunity**

Was it the intent of the framers of the Constitution of 1901 to provide adequate educational opportunity for all students? The plaintiffs contended that this was the intent based upon the inclusion of the term "liberal" in §256:

The Court accepts as the prevailing interpretation of "liberal" at the time of the framing of the 1901 constitution that offered by Dr. Harvey and Dr. Flint at trial as historically correct: "generous," "bountiful," and "broad-based" in the sense of preparing one for future citizenship (*Order of March 31, 1993*, p. 94).

This Court finds that the "ordinary meaning" of these words, "common to the understanding at the time of its adoption by the people,"...is a system of public schools that is generous and broad-based in its provision of educational opportunity and that meets evolving standards of educational adequacy (*Order of March 31, 1993*, pp. 94-95).

Judge Reese concluded that "the state of Alabama has a strong historical commitment to education that it has expressed with increasing force in each of its six constitutions (*Order of March 31, 1993*, p. 97)." The text of history of §256 created the opposite of the weak right to a education, nearly devoid of substantive content, as suggested by Governor Hunt:

To the contrary, the Court finds the Alabama constitution's education guarantee is one that accords school children of the state the right to a quality education that is generous in its own provisions and that meets minimum standards of adequacy (*Order of March 31, 1993*, p. 98).

The Court, after careful consideration of the text, history, and purpose of §256, and the expert evidence and the record in this case, concludes that §256's mandate of a "liberal system of public schools" dictates certain standards of adequacy for Alabama schools, as set forth in the Court's order (*Order of March 31, 1993*, p. 100).

Judge Reese summarized "that the education provided to plaintiffs is not adequate to meet the requirements imposed upon the state by §256 and is therefore not in conformity with the Alabama constitution (*Order of March 31, 1993*, pp. 100-101).

#### **Equal Protection**

The plaintiffs alleged that equal protection standards should apply to the state system of public schools. The combination of §§1, 6, and 22 of Article I, Constitution of Alabama 1901, act to guarantee the citizens of Alabama equal protection under the laws. While Federal equal protection jurisprudence has traditionally employed three levels of scrutiny (strict, intermediate, and rational basis), Judge Reese employed a ruling of the Alabama Supreme Court that states "are not compelled exactly to correlate their standards of review of the 'three-tiered scrutiny' employed by the federal courts...(Order of March 31, 1993, p. 102). Judge Reese concluded:

In any event, this Court holds that the Alabama system of



public schools fails to provide plaintiffs the equal protection of the laws under any standard of equal protection review. For the reasons set out below, the Court holds that plaintiffs are entitled to strict scrutiny of the differential treatment at issue here. The Court also reviews the challenged inequalities under the more deferential standard of mere rationality. In each instance, the result is the same: the present system of public schools in Alabama cannot survive equal protection scrutiny (*Order of March 31, 1993*, pp. 102-103).

Given the history and text of Alabama's education article, the Court determines that the right to education in Alabama is fundamental under any of these criteria (*Order of March 31, 1993*, pp. 103-104).

Given the conclusions regarding the constitutional issues raised to this point, Judge Reese then addressed the claim of plaintiffs that public education in Alabama is a fundamental right: "... the Court finds ample additional evidence of the fundamental character of the right to education in the constitution, laws, history, and practice of the state of Alabama (*Order of March 31, 1993*, p. 104)."

An issue raised by the defendant was that public education could not be considered a fundamental right in light of the decision in *Abramson v. Hard* in 1934, in which public education was classified as a non-essential function of state government. This issue was discounted by the Court:

However, the question of whether education is constitutionally fundamental does not depend upon whether or not public school appropriations were held to be subject to proration under a budget statute, in a case decided by five members of the bar sitting as a special court in which neither §256 nor equal protection claims were raised (*Order of March 31, 1993*, p. 105).

The Court concluded "that education is a fundamental right under the Alabama constitution (*Order of March 31, 1993*, p. 108):"

Because education is a fundamental right under the Alabama Constitution, the stark inequities in educational oppor-

tunity offered schoolchildren in this state must be justified under strict scrutiny by a compelling state interest to pass constitutional muster (*Order of March 31, 1993*, p. 109).

As discussed supra, the interest in local control asserted by the Governor—that is, local autonomy to secure the level of education that citizens desire for the children in their districts—is actually defeated, rather than promoted, in many poorer school systems in Alabama by differentials in school funding (*Order of March 31, 1993*, p. 110).

Accordingly, the Court holds that no matter what standard of equal protection review is employed, the present system of public schools in Alabama violates the Constitution of Alabama Article I, §§1, 6, and 22 (*Order of March 31, 1993*, p. 112).

#### Due Process

The plaintiffs further raised the issue of adequacy, claiming that inadequate educational opportunity violated due process protection. Judge Reese agreed that a claim for due process protection could be made under our state Constitution:

It is well-settled in this state that when the state deprives citizens of liberty for the purpose of benefitting them with a service, due process requires that the service be provided them in an adequate form (*Order of March 31, 1993*, pp. 112-113).

There was no question regarding the fact that "The state of Alabama deprives students of their liberty by requiring them to attend school under penalty of law (*Order of March 31, 1993*, p. 113)." Judge Reese concluded: "... Alabama schoolchildren have a due process interest or entitlement with respect to public education under Alabama law (*Order of March 31, 1993*, p. 114):

Plaintiffs have established that many Alabama schoolchildren are deprived of their state law entitlement to public education arbitrarily and without any constitutionally sufficient justification in violation of due process (*Order of March 31, 1993*, p. 115).

#### Special Education Claims

With regard to special education claims made by the Doe

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plaintiffs in *Harper vs. Hunt*, the Court emphasized "... that schoolchildren with disabilities have the same constitutional right to an equitable and adequate education as all other schoolchildren in Alabama (*Order of March 31, 1993*, p. 115). Judge Reese ruled in favor of the these plaintiffs on their two unique claims:

(1) that children with disabilities are deprived of their statutory right under *Ala. Code* §§16-39-3 and 16-39A-2 to an appropriate education and special services, and (2) that the Alabama system of funding for special education is irrational and violates the due process clause of the Alabama constitution (*Order of March 31, 1993*, p. 115).

### Conclusions

In concluding, Judge Reese recognized the importance in the case of the delicate balance among the judicial, executive, and legislative branches of government under the doctrine of separation of powers. Little argument had been made between defendants and plaintiffs as to whether deficiencies actually existed in Alabama's public school system which required additional funds. Judge Reese concluded:

The real issue here is whether these deficiencies and conditions rise to the level of deprivations of constitutional and statutory rights. In the opinion of the Court, they do (*Order of March 31, 1993*, p. 122).

**Therefore, it is ORDERED, ADJUDGED and DECREED as follows:**

1. That, pursuant to *Ala. Const.* art I, §§1, 6, 13, 22 and art. XIV, §256, Alabama school-age children, including children with disabilities, have and enjoy a constitutional right to attend school in a liberal system of public schools, established, organized, and maintained by the state, which shall provide all such schoolchildren with substantially equitable and adequate educational opportunities;
2. That the essential principles and features of "the liberal system of public schools" required by the Alabama Constitution include the following:
  - (a) It is the responsibility of the state to establish, organize, and maintain the system of public schools;
  - (b) the system of public schools shall extend throughout the state;
  - (c) the public schools must be free and open to all schoolchildren on equal terms;
  - (d) equitable and adequate educational opportunities shall be provided to all schoolchildren regardless of the wealth of the communities in which the schoolchildren reside; and
  - (e) adequate educational opportunities shall consist of, at a minimum, an education that provides students with opportunity to attain the following:
    - (i) sufficient oral and written communication skills to function in Alabama, and at the national and international levels, in the coming years;
    - (ii) sufficient mathematic and scientific skills to function in Alabama, and at the national and international levels in the coming years;

- (iii) sufficient knowledge of economic, social, and political systems generally, and of the history, politics, and social structure of Alabama and the United States, specifically, to enable the student to make informed choices;
- (iv) sufficient understanding to governmental processes and of basic civic institutions to enable the student to understand and contribute to the issues that affect his or her community, state, and nation;
- (v) sufficient self-knowledge and knowledge of principles of health and mental hygiene to enable the student to monitor and contribute to his or her own physical and mental well-being;
- (vi) sufficient understanding of the arts to enable each student to appreciate his or her cultural heritage and the cultural heritages of others;
- (vii) sufficient training, or preparation for advanced training, in academic or vocational skills, and sufficient guidance, to enable each child to choose and pursue life work intelligently;
- (viii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in Alabama, in surrounding states, across the nation, and throughout the world, in academics or in the job market; and
- (ix) sufficient support and guidance so that every student feels a sense of self-worth and ability to achieve, and so that every student is encouraged to live up to his or her full human potential.

3. That, pursuant to *Ala. Code* §16-39-3 and 16-39A-2, Alabama schoolchildren with disabilities aged 3-21 have the right to appropriate instruction and special services;
4. That the present system violates constitutional and statutory rights of plaintiffs;
5. That the state officers charged by law with responsibility for the Alabama public school system, are hereby enjoined to create a system of public schools, that provides equitable and adequate educational opportunities to all school-age children, in accordance with constitutional mandates of *Ala. Const.* art XIV, §and 256; art. I, §§1,6,13 and 22; and to provide appropriate instruction and special services to children with disabilities aged three through twenty-one pursuant to *Ala. Code* §§16-39-3 and 16-39A-2;
6. That this matter is *set for status conference on 9th day of June, 1993, at 8:30 a.m.* for the purpose of establishing the procedures and timetable for determination of an appropriate remedy in this case.

Without appeal, this Order was certified as final.

### Remedy Order of August 22, 1993

The system of public education in the State of Alabama shall be funded sufficiently to enable all public schools to fully achieve Constitutional and statutory standards of educational equity and adequacy, including all components of this court order (*Order of August 22, 1993*, p. 17).



Remedy involves three aspects of Alabama's school funding system which are listed in order of priority. The first is equity, the fundamental basis of the lawsuit. The second is adequacy: by no measure are funds currently adequate to implement statutes and regulations in place or to meet regional or state funding standards. The third is the new programs which are required to be funded by the Order. All issues ultimately revolve around equity, which should mean adequately funded programs for all.

Equity, unfortunately, could devolve in equalizing poverty unless new revenue sources are found for public schools (Robin Hood). New funds are necessary to equalize and hold-harmless the wealthier systems. Irrespective of the programmatic offerings which may be mandated in the Order or deemed necessary by politicians (ex., *S.B. 75, Regular Session, 1994*), little will be accomplished without additional resources. Adequacy and equity are statutory issues. For the most part, modifications in governance and programs can be accomplished by regulation and should not distract attention away from the crucial funding issues.

The funding deficiencies found by the Court, in addition to inadequacy, included the following:

- (1) the lack of a reasonable required local taxation at a standard rate;
- (2) the creation of matching grant programs by the state which reward local tax effort and wealth;
- (3) the lack of an adjustment for wealth in the allocation of state funds; and
- (4) the lack of uniform access to local taxation at the maximum rate by tax allowed in other local school systems (tax reform is inevitable in a sound program of school finance).

Achieving equity would be a relatively simple manner if the State assumed full responsibility for funding schools and abolished—or strictly uniformly limited—taxation at the local level. This is not a realistic possibility as a possible outcome is overall diminished revenues for public schools.

#### What are the required elements of a Constitutional system?

The Order defines these elements as follows:

1. The State shall establish a foundation program that shall operate to assure all children an adequately funded education (p. 17);
2. School funding, both among schools systems and among schools within school systems, shall be equitable (p. 17);
3. ...shall require a uniform local tax effort equalized by the State so that every school child shall receive an adequately funded educational opportunity...(p. 17);

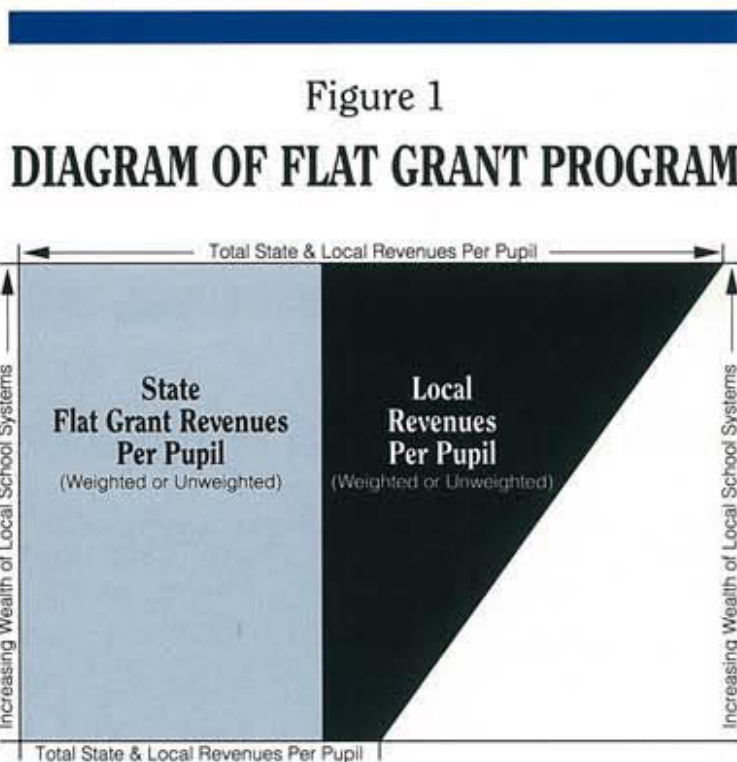
4. Locally collected taxes...shall be levied in school taxing districts that are coextensive with entire local school systems (p. 17);
5. Authorization for local school system taxes...shall be uniform, so that all school systems have equal access to their respective tax bases...(p. 18);
6. Defendants shall develop a method for determining what level of funding is necessary to provide an adequate education ...(p. 18.);
7. ...fringe benefits for state and local school employees ...shall be equalized by incorporation into the foundation program (p. 18);
8. ...shall use the pupil, rather than the teacher unit, as the unit for measuring the funding needs of local school systems and allocating funds to address those needs (p. 18);
9. The funding system shall take into consideration high cost factors such as sparsity and geographical isolation ...(p. 19);
10. A weighting system shall be developed for ...students whose

education is demonstrably more expensive ...(p. 18);

11. Transportation shall be funded as an item . . . outside the foundation program (p. 19);
12. All students in the state shall be provided with adequate textbooks ...(p. 13); and
13. Funds shall be provided for the ongoing soundness and adequacy of educational facilities in Alabama (*Order of August 22, 1993, p. 19*).

#### The Current statutes: a flat grant program?

The defendant argued the State operated a flat grant program as appears in Figure 1; that the state was neutral in the allocation of state funds for public schools. The plaintiffs countered this argument by demonstrating this to be a matching grant program, due to the large number of appropriation line items based upon numbers of employees rather than on numbers of students (see Appendix 1 on page 367). These tend to reward wealth and effort through a matching grant program. Low taxable wealth local school systems, even with significant rates of local taxation, simply cannot compete for these grants. Implementing a flat grant program which allocates only on the needs of students would be a significant **first** step toward equity. Allocation of funds should be based upon students and their needs rather than on number of employees.





Given a flat grant program, other equity issues regarding local taxation remain: (1) if local taxation is utilized, it must be uniformly required at the local level; and (2) if local taxation is utilized, each local school system must have the same right to levy the type and rate of tax authorized any other local school system. These requirements exist independently of the type of finance system employed and must be accommodated through a constitutional amendment, the **linchpin** of achieving equity in Alabama for both students and for taxpayers. Required disparate rates of local taxation will be unconstitutional under the Liability Order.

Equity increases in a flat grant program as the amount of permissible local taxation decreases. A flat grant program is most equitable when no local taxes are permitted and the state assumes the full cost (no local tax leeway). Allocation can either be based on an equal amount per pupil (unweighted) which assumes that all educational needs are normally distributed or on an equal amount for students equally situated (weighted).

The first case produces *horizontal equity*—like amounts for all students. The second case produces *vertical equity*—like amounts only for students with similar educational needs. In either case, the taxable wealth of local school systems must play a restricted role in the determination of total funds available.

Two problems make this type of solution unlikely in Alabama. The first is that to achieve equity, local taxes would have to be abolished. Without even considering the constitutional issues involved, it would appear foolhardy to abolish current ad valorem taxes (historically underutilized) at the local level, when it is so difficult to levy them in the first place. The second is that the Order specifically prescribes the use of local taxes in a foundation program.

#### The issue: a new state aid program?

Programs of state aid to local school systems are classified as either a *foundation program* or a *power equalization program*. Usually no such program is "pure". State aid programs may use a combination of these in addressing special circumstances. A foundation program can become, for example, a flat grant program when the required local taxation approaches zero. A power equalization program can become essentially a foundation program as required local taxation increases and guaranteed spending increases.

The *Remedy Order* requires a *foundation program* which the legislature must implement statutorily and for which, in the case of required local taxation, must present to the voters of the state

for constitutional approval. A totally new foundation program is not a necessity; the 1935 statutes can be updated. The question is whether another type of modern school finance program, such as *power equalization*, is precluded by this order. Irrespective of the type of program, two policy issues must be addressed by the legislature:

- (1) What shall be the magnitude of the foundation program? and
- (2) How much of the cost shall be assumed at the local level?

#### What is a foundation program?

A foundation program is a state guarantee of equal access to a minimum (adequate) level of revenues for each pupil. A state could fully fund this minimum level of revenue or it could impose upon each local school system a required local share or tax effort by rate. The yield of this required local share or effort for each local school system depends on its taxable wealth or tax

capacity. Commonly, the assessed property value per pupil is the wealth measure of wealth used. The required local share is the amount of revenue raised from a property tax with a statewide uniform millage rate (tax rate per \$1,000 of assessed value) (*US ACIR, December 1990, p. 19*).

The tax effort required to produce the local share of the foundation spending level is the same in each school system, irrespective of its property wealth per pupil (equity for taxpayers). Because the state contribution equals the difference between the foundation revenue guarantee and the required local share or effort, state aid is greater for less wealthy districts where taxing at the statewide rate generates a smaller local

contribution. In most states with foundation programs, local school systems may augment the minimum (adequate) level of spending with optional local tax revenues or local leeway (*US ACIR, December 1990, p. 20*). This is seen in Figure 2.

The amount of state aid that a local school system receives is calculated as follows:

$$\text{State} \times \text{N}_{\text{umber}} = (\text{F}_{\text{oundation}} \times \text{N}_{\text{umber}}) - (\text{r}_{\text{ate}} \times \text{V}_{\text{aluation}})$$

where: S = the level of state aid per pupil;

- N = the number of pupils;
- F = the foundation level of revenue per pupil;
- r = the tax rate that each system must levy; and
- V = the total value of property in the system.

The product (rV) is the local share or effort in a foundation program (*US ACIR, December 1990, p. 42*).

Allocation by a teacher unit basis rather than by a pupil unit

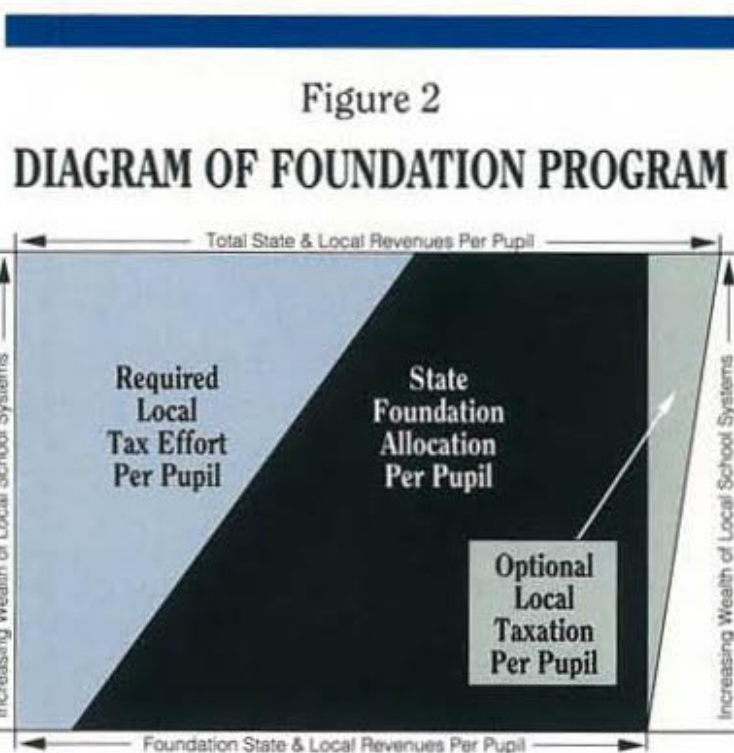
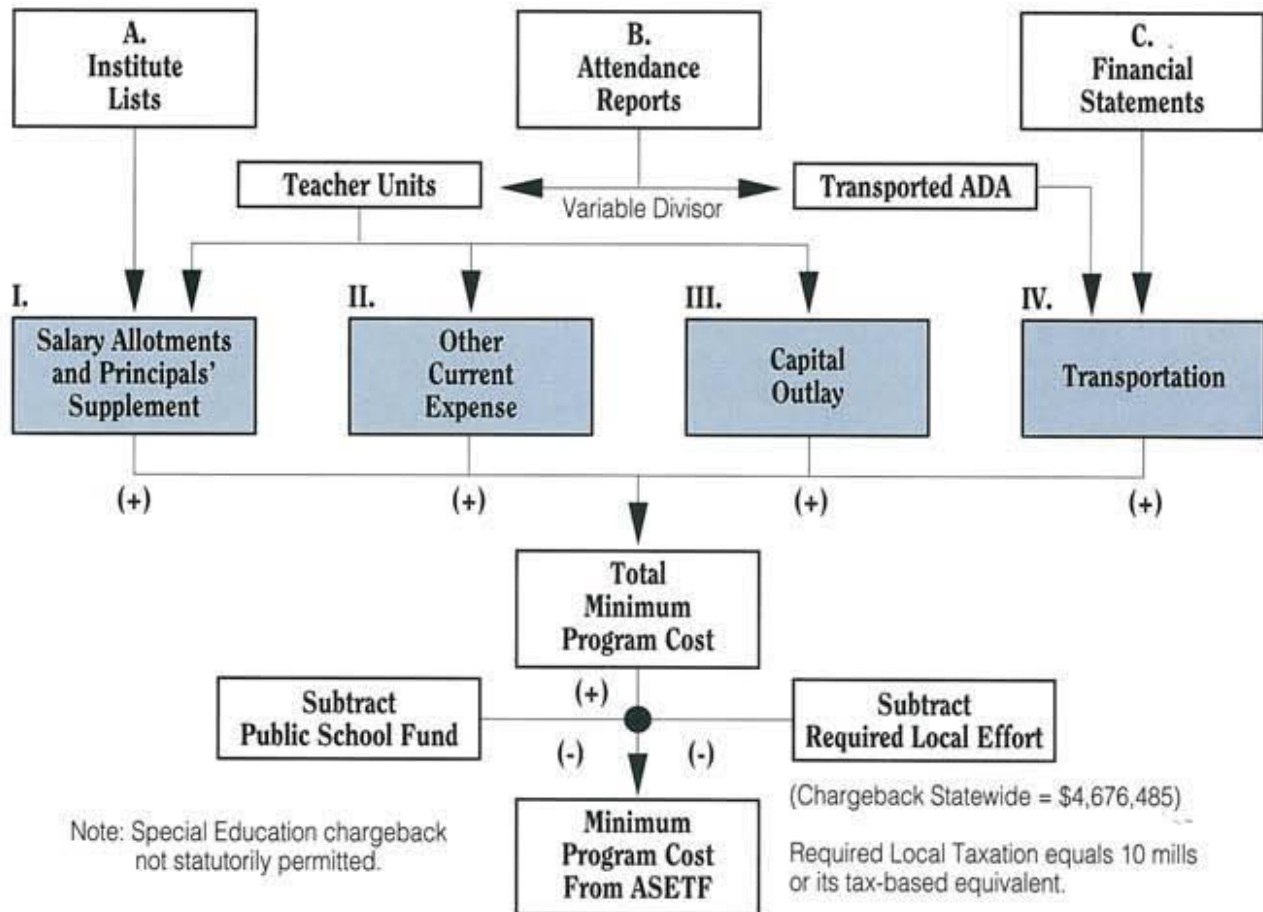




Figure 3

## THE ALABAMA MINIMUM FOUNDATION PROGRAM, 1935



may in fact be a preferable procedure to meet student and system needs (both units are common in foundation programs). Currently, any planned education reform in Alabama contains standards regarding class sizes. To accommodate such standards, it is logical to consolidate those costs associated with funding a classroom into an allocation unit. Allocation by teacher units is predicated upon a student's educational needs. The obvious mathematical equivalency between a teacher unit and a per student unit is the ratio of the consolidated costs to the number of students (student/teacher ratio) these costs will serve. This ratio should vary by grade and so should required costs.

### The Alabama Minimum Foundation Program of 1935

The Alabama Minimum Foundation Program created in 1935 was based on the factors shown in Figure 3. Funds were allocated on the teacher unit basis, one teacher unit for each 28 pupils in average daily attendance statewide (Note: teacher unit implies all costs necessary to support the teacher unit, not just a salary for a teacher). The State Board of Education was statutorily authorized to adjust this divisor nominally for certain conditions such as sparsity of population where a remote local school needed a teacher even if there were fewer than 28 pupils in ADA. This

was and is an effective adjustment for problems associated with school size, whether a function of sparsity, geographical isolation, or density. In addition, the modification of this divisor in FY 1988-89 (the Smith Bill) to vary by grade level effectively added grade level weights to our current foundation program.

Each school system's allocation is on a per pupil basis adjusted for class size. The teacher unit consolidates costs for **salaries**, funds for support services entitled "**other current expense**," and funds for **capital outlay**. These cost factors were to be adjusted by the State Board of Education on an annual basis. Funds for **transportation**, the fourth cost factor, were provided for those school systems which met state requirements to operate at state expense a school transportation system.

The determination of the required local share or tax effort in the 1935 statute is common today; local taxes would be included in the foundation program—the ad valorem tax—and would be uniform statewide. Each local school system's required tax effort was 5.0 mills of the 7.0 mills of local ad valorem tax required to be levied. This was each local school system's share of one half of one percent of total assessed state valuation (5.0 mills). The wealth index created in 1935 was the *assessed valuation index*.



### Revising the Alabama Minimum Foundation Program

The Foundation Program concept is still the most commonly utilized state aid program in use today (AEFA, 1988; ECS/NCSL, 1988; NEA, 1987). Yet it may not be the only aid formula in all cases as other components (tiers) such as a guaranteed tax yield program may be used in conjunction with the foundation program. As education developed in Alabama after 1935, two patterns developed which limited the equity provisions of the foundation program. The first was the disconnection of the calculation of the required local share or effort; the second was the appropriation of general school aid funds outside of the foundation program as categorical aid. These categorical aid programs have been of two types.

The first type consists of components which should be included in the foundation program, such as teacher units to reduce class size or funding for fringe benefits. The second consists of programs which are properly categorical aid and which do not necessarily represent a general per pupil allocation to each local school system (ex., special education and vocational education). Transportation is of this second type and should be allocated outside the foundation program as ordered: "Transportation shall be funded...outside the foundation program (*Order of August 22, 1993*, p. 19)."

Funding for school facilities is a major problem. The Minimum Program concept includes capital outlay as a cost factor because it was properly assumed that each local school system would have to bear major responsibility for its capital outlay needs and that the building program should be equalized through the foundation program (statewide bond issue for school buildings is a relatively recent phenomena). Judge Reese has ruled that "Funds shall be provided outside the foundation program that will eliminate identified deficiencies in school facilities within five (5) years ..." This undoubtedly refers to past deficiencies. In addition, "Funds shall also be provided for the on-going soundness and adequacy of educational facilities ...(*Order of August 22, 1993*, p. 19)." "On-going soundness" requires current revenues, not sporadic bond issues.

Judge Reese may have anticipated two different funding mechanisms for capital outlay:

The funding system for eliminating deficiencies in facilities and for new construction shall be equitable and shall take into account: the current state of buildings, the existing capital debt services and tax capacity of local school systems (*Order of August 22, 1993*, pp. 19-20).

Accomplishing this indicates that equity funding, analysis of

facilities deficiencies, and new bond issue proceeds should all be addressed simultaneously, and their purposes and long-term implications carefully integrated.

### Categorical Aid Programs

Funding that is targeted for specific categories of students implies full state assumption of costs, such as transportation, outside the foundation program. The weighting system required by Judge Reese for special education, at-risk, and vocational education may suggest allocation as categorical aid (*Order of August 22, 1993*, p. 18). By removing these from the foundation program, local school systems proportionately bear only the cost of the general school aid program; programs which are not general in nature are best assumed 100 percent by the state. The incidence of such educational needs is directly a state problem, not a local problem (ex., catastrophic costs in special education).

### Required local share or effort

Required local effort was defined in 1935 as the yield of 5.0 mills of ad valorem tax. This has not been updated to reflect the increased levies authorized generally or the selective local levy authorizations. Whereas in 1935 the required local taxation was 7.0 mills (the total then with statewide authorization), the maximum authorized today is approximately 53 mills (with 15 mills authorized statewide). School systems may not levy all ad valorem taxes available. A foundation program's equalization is limited when a local school system's total access to local revenues is not calculated in the formula. The greater the variance between the required local share or effort and the maximum local levy, the less the equalization. Given that the range of ad valorem levied for school purposes has increased from 7.0 mills in 1935 to approximately 53 mills in 1993, the simple average of this range, or 30 mills, could be required of all local school systems (requires **linchpin** constitutional amendment). As the required number of mills decreases, equity decreases. Conversely, as the required number of mills increases, equity increases.

Another development since 1935 has been both the statutory authorization of the local sales tax (including franchise, excise and privilege license taxes) for school purposes and its widespread utilization. To increase the equalization effectiveness of a foundation program, it must take into account the common local tax base approved to fund schools. Given that over 75 percent of local school systems today use the sales tax (average one cent), some standardization of its incidence should be developed. This could be accomplished by statutorily levying a uniform local one cent sales tax for school purposes, which becomes a part of the required local share of effort. The sales tax wealth of a local

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school system becomes its share of a uniform local one cent sales tax; for sales taxes the measure of wealth becomes the Sales Tax Index. Should other taxes be made available to local school systems, such as the income tax, a similar wealth index could be constructed.

There is difficulty in measuring the yield of taxes other than ad valorem tax on the basis of ad valorem tax yields. In Alabama, property wealth is its appraised or fair market value. Much property currently escapes the appraisal process due to tax abatements and is unrecognized as wealth. Additionally by Amendment 373 (the "Lid Bill"), all property is discounted by an assessment ratio into four classes. The statewide average of these classes is about 17 percent. Finally, the application of exemptions (homestead, current use) means that less than 17 percent of property wealth is reflected in the tax yield.

On the other hand, taxes such as the sales taxes are based upon the 100 percent value of the transaction, with relatively few exemptions provided. While an ad valorem tax tends to understate the wealth of the local school system, measuring the yield of other taxes—particularly the sales tax—in terms of the ad valorem tax tends to overstate the tax effort involved. Given Alabama's current tax system, it is difficult to fairly equate capacity, effort, and yield. The most practicable way to do this is through a uniform local tax levy.

Other issues such as the appropriations to local school systems by their respective city councils and county commissions may need to be considered in determining required local share. Taxes which are uniquely available to certain local school systems and denied to others such as the gasoline tax and federal impact aid also require review.

#### **Required local taxation versus required local effort**

Required local taxation means that a standard rate of local taxation is required for participation in the foundation program. This has historically been 7.0 mills. However, the state has assumed that some of this required local taxation should be available for strictly local educational purposes, particularly capital outlay. Therefore, the chargeback or required local effort was only determined to be 5.0 mills. This means that only 5.0 of the 7.0 mills thus required was considered to be available to fund state educational purposes. Stated another way, the only amount the Legislature could spend in the appropriations bill was 5.0 mills of *required local effort*. The other 2.0 required mills were unrestricted *required local taxation* as was any additional local tax levy (local leeway).

An important issue for careful evaluation in any revised or new foundation program is whether the required local effort shall be 100 percent of the required local taxation. If the amount is 100 percent, then local boards of education have no flexibility in local education matters over and above the minimum (whether it is called minimum or adequate is immaterial—it is still the minimum required by the state). If a local governing body has been unwilling to tax itself up to whatever shall be required as local taxation, it doesn't seem realistic that once this new minimum levy is in place that there will be great interest in levying additional taxes for local purposes, particularly to pay for a building program. In fact, many local taxes currently levied—some as school taxes, some as city or county taxes—are pledged or earmarked for retiring bond issues. How can the tax yield of these levies be counted as being available for state educational purposes

es such as lowering student/teacher ratios? It will be important for state lawmakers and educators to determine a required local effort that is *less* than the required local taxation in order to recognize the validity of any pledges and to leave local flexibility for educational programs or for capital outlay.

#### **Court-ordered new programs**

Other new programs ordered by Judge Reese include a system of school rewards for successful performance (p. 7), substantial staff development (p. 9), extra staff days, (p. 9), targeted compensatory assistance (p. 10), a state plan including funding to minimize non-school barriers to learning (p. 11), an early childhood development program for disadvantaged four-year olds (p. 11), preschool services for three to five year olds with disabilities (p. 11), adequate instructional supplies (p. 13), technology acquisition, support, maintenance, and staff development (p. 13), and staff development in special education (*Order of August 22, 1993*, p. 14). These are new costs to the State. Equity is not effected with these programs funded outside the foundation program.

#### **Limitations of a Foundation Program as described**

Troublesome aspects remain in reviving Alabama's foundation program which are perhaps unique to Alabama.

- (1) The first is that without a statistically significant chargeback many local school systems have built an infrastructure based upon an extra cost subsidy from the state (example, fringe benefits) and an assumption that everything levied at the local level is for local purposes. The concept that some or all local revenues could be subsumed by a chargeback and, in effect, captured by the state to pay for educational expenditures currently directly funded by the state is a politically—

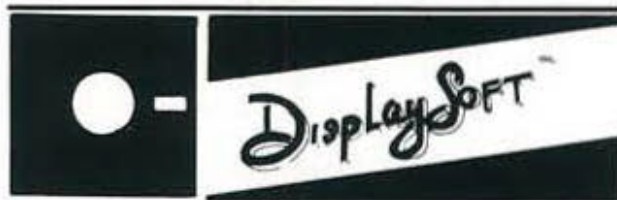
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and financially—difficult issue. Somehow, the concept of a hold harmless clause on some combination of state and local resources on a per student basis is required in the Order (p. 19), but its implementation scheme has not been declared. The second issue is local indifference to the financial plight of schools and the lack of a true incentive for levying taxes, even those currently authorized. Local boards of education do not have taxing authority as in some other states.

Equity funding requires substantial new tax revenues, unless the plan is to reallocate current educational funding. The plaintiffs argued from the beginning that the intent was to level up, not down. In addition, a hold-harmless provision apparently precludes reallocation of current revenues (Robin Hood). Therefore, what is the source of new funding to supplement less affluent local school systems? Where is the incentive to levy new local taxes for schools? Systems currently levying substantial local levies have understood that excess local revenue (local tax revenue derived strictly from a tax rate in excess of any proposed state required local taxation) could be used to offset proposed reductions in state allocations or redirected to new state requirements. The implementation of a chargeback in a foundation program is a painful transition for local school systems which have implemented a lawful educational program in full compliance with state statutory and administrative code provisions. This scheme which allowed these local school systems to prosper at the detriment of others has its antecedent in 1938 and in successive state officials who have been unwilling to address the deficiencies which have existed. The Order requires standardization of school system taxes:

Authorization for local school system taxes (rates permitted, kinds of taxes authorized, etc.) shall be uniform, so that all school systems have equal access to their respective tax bases, and sufficient taxing authority to participate fully in the State funding system ...*Order of August 22, 1993*, p. 18).

The resolution of the chargeback awaits the **linchpin** constitutional amendment.

(2) Alabama has designated education as the one function of state government whose implementation is subject to local aspiration. When state government was reorganized in 1932, the *Brookings Institution Report* lamented that local voters were given the right to reject tax levies uniquely for education, the most important function of government. This local indifference may actually be voter expression of distrust of the governmental process. Initiative and recall is not allowed in Alabama. The closest to this is a vote on a local school ad valorem tax. Given these circumstances and the realization of tax levying authority by local boards of education in other states, Alabama's school finance plan may have to reflect significant peculiarities to Alabama.

Judge Reese has also ordered adequate funding:

Defendants shall develop a method for determining what level of funding is necessary to provide an adequate education...(*Order of August 22, 1993*, p. 18)."

If the methodology is *absolute adequacy*, adequacy will be measured against statutory and regulatory standards for the operation of schools; if *relative adequacy*, the spending level of other states will become a benchmark. This will represent a major policy decision for the state. In a foundation program, the

application of a chargeback effectively resorts local funds, reallocating upon need. Granted, a hold harmless should be instituted. However, the focus becomes less for adequacy and equity and more on winners and losers. Balancing adequacy and equity will become a difficult issue. If the burden of instituting equity is through a financial aid program in which equity funding is identified as an "add-on," its cost and impact would be more clearly visible to educators and policy-makers. This might promote adequate funding more readily. That may be one advantage of a power or percentage equalization program.

### The Percentage Equalization Program

In simplest terms, a percentage equalization program means that each mill levied in a local school system should produce the same number of dollars of total school revenue per mill per pupil (weighted or unweighted) in every local school system (Burrup, et. al, p. 250). Such a program uses the concept of a State Aid Ratio (SAR) which defines a mathematical relationship between state and local revenues:

$$\text{State Aid Ratio (SAR)} = 1 - k(\text{fc}/\text{FC})$$

where:

**fc** = per unit fiscal capacity of the local school system;

**FC** = per unit fiscal capacity of the state; and

**k** = constant selected by state (less than 1)

The State Aid Ratio on a per unit basis (teacher unit or weighted pupil unit) determines the state aid allocation for each of these units and is a function of local tax capacity, tax effort, and state assumption of cost. To determine the amount of state aid, the SAR is multiplied by the level of expenditure required by the state. Obviously, if the state mandates the total per unit expenditure deemed adequate, the percentage equalization formula has the characteristics of a foundation program. The smaller the constant *k* is, the greater the cost of the program to be assumed by the state and more if left to local tax resources (AEFA, p. 5).

If the state does not specify what the minimally adequate expenditure level is to be for each local school system, then this type of percentage-equalization program becomes a District or System Power Equalization Program and simply assumes the characteristics of the Guaranteed Tax Yield/Base Program (ASFA, p. 5). This is a state guarantee that each local school system will have the ability to generate the identical revenue on a per student basis for a given tax rate. It does not matter whether this is called a Guaranteed Tax Base (GTB) or a Guaranteed Tax Yield (GTY) because of the convertibility of tax base to yield as follows:

$$\text{Yield} = \text{Rate} \times \text{Base}$$

These programs are conceptually similar as the state fiscally neutralizes the effects caused by wealth or fiscal capacity in local school systems (AEFA, p. 5).



### Ira W. Harvey

Ira W. Harvey received his undergraduate degree in physics and chemistry from Millsaps College, a master's degree in physiology and biophysics from University Medical Center, Jackson, Mississippi, and a doctorate degree in educational administration and political science from Auburn University. He is associate director of the President's Office of Public Policy of the University of Alabama at Birmingham. He is the author of *A History of Educational Finance in Alabama*, and present-

ly is a consultant to the Governor's Education Reform Task Force.



Once the state determines the tax rate that it will allow to be counted in this matching grant program and the yield on a per student basis that it will guarantee, the state allocates to each local school system the amount of revenue that will be necessary to bring the yield of the local tax on a per student basis up to the state guarantee. For example, if the state guarantee for a given tax rate is \$1,000 per student and the local tax yield for the given tax rate per pupil is \$200, then the state matching grant is \$800. For equity, the guaranteed yield needs to be 100% of the highest yielding local school system in the state on an annual basis. This is the principle incorporated in the mediated settlement for FY 1994-95.

**A two-tier proposal: flat grant and guaranteed tax yield**

While not uniquely a foundation program, a two-tier school finance program for Alabama could meet all of Judge Reese's requirements (see Figure 4). For Tier I, a flat grant on a weighted per pupil basis provides an equal amount of state revenue to each student equally situated. This flat grant most closely resembles what Alabama currently provides through state funding and should contain the cost factors of a foundation program (this will be in fact a foundation program with the chargeback equal to zero). Tier II of the funding formula could be a guaranteed tax yield program based upon required local tax taxation (the **linchpin** constitutional amendment) for all local school systems calculated at 100 percent of the yield of the highest-yielding school system of the state. This will have the financial impact of a foundation program with a chargeback, but eliminates the need for a "hold-harmless" provision and negates the fear that current revenues will just be redivided. The additional optional local taxation was presumed to be in existence with a foundation program as it was not precluded in Judge Reese's Order. Mathematically, the same result is obtained with a different set of funding principles.

Outside of this equalized state funding program would exist those categorical aid programs (line item appropriations) which are defined as being full state assumption: special education, vocational education, at-risk students, transportation, pre-school programs, etc. Treating these as categorical aid programs neither enhances nor diminishes equity, since they represent only special needs of students.

This type of program places the state in financial partnership with each local school system, allowing the financially

weakest local school system to offer the same quality of program as wealthier ones and to make the same kind of local funding decisions as made by the wealthier ones. This partnership may cease once the local school system's local levy exceeds the state mandate. Or the state may choose to place a premium on additional local taxation of a specific type (ad valorem for example) and institute a tax policy by expanding the guaranteed tax yield beyond the level of required local taxation. A rational fear may be that local determination of local

levy could be so high as to deplete available state funds. However, the state is free to dictate, within the boundaries of constitutional requirements, just how far the partnership extends. Another option available to the state besides open-ended or capped is reduced equalization in which successive mills levied beyond those required are equalized at a diminishing rate of return, a sliding scale (Burrup, et. al., pp. 250-252). In any case, it seems unlikely that any local governmental unit will undergo excessive taxation.

A value of this program in terms of tax increases at the state level (adequacy) is that for such a program to exist, a separate fund should be created in the state treasury for the purpose of Tier II. This fund's revenue requirements

would be based upon the equity and adequacy decisions made by the legislature. All would clearly see where funds are placed by priority: new program initiatives or equity funding of the general school aid program.

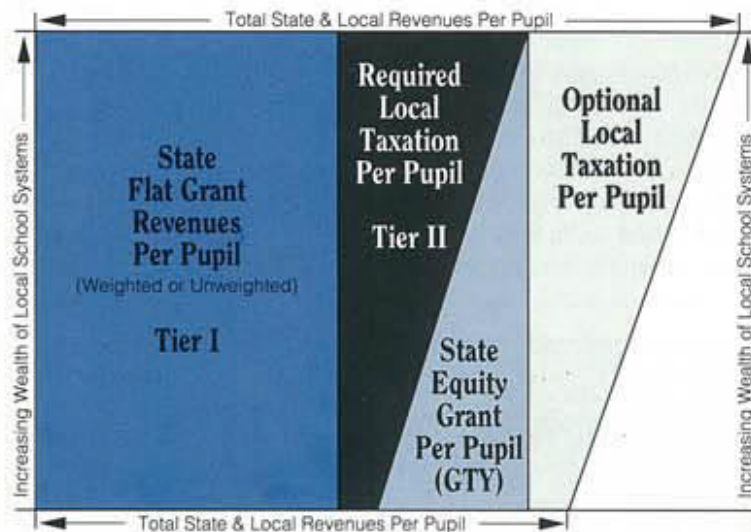
**Conclusions**

Alabama's Minimum Foundation Program law of 1935 can with revision accommodate the modern instructional world and provide for adequacy and equity. Whether the revision is major or minor, the two basic problems described above must be solved. (1) How much and what type of required local effort shall be considered in the equitable application of the foundation program? (2) What shall be the magnitude of the foundation program; will it encompass all the categorical aid programs defined as necessary in the past to operate the schools; and are these revenues adequate. The critical problem to face school finance reform is access to revenues at the local level and the state level. No finance program will meet Judge Reese's Order without reasonable local taxation. Nor will any such program reach equity and adequacy without significant new state revenues. The lawsuit



Figure 4

**DIAGRAM OF A TWO-TIER PROGRAM:  
FLAT GRANT PLUS  
GUARANTEED TAX YIELD**





was instituted on the basis of adequacy and equity, not unspecified school reforms.

This can be accomplished with a pure foundation program or a pure power equalization program. Or it can be accomplished by a combination of the two. In such a combination, the foundation program could become a flat grant program with any degree of complexity in cost factors the legislature might desire, including the complexity of any contemporary foundation program. The important point is that students with equal needs would be treated equally (weighted). The chargeback or local required effort would be zero, thus eliminating problems associated with a hold-harmless and a chargeback.

All scenarios require local taxation (the importance of the **linchpin** constitutional amendment). The process of equalization occurring through a power equalization program such as a guaranteed tax yield, might be an attractive option for Alabama. This could operate by determining just what rate of the required local taxation will be equalized. This additional allocation would be made to local school systems to, in effect, provide them with the unrestricted local tax revenues that wealthier school systems enjoy. No one would be penalized, and equity would be attained through supplemental allocations which would require new state taxes. The plaintiffs clearly demonstrated to the Court that the current revenue base for public education in Alabama is inadequate. If an adequate educational program could be attained through growth, then there was no basis for bringing this lawsuit. The ASETF is already earmarked "for educational purposes only."

There are many ways to accomplish the desired remedies ordered by Judge Reese. Perhaps, the greater the complexity of the proposed solution, the longer it will take to be acted upon, and greater the difficulty to bring consensus for legislative

action. Building successfully upon the program already in place can occur with a wide number of variations possible. Each of these variations should be available to policy-makers to allow them to make an informed decision about which is best for the school children of Alabama and its taxpayers. ■

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## ALABAMA CENTER FOR DISPUTE RESOLUTION



Keegan

The Alabama Center for Dispute Resolution, located in the Alabama State Bar offices, is now fully operational. It maintains educational and resource materials and a roster of mediators for use throughout the state court system. Administered by **Judy Keegan** (J.D. 1986, Catholic University), the Center is being developed into an alternative dispute resolution management, coordination, research and development office similar to dispute centers developed in other states in recent years. Operating under the supervision of the newly-created Alabama Supreme Court Commission on Dispute Resolution, and in conjunction with the Alabama State Bar Committee on Alternative Methods of Dispute Resolution, the Center will manage and coordinate all alternative dispute resolution programs in the State of Alabama.

The Center will serve as a clearing house for ADR information. It will provide support to local bar association ADR committees, assist with the presentation of ADR seminars, maintain statistical data to evaluate the effectiveness of ADR programs, assist state agencies in implementing ADR concepts in the administrative process, and work to promote conflict resolution programs in the courts, schools and neighborhoods.

For information about mediators, to register on the Center's roster as a mediator, or to obtain information about ADR materials or educational programs, call the Center at (205) 269-0409.

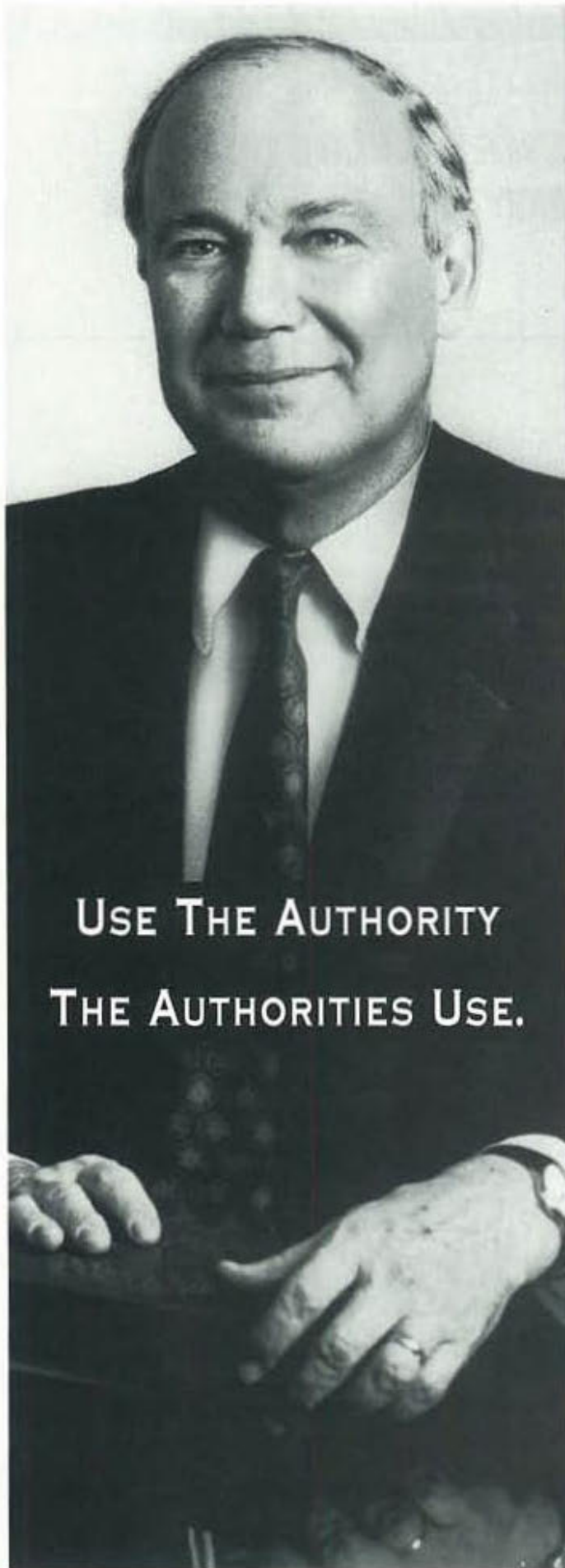


## Appendix 1

# APPORTIONMENT PROCEDURES FOR STATE FUNDS FOR ELEMENTARY AND SECONDARY EDUCATION, FY 1993-94

Item	Financial Program and Line Item of State Appropriation	Basis of Apportionment
<b>I.</b>	<b>Financial Assistance Program</b> <b>Minimum Program And Public School Fund</b> A. Allocation Based Upon Number of Students 1. Public School Fund 2. Minimum Foundation Program	Based upon 1978 School Census Based upon Average Daily Attendance
<b>II.</b>	<b>Financial Assistance Program</b> <b>Local Boards Of Education</b> A. Allocation Based Upon Number of Students 1. Additional Allocation for Special Education 2. Additional Elementary Teacher Units, Grades 3-6 3. Career Ladder Salary Increases for Tenured Teachers 4. Driver Education Teacher Units 5. Elementary Guidance Counselor Teacher Units 6. Kindergarten Teacher Units 7. Library Enhancement (K-12) 8. Maintenance 9. Special Education Teacher Units 10. Supportive Teacher Units 11. Teacher Aides 12. School Bus Capitol Outlay 13. Vocational Teacher Units B. Allocation Based Upon Number of Employees 1. Classroom Instructional Supplies, Grades K-12 2. Kindergarten Instructional Supplies 3. Social Security-FICA 4. Support Personnel Personal Leave 5. Support Personnel Sick Leave 6. Support Salary Increases 7. Teachers' Personal Leave 8. Teachers' Sick Leave Reimbursement	Based upon Enrollment in Grades 1-12 Based upon Enrollment in Grades 2-6 Based upon State Teacher Units Based upon Enrollment in Grade 10 Based upon Average Daily attendance in Grades 1-6 Based upon Average Daily Attendance in K Based upon Enrollment in Grades K-12 Based upon State Teacher Units Based upon Enrollment in Grades 1-12 + Childcount Based upon Defined State Teacher Units Based upon Average Daily Attendance in Grades K-12 Based upon units in service built before 1978 Based upon Formula Devised by SBE  Based upon State and Local Teachers Based upon State and Local Teachers Based upon State and Local Teachers and Employees Based upon all Support Employees Based upon all Support Employees Based upon all Support Employees Based upon State and Local Teachers Based upon State and Local Teachers
<b>III.</b>	<b>Payments On Behalf</b> A. Allocation Based Upon Number of Employees 1. Public Education Employees Health Insurance Board 2. Teachers Retirement System of Alabama 3. Unemployment Compensation	Paid on Behalf of all State and Local Employees Paid on Behalf of all State and Local Employees Paid on Behalf of all State and Local Employees
<b>IV.</b>	<b>Programs Of State Department of Education</b> 1. Textbooks 2. Adult Basic Education 3. Community Education	Based Upon Student Enrollment Based Upon Program Based Upon Program
<b>V.</b>	<b>Public School And College Authority</b> 1. Proceeds of Bond Issues	Based upon Authorizing Legislation





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means of furthering the debate on tax reform in Alabama. (See James D. Bryce, *Tax Reform Issues in Alabama*, 43 *Ala. L. Rev.* 541-599 (1992). Please accept as a major premise of this article, in reviewing our present state system of taxation, that an increase in state tax revenues of 15 to 20 percent (in addition to the usual annual revenue increases, which are accompanied by inflation and the usual government cost increases) is urgently, meaningfully, and vitally needed to provide minimum, adequate and equitable funding for the public school system and general government in Alabama.

Alabama state tax revenues, this year (FY 93-94), are expected to equal approximately \$4.5 billion. State tax revenues (not including local government taxes) last year were about \$4.2 billion. The annual increases in state revenue from last year to this year will be quickly consumed by pressing government cost increases.

Approximately three-fourths to four-fifths of this year's state tax revenue is allocated to support public education, and about one-fourth to one-fifth will be used to support general state government. At least \$675 to \$900 million in additional state tax revenue is needed to bring our schools and general state government up to average among the states in this country. About 75 percent to 80 percent would go to the public schools and the remainder would help fund general government. The need is large but not beyond our reach. A 15 to 20 percent tax increase should do the job. Such investment, made now, will yield enormous future economic, social, and cultural dividends to the people of Alabama.

Alabama, today, has a population of about 4.1 million people. Approximately 26 percent of Alabama's people are under the age of 18 years. These, more than one million, children represent Alabama's greatest promise and potential new resource. Our state is blessed with over 51,000 square miles of beautiful land. Alabama's gross state product (GSP) is estimated to reach, this year, approximately \$78 billion. The total personal income of our citizens (and taxpayers) will reach about \$71 billion this year. Our per capita GSP will be about \$19 thousand, and our per capita personal income will be about \$17.3 thousand this year.

The population of Alabama is greater than the population of about 71 of today's world of some 191 nations (according to the *World Almanac and Book of Facts*, 1994). Alabama's population and economy, for example, is larger than that of Ireland. Ireland has a population of about 3.5 million and a gross domestic product (GDP) of some \$39.2 billion (1991). Ireland's 1991 per capita GDP was \$11.2 thousand.

#### **Compare Alabama with Norway**

The population and economy of Alabama is comparable to that of Norway. Norway's population in 1992 was estimated at 4.3 million and its 1992 GDP was \$72.9 billion. Per capita GDP in Norway in 1992 was \$17.1 thousand. The purpose of these comparisons is to show the significant relative size and strength of the present Alabama population and economy.

Perceived on a worldwide basis, Alabama is an advanced, well-developed, industrial state and economy. Consider Liberia, for example, which had a 1992 population of about 2.5 million. The geographical area of Liberia is 38,250 square miles. The GDP of Liberia, in 1989, was about \$1 billion. The per capita GDP, in 1989, of Liberia was \$440.

#### **Honduras**

Comparison of Alabama with Honduras, in Central America, for example, makes the same point. Honduras has a population of 5.1 million (1992 est.). Its geographical area is 43,277 square miles, slightly smaller than Alabama. Honduras, in 1991, had a GDP of \$2.5 billion and a per capita GDP of \$516.

#### **Foreign tax system**

The total tax burden of most of the industrialized world is as great or greater than that of the present system in Alabama (including the federal government's levies). In Ireland, the maximum income tax rate on individuals is 48 percent. Graduated individual rates begin at 27 percent. The corporation tax rate is 40 percent. The Value Added Tax (VAT) of 21 percent is levied on many goods and services. Capital gains are taxed at a rate of 40 percent.

Norway imposes a VAT at the rate of 28 percent on the sale of goods and ser-

vices. Personal income tax is levied at a maximum rate of 28 percent on taxable income. The corporation tax rate is 28 percent of taxable income.

#### **Alabama tax burden**

This year the people of Alabama will pay in tax revenues about \$13.7 billion to the federal government, approximately \$4.5 billion to state government, and an estimated \$1.6 billion to local governments (cities and counties). The total tax burden of Alabamians, an estimated \$19.8 billion, represents 25 percent of our state GSP. Of this amount the state's share is 6 percent, the local share is 2 percent, and the federal portion is 17 percent. (These estimates are derived from *The Statistical Abstract of the United States*, 1993-1994, and *The Universal Almanac* 1994; see also *Center for Business and Economic Research, Alabama Economic Outlook* (1994)).

There were 1.7 million federal income tax returns filed by Alabama taxpayers in 1990, and presumably about that same number of returns were filed with the State Department of Revenue. The 1992 per capita taxes paid by Alabama citizens to the federal government was \$3,177. This represented 76 percent of the U.S. average. Alabama citizens, however, received a pretty good deal. In 1992, the federal government spent \$4,920 per capita in Alabama. Alabamians paid about 65 cents for each dollar received.

Connecticut, the state with the highest per capita personal income, did not fare as well as Alabama. The 1992 per capita taxes paid by Connecticut citizens was \$6,286. That year the federal government spent \$4,846 per capita in Connecticut. The people of Connecticut, therefore, paid \$1.44 in federal taxes for each dollar received.

#### **Alabama taxes**

The *Parca Report* (a publication of the Public Affairs Research Council of Alabama, Number 20 (1994)) lists the sources of revenue for the Alabama state government for FY 1993-94. The total tax revenue, as previously stated, is estimated to be \$4.5 billion. (The total state revenues, including federal sources, local sources, licenses, fees, college and university revenue, hospital fees for services, etc., are projected at \$10.2 billion).



The "big mules" among state taxes (each of which generates over \$100 million of revenue annually) are: state income tax, general sales and use taxes, alcoholic beverage taxes, insurance premium tax, motor fuels and oils taxes, utility gross receipts taxes, ad valorem (property) tax, and corporate franchise tax. About 90 percent of all state tax revenue is produced by these eight taxes. The "big, big mules" are the sales and income taxes, which together produce about 61 percent of total state revenues. The state ad valorem (property) tax (not counting its important contribution to local government) provides only about 2.6 percent of total state tax revenue. Based on its state tax contribution, the ad valorem (property) tax "big mule" is not very healthy. In fact, Alabama ranks 50th among the states in this category.

The following table, which appeared in the summer 1994 issue of the *Parca Report, supra*, lists some 21 statewide taxes (or categories of taxes) which together will generate the \$4.5 billion of expected state revenue. Each of the taxes is numbered and will be discussed in more detail subsequently in this article. They are:

State of Alabama Tax Revenues For FY 1993-94	Total (Dollar figures in millions)
<b>INCOME TAXES</b>	
1. State Income Taxes	1,533
2. Financial Inst. Excise Tax	33
<b>TOTAL INCOME TAXES</b>	<b>1,566</b>
<b>SALES &amp; GROSS RECEIPTS TAXES</b>	
3. General Sales and Use Taxes	1,221
4. Alcoholic Beverage Taxes	158
5. Cellular Telephone Tax	7
6. Contractors Gross Receipts Tax	21
7. Insurance Premium Tax	168
8. Lodging Tax	18
9. Motor Fuels & Oil Taxes	531
10. Parimutuel Tax	6
11. Rental & Lease Tax	39
12. Tobacco Taxes	67
13. Utility Gross Receipts Taxes	227
14. Utility License Taxes	74
<b>TOTAL SALES &amp; GROSS RECEIPTS TAXES</b>	<b>2,538</b>
<b>PROPERTY &amp; OTHER TAXES</b>	
15. Ad Valorem Tax	120

16. Corporate Franchise Tax	119
17. Documentary or Filing Taxes	18
18. Estate & Inheritance Tax	20
19. Medical Providers Tax	74
20. Other Property Taxes	2
21. Severance Taxes:	
Coal Severance Tax	8
Forest Products Severance Tax	6
Oil & Gas Production Tax	58
<b>TOTAL PROPERTY &amp; OTHER TAXES</b>	<b>425</b>
<b>TOTAL TAX REVENUES</b>	<b>4,529</b>

### 1. State Income Tax

The state income tax is estimated to produce \$1.5 billion in revenue for 1994 (hereafter tax revenue figures are FY 1993-94 estimates). This amounts to approximately 34 percent of total state tax revenues.

The tax base for the state income tax is the net income earned from all sources by residents, non-residents, and part-year residents deriving income from Alabama sources, and corporations domiciled in or receiving income from Alabama.

The Alabama income tax rate is:

(1) Single Persons, Head of Family, and Married Persons Filing Separate Returns:

- 2 percent on the first \$500 of taxable net income
- 4 percent on the next \$2,500
- 5 percent on income over \$3,000

(2) Married Persons Filing Joint Return:

- 2 percent on the first \$1,000 of taxable net income
- 4 percent on the next \$5,000
- 5 percent on income over \$6,000

(3) Domestic Corporations  
5 percent of entire net taxable income annually

(4) Foreign Corporations:  
5 percent of entire net income annually. Unless a separate accounting system is employed for Alabama operations, that part of income earned in Alabama will be determined by a formula set forth in Income Tax Regulation No. 398.2.

Authority for the state income tax is *Ala. Const.* of 1901, amends. 25, 61, 212 and 225, and *Ala. Code* §§40-18-1

through 40-18-91 (1975).

The Commission recommended that the Alabama personal income tax be conformed as closely as possible to the federal income tax, with federal adjusted gross income as a beginning point.

The Commission also recommended that the Alabama corporate income tax be conformed as closely as possible to the federal corporate income tax, and that it be extended to financial institutions to replace the Financial Institutions' Excise Tax.

### 2. Financial Institutions Excise Tax

The financial institutions excise tax (FIET) will produce revenue of approximately \$33 million this year (the actual estimates are for the fiscal year).

The tax base for the financial institutions excise tax is the net income of any bank, banking association, trust company, building and loan association, industrial or other loan company doing business in Alabama.

The Alabama financial institutions excise tax rate is 6 percent of taxable net income.

Statutory authority for the FIET is *Ala. Code* §§40-16-1 through 40-16-8 (1975).

As previously stated, the Commission recommended that the Alabama corporate income tax be extended to financial institutions to replace the financial institutions' excise tax.

### 3. General Sales and Use Taxes

General sales and use taxes in Alabama this year will produce about \$1.2 billion. This amounts to approximately 27 percent of total state tax revenues.

The tax base for the Alabama sales tax is the gross proceeds from the sale of all taxable items to individuals, corporations, and other entities within Alabama, except as specifically exempted by law, and on the gross proceeds from conducting or operating public places of amusement or entertainment.

The sales tax rate is:

- 4 percent of gross proceeds of sale of tangible personal property.
- 4 percent of gross receipts from conducting or operating public places of amusement or entertainment.
- 2 percent of net trade difference of new or used automobiles, trucks, trailers or house trailers.
- 1 1/2 percent of selling price of



machinery used for mining or manufacturing.

- 1 1/2 percent of net trade difference of new or used farm machines, machinery and equipment that is used in production of agricultural produce or products, livestock, or poultry on farms.
- 3 percent of cost of food products sold through vending machines.

In addition to the Alabama sales tax, the Department of Revenue collects and administers approximately 350 county and municipal sales and gross receipts taxes, ranging in rate from 1/4 of 1 percent to 4 percent.

Authority for the sales tax is *Ala. Code* §§40-23-1 through 40-23-38 (1975).

The Alabama use tax is paid, in general, by all consumers, corporate or otherwise, with respect to all tangible items purchased outside Alabama, but consumed or used inside the state.

The use tax rate is generally the same as the Alabama sales tax rate. When property is imported to Alabama from a state having a reciprocal agreement with Alabama, and a tax equal to or greater than the Alabama tax was paid in the other state, such property is not subject to Alabama use tax. If the tax paid to the other state is less than the Alabama tax, the difference must be paid to Alabama.

Authority for the use tax is *Ala. Code* §§40-23-60 through 40-23-88 (1975).

The Commission recommended extension of the general sales tax to include services and automobiles and a redefinition of exemptions.

#### 4. Alcoholic Beverage Taxes

Alcoholic beverages taxes in Alabama will generate approximately \$158 million in revenue this year. This amounts to about 3.5 percent of total state tax revenue.

Alabama alcoholic beverage control revenues include an excise tax on the sale, storage, or receipt of malt or brewed beverages for the purpose of distribution. Distillers, manufacturers, wholesalers and retailers of alcoholic beverages also pay license and filing fees.

The Alabama alcoholic beverage tax rate is:

- Beer 5 cents per 12 fluid ounces or fraction thereof

- Local beer taxes 1.625 cents per 4 fluid ounces or fraction thereof.
- Liquors & fortified wine 56 percent of cost plus markup. (Sales tax also applies)
- Table wine 45 cents per liter.

Authority for the Alabama alcoholic beverage taxes is *Ala. Code* §§28-3-43; 28-3-183 through 28-3-205 (1975).

The Alabama alcoholic beverage taxes are actually higher than comparable taxes in most of the other states.

#### 5. Cellular Telephone Tax

The cellular telephone tax will produce approximately \$7 million for the state this year. The Alabama cellular telephone tax is a privilege tax on the provision of cellular radio telecommunication services in the state.

The tax rate is:

##### If monthly taxable receipts from each person are:

	The tax is:
• Not over \$40,000	4 percent of taxable amount
• Over \$40,000 but not over \$60,000	\$1,600 plus 3 percent of excess over \$40,000
• Over \$60,000	\$2,200 plus 2 percent of excess over \$60,000

Authority for the Alabama cellular telephone tax is *Ala. Code* §40-21-121.

#### 6. Contractors' Gross Receipts Tax

The contractors' gross receipts tax will produce revenue this year of approximately \$21 million. The contractors' gross receipts tax is a privilege tax on any person, corporation, or other entity engaging in the business of contracting to construct, reconstruct or build any public highway, road, bridge or street.

The tax rate is 5 percent of gross receipts derived from the performance of contracts subject to the tax. Authority for the contractors' gross receipts tax is *Ala. Code* §40-23-50 (1975).

#### 7. Insurance Premium Tax

The insurance premium tax will produce about \$168 million of revenue for Alabama this year. This amounts to

approximately 3.7 percent of the total state tax revenue.

An insurance premium tax is imposed on the amount of premiums written by an insurer. A license tax is also levied for the privilege of transacting an insurance business in the state.

The premium tax rate is:

- Domestic Fire and Casualty—1 percent of gross premiums less returned premiums and prescribed dividends.
- Foreign Fire and Casualty—4 percent of gross premiums less returned premiums and prescribed dividends.
- Wet or Ocean Marine Tax—3/4 percent of 1 percent of the gross underwriting profit.
- Domestic Life—1 percent of premiums and annuity considerations.
- Foreign Life—3 percent of premiums and 1 percent of annuity considerations.

The foreign insurers tax rate is adjusted downward if the requisite percentage of admitted assets is invested in Alabama investments. Authority for the Alabama insurance premium tax is *Ala. Code* §§27-4-2 through 27-4-11 (1975).

The Commission recommended that the insurance company premium tax be modified to treat foreign and domestic insurers under the same formula.

The insurance premium tax has now been amended by the Insurance Premium Tax Reform Act of 1993 (Acts 1993, No. 93-679) to become effective January 1, 1995. *Ala. Code* §27-4A-1 through §27-4A-7 (1975). In general, the premium taxation rates for life insurance premiums and health insurance premiums for both foreign insurers and domestic insurers will be equalized in increments over a five year period, and will thereafter be equal. Premium tax on other insurance premiums, effective January 1, 1995, will be 3.6 percent per annum, except for certain types of insurances specifically listed in the statute at lower rates.

#### 8. Lodging Tax

The lodging tax will produce about \$18 million in revenue this year. The lodging tax is a privilege tax imposed on every person or firm renting or furnishing lodgings or accommodations to transients for a period of less than 30 days for a fee.

The lodging tax rate is:

- 5 percent of the charges for accommodations in the counties compris-



ing the Alabama mountain lakes geographic area: Blount, Cherokee, Colbert, Cullman, DeKalb, Etowah, Franklin, Jackson, Lauderdale, Lawrence, Limestone, Madison, Marion, Marshall, Morgan and Winston.

- 4 percent of the charges for accommodations in all other Alabama counties.

Authority for the Alabama lodging tax is *Ala. Code* §§40-26-1 through 40-26-21 (1975).

### 9. Motor Fuels and Oils Taxes

Motor fuels and oils taxes in Alabama this year will bring in about \$531 million to the state treasury. This is equal to approximately 11.7 percent of total state tax revenue.

The taxes are imposed on the sale, consumption, distribution, storage or withdrawal from storage of gasoline or motor fuel in Alabama. There is also an excise tax on motor carriers which operate motor vehicles on any Alabama highway (Motor Carrier Fuel Tax).

Alabama collects three levies, of \$.07, \$.05 and \$.04, for a total of \$.16 per gallon. The motor carrier fuel tax is levied at the same rate that is in effect for gasoline.

Authority for these taxes is *Ala. Const.* of 1901, amends. 93 and 354; *Ala. Code* §§40-17-30 through 40-17-124 and 40-17-220 through 40-17-225 (Gasoline Tax), and 40-17-140 through 40-17-155 (Motor Carrier Fuel) (1975).

### 10. Parimutuel Tax

The Alabama parimutuel tax is expected to yield approximately \$6 million in revenue this year. The parimutuel tax is levied on persons engaged in the business of operating a dog or horse track, based on the total amount wagered (pool) on all pari-mutuel races (a race in which individuals who wager on winners divide the total amount wagered in proportion to their individual wagers, after deduction of authorized taxes, fees and management expenses).

The state parimutuel tax rate is 1 percent of the parimutuel pool on all parimutuel races plus 1 percent of the parimutuel pool on all parimutuel races requiring the selection of three or more racers.

Authority for the parimutuel tax is *Ala. Code* §§40-26A-1 through 40-26A-17, and §11-65-29 (1975).

Local tax rates from 2 percent to 7 percent are also imposed in Green, Macon, Mobile and Jefferson counties.

### 11. Rental and Lease Tax

Rental and lease taxes in Alabama will generate approximately \$39 million in revenue this year. The rental or leasing of personal property tax is a privilege tax on persons engaged in the business of leasing or renting tangible personal property.

The tax rate is:

- 4 percent of gross proceeds from leasing or rental of most tangible personal property.
- 1½ percent of gross proceeds from leasing or rental of automobiles, trucks, semi-trailers, or house trailers.
- 2 percent of gross proceeds from leasing or rental of linens or garments.

Authority for the rental and lease tax is *Ala. Code* §§40-12-220 through 40-12-227 (1975).

### 12. Tobacco Taxes

Tobacco taxes in Alabama, which are comparable, or higher than most other states, will bring in revenue this year of approximately \$67 million. The tobacco tax is based on the sale, storage, use or distribution of tobacco and tobacco products by wholesalers, retailers and consumers.

The tobacco tax rate is 8.25 mills on each cigarette. Rates vary on other tobacco products such as cigars, smoking tobacco, chewing tobacco, and snuff, depending on weight or retail price of the package.

Authority for the Alabama tobacco tax is *Ala. Code* §§40-25-1 through 40-25-47 (1975).

### 13. Utility Gross Receipts Taxes

Alabama utility gross receipts taxes will bring in about \$227 million this year. This amount equals approximately 5 percent of total state tax revenue. The tax is similar to a sales tax.

The basis of the utility gross receipts tax is a privilege tax on every utility (electric, domestic water, natural gas, telegraph and telephone) furnishing utility services in Alabama. Although the tax is imposed on the utility service purchaser, liability for payment of the tax remains with the provider.

The utility gross receipts taxes rate is:

### If monthly gross sales or gross receipts respecting a person are:

	The tax is:
• Not over \$40,000	4 percent of gross sales or gross receipts
• Over \$40,000 but not over \$60,000	\$1,600 plus 3 percent of excess over \$40,000
• Over \$60,000	\$2,200 plus 2 percent of excess over \$60,000

Authority for the Alabama utility gross receipts taxes is *Ala. Code* §§40-21-80 through 40-21-87 (1975).

### 14. Utility License Taxes

Utility license taxes in Alabama will generate approximately \$74 million of revenue this year. The utility license tax is imposed on all persons operating a public utility in Alabama (except railroads, express companies, telephone and telegraph companies).

The tax rate is 2.2 percent on each dollar of gross receipts. Authority for the utility license taxes is *Ala. Code* §§40-21-50 through 40-21-51, and 40-21-53 (1975).

### 15. Ad Valorem (General Property) Tax

The state ad valorem (general property) tax will produce about \$120 million this year. Approximately 2.6 percent of the total state tax revenue is produced by the ad valorem tax.

The basis of the ad valorem (general property) tax is ownership of real and personal property in Alabama. The state tax rate is 6.5 mills.

Authority for the state ad valorem tax is *Ala. Const.* of 1901, §§91 and 214, and amends. 111 and 373; *Ala. Code* §§40-7-1 through 40-9-29 and 40-11-1 through 40-11-5 (1975).

For purposes of the ad valorem tax, all non-exempt property is divided into the following classes and subject to the assessment ratios indicated:

- Class I All utility property used in such utilities  
30 percent
- Class II All property not otherwise classified  
20 percent



- **Class III** All agricultural, forest and single-family owner occupied residential property, including mobile homes and historic buildings and sites.  
10 percent
- **Class IV** All private passenger automobiles and motor trucks used for personal use.  
15 percent

All taxable property is to be appraised at its fair and reasonable value, with the exception of Class III property, which may be appraised by the assessor on current use value if the owner of the property requests. Homesteads, not to exceed 160 acres, whose owners are less than 65 years of age, are exempt from state ad valorem tax up to \$4,000 of assessed value. County exemptions vary from \$2,000 to \$4,000 of assessed value for the regular homestead.

County millages varied for the 1991-92 fiscal year from 14.5 mills to 38 mills. City millages vary from one mill to 46.9 mills (a mill is 1/1000 of a dollar or 1/10 of a cent, so that 6.5 mills equals \$.0065 or .65 percent of \$1).

The following is an example of application of state millage rate to determine state ad valorem taxes due. Assume a home with an appraised value of \$100,000 and a homeowner (taxpayer) who is eligible for the \$4,000 state homestead exemption:

\$100,000	(appraised value)
<u>x .10 percent</u>	(assessment ratio of Class III property)
\$ 10,000	(assessed value)
<u>- 4,000</u>	(homestead exemption)
\$ 6,000	
<u>x .0065</u>	(6.5 mills)
\$ 39	(state ad valorem tax due)

The state ad valorem tax in Alabama is lowest of the 50 states. In general, the state and local ad valorem tax rates in Alabama are the lowest in the United States.

#### 16. Corporate Franchise Tax

The Alabama corporate franchise tax will bring in revenue this year of about \$119 million. This amount is equal to approximately 2.6 percent of total state tax revenue.

The corporate franchise tax is based on the capital stock of a domestic corporation and on the actual amount of capital employed in Alabama by a foreign corporation. The corporate franchise tax rate is:

- **Domestic Corporations**—\$10 for each \$1,000 of paid-up stock, plus subscriptions subject to call. No-par stock is based on the amount dedicated to the capital stock account, derived from sales of stock. Minimum fee is \$50.
- **Foreign Corporations**—\$3 for each \$1,000 of actual capital employed in Alabama.

Authority for the corporate franchise tax is *Ala. Const.* of 1901, §§229 and 232, and amend. 27 (amending §229). *Ala. Code* §§40-14-40 through 40-14-57 (1975).

The Commission recommended retention of the corporate franchise tax, based on capital employed for all corporations.

#### 17. Documentary and Filing Taxes

This year the Alabama documentary and filing taxes will provide about \$18

million in revenue. Documentary and filing taxes are imposed on the recording of mortgages, deeds, bills of sale, conditional sale contracts, etc. The rate of tax is:

- **Mortgages** \$.15 per \$100 of indebtedness, or fraction thereof. (Also deeds of trust, conditional sale contracts, etc.).
- **Deeds** \$.50 per \$500 of value, or fraction thereof. (Also bills of sale).

Authority for the documentary and filing taxes is *Ala. Code* §§40-22-1 through 40-22-12 (1975).

#### 18. Estate and Inheritance Tax

The estate tax in Alabama this year should produce about \$20 million in revenue. The Alabama estate tax is based on all net estates passing by will, devise, or under intestate laws of Alabama.

The estate tax rate is an amount equal to the tax credit allowable under the federal estate tax laws. The tax on non-resident estates is imposed on the proportionate share of the net estate which the Alabama property bears to the entire estate. Authority for the estate tax is *Ala.*

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Code §§40-15-1 through 40-15-19 and 40-15A-1 through 40-15A-14 (1975).

### 19. Medicaid Provider Taxes

Medicaid provider taxes in Alabama will garner about \$74 million in revenues this year. Medicaid provider taxes are privilege taxes levied on all providers of pharmaceutical services, nursing home care, and hospital care. The tax rate is:

- Pharmaceutical Services—\$0.10 per prescription with a retail price of at least \$3, filled or refilled for an Alabama citizen;
- Nursing Home Facilities—\$999.96 per year per bed;
- Non-public Hospitals—\$25 per patient day per year, adjusted according to the hospital's Medicare case mix index for discharges, as published by the Health Care Financing Administration (HCFA) of the Department of Health and Human Services. Any non-public hospital not having such mix index published by HCFA shall be assessed the same rate with no adjustment. (Public hospitals, as defined in Sections 22-21-1 and 40-268-40(B), are not taxed, but are mandated to transfer funds to Medicaid at a rate determined annually by the Alabama Medicaid Agency, based on factors noted in Act 92-418.)

Authority for the Medicaid provider taxes is *Ala. Code* §§22-12B-1 through 22-12B-4, and 40-26B-1 through 40-26B-27 (1975).

### 20. Other Property Taxes

This year other property taxes levied by the state will produce revenue of about \$2 million. This category includes miscellaneous other property taxes which are not separately discussed in this article.

### 21. Severance Taxes

Severance taxes in Alabama this year will generate approximately \$72 million of revenue. These severance taxes include the coal severance tax, forest products severance tax, and oil and gas production taxes. The coal severance tax is a privilege tax levied on every person severing coal in Alabama. The forest products severance tax is a tax on the severing of timber or any other forest

product from the soil for sale, profit or commercial use and on every processor or manufacturer (in-state or out-of-state) using such forest products. The oil and gas production tax is a tax on the production of oil or natural gas severed from any well or wells in Alabama. There is also an oil and gas privilege tax.

The rate of the coal severance tax (which includes two levies of \$.135 and \$.20 cents per ton) is a total of \$.335 per ton. The rate of the forest products severance tax varies based on the specific timber or other forest product severed. The rate of the oil and gas production tax is 2 percent of the gross value of the oil or gas at the point of production.

Authority for these taxes are: Coal severance tax: *Ala. Code* §§40-13-1 through 40-13-10 and 40-13-30 through 40-13-36 (1975); Forest products severance tax: *Ala. Code* §§9-13-80 through 9-13-108 (1975); and Oil and gas production tax: *Ala. Code* §§9-17-25 through 9-17-31 (1975).

### Conclusion

Based upon the preceding overview of Alabama taxes, one at once appreciates the magnitude of the task assumed by the Alabama Commission on Tax and Fiscal Policy Reform. The Commission report is dated January 1991 and appears as an Appendix to 43 *Ala. L. Rev.* 741-775 (1992). The Commission states in its report that it recommended an overall tax system that, which generally maintaining revenue neutrality, allows our elected public officials to make the necessary policy choices to increase or lower various tax rates to generate the required amount of revenue. The Commission stated that one of its goals is to "broaden the tax basis and lower the rates" in order to lessen the regressivity of the current system and to make the system more fair for all taxpayers.

This article fully accepts the need to lessen the regressivity of the current Alabama tax system and to make the system more fair for all taxpayers. As stated previously, however, a major premise of this article in reviewing our state system of taxation is that an increase of state tax revenue of 15 to 20 percent is urgently needed and vital to provide minimum adequate and equitable funding for the public school sys-

tem and general government in Alabama. This represents a need of 675 to 900 million dollars each year of additional state tax revenue. The need for additional revenue has existed for a long time. "And it came to pass in those days that there went out a decree from Caesar Augustus, that all the world should be taxed." Bible: Luke 2:1. The following more specific recommendations or suggestions (without the benefit of Legislative Fiscal Office estimates) are made:

- Double the rate of the state ad valorem tax from the present 6.5 mills to 13 mills.
- Extend the general sales tax to include services (taxed at a rate of 2 percent).
- Increase the domestic corporate franchise rate to equal the rate now imposed on foreign corporations.
- Eliminate the Alabama income tax deduction for federal income taxes paid.
- Increase or decrease other taxes and change the tax base with the goal of tax equity and revenue neutrality.
- Accept the goal and develop policies to encourage and promote growth and development of the gross state product in Alabama.

The first five recommendations relate specifically to state taxes and methods of raising additional revenue, as well as tax equity and fairness. The last recommendation may be the most important one. The growth and development of Alabama industry, trade, and services, thereby increasing the GSP, will lead to increased revenue from existing taxes through the principle of elasticity, that tax revenue grows in proportion to growth of personal income and GSP.

A pragmatic approach should be adopted, namely to find and use whatever methods are cost effective in the state effort to support the attraction and growth of industrial development. The recent successful effort of the state to encourage Mercedes-Benz to build its new U.S. manufacturing plant in Vance, Alabama is a fine example of what can be done. Every city and county in Alabama should seek to develop first class industrial parks to help attract and develop new industry throughout the state.





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The first recommendation above, relates to the present state ad valorem (property) tax. The present state rate is 6.5 mills and produces about \$120 million in state revenue each year. Doubling the present millage should generate an additional \$120 million of revenue. Alabama ranks last among the states in making effective use of the property base to deliver needed government revenue. A complete overhaul of the ad valorem (property) tax system would, of course, be preferable. At least, doubling the state millage rate would be a step in the right direction.

The second recommendation proposes extension of the general sales tax to include services (taxed at a rate of 2 percent). The Commission recommended that all services be subject to the state tax. For example, repair services, personal care services, construction, computer programming and professional services would be included. The 2 percent rate is suggested since this would represent a completely new source of state revenue in Alabama. If the present sales tax is maintained at the present rate, the extension to include services taxed at a 2 percent rate should produce sufficient revenue to meet approximately half of the present need for additional revenue for state schools and general government. This extension would represent a step in the right direction toward a state tax system more soundly based on equitable principles. As a practical matter, this may be the most fruitful source of new revenue. We should diligently search for new equitable tax sources. As Jonathan Swift told Lady Carteret: "For God's sake, madam, don't say that in England for if you do, they will surely tax it."



### Robert Sellers Smith

Robert Sellers Smith received his undergraduate and law degrees from the University of Virginia and an LL.M. in taxation from the University of Alabama. He is a partner in the Huntsville office

of Bradley, Arant, Rose & White, and is a member of the editorial board of *The Alabama Lawyer*.

The third recommendation, above, suggests that the domestic corporate franchise rate be increased to equal the rate now imposed on foreign corporations. This step will promote tax equity and fairness without decreasing tax revenue derived from the present franchise tax on foreign corporations. Implementation of this recommendation may involve a constitutional amendment since the Alabama Constitution now requires imposition of the corporate franchise tax on domestic corporations "in proportion to the amount of capital stock." (*Ala. Const.* art. XII, §229 (amended 1936).

The present system of taxing the par value of capital stock of domestic corporations is easily circumvented by simply reducing the par value of a corporation's stock. Placing domestic corporations on an equal footing with foreign corporations will both produce needed additional revenue and will represent a major step in the direction of equity and fairness in the state tax treatment of both domestic and foreign corporations.

The fourth recommendation, above, is to eliminate the Alabama income tax deduction for federal income taxes paid. The purpose, of course, is to raise additional revenue. This step would prove productive of revenue in a fair, progressive way. It would help lessen the present regressivity in the state tax system. Implementation of this suggestion will be relatively simple and highly effective. A comparable step in the federal tax system was elimination of the itemized deduction for consumer interest. The fifth recommendation, above, in effect accepts all the recommendations of the Commission to broaden the tax base and lower the tax rate.

Full implementation of the Commission's recommendations in Alabama may take years. In the meantime, the citizens of Alabama should immediately address the present need for increased funding of our public schools and general government. Additional investment in the human resources of our state is a sound investment. It is a conservative investment that will pay incalculable future dividends. ■



# DISCIPLINARY REPORT

## Transfer to Disability Inactive Status

• Auburn attorney **Andrew J. Gentry** was transferred to disability inactive status, effective August 26, 1994. Gentry's transfer was ordered by the Supreme Court of Alabama pursuant to a prior order of the Disciplinary Board of the Alabama State Bar. [Rule 27(a); Pet. No. 94-03]

## Surrender of License

• Birmingham attorney **Barry G. Terranova** has surrendered his license to practice law in response to charges brought against him by the Office of General Counsel of the Alabama State Bar. The formal charges filed against Terranova allege that he, while not authorized to practice law in the State of Alabama, held himself out as a lawyer and accepted a fee of \$5,000 from a client, Robert M. Dailey, Jr., to set up a corporation and obtain a patent of an invention. He associated a patent lawyer to obtain the patent for a fee of \$1,000 to be paid out of the \$5,000 fee that he had received. Terranova failed to pay the patent lawyer the \$1,000 and nothing was done on the patent. Although he drew up some incorporation documents, none were filed and Terranova retained the \$5,000 fee. In addition to this amount, Terranova received two additional checks from Dailey, one in the amount of \$36 made payable to the probate court and another in the amount of \$50 made payable to the Secretary of State. Terranova altered the names of payee on both of these checks to read "Barry Terranova, Attorney" and deposited them in his business checking account. [ASB No. 91-775]

• Centre attorney **Gary E. Davis** has surrendered his license to practice law. In an order dated August 31, 1994, the Supreme Court of Alabama, based upon Davis' surrender of his license, canceled and annulled Davis' license to practice law in this state effective September 1, 1994. [ASB Nos. 93-356, 93-384, 93-401, 93-470, 93-486, & 94-023]

• **Ruth Simmons Capra**, a Birmingham lawyer, surrendered her license to practice law and was stricken from the roll of attorneys by the Supreme Court of Alabama, effective July 7, 1994.

Capra was convicted in the United States District Court for the Northern District of Alabama for knowingly and fraudulently transferring to her own use real property belonging to a bankruptcy estate while the property was in her charge as a bankruptcy trustee in violation of 18 U.S.C. §153; for unlawfully retaining and converting to her own use certain sums of money belonging to the bankruptcy estate, which money came into her hands by virtue of her position as bankruptcy trustee in violation of 18 U.S.C. §645; and for making and causing to be made false and fictitious statements and representations in the trustee's Application for Final Compensation and Reimbursement of Expenses, Report of Receipts and Disbursements and Notice of Proposed Distribution submitted to the Bankruptcy Court in violation of 18 U.S.C. §1001. [Rule 22(a) Pet. No. 94-05]

• Auburn attorney **Jack F. Saint** has surrendered his license to practice law. In an order dated August 23, 1994, the Supreme Court of Alabama, based upon Saint's surrender of his license,

canceled and annulled Saint's license to practice law in this state effective August 8, 1994. [ASB Nos. 93-107 & 94-187]

## Suspensions

• Huntsville attorney **Gary C. Huckaby** has been suspended from the practice of law for a period of 45 days by the Disciplinary Board of the Alabama State Bar. Huckaby's suspension became effective September 3, 1994. This action was a result of his having pled guilty in the United States District Court for the Northern District of Alabama to the criminal misdemeanor of failing to file an income tax return for the calendar year 1988. [Rule 22(a)(2) Pet. No. 92-07]

## Public Reprimands

• Gadsden attorney **Milford Leon Garmon** was publicly reprimanded by the Alabama State Bar on July 17, 1994.

A family of former clients of Garmon's had contacted another attorney about pursuing a possible malpractice claim against Garmon. Garmon had received a letter from this attorney wherein the attorney instructed Garmon to have no further contact with Garmon's former clients, and to direct any and all correspondence concerning them to the new attorney's office.

Contrary to this request, Garmon copied correspondence to the former clients. The new attorney again wrote to Garmon requesting that he cease any further communications with the clients. Again, Garmon copied the former clients with a separate letter wherein he attacked the character of the former clients' new attorney, and threatened to sue the new attorney, as well as the former clients, for attorney's fees, court costs and expenses under the Litigation Accountability Act.

Formal charges were filed against Garmon. At the conclusion of the due process hearing on the formal charges, the Dis-

## Notice to Show Cause

Notice is hereby given to **Nickey John Rudd, Jr.** of Birmingham that pursuant to an Order to Show Cause of the Disciplinary Commission of the Alabama State Bar, dated May 23, 1994, he has sixty (60) days from the date of this publication (November 18, 1994) to come into compliance with the Client Security Fund Assessment. Non-compliance of this assessment shall result in a suspension of his license.

—Disciplinary Commission, Alabama State Bar



ciplinary Board found that Garmon had violated Disciplinary Rule 7-104 (a)(1) of the former *Code of Professional Responsibility* in that he communicated with a party he knew to be represented by a lawyer without the prior consent of the lawyer representing such party.

The Disciplinary Board then conducted an aggravation and mitigation hearing as to the issue of discipline and ordered that Garmon receive a public reprimand, without general publication, for his ethical misconduct. [ASB No. 90-632]

• On July 17, 1994, Montgomery lawyer **Kenneth T. Hemphill** received a public reprimand with general publication for failing to respond to a lawful demand for information from a disciplinary authority under Rule 8.1(b) of the Rules of Professional Conduct. A client/friend of Hemphill's complained that he had not received all the money to which he was entitled from a real estate closing. The case was resolved by a plea agreement between Hemphill and the bar in which he agreed to the reprimand and restitution in the amount of \$10,500. Hemphill had no prior discipline. [ASB No. 93-069]

• On July 17, 1994, Birmingham lawyer **David E. Hodges** received a public reprimand with general publication arising from ethical problems in the handling of his firm's expanded divorce practice. In 1993, the firm of Hodges & Greer began advertising low-cost uncontested divorces. Within a relatively short time, the firm's divorce clientele had increased substantially. In time, clients began to complain to the bar about not receiving their divorce after long periods of delay. Investigation into the matter revealed the clients were signing blank or incomplete divorce documents, and many never even talked with a lawyer. Serious questions were raised about the authenticity of the signatures on a number of the divorces being filed by the firm. Hodges denied ever knowingly filing any false doc-

uments with a court, but accepted the reprimands proposed by the Disciplinary Commission. His only defense was that the sudden high volume of divorce files overtaxed the office's ability to deal with the caseload. At some point, some staff members of the firm began to overstep legal and ethical bounds. The Disciplinary Commission found that Hodges had failed to supervise non-lawyer assistants, failed to provide competent representation to a number of these divorce clients, and engaged in conduct that is prejudicial to the administration of justice. [ASB No. 93-458]

• On July 17, 1994, Birmingham lawyer **J. Mark Greer** received a public reprimand with general publication arising from ethical problems in the handling of his firm's expanded divorce practice. In 1993, the firm of Hodges & Greer began advertising low-cost uncontested divorces. Within a relatively short time, the firm's divorce clientele had increased substantially. In time, clients began to complain to the bar about not receiving their divorce after long periods of delay. Investigation into the matter revealed the clients were signing blank or incomplete divorce documents, and many never even talked with a lawyer. Serious questions were raised about the authenticity of the signatures on a number of the divorces being filed by the firm. Greer denied ever knowingly filing any false documents with a court, but accepted the reprimands proposed by the Disciplinary Commission. His only defense was that the sudden high volume of divorce files overtaxed the office's ability to deal with the caseload. At some point, some staff members of the firm began to overstep legal and ethical bounds. The Disciplinary Commission found that Greer had failed to supervise non-lawyer assistants, failed to provide competent representation to a number of these divorce clients, and engaged in conduct that is prejudicial to the administration of justice. [ASB No. 93-457] ■

## ADDRESS CHANGES

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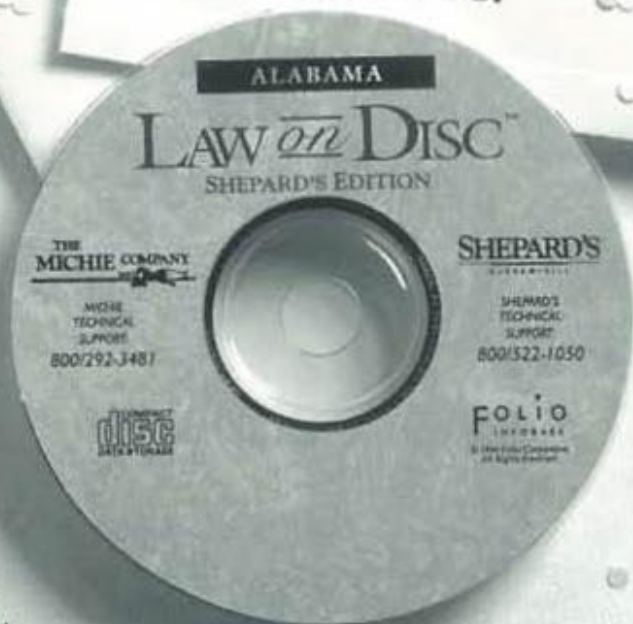
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# WHO REPRESENTS THE POOR?

## *A Look at Two Legal Services Programs*

by Penny Weaver

**A**t first glance, Thomas Grady Keith and Rita Kay Lett-Dean may seem to have little in common, other than the fact they are both Legal Services lawyers. They differ in age, gender and race. Tom has worked for Legal Services for more than 20 years, Kay fewer than two. But, the common qualities they share are an unwavering commitment to community service and the respect of their peers. Both also were reared in Alabama—Tom in Fort Payne in the northeastern part of the state, and Kay in southern Monroe County. As youths, neither planned a career in law.

"I can't think of any lawyer I've ever known that I respect more than Tom Keith," says Huntsville's Bill Burgess, a former Legal Services lawyer whose practice now is primarily criminal defense. He has chaired the Legal Services of North Central Alabama (LSNCA) board of directors for the past eight years. "You couldn't ask for anyone more dedicated, and that's an opinion that's shared by everyone in the legal community here. He is a dedicated public servant."

Tom Keith joined LSNCA in Huntsville as a staff attorney in 1972, straight out of the University of Alabama's law school; he's been the program's director since 1981. At first Tom planned a career in engineering, but exposure to ideas about economic development "got me thinking beyond what I was doing," and he

began to think about ways of helping poor people in the South. Accepted in 1968 at the University of Virginia's law school, Tom put studies on hold after receiving an induction notice from the U.S. Army. For two years he flunked the Army's periodic physical exam, and his tentative status forced him to forgo the education at UVA. He worked at Lockheed in Atlanta while in limbo with the Army and finally was able to begin law school at Alabama.

"I wanted to do something socially useful from the beginning," he says, noting that several law professors at the University encouraged public service. Doing legal aid-type work was "more fashionable then," he says.

Tom took part in the school's legal clinic, which sometimes took cases that became controversial at the time.

After graduation, Tom became a staff attorney in the Huntsville Legal Aid office, a program founded in 1968 by local private lawyers, including Tommy Armstrong of Scottsboro, and prominent members of the Huntsville bar,

such as Robert Sellers Smith, who remains on the program's board today, and Glenn Manning, who stepped down last year after more than 20 years' service on the board. Their efforts to provide legal representation for low-income citizens predated the creation of the federal Legal Services Corporation, which was signed into law by President Nixon in 1974.

"In those early days, the staff was green and had a lot of growing to do. But the young lawyers were talented, they had good rapport with the clients, and great spirit and energy abounded," Tom says. The years between 1975 and the early 1980s was a time of rapid growth and outreach. During that time, the program had as many as eight class actions going at once. Initially, local judges had to be educated about many of the poverty issues the legal aid lawyers brought before them, and some private lawyers felt threatened at first. "Back then, there were lots of challenges to client eligibility. You hardly ever have that today," Tom says. Much time was spent monitoring agencies' compliance with regulations and getting them to operate under the law. The number of staff lawyers peaked at 14 in the late 1970s, dropping to six by the mid-1980s. The program's caseload has remained around 3,000 closed cases a year, despite the attrition in staff attorneys. Its work has shifted from impact cases to more routine work.



**Thomas Keith**



"There were a lot of big trees to chop down then," Tom says of the early years. "There were lightning bolt decisions coming down from the federal courts, and we were responding to issues never tackled before." These included jail conditions suits, challenges to school fees, consumer class actions, and lots of due process cases. "A lot of time was spent on procedural issues, making programs work the way they were supposed to," he says.

The 1980s were difficult years. Severe funding cuts, coupled with the uncertainty of Legal Services' future under the Reagan administration, made recruitment and retention of staff problematic. In 1981, when the opportunity came up to take over LSNCA's directorship, Tom wasn't particularly enthusiastic about assuming the role, Burgess recalls. "He didn't want to be a manager, but somebody had to step up to the plate and do it, and he did it. His preference is to be a courtroom lawyer, and he continues to do courtroom work today," Burgess says.

Bar relations, always strong in Huntsville, continued to improve over the years as the program established credibility with both judges and private lawyers. And over the years private lawyers became more aware of remedies available for poor people. They recognized that Legal Services helps make the system work and doesn't take away their business. "We are the safety valve for problems in the community. We provide access for poor people seeking justice through the courts," Tom says.

What keeps Tom from burning out after 20 years of poverty law practice? "Seeing clients is the best thing I do. I genuinely like my clients, like helping them, and they appreciate my work.

"It's a lot of fun being a Legal Services attorney. I feel we have more fun than the attorneys we go against. It's an intellectual luxury to do what you need to do and not be guided by purse strings. You can live what you believe in and make a career of it," he says.

When he isn't representing clients, Tom enjoys tinkering with his three old MGBs and spending time with his wife, Karen, a former nuclear quality engineer who now operates her own graphic design business.

Unlike Tom, Kay Lett-Dean came to

a well-established Legal Services office in the fall of 1992, after graduating from Tulane University's law school. She joined Mary Jane Oakley in the Legal Services Corporation of Alabama (LSCA) office in Monroeville, where Mary Jane has practiced since 1983.

Coming to Monroeville was coming home for Kay, who was born and reared there and whose family is still very much a part of the community fabric. Both parents are retired schoolteachers who grew up in the Burnt Corn and Uriah areas of Monroe County. Her twin brother lives in Monroe County and teaches in neighboring Clarke County.

In her senior year at Monroe County High School, a recruiter from the University of the South at Sewanee, Tennessee, convinced Kay to choose that college. She was awarded a full academic scholarship there but only stayed two years before transferring to Auburn University, where she wanted to become a pharmacist. "Organic chemistry changed my mind about pharmacy school," Kay says, and she earned her degree in community health instead.

A career in law was not Kay's plan, but one day during her senior year at Auburn she decided to take the LSAT. "It asked you to list institutions you wanted your scores sent to, and I put Tulane and Emory. After the results were out, I got a call from Tulane. I still wasn't sure I wanted to go to law school, but I did go to New Orleans that spring, visited the school and then decided to go," Kay says. Tulane awarded her a \$14,000 yearly scholarship.

During her law school summers, Kay clerked for the Federal Deposit Insurance Corporation in Atlanta, but she already had public interest law in mind. Tulane's law school has a mandatory community service requirement, and she spent her time at Covenant House, a center for

troubled youths and runaways in New Orleans. Her interest in helping troubled juveniles continues today. She serves on Monroe County's juvenile justice coordinating committee and is working with the local Department of Human Resources on developing alternative community service programs for juvenile offenders.

Legal Services appealed to Kay, even in law school. "I saw Legal Services as a means of helping people less fortunate than myself and because I wanted to contribute to my community. I realized that somebody along the way had done something that helped make my life what it is today, and I wanted the opportunity to repay society," she says.

"The work has been hard but rewarding," Kay says. Her casework involves mostly unemployment compensation claims, public housing evictions and public benefits problems.

"She's a real plus at Legal Services," says Monroe County District Court Judge William J. Causey, Jr. "She's in my court about as much as anyone else, and I enjoy working with her."

Active in her church and in youth programs, "Kay is in constant demand for speeches," says her colleague, Mary Jane Oakley. Being so well known in the community does have its drawbacks. "It is nothing for the phone to ring at home at nine or ten at night because people who know me think I can do something special for them outside the regular channels. This can be frustrating, but at the same time, if you can help somebody you've grown up with, it can be very gratifying."

Kay's husband, John Dean, works for AT&T in Atlanta, and the couple takes turns commuting on the weekends. She has no plans to leave Legal Services or Monroeville anytime soon. "Right now, I'm taking one day at a time. Ultimately, I'd like to be a juvenile court judge," she says. Currently, Monroe County doesn't have this position. ■



**Kay Lett-Dean**

Penny Weaver is communications coordinator of the Alabama Consortium of Legal Services Programs. She has previously served as a free-lance photographer and writer, as director of information for the Southern Poverty Law Center, and as assistant director of the American Friends Service Committee's Alabama Community Relations Program.



## Julian Harris



**J**ulian Harris of Decatur, Alabama, a giant of the legal profession of this state, died on August 9, 1994. He was born in Decatur on December 10, 1904 and lived all of his life in that city. His

father, A.J. Harris, and his grandfather, C.C. Harris, were leading lawyers in Decatur from the year 1872 when C.C. Harris moved from Moulton to Decatur and began his practice here. His mother, Edith West Harris, was the daughter of Reverend Anson West who was a renowned bishop in the Methodist church.

Mr. Harris graduated from high school in Decatur at the age of 16. He attended the Alabama Polytechnic Institute, which later became Auburn University. Although first contemplating a banking career, Mr. Harris later decided to follow in his father's and grandfather's footsteps and take up the law. He entered law school at the University of Virginia in 1925. While at that university he was elected to Phi Beta Kappa, the Order of the Coif and the Raven Society. He served on the editorial board of the *Vir-*

*ginia Law Review*. The summer following his second year of law school Mr. Harris passed the Alabama bar examination and was admitted to the practice in Alabama. He received his law degree in 1928 and entered law practice with his father.

Mr. Harris was elected Morgan County Solicitor in 1930 and in 1934, resigning in 1936. He was appointed circuit judge of the Eighth Judicial Circuit in 1943 and served until 1945. Mr. Harris was the attorney for Morgan County for more than 20 years.

He served on the Decatur Board of Education from 1943 to 1963. He was a member of the Governor's Commission on Higher Education and served as chairman of the Board of Trustees of Athens College for 20 years. Mr. Harris was chairman of the committee of the Alabama State Bar which drafted the *Code of Professional Responsibility of the Alabama State Bar* adopted in 1974 by the Supreme Court of Alabama. He was a member of the Alabama State Bar and the American Bar Association. He served for a number of years on the Board of Commissioners of the Alabama State Bar.

Not only was Julian Harris one of the great lawyers of his time, he was also a renowned public servant and civic leader. He responded without fail to every request upon his time and resources for the things needed to improve his com-

munity, state and nation. In recognition of his public service, he was honored on numerous occasions. Among these honors were the Brotherhood Award of the National Conference of Christians and Jews, selection as the honoree of the Decatur General Hospital Foundation Gala, and the naming of a Decatur public school as the Julian Harris Elementary School. He was a charter member of the Decatur Rotary Club and named as a Paul Harris Fellow by that club. For 50 years Julian taught the men's Bible class at First United Methodist Church. So distinguished was his service that this class bears his name: The Julian Harris Lend a Hand Bible Class.

Surely, his smile, his wit and his wisdom will be sorely missed by all who were honored to enjoy association with Julian. His legacy, however, is much more than fond memories. His life is a continuing testimony that the practice of law should not be a selfish pursuit of fortune and fame but a selfless dedication to the service of those in need.

He has left for all of us who claim the name of "lawyer" the perfect example of noble and devoted service to the "Jealous Mistress".

—John A. Caddell  
Lifelong friend and admirer  
of Julian Harris  
Decatur, Alabama

## T.O. Howell, Jr.



**W**hereas, T.O. Howell, Jr., a distinguished member of this association, passed away on May 7, 1994; and

Now, therefore, be it resolved that "T.O.", as he was

affectionately known, was born in and stayed a lifelong resident of Mobile, Alabama where he attended public schools and graduated from the University of Alabama School of Law and commenced practice in Mobile in 1937. He served as an assistant district attorney and was recognized by the Alabama State Bar and the Mobile Bar Association for more than 50 years of dedicated service. He was a founding director of Mobile Federal Savings & Loan, a

patron of the Mobile Opera Guild, and a member of the board of the Fine Arts Museum of the South. He was also a member of the Freedom Foundation, the Boehm Society and the Ciudad de Malaga Organization, as well as several mystic societies, the Athelston Club and the Mobile Country Club. He was the senior partner in the firm of Howell, Johnston & Langford.

T.O. was recognized by his peers as a tough and skilled negotiator, as well as a very able and competitive advocate in the courtroom.

T.O. was a devoted father and family man and left surviving him a son, T.O. Howell, III of Mobile, a daughter, Chrissie Howell of Atlanta, and long-time devoted friend, Dot Boykin, also of Mobile, and many other relatives.

—Richard Bounds  
President  
Mobile Bar Association

## Please Help Us

*The Alabama Lawyer* "Memorials" section is designed to provide members of the bar with information about the death of their colleagues. The Alabama State Bar and the Editorial Board have no way of knowing when one of our members is deceased unless we are notified. Please take the time to provide us with that information. If you wish to write something about the individual's life and professional accomplishments for publication in the magazine, please limit your comments to 250 words and send us a picture if possible. We reserve the right to edit all information submitted for the "Memorials" section. Please send notification information to the following address: **Margaret L. Murphy, The Alabama Lawyer, P.O. Box 4156, Montgomery, AL 36101**



# • M • E • M • O • R • I • A • L • S •

## Daniel A. Pike



Whereas, Daniel A. Pike, a distinguished member of this association, passed away on May 12, 1994; and

Whereas, the Mobile Bar Association desires to remember his name and recognize his contributions made to our profession and to this community;

Now, therefore, be it resolved that Dan,

as he was affectionately known, was a native of Mobile where he attended parochial and public schools. He earned his bachelor of science degree in 1968 from Springhill College, where he helped found the Alpha Delta Gamma fraternity. In 1968, he received the O'Leary Award at Springhill in recognition of the efforts toward the betterment of the community. He attended the University of Alabama where he graduated from law school in 1971. Dan was a veteran of the U.S. Navy. He served as president of the Skyline Country Club in Mobile and was a member of the Mobile Bar Association, the Alabama State Bar and the American Trial Lawyers Association, as well as an officer

of the Alabama Trial Lawyers Association.

Dan specialized in the practice of maritime law, particularly personal injury and death involving maritime workers. He was recognized and respected as being highly proficient and able in this area of the practice of law.

Dan was a devoted family man and left surviving him his wife, Vaughn Pike of Mobile, two daughters, Ginger and Tiffany, and his mother, Christine Hammonds of Mobile, as well as two sisters, Eleesha Neese and Jo Ann Wunschel.

—Richard Bounds  
President  
Mobile Bar Association

### Ernest Ray Acton

Montgomery  
Admitted: 1950  
Died: September 2, 1994

### John Heron Edmondson, Jr.

Tampa, Florida  
Admitted: 1952  
Died: 1993

### Charles Leroy Howard, Jr.

Birmingham  
Admitted: 1949  
Died: September 12, 1994

### John Calvin Adams

Birmingham  
Admitted: 1947  
Died: August 23, 1993

### David Bernard Ellis

Tuscaloosa  
Admitted: 1974  
Died: August 10, 1994

### Joseph Huntley Johnson

Dothan  
Admitted: 1966  
Died: June 27, 1994

### William Jackson Allen

Gadsden  
Admitted: 1942  
Died: February 22, 1993

### Claude A. Gholston

Jasper  
Admitted: 1939  
Died: May 19, 1993

### George Alexander LeMaistre

Tuscaloosa  
Admitted: 1933  
Died: September 26, 1994

### Thomas Legrand Borom

Ozark  
Admitted: 1928  
Died: February 2, 1992

### Miles Shinkle Hall

Montgomery  
Admitted: 1934  
Died: July 29, 1994

### Randolph A. Lurie

Montgomery  
Admitted: 1931  
Died: June 3, 1994

### Joe T. Burns

Wedowee  
Admitted: 1953  
Died: March 31, 1994

### Julian Harris

Decatur  
Admitted: 1927  
Died: August 9, 1994

### Robert M. MacLaurin

Jasper  
Admitted: 1938  
Died: April 2, 1994

### Hugh Franklin Culverhouse

Tampa, Florida  
Admitted: 1947  
Died: August 25, 1994

### Thomas Orr Howell, Jr.

Mobile  
Admitted: 1937  
Died: May 7, 1994

### Albert Gordon Rives

Birmingham  
Admitted: 1925  
Died: September 26, 1994



# ♦ M • E • M • O • R • I • A • L • S ♦

## Joe Graham Barnard

Whereas, Judge Joe Graham Barnard, a member of the Birmingham Bar Association since 1956, died at the age of 64 on July 18, 1994; and,

Whereas, Judge Barnard attended Woodlawn High School, Birmingham-Southern College, and the University of Alabama School of Law; and,

Whereas, Judge Barnard served his country with distinction, earning the Combat Infantry Badge and the Bronze Star with Valor in the Korean War, and retired as a colonel from the Alabama Army National Guard; and,

Whereas, Judge Barnard was a lifelong member of East Lake United Methodist Church, where he organized and directed the Boy's Choir and directed the Chancel

Bell Choir and the Celebration Ringers; and,

Whereas, Judge Barnard gave freely of his time to his community, serving as director of the Chancel Choir, the Chancel Bell Choir, and the Youth Bell Choir at Seventy-Sixth Street Presbyterian Church, as leader of an Explorer Scout Post, and as an active member of the Warblers Club and the Birmingham Metro Chapter of the Society for Preservation and Encouragement of Barber-shop Quarter Singing in America; and,

Whereas, Judge Barnard served with honor and distinction as Birmingham City Court Judge for seven years and as a circuit judge for 16 years; and,

Whereas, Judge Barnard served his fellow judges by teaching frequently in judicial academies and seminars, which is the work in which he was engaged at the time of his death; and,

Whereas, Judge Barnard was deeply respected by the members of this community, the bar and his colleagues on the bench; and,

Whereas, we express our enduring regard and respect for our distinguished colleague who served our profession, our state, and our country in such an exemplary manner.

It is, therefore, hereby resolved, by the Executive Committee of the Birmingham Bar Association, that this Resolution be spread upon the minutes of this Committee, and that copies thereof be sent to his wife, Betty Sykes Barnard; his son, Joe Graham Barnard, Jr.; and his mother, Bernice Graham Barnard.

—William N. Clark  
President  
Birmingham Bar Association

## Judge James Russell McElroy

Whereas, Judge James Russell McElroy, who served in Jefferson County as an active circuit judge for almost 50 years, and as a supernumerary judge for several years thereafter, died at the age of 92 on June 28, 1994; and,

Whereas, Judge McElroy was a native of Sumter County, Alabama, who received his secondary education there, and worked in the railroad industry until he attended the University of Alabama School of Law (special course) and the Birmingham School of Law, being admitted to the bar in 1924; and,

Whereas, Judge McElroy was engaged briefly in private law practice and as a part-time assistant city attorney of Birmingham until he was appointed a circuit judge in 1927, at age 25, in which position he served continuously as an active judge until his retirement in 1977. He served a lengthy tenure as presiding judge of the circuit from April 1942 to June 1960, following which service he elected to return to the trial bench until his retirement; and,

Whereas, Judge McElroy presided over many notable trials, both civil and crimi-

nal, and became a nationally recognized authority on the law of evidence. He authored what is now known as *McElroy's Alabama Evidence*, which continues under the authorship of Dean Charles W. Gamble, as the most widely used legal treatise in the state. He was a prolific writer and lecturer, and served over periods of many years as a part-time faculty member of Birmingham School of Law, the University of Alabama School of Law, Samford University-Cumberland School of Law, and the Medical College of Alabama; and,

Whereas, Judge McElroy has been honored by the establishment of Endowed Professorships in his honor at Samford University's Cumberland School of Law and the University of Alabama School of Law, where a scholarship in his honor also has been established, and by such awards as the University of Alabama Law School Dean's "Notable Service" award (1972) and the Birmingham Bar Association's "Law and Justice" award (1972) and other honors; and,

Whereas, Judge McElroy served his community, state and nation throughout his lengthy career in such diverse activities as the YMCA, the Junior Chamber of Commerce, as chairman of the Jefferson County Council of United Service Organi-

zations and chairman of all advisory boards to local draft boards in Jefferson County during World War II; as a co-organizer of the Alabama Circuit Judge's Association and its past president; as a member of the board of the Birmingham Area Educational Television Association, Inc.; as a staff member for Boys Summer Camps at Camp Winnataska; and as a longtime member and past member of the board of stewards of Trinity United Methodist Church; and,

Whereas, Judge McElroy was possessed of a love of the law equaled only by his love of God, his family and his fellow man. His great intellect, high moral and ethical standards, and his tireless efforts to contribute to justice, logic and good order in the rule of law have indelibly stamped him as a leader of the highest order and have contributed immeasurably to the improvement of the bench and bar of this state; and,

Whereas, we express our enduring regard and respect for this most distinguished colleague for his peerless and selfless service.

—William N. Clark  
President  
Birmingham Bar Association



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- **CONTRACT PARALEGAL SERVICES:** Certified paralegal available for contract work. Prompt and professional service in ordering, organizing and summarizing medical records; summarizing depositions; drafting legal documents; and word processing. Extensive trial preparation offered, including the preparation of trial notebooks, exhibits and personal assistance at trial. Carmen Curtis, 2845 Bridlewood Terrace, Birmingham, Alabama 35080. Phone (205) 620-4053.

## POSITIONS OFFERED

- **ATTORNEY JOBS:** National and Federal Employment Report. Highly regarded monthly detailed listing of attorney and law-related jobs with the U.S. Government, other public/private employers in Washington, D.C. throughout the U.S. and abroad. 500-600 new jobs each issue. \$34 for three months; \$58 for six

months. Federal Reports, 1010 Vermont Avenue, NW, #408-AB, Washington, D.C. 20005. Phone (202) 393-3311. VISA and MasterCard accepted.

- **MANAGING ATTORNEY:** Legal Services Corporation of Alabama, a non-profit law firm providing free legal services to the poor, is seeking to fill the position of managing attorney in its Tuscaloosa Regional Office. Minimum three years of law practice. Management experience required. Salary: DOE. Please respond to Merceria Ludgood, Executive Director, Legal Services Corporation of Alabama, 207 Montgomery Street, 500 Bell Building, Montgomery, Alabama 36104. LSCA is an Equal Opportunity Employer.
- **LITIGATION ASSOCIATE:** An established, small but growing law firm in Montgomery seeks an associate with two to four years of experience. Strong civil litigation experience desired. Salary commensurate with education and background. Position available immediately. Send resume to Managing Partner, P.O. Box 4992, Montgomery, Alabama 36103-4992.
- **ERISA ATTORNEY:** New Orleans firm seeks ERISA associate with one-five years of benefits law experience. The firm's practice encompasses all phases of employee benefits law, including advice and planning with respect to retirement and welfare plans as well as an active ERISA litigation practice. Excellent credentials, communication ability and organizational skills required. Send resume to Hiring Attorney, P.O. Box 750368, New Orleans, Louisiana 70175-0368.

## ASSISTANCE NEEDED

- **PUBLIC RIGHTS-OF-WAY ATTORNEY:** Anyone experienced in dealing with the Alabama Department of Transportation representing or defending claims by homeowners where roads are being widened. Call Jack at (205) 251-9958.



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