A photograph of a forest stream flowing over mossy rocks. The stream is the central focus, with water cascading over several large, dark rocks covered in vibrant green moss. The surrounding forest is dense with tall, thin trees, mostly without leaves, suggesting a late autumn or winter setting. The ground is covered with fallen leaves and branches. The overall scene is serene and natural.

# The Alabama Lawyer

Vol. 59, No. 7

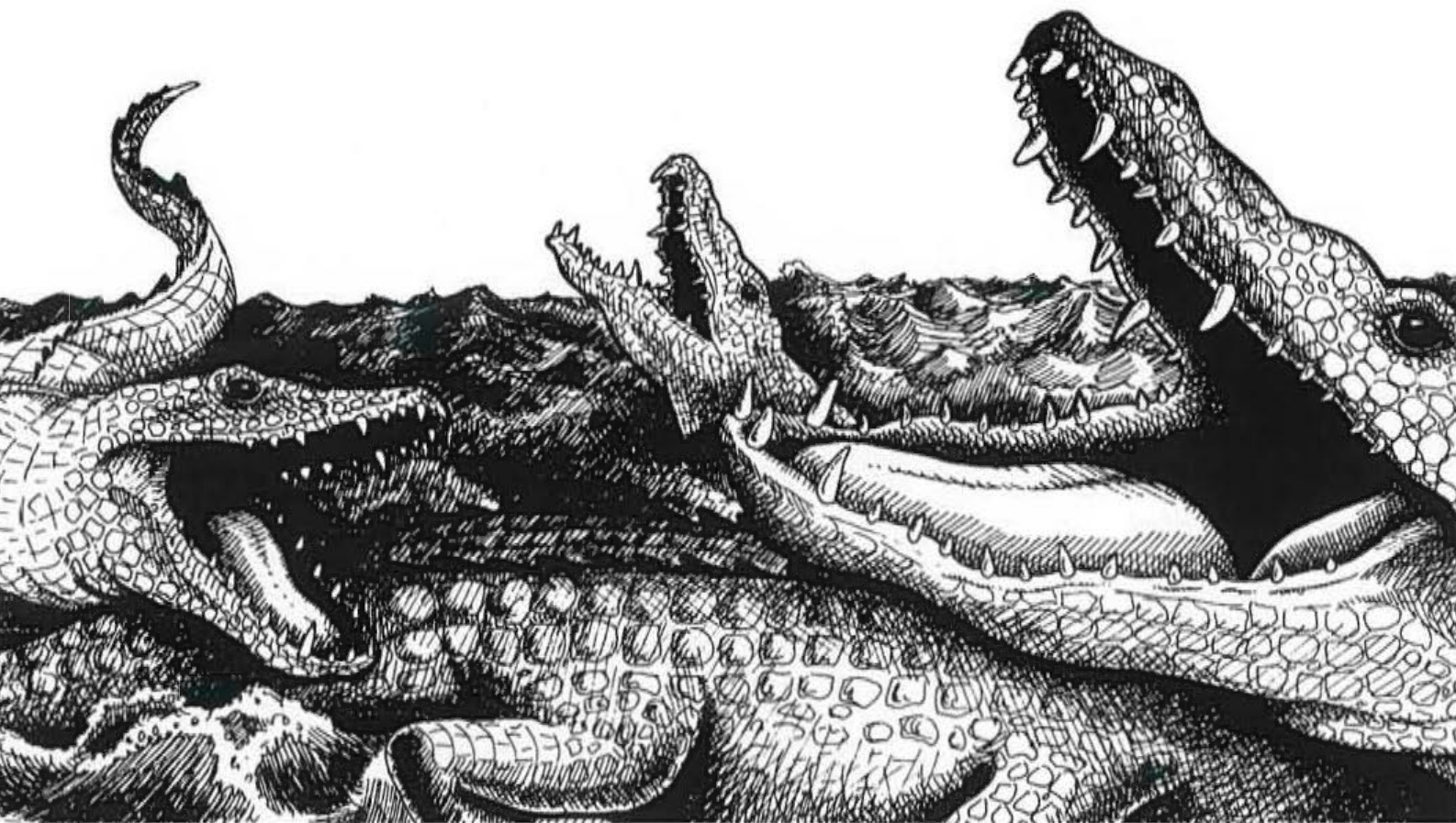
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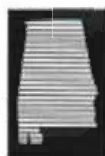


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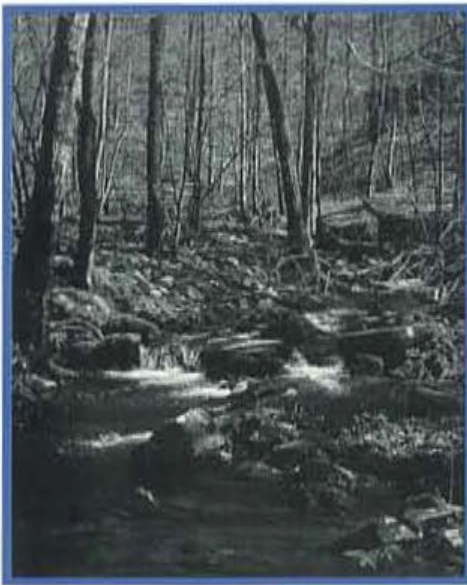
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<b>DECEMBER</b>	<b>2</b>	<b>Alabama Evidence in Huntsville</b>
	<b>3</b>	<b>Effective Negotiation and Settlement Techniques</b>
	<b>3</b>	<b>Alabama Update in Montgomery</b>
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# The Alabama Lawyer

Vol. 59, No. 7

November 1998

### On the Cover

Alabama mountain stream near *DeSoto State Park*, DeKalb County  
—Photo by Paul Crawford, JD, CLU

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- OGC Opinions
- CLE Calendar
- On-Line Change of Address



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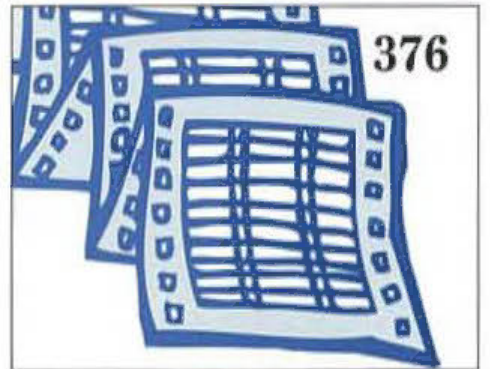
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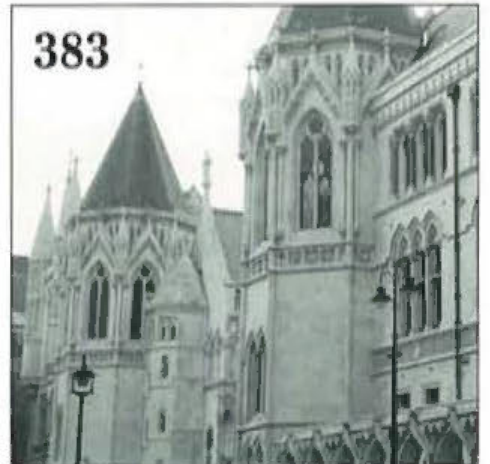
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## PRESIDENT'S PAGE

By Vic Lott

# Increasing Communication Within Our Bar



Vic Lott

**W**e often hear that the Alabama State Bar is irrelevant, or that it is viewed in a negative sense by many of our members because their only contact happens to be with our disciplinary system. Of course, discipline, and the other regulatory functions which the bar provides (admissions, MCLE), is one of our primary functions by law, but it is certainly not the only reason that the state bar exists. In addition to our regulatory function, the state bar also provides a complete panoply of programs and related services to its members, including the Volunteer Lawyers Program, law office management assistance, insurance programs, AlaPals, lawyer referral, etc. These programs are intended to assist our membership in setting up a successful legal practice, insuring against various professional and personal risks, providing access to our legal system to all of the citizens of our state, fostering alternative dispute resolution and so on, and each of these programs is well staffed and overseen by committees of dedicated volunteers throughout the state.

I am confident that we have one of the top organized bar associations in the country, and I base this on the comments and conversations which I have had with bar leaders from across this nation over the past couple of years at conferences of regional and national bar presidents and bar executives. In fact, as often as not, we are among the first state bars in the nation to address critical issues facing our profession nationally, and many efforts by organized bars to address these issues have been mod-

eled around programs initiated right here in Alabama. For example, our current series of videos advertising the Volunteer Lawyers Program, alternative dispute resolution, and our school partnership program has been copied by many other state and local bar associations as a means of addressing the tarnished image of our profession by communicating to the public some of the good things that we do.

Under the constant vigilance of our executive director, Keith Norman, and the Board of Bar Commissioners, we are also in very sound financial condition. Many of us take this for granted, but not only has this not always been the case in Alabama, it is increasingly becoming a significant issue for bar associations throughout the country. We have made an effort to fulfill our primary functions, regulatory and programming, in the most efficient manner possible and based upon a dues structure which is one of the lowest among unified bars in the country. We are now working on a plan which includes an analysis of trends related to our expenditures and continuing growth of our membership, in an effort to ensure that we avoid any financial difficulties or strains on our budget that have a negative impact on our services to members, while ensuring that our dues structure remains as low as possible. We must also ensure our ability to maintain and repair state bar headquarters while providing the latest in technical services to our staff and members, including video-conferencing facilities around the state which will allow and



encourage participation in our committee work, programs and possibly even CLE from the major metropolitan areas within our state without the need for extensive travel.

With all of this said, many, if not most, of our members still look to specialty bars for substantive nourishment and relationships that directly benefit their individual practices. I do not mean to sound critical of the specialty bars in any way. To the contrary, one of our primary efforts this year will be to significantly improve the level of communication and interaction between your state bar and the various specialty bars, including the Alabama Trial Lawyers Association, the Alabama Defense Lawyers, the District Attorneys Association, the Criminal Defense Lawyers Association, Alabama Lawyers Association, etc. Each of these specialty bars provides CLE, and other services which are specifically designed to meet the needs and interests of their particular membership, and they also allow for camaraderie amongst those who practice in specific areas of law. Similarly, the sections of our state bar provide services tailored to their specific memberships. But we are the umbrella organization, the association which oversees and undertakes the broadest and most basic regulation of our profession and which is fundamental to the existence and success of each of these specialty bars.

Last spring, then-President Dag Rowe called a Summit on the Profession in Montgomery, to which he invited the leaders of all of the specialty bars in this state, along with the presidents of the circuit and district judges associations. Every invitee attended and there was unanimous agreement that heightened communication between the state bar and specialty bars was the order of the day. Being a unified or mandatory bar, it is not appropriate for the state bar to take positions on divisive issues [nor is it legal pursuant to *Keller vs. State Bar of California*, 496 U.S. 1 (1990)]. However, it is appropriate for the state bar to facilitate a resolution of common issues among its members and we can best do this if we have put into place the communicative infrastructure necessary to ensure that we are all talking to each other about issues which have

an impact on our abilities to practice law successfully and serve our common system of justice.

For this reason I have created a task force to be chaired by **Greg Breedlove**, who is currently the president of the Alabama Trial Lawyers Association, and asked Greg and his committee to devise a system that ensures routine communication between all of the various specialty bars and the Alabama State Bar about programs, services, issues and legislation of interest to a particular group or all lawyers in the state. We are also trying to improve and better coordinate participation by these specialty bars in our Annual Meeting, and use the discussions and communication which, I hope, will result as a means of addressing issues which affect all of us.

Please encourage the leadership of any specialty bar group or section with which you may be affiliated to participate fully in this effort and the resulting dialogue which can only serve to benefit each lawyer in Alabama and the public we seek to serve. ■

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## EXECUTIVE DIRECTOR'S REPORT

By Keith B. Norman

# Bar Membership Has Its Reward\$



Keith B. Norman

Your state bar membership is a valuable privilege. Have you ever considered the other benefits, aside from the opportunity to practice law, that accrue to you as a state bar member? With a new licensing period just beginning, this is an appropriate time to discuss the many benefits available to all bar members who either purchase the occupational license (\$250) or a special membership (\$125). The host of benefits available to you are worth many times the fee you pay each year as a state bar member. I will highlight them below.

**Self-Regulation** The Alabama State Bar is the licensing and regulatory agency for lawyers in this state. Your fees and dues fund the bar's entire operation. We receive no other funds to fulfill our public function. As a result, we have been able to remain a strong, self-regulated profession.

**Lawyer Image Campaign** Our partnership with the Alabama Broadcasters Association will be ending soon. At its conclusion, we will have received approximately \$400,000 of radio and television time focusing on bar programs and positive aspects of the profession that would otherwise have received little attention in the media.

**Fee Mediation Program** When a fee dispute arises between a lawyer and a client, this program provides a trained and experienced attorney to mediate the dispute free of charge to both parties.

**Practice Sections** ASB members can choose to join one or more of the 18 practice sections. Many publish newsletters and offer CLE programs. Section membership affords networking opportunities with members sharing similar interests.

**Ethics Opinions** As a service, the Office of General Counsel will furnish to

members who need guidance informal ethics opinions over the telephone. Formal ethics opinion or copies of previously rendered ethics opinions are available free of charge as well.

### **Lawyers Assistance Program**

This is a new service of the state bar designed to assist lawyers with an alcohol or substance abuse problem. This service is confidential and available to work with and be a resource for families, as well as partners of lawyers with alcohol or substance problems. The confidential service can be accessed by calling (334) 834-7576.

The bar has a number of other programs that can help lawyers build their practice or offer them substantial savings on the products and services they use:

### **Law Office Management Assistance Program (LOMAP)**

This is another new service for bar members. LOMAP is designed to act as a clearinghouse for information on all aspects of the operation and management of the modern law office. For example, lawyers can save time searching for information on the latest in law office technology by simply contacting LOMAP.

### **Lawyer Referral Service**

This statewide public service program receives over 16,000 calls a year. For lawyers outside Jefferson, Madison and Mobile counties (these have their own local referral services), this is a good way to help build a client base. Participants pay a \$60 annual fee and may elect up to 15 areas of practice in which to receive referrals. Service members agree to provide the first 30 minutes of consultation to the referred client for \$25. Subsequent fee arrangements are agreed upon by the client and attorney.

*(Continued on page 350)*

## Alabama Bar Institute for Continuing Legal Education

ALABAMA LAWYERS  
SERVING ALABAMA LAWYERS

My legal career began with a part-time, work-study job, proof-reading seminar hand-outs with ABICLE. I knew instantly that ABICLE was "something special." I saw the busiest and most interesting lawyers in Alabama working on projects with Camille Cook and ABICLE. These fine lawyers were volunteering their free time to write seminar materials and give talks to help fellow professionals in various areas of practice.

In the twenty some odd years since that first work-study job, I have watched Steve Emens and ABICLE carry forward the grand tradition of "Alabama lawyers helping Alabama lawyers." We can all be inspired by this tradition.

1998 Gewin Award Recipient  
Carol Ann Smith  
Smith & Ely  
Birmingham, Alabama



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## Executive Director's Report

(Continued from page 348)

### Group Medical, Disability and Term Life Insurance

The ASB endorses several insurance programs through its plan administrator, Insurance Specialists, Inc. These programs are competitive with other similar programs and in many cases can result in substantial savings. For example, a recent comparison found that a 28-year-old with term life, disability and major medical insurance with ISI saved \$1,400 in annual premiums over a comparable insurer's products. A 38-year-old was shown to save more than \$850.

Other money-saving services and products include:

**Telephone Service** With AT&T savings service for ASB members, you can save 5 percent on domestic, international, toll-free and local calling.

**Car Rental Discounts** The AVIS group membership program provides significant discounts on nation-

wide rentals, with as much as 20 percent savings on select daily rates.

### Office Supplies Discounts

ASB members can save four to 11 percent off already discounted name brand office supplies and products through Pennywise. You can place your order 24 hours a day, seven days a week and receive fast, free delivery.

### Airborne Express Discounts

Save as much as five dollars on the next-day delivery of a one-ounce letter over similar services.

**Alabama Bar Directory** Every bar member receives a *free* copy of the bar directory which contains the listing of all Alabama lawyers, plus rules and a wealth of other helpful information. An on-line directory is also located at the ASB Web site, [www.alabar.org](http://www.alabar.org).

### Lexis-Nexis Group

**Membership Discount** This program allows bar members unlimited access to Alabama case law, statutes and more, without "on-line" time limits, for a low monthly fee.

### Professional Liability

**Insurance** Attorneys Insurance

Mutual of Alabama, Inc. (AIM) was established by the ASB to provide a more stable professional liability market to its members than had been the case with the commercial providers.

There are other programs and services including use of state bar conference room facilities; the bar's legislative newsletter, *Alabama Bar Reporter* (headnoted and full-text copies of Alabama Supreme Court decisions); *The Alabama Lawyer*; the *ADDENDUM*; CLE seminar schedules; and certificates of good standing, just to name a few that are available to bar members either free or for a small charge.

Unfortunately, there is not enough space to list in detail all the services and programs that are available to you as a state bar member. As you can readily see, however, the Alabama State Bar provides an array of programs and services to benefit every member of our profession. If you are not utilizing some or all of these programs, I encourage you to do so. ■

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## MEMORIALS

### Gary Lynn Aldridge

**F**ormer Alabama State Senator Gary L. Aldridge of Birmingham died July 12, 1998 in a rafting accident in Alaska. He was 47. He is remembered as a highly respected lawyer, a visionary leader and friend, and a man of uncommon compassion and humanity.

Prior to entering law practice in Birmingham, he practiced law in Decatur, and also served as municipal judge of Hartselle. A longtime resident of Hartselle, Gary was elected to the Alabama State Senate in 1982, representing Morgan and Lawrence counties. During his term, he co-sponsored legislation that reformed Alabama's child abuse and neglect laws. This legislation became a model for states throughout the country, and his role in passing the legislation is depicted in "Adam's Song," a movie about the abduction of John Walsh's young son, Adam. The legislation also established the Children's Trust Fund of Alabama which provides funding for child abuse and neglect prevention agencies across Alabama. During their ten-year celebration, the Children's Trust Fund published *The Deer in the Big Forest* coloring book in

which Gary is lovingly depicted as a courageous lion who helps save young deer from getting hurt. Following one term in the Senate, Gary left politics, choosing to focus more time on the practice of law.

In recent years, Gary began painting in his leisure time and quickly became a locally recognized artist. Though he created both abstract and representational works, he is best known in the art community for his abstracts, which blended diverse media and found objects into visually pleasing contemporary pieces that evoke the feel of the worn, layered life of the city. His artistic talent possessed the richness and breadth of his successful professional and public career, and his works are included in private and corporate collections.

During the 1984 presidential campaign, Gary was in charge of the Mondale-Ferraro campaign in Alabama, and also served on a standing committee of the Democratic National Convention in San Francisco. Active in community and civic work, the Alabama Jaycees named him one of four Alabama Young Men in 1985. He was named Outstanding Young Man by the

Hartselle Jaycees for three consecutive years.

A veteran, Aldridge served with the United States Army in Wurzburg, Germany. He received his B.S. degree from the University of Alabama at Huntsville in 1974, and his J.D. degree from the University of Alabama School of Law in 1977. He was a member of the First Baptist Church of Hartselle.

Gary is survived by his wife, Marsha White Aldridge; his mother, Eva Hogan, Hartselle; sister, Shelby Reeves, Hartselle; brothers, Gwen Morgan, Decatur; Larry Morgan, Addison; and Mickey Aldridge, Flintville, Tennessee. He was preceded in death by his father, Malcolm Raymond Aldridge, and his sister, Sue Harrison.

Memorials may be made to the Gary L. Aldridge Memorial Scholarship Fund, The University of Alabama School of Law, c/o Andrew P. Campbell, 2000A SouthBridge Parkway, Suite 330, Birmingham, Alabama 35209; the Children's Trust Fund of Alabama, P.O. Box 4251, Montgomery, Alabama 36103; or the Boys and Girls Club of Morgan County, P.O. Box 1431, Decatur, Alabama 35602.

— Janet Varnell  
Birmingham, Alabama



**Mary Lynn Clark**  
*Hampton, Virginia*  
Admitted: 1985  
Died: July 16, 1998

**James Taylor Hardin**  
*Montgomery*  
Admitted: 1942  
Died: June 6, 1998

**Clifford Walker Norris**  
*Birmingham*  
Admitted: 1948  
Died: July 5, 1998

**William W. Stewart**  
*Homewood*  
Admitted: 1950  
Died: August 16, 1998

**Riley P. Green, Jr.**  
*Troy*  
Admitted: 1960  
Died: August 10, 1998

**Francis Xavier Lynch**  
*Birmingham*  
Admitted: 1995  
Died: June 14, 1998

**Worth P. O'Dell**  
*Birmingham*  
Admitted: 1931  
Died: June 3, 1998

**Governor**  
**George Corley Wallace**  
*Montgomery*  
Admitted: 1943  
Died: September 13, 1998





## ABOUT MEMBERS, AMONG FIRMS

Due to the huge increase in notices for "About Members, Among Firms," *The Alabama Lawyer* will no longer publish address changes for firms or individual practices. *It will continue* to publish announcements of the formation of new firms or the opening of solo practices, as well as the addition of new associates or partners. Please continue to send in address changes to the membership department of the Alabama State Bar.

### About Members

**John T. Ritondo, Jr.** announces the opening of his office at 1824 29th Avenue, South, Suite 220, Homewood, 35209. Phone (205) 879-8595.

**Michelle Perry** announces the opening of her office at 28250 U.S. Highway

98, Daphne, 36526. The mailing address is P.O. Box 1530. Phone (334) 621-1114.

**Lateefah Muhammad** announces the relocation of her office to 3805 W. Martin Luther King Highway, Tuskegee, 36083. Phone (334) 727-1997.

**Milton J. Westry** announces the relocation of his office to 4252 Carmichael Road, Suite 221, P.O. Box 230661, Montgomery, 36123-0661. Phone (334) 271-1995.

**Daisy M. Holder** announces the relocation of her office to 1625 Financial Center, 505 20th Street, North, Birmingham, 35203-2605. Phone (205) 251-2334.

**Claude E. Patton** announces his resignation from the Attorney General's Office and the opening of his office at 305 Main Street, P.O. Box 760, Reform, 35481. Phone (205) 375-6343.

**George H. Blake, III** announces the opening of his office at 203 Cook Street, Auburn, 36830. Phone (334) 887-3866.

**Mike Davis**, former assistant district attorney, announces the opening of his office at 258 State Street, Mobile, 36603. Phone (334) 432-3555.

**C. MacLeod Fuller** announces the relocation of his office to 1990 N. California Boulevard, Suite 540, Walnut Creek, California 94596. Phone (925) 988-9499.

**Steven P. Gregory** announces the opening of his office at 2824 Seventh Street, Tuscaloosa, 35401. Phone (205) 758-2824. Gregory will remain of *counsel* to Richie & Rediker, L.L.C. at 312 N. 23rd Street, Birmingham, 35401.

**Gary A.C. Backus** announces the formation of **Gary A.C. Backus, L.L.C.** Offices are located at 472 S. Lawrence Street, Suite 209, P.O. Box 1804, Montgomery, 36102-1804. Phone (334) 265-0800.

### Among Firms

**Fann & Rea, P.C.** announces that **Michael B. Odom** has become a member. Offices are located at 22 Inverness Center

Parkway, Suite 140, Birmingham, 35242. Phone (205) 991-5045.

**Thomas J. Travers** announces his appointment as the associate district counsel for the **Internal Revenue Service** office in Portland, Oregon. Offices are located at 222 S.W. Columbia, Suite 450, 97035. Phone (503) 326-3185.

**Powell, Peek & Weaver** announces that **Arthur C. Brunson, III** has become an associate. Offices are located at 201 E. Troy Street, Court Square, P.O. Drawer 969, Andalusia, 36420. Phone (334) 222-4103.

**Crosslin, Slaten & O'Connor, P.C.** announces that **Lee M. Russell, Jr.**, **David W. Van Buskirk**, **M. Andrew Donaldson**, and **Melinda Kaye Camp** have become associates, and that the firm has relocated to 2400 Presidents Drive, Suite 300, Montgomery, 36116. Phone (334) 396-8882.

**David H. Marsh, P.C.** announces that the firm name has changed to **Marsh, Rickard & Bryan, P.C.** Offices are located at 800 Shades Creek Parkway, Suite 600, Birmingham, 35209. Phone (205) 879-1981.

**Frese, Nash & Torpy, P.A.** announces that **Laura L. Anderson** and **Patrick E. Roche** have become shareholders. Offices are located at 930 S. Harbor City Boulevard, Suite 505, Melbourne, Florida 32901. Phone (407) 984-3300.

**Janecky, Newell, Potts, Wilson, Smith & Masterson** announces the relocation of offices to 1475 Financial Center, 505 N. 20th Street, Birmingham, 35203. Phone (205) 252-4441.

**McInnish, Bright & Long, P.C.** announces that **Tiernan W. Luck, III** and **Joseph Edward Parish, Jr.** have joined the firm. Offices are located at 323 Adams Avenue, Montgomery, 36104. Phone (334) 263-0003.

**Lanier, Ford, Shaver & Payne, P.C.** announces that **Rodney C. Lewis** has

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become a member and **Gregory S. Martin** and **Russell L. Sandidge** have become associates. Offices are located at 200 West Side Square, Suite 5000, Huntsville, 35801. Phone (256) 535-1100.

**Vickers, Riis, Murray & Curran, L.L.C.** announces that **M. Kathryn Knight** has become a member. Offices are located at Regions Bank Building, Eighth Floor, 106 Saint Francis Street, Mobile, 36602. Phone (334) 432-9772.

**Karen Tosh** announces she has joined **Hill & Barlow, P.C.** Offices are located at One International Place, Boston, Massachusetts 02110-2607. Phone (617) 428-3000.

**J. Calvin McBride** and **Douglas R. Bachuss, Jr.** have relocated to 225 Grant Street, S.E., P.O. Box 1661, Decatur, 35602. Phone (256) 350-4100.

**Thomas E. Baddley, Jr.** and **Jeffrey P. Mauro**, formerly of Baddley & Crew, P.C. announce the formation of **Baddley & Mauro, L.L.C.** Offices have relocated to 2545 Highland Avenue, Suite 201, Birmingham, 35205. Phone (205) 939-0090.

**Webb & Eley, P.C.** announces that **Frank E. Bankston, Jr.** has become a shareholder. Offices are located at 166 Commerce Street, Suite 300, Montgomery, 36104. Phone (334) 262-1850.

**Jay Ross**, formerly a partner in Reid, Friedman, Perloff & Ross, has become a partner in **Huntley, Jordan & Associates, P.C.** The firm's new name is **Huntley, Jordan & Ross, L.L.C.** The mailing address is P.O. Box 370, Mobile, 36601. Phone (334) 434-0007.

**Cook's Pest Control** announces that **Joe Sides** has been promoted to vice-president, general counsel. The mailing address is P.O. Box 669, Decatur, 35602. Phone (256) 355-3285.

**John A. Unzicker, Jr.**, formerly of the Cramer Unzicker law firm, announces the establishment of the **Unzicker Law Firm.** Offices are located at 635 W. Garden Street, Pensacola, Florida 32501. **Holly C. Fusco, Christopher J. Ross, Kristin L. Stewart** and **Stephanie D. Alexander** are associates. Phone (850) 432-7864.

**Carol Ann Smith** and **Brenen G. Ely** announce the formation of **Smith & Ely.**

Offices are located at 2000-A SouthBridge Parkway, Suite 405, Birmingham, 35209. Phone (205) 802-2214.

**Holloway, Elliott & Moxley** announces that **Arthur F. Ray, II**, former law clerk to the Honorable William R. Gordon of the 15th Judicial Circuit, Montgomery County, has become associated with the firm. Offices are located at 556 S. Perry Street, Montgomery, 36103. Phone (334) 834-9689.

**Henslee, Robertson & Strawn, L.L.C.** announces that **Christie D. Knowles** has become an associate. Offices are located at 754 Chestnut Street, Gadsden, 35901. Phone (256) 543-9790.

**Martin Bloom, Jeff Friedman, Joe Leak** and **Tommy Dazzio** announce the formation of **Friedman, Leak & Bloom, P.C.** **Chris Zulanis, Mark Bain** and **Mike Bowling** are associates. Offices are located at 3800 Colonnade Parkway,



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**Allen Tippy & Associates** announces that **Caroline T. Pryor** has become an associate. Offices are located at 5905 Airport Boulevard, Suite H, Mobile, 36608. Phone (334) 344-1220.

**Gaines, Wolter & Kinney, P.C.** announces that **M. Jason McCulloch** has joined the firm as an associate. Offices are located at 22 Inverness Center Parkway, Suite 300, Birmingham, 35242. Phone (205) 980-5888.

**Schoel, Ogle, Benton & Centeno, L.L.P.** has changed its name. The new name is **Schoel, Ogle, Liles & Upshaw, L.L.P.** Offices are located at the Financial Center, Suite 600, 505 N. 20th Street, Birmingham, 35203. Phone (205) 521-7000.

**Lee R. Benton and Douglas J. Centeno**, formerly partners in Schoel, Ogle, Benton & Centeno, L.L.P., announce the formation of **Benton & Centeno, L.L.P.** Offices are located at 2100 1st Avenue, North, Landmark Center, Suite 550, Birmingham, 35203. Phone (205) 278-8000.

**Warner, Smith & Harris, P.L.C.** announces that **Matthew C. Carter** has joined the firm. Offices are located at 214 N. 6th Street, P.O. Box 1626, Fort Smith, Arkansas 72902-1626. Phone (501) 782-6041.

**Kellogg, Saccoccia & Sigelman** announces they have relocated. The mailing address is P.O. Box 941668, Atlanta, Georgia 31141-0668. Phone (770) 220-2465.

**Luther, Oldenburg & Rainey, P.C.** announces the relocation of its offices to Suite 1000, Riverview Plaza, 63 S. Royal Street, Mobile, 36602. The mailing address is P.O. Box 1003, 36633. Phone (334) 433-8088. **Christopher Lee George**, formerly of Lyons, Pipes & Cook, and **Lucian B. Hodges**, formerly of Hollingsworth & Associates, have joined the firm as associates.

**Walker, Hill, Adams, Umbach, Meadows & Walton** announces that **Paige R. Jackson**, former law clerk to Honorable Jacob A. Walker, III, circuit judge for Lee County, and **Matthew W.**

**White**, formerly of Nix, Holtsford & Vercelli, have joined the firm as associates. Offices are located at 205 S. Ninth Street, Opelika, 36801. Phone (334) 745-6466.

**Andrew T. Citrin and George A. Martin, Jr.** announce the formation of **Citrin & Martin, L.L.C.** Offices are located at 29000 Highway 98, Summit Building A, Suite 202, Daphne, 36526. Phone (334) 626-7766.

**Courtney Stallings Leach**, formerly with Travelers Property Casualty Company, has become an associate with the Memphis office of **Wyatt, Tarrant & Combs**. The mailing address is 6075 Poplar Avenue, Suite 650, Memphis, Tennessee 38119. Phone (901) 537-1000. Other offices are located in Nashville, Hendersonville and Kingsport, Tennessee, Kentucky and Indiana.

**Kendall W. Maddox** announces that **Jennifer Q. Griffin** has become an associate. Offices are located at 300 Office Park Drive, Suite 160, Birmingham, 35223. Phone (205) 879-1718.

**A. Eric Johnston, Allan M. Trippe and Hayes D. Brown**, of Johnston, Trippe & Brown, announce their association with **Walter H. Monroe, III** under the firm name of **Monroe, Johnston, Trippe & Brown**. **Harry O. Yates** has joined as an associate. Offices are located at 2700 Highway 280, Mountain Brook Center, Suite 220 West, Birmingham, 35223. Phone (205) 879-9220.

The **Alabama Board of Pardons and Paroles Legal Division**, announces that **Greg Griffin** has been promoted to attorney 4. **Hugh Davis** is returning as an assistant attorney general and will join chief legal counsel **Greg Griffin** and **deputy Attorney General Steve Sirmon**. Offices are located at 500 Monroe Street, Lurleen B. Wallace Building, Montgomery, 36130-2405. Phone (334) 242-8700.

**Johnston, Barton, Proctor & Powell, L.L.P.** announces that **Artur G. Davis** has become an associate. Offices are located at 2900 AmSouth/Harbert Plaza, 1901 Sixth Avenue, North, Birmingham, 35203-2618. Phone (205) 458-9400.

**Brooks & Hamby, P.C.** announces that **Jene W. Owens, Jr.** has become a

partner. Offices are located at 618 Azalea Road, Mobile, 36609. Phone (334) 661-4118.

**Scott L. McPherson** has joined the firm of **B.J. McPherson** and the new name is **McPherson & McPherson**. Offices are located at 210 Third Avenue, East, Oneonta, 35121. The mailing address is P.O. Box 1016. Phone (205) 625-3462.

**Stanley E. Munsey**, formerly of Munsey & Ford, P.C. announces that the new name is **Stanley E. Munsey & Associates, P.C.** Offices are located at 110 East Fifth Street, Tuscumbia, 35674. The mailing address is P.O. Drawer 409. **Rodney D. Dickinson** continues his practice at the same location. Phone (256) 383-5953.

**Inzer, Stivender, Haney & Johnson, P.A.** announces a change of firm name to **Inzer, Haney, Johnson & McWhorter, P.A.** Lawyers in the firm are **W. Roscoe Johnson, III; James C. Inzer, III; F. Michael Haney; Robert D. McWhorter, Jr.; James W. McGlaughn; and Elizabeth G. McGlaughn.** **James C. Inzer, Jr.** and **James C. Stivender** continue their status as *of counsel*. Offices are located at Compass Bank Building, Second Floor, 601 Broad Street, Gadsden. The mailing address is P.O. Drawer 287, 35902-0287. Phone (256) 546-1656.

**H.L. Ferguson, Jr., J. Mitchell Frost, Jr. and John W. Dodson**, former partners in Dominick, Fletcher, Yeilding, Wood & Lloyd, P.A., announce the formation of **Ferguson, Frost, Dodson, L.L.P.** **L. Hunter Compton, Jr.** and **Katherine Claire White** are associates. Offices are located at 115 Office Park Drive, Suite 300, Birmingham, 35223. Phone (205) 879-8722.

**Coxwell & Coxwell** announces that **Katharine W. Coxwell** has become a member. Offices are located at 109 E. Claiborne Street, Monroeville, 36461-0625. The mailing address is P.O. Box 625. Phone (334) 575-2146.

**William R. Hill, Jr. and J. Haran Lowe, Jr.** announce the relocation of their offices to 504 2nd Avenue, South, P.O. Box 1106, Clanton, 35046. Phone (205) 280-3117. ■





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## BAR BRIEFS



*Judge Michael Bellamy (center) and family*

• The first African-American chosen to serve as district judge of Russell County was sworn in September 18. **Michael Bellamy**, a Phenix City attorney, was appointed by Governor Fob James to fill the unexpired term of District Court Judge George Greene. Greene was appointed in July to fill the remainder of Circuit Court Judge Wayne Johnson's term.

Bellamy, a graduate of Tuskegee University, served as Phenix City's municipal judge for 14 years before resigning in 1996.

• **Earle F. Lasseter**, a partner in the Columbus, Georgia office of Pope, McGlamry, Kilpatrick & Morrison, LLP, and a member of the Alabama State Bar, recently became the treasurer-elect of the American Bar Association. He will serve one year as treasurer-elect before taking office as treasurer in August 1999.

As treasurer, Lasseter will be responsible for maintaining the financial records of the association, and serve as a member of the ABA Board of Governors, which oversees the administration and management of the association.

• **William C. Wood** has been elected a director of the 21,000-member Defense Research Institute, the nation's largest association of civil litigation defense lawyers. He is a partner with the Birmingham firm of Norman, Fitzpatrick, Wood & Kendrick.

Most of DRI's 21,000 members are attorneys in private practice who defend corporations, associations, insurance companies, government bodies, and individuals in damage suits and other civil litigation.



*Earle F. Lasseter*



*William C. Wood*

• Former **United States Senator Howell Heflin** will be honored this month with Common Cause Alabama's "Citizen of the Century" award at the nonprofit, nonpartisan good government group's state meeting in Birmingham. He will receive the centennial award for "three decades of public service, sweeping Alabama court reforms while chief justice of the Supreme Court of Alabama and his support for an independent judiciary."



*Sen. Howell Heflin*

• The **Environmental Law Section** of the Alabama State Bar recently won the 1998 Dispute Resolution Simulation Contest sponsored by Willamette University Center for Dispute Resolution. The section's Pigs R Us mediation scenario involved the siting of a concentrated animal feedlot operation (CAFO) by Pigs R Us, a fictional corporation, in Pennyless County, a fictional county in Alabama. In addition to the honor of a first-place entry, the section was presented with a check in the amount of \$500.

The mediated role play originated as part of the Environmental Law Section's annual Earth Day activities and was a modification of an American Bar Association Section of Natural Resources, Energy and Environmental Law Public Task Force Project about landfills. The idea to focus on CAFOs was the idea of Bart Slawson, an environmental attorney in Birmingham and co-chair of the Earth Day Committee.

Slawson and Co-Chair Karen Bryan, corporate counsel for P.E. LaMoreaux & Associates, Inc. of Tuscaloosa, were responsible for drafting the role play parts that were then utilized by students in the Alternative Dispute Resolution class taught at the University of Alabama School of Law, the University of Alabama Department of Geology's Environment and Society class and Girl Scout troops who were working on conflict resolution skills.

The Environmental Law Section designed the Pigs R Us role-play to encourage Alabamians to view complex multi-party, multi-faceted issues from a variety of angles and to use consensus-building skills in solving problems.

• **Robert L. McCurley, Jr.**, director of the Alabama Law Institute and an adjunct professor of law at the University of Alabama School of Law, was recently elected president of the Kiwanis International Foundation (KIF) for 1998-99. McCurley is a 30-year member of the Kiwanis Club of Greater Tuscaloosa and a past governor of the Alabama District. He is also a Tablet of Honor recipient and a charter member of the KIF's 21st Century Heritage Society, and served as a Kiwanis International Trustee from 1987-1991 and as a Kiwanis International vice-president from 1991-92.

McCurley is a published author, having written 12 books on law and government, as well as the 75-year history of Kiwanis in Alabama. He also writes a regular feature for *The Alabama Lawyer*, "Legislative Update." ■



*Robert L. McCurley, Jr.*



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information. (NOTE: TV and radio announcements have been excerpted from the video and are now being shown across the state—look and listen for them in your community and encourage your local stations to air them!) This complete public service video presentation includes: the eight-minute video; a handbook of speech points; and informational brochures for the audience.

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# BUILDING ALABAMA'S COURTHOUSES

By Samuel A. Rumore, Jr.



## Pike County

Established: 1821

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



*Pike County Courthouse before 1898 renovations*

### Pike County

The story of Pike County in southeastern Alabama begins with its namesake. Most Americans have at least heard of the alliteratively-titled mountain in Colorado, Pike's Peak. The county in Alabama and that landmark in the Rockies are both named for the same American hero, Zebulon Montgomery Pike.

Pike was born January 5, 1779, at Lambertton, New Jersey. He was the son of Major Zebulon Pike, a Revolutionary War soldier. Following in his father's footsteps, young Pike volunteered for service in the United States army at the age of 15. Within six years he rose to the rank of lieutenant. In 1805, Lieutenant Pike, who was serving on the American frontier, led an exploring

party in search of the source of the Mississippi River. In 1806 he explored the headwaters of the Arkansas and Red rivers. It was on this expedition that he discovered the majestic mountain peak which bears his name.

Turning south, the party passed through Spanish territory, Pike and his men were arrested by Spanish troops and taken to Santa Fe. Later they were sent to Chihuahua in Mexico, but several months later were allowed to return to the United States by way of Texas and New Orleans. In 1808 he published the "journal" of his expedition. Pike's adventures caught the attention of the American public and his name became a household word. Pike received promotions to major in 1808 and colonel in 1812.

When the second war with Great Britain broke out, Pike was commissioned a brigadier general. He led an





*Pike County Courthouse at time of County Centennial Celebration, 1921*

attack on York, later to become Toronto, Canada. The Americans captured York, but at a great cost. During the course of the battle a powder magazine exploded. The explosion killed General Pike, who died April 27, 1813. His death was a tragedy felt deeply by his officers and men, and by the American people.

Members of the Pike family have continued to serve this nation up to the present day. Former Congressman Otis Pike of New York claims relationship to Zebulon Pike. After leaving Congress in 1978, Pike began writing a syndicated column of political commentary that is carried throughout the country. The name of his column is "Pike's Pique."

Pike County, Alabama is one of ten counties in the United States named for Zebulon Pike. It was established by the Alabama Legislature on December 17, 1821 from land taken out of Montgomery and Henry counties.

There is one more story about Pike's name that should be recounted. This story was even chronicled by Robert Ripley in his "Believe It Or Not" cartoon series. In the 1830s, after Pike County citizens chose a centralized location for their county seat, the proposal was made to name the new county seat Zebulon in honor of Zebulon Pike. Unfortunately, the recording secretary at the meeting could not write a script capital Z. No one else present at the meeting could write a capital Z either. The citizens

then decided to give their town the shorter and much-easier-to-write name of Troy.

On December 18, 1821, one day after creating Pike County, the Alabama Legislature designated the home of Andrew Townsend as the temporary seat of justice. At the same time, a five-member commission, consisting of Andrew Townsend, William Cox, Jacinth Jackson, Alexander McCall, and Daniel Lewis, was appointed to select a permanent site for the county seat, to contract for public buildings with the lowest bidder, and to call upon the county treasurer for their expenses.

No action was taken by these commissioners during that first year. A second five-member commission was appointed on December 12, 1822. Alexander McCall and Daniel Lewis continued to serve. The three new members were Obadiah Pitts, James Arthur and Edmond Hobdy. A second temporary seat of justice was established at the



*Historic marker at Louisville*

home of Samuel Smilley. Variant spellings or misspellings have reported his name as Swilley, Sivilley or Smiley. In any event, the new commission was authorized to select a permanent county seat, to superintend the building of the courthouse, and to give 20 days notice of their decision at three or more public places in the county.

The commissioners chose Lewisville as the first permanent county seat of Pike County. This town was named for Daniel Lewis who had built a store and

cabin there and who coincidentally had served on both commissions for selecting the site of the county seat. The pronunciation of the town name remained the same but its spelling was soon changed to Louisville.

There are no records describing the first permanent Pike County Courthouse. Its exact location is not known. However, it is presumed that Louisville was the center of activity for frontier lawyers in the county. The town grew and soon received weekly mail service. One early resident recorded in her memoirs that the first sermon she heard in Pike County was in 1822 and was "preached in the courthouse at Louisville by a local Methodist preacher." The first term of circuit court was held in September 1823. Reuben Saffold was judge.

Louisville served as county seat until 1827. Normally a former county seat town will not get the opportunity to serve as a county seat again. However,

when Barbour County was created on December 18, 1832 Louisville was placed within the new county boundaries. It was then chosen to be the first temporary county seat of that county until Clayton became the permanent county seat. Thus, it has the distinction of serving as the county seat of two different Alabama counties.

Pike County citizens chose Monticello as the new county seat in 1827. This town was probably named for Thomas Jefferson's home in Virginia. More than likely this site was selected because it was central to the population of the



**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, and is a member of *The Alabama Lawyer* Editorial Board.





*Pike County Courthouse (circa 1940)*

county at the time. Also, this town was located on the old Three Notch Trail, a pioneer path blazed by United States soldiers who placed three notches on the trees used for markers. This former Indian trail extended from Fort Barrancas at Pensacola to Fort Bainbridge southeast of Tuskegee. Then it joined the Federal Road to Fort Mitchell in Russell County.

What did the town of Monticello look like? An 1831 plat of Monticello exists in Deed Book A of the Pike County records. It shows that in the center of the town was a square where a wooden courthouse was constructed in 1828. Streets extended from the square at right angles. These major arteries and paralleling streets had the names Washington, Jefferson, LaFayette, Montgomery, and Monroe. Jail Street probably led to the county jail. A log cabin school was more than likely located on Academy Street.

There is evidence that two courthouses were constructed at Monticello. In 1835 the commissioners for the town made their only written report to the Pike County Commission concerning their activities, beginning with the establishment of the town. This report listed the sale of a number of lots. It also noted certain expenses beginning in 1828, including the following: \$153 paid for the "old" courthouse, \$1,687 paid for the "new"

courthouse, and \$399 paid for the jail.

The town was incorporated in 1835. It was a small place, having only 200 residents at the time of incorporation. However, the population swelled whenever court was in session. If a man had to appear at court, he generally brought his wife and family with him. This was still frontier country and isolated farms were sometimes attacked by marauding Indians.

Mrs. Ann Love's inn was the popular gathering place during court sessions which became important social events as women from all parts of the county gathered for knitting, quilting and gossip. For many of the women, their nearest neighbors were many miles away and occasions to socialize were rare. After the court sessions ended, the inn was generally empty except for an infrequent traveler on horseback.

The most significant event to take place in Pike County during this period was the Battle of Hodby Bridge. The title is somewhat inaccurate because it actually encompasses several encounters which took place between white settlers and Indians in the area on the Pea River in 1836. The result of this fighting was that most of the Indians were killed or captured. Some escaped to Florida and gained refuge with the Seminoles. Historians consider the

encounters at Hodby Bridge to be the last Indian fighting in Alabama.

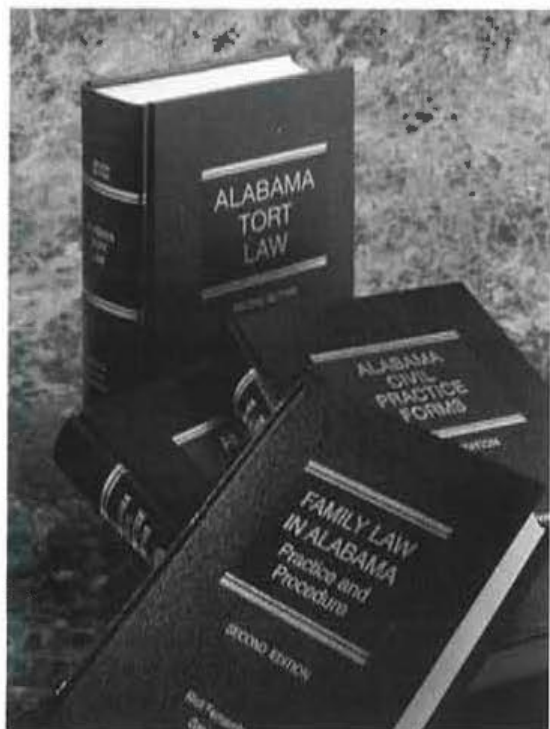
In 1837 a movement began to select a more geographically centralized location for the county seat of Pike County. Luke R. Simmons was elected to the legislature to implement that action. On November 24, 1837 the legislature passed an act appointing a five-member commission consisting of John Harrell, Hiram Carter, Barnet Franklin, Samuel T. Owen, and John Hanchey. This commission was directed to find a suitable location for the county seat by June 1, 1838. An election would then be called so that the citizens could choose between Monticello and the new site. The commissioners chose Deer Stand Hill as their recommended location for the courthouse.

Deer Stand Hill was a ridge covered with vegetation. When settlers hunted deer in the area, the deer often sought shelter among the tall oats on the hill, resulting in its being given the name Deer Stand Hill. The land at Deer Stand Hill was owned by two men—John Coskrey and John Hanchey. Both of them had stores in the area. Hanchey was also a member of the five-person site selection commission. Coskrey and Hanchey knew that their properties would gain in value if the county seat came to their land, so they offered the county 30 acres as consideration for selecting their site. The citizens of Pike County approved the selection of Deer Stand Hill for their county seat in an election held in August 1838. On October 6, 1838, Coskrey deeded approximately 15 acres to the county. On October 8, 1838, Hanchey also deeded approximately 15 acres to the county.

Much work had to be done in order to build a town on Deer Stand Hill. The trees and vegetation had to be cleared. The county surveyor, Robert Smiley, then laid off the courthouse square. Next, the rest of the 30 acres had to be subdivided into business lots and residential lots. Proceeds from the sale of lots were used to construct a courthouse.

South of Deer Stand Hill stood three stores that were owned by John Hanchey, John Coskrey and Nathan Soles. The area where they were located was called Centerville. Once the decision was made to move the county seat





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to Deer Stand Hill, these three entrepreneurs placed their buildings on rollers and moved them to the west side of the new public square. They immediately set up business there. The east side of the square was reserved for law offices.

Meanwhile, back in Monticello, the county sold its old courthouse and public square. Mrs. Love's customers helped her to raise \$250 for the purchase of the building and the property. This courthouse was then torn down and the materials transported by wagon to the new county seat. There the structure was rebuilt as an inn in 1839. The inn was constructed at the corner of Church and Oak streets.

Court sessions were moved from Monticello to the new county seat before the inn was completed. Mrs. Love and her son built temporary shelters for use by her boarders. The kitchen was outdoors and she served food camp-style. Because a courthouse was not yet ready, the courts were held in one of the stores that had been rolled over to and positioned at the court square.

When the new town was laid out, the citizens decided that a new and more dignified name was needed. Centerville was considered, but not chosen. The reader also knows that Zebulon was

seriously proposed, but no one could write a capital Z. So it was also rejected. Finally, the name Troy was suggested and approved. But why the name "Troy"?

Some historians claim that Troy was named for the ancient city of the same name. Others believe that a lawyer from Troy, New York, working in the office of John Beecher, one of the first lawyers in the town and a cousin of the famous northern preacher Henry Ward Beecher, suggested the name of his hometown. It was short and easy to spell. Still others believe that state representative Luke R. Simmons named the town in honor of Alexander Troy of Columbus County, North Carolina. Many of the early residents of Pike County came from North Carolina. The real reason that Troy has its name may be lost in the mists of time. In any event, on December 24, 1838, the city of Troy, Alabama was officially recognized by the Alabama Legislature as the permanent county seat of Pike County.

A new courthouse was constructed at Troy in 1839. The building was wooden and placed in the center of the public square which was 160 yards on each side. No other structures were allowed within the square. The builder of the courthouse was Nubel A. Moore. The

county court first met at Troy on June 10, 1839. Joseph W. Townsend was judge.

Pike County grew steadily during the next few decades. In 1840, the population was 10,108. In 1850, it was 15,920. By 1860, it had reached 24,435. Fortunately, the ravages of the Civil War did not touch Pike County, although many men from the county went off to fight.

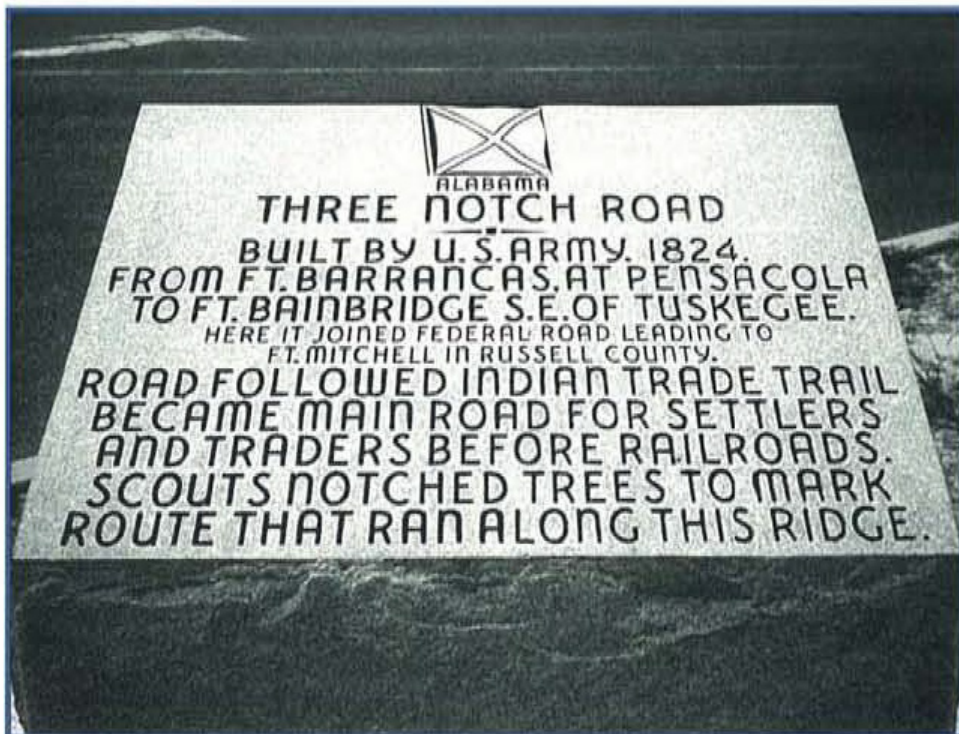
The most significant occurrence to affect Pike County during this era took place in 1866. The Reconstruction Legislature established 13 new counties in Alabama. Two of the counties, Crenshaw and Bullock, were created from territory taken from Pike. Overnight the size of the county shrank by almost one-third. The population in 1870 was only 17,423. However, Troy was still the center of the county and was poised for a period of growth.

The year 1870 proved to be a most important one in the history of Troy and Pike County. The first train arrived in Troy on Monday evening, June 20, 1870. The line was completed from Columbus, Georgia to Troy. Future expansion was also planned. It is no mere coincidence that a land-locked market town like Troy began its great period of growth after the arrival of the railroad.

Other changes were planned at this time. The old courthouse had stood in the public square since 1839 and county officials began the process for relocation. The county commission purchased a lot and took preliminary steps for the erection of a new courthouse. An editorial in the *Troy Messenger* of January 4, 1871, described the existing courthouse as old, insecure and badly located.

However, a group of local citizens fought fiercely against removing the courthouse or making any changes whatsoever. A meeting held on January 28, 1871 was reported in the *Messenger* of February 9, 1871. At this meeting the following resolution passed:

"Whereas it is the opinion of the citizens of this county that the courthouse of this county is situated in the most beautiful, suitable, and convenient part of the city of Troy and any removal of the same would of necessity be attended with costs that the county is at present unable to sustain, therefore be it,



Marker located at the Pike County public square





Present-day Pike County Courthouse

Resolved—That we, a part of the citizens of Pike County, are opposed to the destruction, sale, or any other disposition that may be made of the courthouse other than the disposition for which it was originally intended; and that we do especially request the commissioners of this county not to make any dispositions of such property by sale or otherwise without consulting the feelings of the voters of the county.”

This group of citizens did not want to move the courthouse and they apparently had the political muscle to stop the county commission. They were able to get the legislature to pass an act prohibiting the assessment or collection of or the appropriation of a tax on Pike County by its commissioners for the erection of a courthouse. This act is a unique piece of legislation specifically prohibiting a tax that would be earmarked for the purpose of building a courthouse.

Thus, the issue of relocating the courthouse died. However, on December 15, 1875, the commission received a report advising that repairs had to be made to the courthouse. They approved a contract for \$450 to hire Jerre Sanders for painting and repairs.

The 1880s proved to be another significant decade in the history of Troy and Pike County. The population of Troy had increased to 3,000. And in 1880, the citi-

zens built a new brick courthouse on the square. However, as with the earlier effort to move the courthouse, the new courthouse plan had sparked controversy.

A report to the county commission from the grand jury in 1879 noted that a new courthouse was desperately needed by the county. The 40-year-old wooden structure had outlived its usefulness. The report stated that a committee should be appointed to select a suitable site.

The editors of the two newspapers in Troy disagreed over the relocation issue. The editor of the *Messenger* argued that the public square should be cleared and that a courthouse should be built on a site next to the county jail. This proposal would open up the downtown area for commercial purposes and would give more room for the parking of wagons which would help business. The editor of the *Enquirer* protested the suggested relocation site. He believed that if a courthouse were to be erected, the people should decide its location by a vote. His paper favored the square where the courthouse had always been located.

Mr. Ferris, an architect in Troy, drew plans for the courthouse that were placed on display at the Pike County Bank. After viewing the drawings, a

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majority of citizens strongly favored a new building. The site selected remained the old courthouse square.

The county entered into a contract with Joseph Minchener, an Englishman, on February 16, 1880 to build a brick courthouse at a cost of \$15,000. The structure was not to occupy more of the public square than was absolutely necessary. The old wooden courthouse was purchased by Frank and Joseph Minchener, who tore it down and used the materials to build an "opera house" on the corner of Walnut and Oak streets. This structure was used for many years for amateur performances, band concerts, graduation ceremonies, and the like. After the courthouse was razed, temporary offices were housed in a wooden store building.

The new square-shaped, two-story brick building was completed in March 1881. An early photo shows a simple building with a balcony over the entrance. The rooms were heated by fireplaces.

Another important event for Troy's future occurred in the 1880s. In 1887, the legislature established a state teacher's college at Troy. The state agreed to appropriate \$3,000 per year for the school if the community would furnish and equip a suitable structure. The city immediately erected a handsome brick building at a cost of \$12,000. The school has grown over the years to become Troy State University.

The last significant event of the 1880s was the completion of a second railroad line to Troy in 1889. These tracks connected Troy to Montgomery. They helped to make Troy the leading market town of the area.

By 1898 the population of Pike County exceeded its total before the 1866 reduction in size. The new courthouse proved to be inadequate and needed expanding. The county authorized expenditures of not more than \$10,000. Four wings were attached. A Neo-Classical facade with pediment, portico and arched entrance-way was added. Above the archways was placed the date "1898," which confused later citizens who thought that the courthouse only dated back to that year. In fact the courthouse was an 1880s structure with 1898 renovations. On the roof was a cupola containing four clock faces

that allowed the time to be viewed from all sides. The sidewalks around the court square were paved in 1900.

This courthouse project served the county for more than half a century. By the 1950s time had taken its toll. Another new courthouse was needed. Once again, a debate arose over the location of the courthouse. This time proponents of a parking lot for the commercial district won out. The new courthouse would be built one block from the public square at the dead end of Church Street.

The latest Pike County Courthouse was conceived when the 1951 Alabama Legislature set up a Pike County Public Building Authority. The Authority was authorized to issue bonds so that public buildings could be constructed without the need to raise taxes. The cost of the project was paid out of general revenues of the county on a "rental" basis. Title was conveyed from the Authority to the county after 30 years.

Charles F. Minch, of the Montgomery architectural firm Minch, Kershaw & Crump, designed the structure. S. J. Curry & Company of Albany, Georgia were the contractors. The total project cost approximately \$400,000 and the courthouse was dedicated on November 12, 1953. The same architectural firm designed a \$240,000 jail, which was completed in July 1958.

At the courthouse dedication, Probate Judge Alex Brantley praised the work of contractors, legislators, the Building Authority and others. Lacy Rose, president of the Pike County Building Authority, presented the keys to the building to Judge Brantley. State Senator Lawrence K. Anderson of Union Springs, a sponsor of the legislation setting up the Authority, praised this local achievement. He stated: "This building is a monument to the people of Pike County and all other counties. The untiring efforts of those making this building possible are unprecedented. Independently and without the usual Federal aid, the people of this county have accomplished almost the impossible." Mrs. Pearl Reeves, former sheriff of Pike County, then officially cut the ribbon to open the new building.

The newest Pike County Courthouse is a two-story structure with a basement. It has two wings and is construct-

ed of steel, limestone, granite and brick. The former four-sided clock tower on the old courthouse was replaced in the new building by a clock with one face above the front entrance. The building is topped by a flag pole.

After the new courthouse was dedicated, the county commission took bids for the demolition and removal of the old 1880/1898 structure. Under terms of the contract, all material and debris was to be removed within 120 days of acceptance. Unfortunately, when the bid ceremony took place on January 20, 1954, at 10 o'clock a.m., there were no bids. Judge Brantley noted that no one wanted to buy the building at any price. He said he received overtures for the county to pay someone to tear it down, but that was unacceptable. This situation was somewhat reminiscent of a Henry Youngman one-liner. Instead of "Take my wife, please," the line becomes "Take my courthouse, please."

Finally, the county received a bid of \$50 which was the highest and best offer to purchase the building, tear down the structure, and haul off the debris. On August 12, 1954, the City of Troy agreed to purchase the court square real estate from the county for \$40,000. A small grassy park was created in the center of the square with the Confederate monument placed within it. The square itself was then turned into parking for the central business district as had been recommended by the *Troy Messenger* 75 years earlier in 1879. ■

The author acknowledges the historic photographs obtained by Troy attorney Keith Watkins for use with this article.

#### SOURCES:

"Reconstruction in Pike County, Political and Military," Mrs. Kate Murphree Copeland, *Alabama Historical Quarterly*, XXII (winter 1900), 284-304; "Early History of Pike County Alabama," Margaret Pace Farmer, *Alabama Historical Quarterly*, X (1948), 26-51; *History of Pike County, Alabama*, Margaret Pace Farmer, 1953; *One Hundred Fifty Years in Pike County, Alabama, 1821-1971*, Margaret Pace Farmer, 1973; *Alabama's Pike County*, Mrs. Frank Ross Stewart, 1976; *Historical Official Souvenir, 1821-1921, Centennial Celebration of Pike County*, Troy, Alabama, June 20-25, 1921. Articles: *Montgomery Advertiser*-February 1, 1952; February 20, 1952; May 5, 1952; May 21, 1952; April 7, 1953; November 12, 1953; November 13, 1953; November 29, 1953; January 3, 1954; January 13, 1954; August 13, 1954. Article: *Birmingham News*-January 22, 1954.





## OPINIONS OF THE GENERAL COUNSEL

By J. Anthony McLain, general counsel

# Retention of Client Files



J. Anthony McLain

### QUESTION:

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

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

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

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

### DISCUSSION:

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

While there are no specific rules in the Alabama Rules of Professional Conduct regarding the length of time a lawyer is required to retain a closed file or the disposition of that file after a lapse of time, the Disciplinary

Commission established the following guidelines in Formal Opinion 84-91.

The answers to the above questions depend on the specific nature of the instruments contained in the files and the particular circumstances in a given factual situation. For that reason, the file should be examined and the contents segregated in the following categories:

- (1) Documents that are clearly the property of the client and may be of some intrinsic value, whether delivered to the lawyer by the client or prepared by the lawyer for the client, such as wills, deeds, etc.;
- (2) documents which have been delivered to the lawyer by the client and which the client would normally expect to be returned to him;
- (3) documents from any source which may be of some future value to the client because of some future development that may or may not materialize; and
- (4) documents which fall in neither of the above categories.

Documents which fall into category 1 should be retained for an indefinite period of time or preferably should be recorded or deposited with a court. Documents falling into categories 2 and 3 should be retained for a reasonable period of time at the end of which reasonable attempts should be made to contact the client and deliver the documents to him or her.

With regard to time, there is no specific period that constitutes "reasonable" time. It depends on the nature of the documents in the file and the attendant circumstances. Since the file is the property of the client it theoretically may be immediately returned to the client when the legal matter for which the client is being represented is concluded. For a variety of reasons, lawyers and law firms usually maintain client files for some period of time ranging



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from a few years to permanent retention. The length of time is more a matter of the lawyer or firm's policy rather than any externally generated requirement. In establishing this policy, it would not be unreasonable for the lawyer or law firm to consider the statute of limitations under the Alabama Legal Services Liability Act is two years and six years for the filing of formal charges in bar discipline matters. (In some cases the time period may be extended.)

At the expiration of the period of time established by the lawyer or law firm for file retention, the following minimum procedures should be followed for file disposition. First, the client should be informed of the disposal plans and given the opportunity of being provided with the file or consenting to its destruction. If the client cannot be located by certified mail or newspaper notice, the file should be retained for a reasonable time (absent unusual circumstances, it is the Commission's view that six years is reasonable) and then destroyed with the exception of those documents classified as category 1 above. Prior to destroying any client file, the file should be screened to ensure that permanent type (category 1) documents and records are not destroyed. Third, an index should be maintained of files destroyed.

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

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## LEGISLATIVE WRAP-UP

By Robert L. McCurley, Jr.

The Alabama Law Institute is currently studying the Uniform Child Custody Jurisdiction and Enforcement Act promulgated by the Commissioners on Uniform State Laws. This Act revises the law on Child Custody Jurisdiction in light of federal enactments and almost 30 years of inconsistent state laws among the 50 states that have adopted the Uniform Child Custody Jurisdiction Act.

The Institute began its study in 1997 with Penny Davis, associate director of the Law Institute, as the reporter, and Gordon Bailey of Anniston, chairman of the committee, which is comprised of:

Marcel Black of Tusculumbia  
Ms. Lynn Merrill of Montgomery  
David Cauthen of Decatur  
William Clark of Birmingham  
Jack Floyd of Gadsden  
Ms. Sammye Kok of Birmingham  
Randall Nichols of Birmingham  
Honorable Deborah Paseur of Florence  
Samuel Rumore of Birmingham  
Sue Thompson of Tuscaloosa  
Bryant Whitmire, Jr. of Birmingham

For the first time, this Act will enumerate a standard of continuing jurisdiction and clarify the modification jurisdiction so as to be consistent among all states. Secondly, it brings a uniform procedure to the law of interstate enforcement. This Act will accomplish for custody and visitation determinations the same uniformity that has occurred in the interstate child support, that Alabama passed as the Uniform Interstate Family Support Act in 1997. This is found in *Alabama Code* §30-3(a)-101, and became effective in January 1998.

In 1980, the federal government enacted the Parental Kidnapping Prevention Act, (PKPA), 28 USC Section 1738(a), to

address the interstate custody jurisdictional problems that continued to exist after the adoption of the Uniform Child Custody Jurisdiction Act. The major aspects of the Uniform Child Custody Jurisdiction and Enforcement Act are as follows:

- 1. Home-State Priority** The UCCJEA prioritizes home-state jurisdiction where as previously there were four independent bases of jurisdiction under UCCJEA.
- 2. Clarification of Emergency Jurisdiction** This Act contains a separate section on emergency jurisdiction, which addresses that emergency jurisdiction may be used to protect the child on a temporary basis until the court issues a permanent order, and takes into account domestic situations in which there has been domestic violence. Thus, a custody determination made under the emergency jurisdiction provision is a temporary order.
- 3. Exclusive Continuing Jurisdiction for the State that Entered the Decree** Currently, there has been a divergence of views regarding simultaneous proceedings when there have been custody orders and visitation orders, as well as when it is necessary to determine whether the state with continuing jurisdiction has relinquished it. This Act addresses these issues by providing for continuing, exclusive jurisdiction in specific situations. Furthermore, the jurisdiction of the home state has been prioritized over other jurisdictional base in the same manner of the Parental Kidnapping Prevention Act (PKPA).
- 4. Specification of What Custody Proceedings Are Covered** The UCCJEA includes a sweeping definition that, with the exception of adoption, includes virtually all cases that involve custody of, or visitation with, the child as a "custody determination." The Act leaves the discretion with each state to determine the applicability of the Act to Indian tribes.
- 5. Role of "Best Interest"** This Act eliminates the term "best interest" in order to clearly distinguish between the jurisdictional standards and the substitutive standards relating to child custody and visitation of children. The Act is not intended to be an invitation to address the merits of the custody dispute, or provide an additional jurisdictional base under the guise of a "best interest" determination.

It is expected that this Act will be ready for introduction in the 1999 regular session of the Legislature and will be available for review by interested parties prior to this introduction in December 1998.



**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.



Other studies under review include Business Entities, Principal and Income Act, the Prudent Investor Act, and Uniform Public Employees Pension Fund.

We have just completed a revision of the Alabama Warrant and Indictment Manual. It is being distributed by the Administrative Office of Courts and Office of Prosecution Services. This third edition was edited by Tommy Smith, who for the past 24 years has been in the District Attorney's Office in Tuscaloosa and Bessemer.

During the past year the Alabama Supreme Court has approved amendments to the Alabama Rules of Criminal Procedure, in either the rule or comments to the following rules:

- Rule 1.4 "Venire" 10/8/97
- Rule 3.7 "Authority to Issue Search Warrants" 10/8/97
- Rule 3.8 "Grounds for Issuance of Search Warrants" 10/8/97
- Rule 3.8 "Grounds for Issuance of Search Warrant" 8/20/98
- Rule 3.9(a) "Evidence" 8/20/98
- Rule 9.1(b)(2) "Defendant's Right to be Present" 10/8/97
- Rule 9.2 "Committee Comments" 10/8/97
- Rule 16.6 "Committee Comments" 10/8/97
- Rule 18.4 "Committee Comments" 10/8/97
- Rule 19.3 "Separation, Sequestration and Admonitions to Jurors" 10/8/97
- Rule 20.3 "Judgment of Acquittal" 4/28/98

- Rule 27.5(a) "Initial Appearance" 10/8/97
- Rule 30.3 "Notice and Perfection of Appeal: Bond on Appeal" 4/28/98
- Rule 32 "Committee Comments" 10/8/97

The court further ordered that a form, "Recommended Uniform Juror Questionnaire," be added as Form 111 as of October 1, 1998.

For more information concerning the Institute or any of its projects contact Bob McCurley, director, Alabama Law Institute, P.O. Box 861425, Tuscaloosa, Alabama 35486-0013; fax (205) 348-8411 or phone (205) 348-7411. The Institute Home Page address is [www.law.ua.edu/ali](http://www.law.ua.edu/ali). ■

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## Judicial Award of Merit Nominations Due

The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the state bar's Judicial Award of Merit through March 15, 1999. Nominations should be prepared and mailed to:

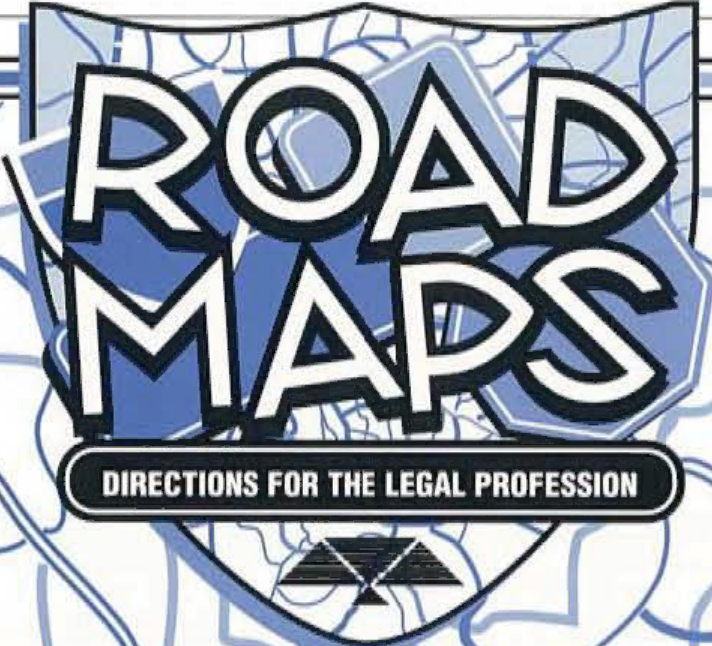
Keith B. Norman, Secretary  
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The Judicial Award of Merit was established in 1987. The 1998 recipient was United States District Court Judge Ira DeMent.

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Nominations are considered by a three-member committee appointed by the president of the state bar, which then makes a recommendation to the board of bar commissioners with respect to a nominee or whether the award should be presented in any given year.

Nominations should include a detailed biographical profile of the nominee and a narrative outlining the significant contribution(s) the nominee has made to the administration of justice. Nominations may be supported with letters of endorsement.



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# YEAR 2000

## Remember Noah

By Will Hill Tankersley, Jr.

**T**hat haggard man on the street corner carrying a sign proclaiming "The End is Near" has company, namely, lawyers carrying their own sign proclaiming "Year 2000 is Near."

Welcome to the world of "Year 2000," "The Millennium Bug," or, more succinctly, "Y2K." Looking ahead to the turn of the millennium, it is becoming more and more apparent that hardware, software and microprocessors might not be able to handle the new millennium.<sup>1</sup> The problem is that many computer programs, particularly "legacy" programs from the 1960s and 1970s, saved computer space by only having a two-digit year identifier in the fields reflecting the date. For example, for the date of October 12, 1973, the date identifier would be 10/12/73 instead of 10/12/1973. The Y2K problem began as a creative solution to computer limitations back in the 1960s and 1970s. At that time, computer memory was very costly. Today's lap top with 32 megs of rapid access memory ("RAM") and one gigabyte of memory on the hard drive would have cost millions in 1970. Programmers vastly reduced the amount of information they needed to input into the system by simply providing a two-year identifier. The consequences of this seemingly innocuous programming decision are profound as we approach year "00." But, as far as the computer system "knows," will the year be 2000, or 1900, zero or some bit of data that completely shuts down the computer? Without corrective action, a computer system or microprocessor could experience a "hard crash" meaning that the entire system shuts down; or, alternatively, the system could experience a "soft crash" meaning that the data is lost, corrupted or is unintelligible.

Predictions as to the consequences of this problem are becoming increasingly alarming. Federal Reserve Chairman Alan Greenspan has warned that the computer problems associated with the Year 2000 could hurt the United States' economy. See *Fortune*, "Industry Wakes Up To Year 2000 Menace," April 27, 1998. On April 22, 1998, the IRS Commissioner, Charles Rossotti, predicted that 90 million taxpayers may not get refunds and that


95 percent of the revenue stream in the United States could be jeopardized. The IRS alone has plans to spend \$1 billion dollars on solving just their own problems with the "Millennium Bug"—that's billion with a "B." Some economists predict that the Year 2000 problem has an over-50 percent chance of causing a worldwide recession. See *WSJ*, News Roundup, p. A1, April 22, 1998. See also *Washington Post*, April 28, 1998, "Year 2000 'Bug' to Cost Firms \$50 Billion" (Edward Xandeni, chief accountant at Deutsche Morgan Grenfell Inc. in New York, New York: "60 percent chance" of recession starting in 2000 because of computer problems.) On April 28, 1998 Federal Reserve Board Governor Edward W. Kelley, Jr. testified to a United States Senate panel that the potential problems associated with the Year 2000 problem were "real and serious." Kelley testified that the prediction that the Year 2000 problems would cause a deep recession were "probably a stretch," but that remedial efforts for just the United States' private sector might be roughly \$50 billion. See <http://www.dog.frb.fed.us/boarddocs/testimony/19980428> (April 28, 1998 testimony of Federal Reserve Governor Edward W. Kelley, Jr. before the Committee on Commerce, Science and Transportation).<sup>2</sup> The predictions as to the costs associated with remedying the Year 2000 are mind-boggling. Correcting the "source code" can cost between \$1.00 and \$1.80 per line. Source code can run in the millions of lines.<sup>3</sup> Information research firms have estimated that it will cost \$300 billion to \$600 billion for a



**Will Hill Tankersley, Jr.**

Will Hill Tankersley, Jr. is a partner of Balch & Bingham LLP in its Birmingham office. He received his J.D. degree from the University of Alabama and his L.L.M. in intellectual property and antitrust from New York University. He is the chairperson of the task force to establish an Intellectual Property Section of the Alabama State Bar.





worldwide resolution of the Year 2000 problem. General Motors plans to spend \$400 million to \$550 million to fix its Year 2000 problems. See *Fortune*, "Industry Wakes Up to the Year 2000 Menace," April 27, 1998. Chase Manhattan bank projects \$250 million as the cost of just its own Year 2000 remediation plan. *Id.* Legal costs associated with the Year 2000 problem are even more staggering. One information technology advisory firm estimates that litigation costs associated with the Year 2000 problem will approach \$1 trillion. *Id.* This amount exceeds by three-fold the annual direct and indirect costs of all civil litigation in the United States, which is estimated to be \$300 billion per year.<sup>4</sup>

Although the Year 2000 "bug" has not struck, there are already examples of what a Year 2000 lawsuit may look like. In Michigan, a grocery store alleges that it installed a cash register system allowing its customers to use a credit card to pay for grocery store purchases. The grocery store alleges that this cash register system was not "Year 2000 compliant" and that customers who used credit cards with an expiration date after January 1, 2000 found that when they swiped their cards in the cash register system, the entire cash register system, that is all checkout lines, were shut down. The grocery store alleges severe loss of business as a result of this problem. *Produce Palace Int'l v. TEC America Corp.*, Michigan, Macomb City Cir. Ct., 6/12/1997 filing date. One manufacturer (that wishes to remain anonymous) experienced a "Year 2000" production line problem because its computer system did not recognize that 1996 was a leap year. The affected company produced industrial solutions and on January 1, 1997, production ground to a halt. By the time the situation was remedied, lipids had hardened in the pipes, costing the company \$1 million to replace. See *Fortune*, "Industry Wakes Up To Year 2000 Menace," April 27, 1998.

### "Ostrich Slaughter" In 2000?

Many executives and many officers and directors probably hope that there is a "magic bullet" that will solve the Year 2000 problem with a "click of the button." One of the few things that is clear about the Year 2000 problem is that this so-called "magic bullet" is little more than a myth. Those officers and directors who have taken a "wait and see" posture may find themselves in an "ostrich slaughter," where officers and directors who have not taken action to address the problem are defendants in shareholder derivative lawsuits by angry shareholders demanding to know why effective action was not taken earlier. Some publicly traded companies have already begun to put Year 2000 disclosures in their annual reports:

If internal systems do not correctly recognize date information when the year changes to 2000, there could be an adverse impact on the Company's operations.... There can be no assurance that another company's failure to

ensure year 2000 capability would not have an adverse effect on the Company.

Intel 1997 Annual Report. (Report also states that likelihood of a potential adverse impact due to problems with internal systems or products sold to customers is remote.) Officers and directors can benefit by having well-established recovery plans even if those plans are ultimately not effective. See *Port City State Bank v. American National Bank*, Lanton, Oklahoma 486 F.2d 196 (10th Cir. 1973) (both officers and directors excused from corporate failure damages because of good faith disaster recovery plan).

### Warning Flags

More and more organizations are joining the bandwagon for raising the visibility of Year 2000 problems. The Emerging Issues Task Force ("EITF") of the Financial Accounting Standards Board ("FASB"), which is the rule-making body for accountants, has been considering how businesses should treat, for accounting purposes, the implementation of a Year 2000 corrective plan. So far, the EITF has found that some of those expenses have to be expensed or currently deducted, rather than capitalized. See <http://www.aicpa.org.members/y2000/intro/htm>. The Internal Revenue Service has also issued guidelines for Year 2000 corrective measures. See IRS Rev. Proc. 97-50, 1997-45 Internal Revenue Bulletin No. 1. The United States Securities and Exchange Commission has issued a statement alerting public companies about the possibility that they may need to disclose information in their annual reports and quarterly reports about Year 2000 problems (<http://www.sec.gov/rules/other/slbcf5.htm>). See *Credit Union Times*, April 29, 1998, [www.cutimes.com/y2k/yr/042998](http://www.cutimes.com/y2k/yr/042998). Even some comic strips are making light of the potential Year 2000 problem. Microsoft has announced that even Windows 95 NT has "minor" problems with the Y2K Bug ([www.microsoft.com.ithome.topic.year2k/product/win95.htm](http://www.microsoft.com.ithome.topic.year2k/product/win95.htm)).

### Governmental Action

Some organizations that have date-sensitive information are taking the painful steps required to assess and remediate Year 2000 problems. For example, the Social Security Administration ("SSA") for the federal government received an "A" in 1996 for its efforts to address Year 2000 problems. The Social Security Administration got an "A" for its efforts because, in 1989, it was the first governmental organization to begin Year 2000 remediation efforts. As a result of these nine years of effort, the SSA had worked through 32 million lines of source code (the computer code that can be read by humans), but it also reported that it needed another 250 man years to correct the problem. (With 250 people working on this problem, that means that the Year 2000 problem would take one year to remedy.) Unfortunately, in



November 1997, SSA reported that it had overlooked the fact that it had to include disability information it received from state governments. This oversight added *another* 32 million lines to the task. After nine years of effort, SSA is only half way through its remediation. Presently, only 35 percent of the federal government's "mission critical" systems have been fixed to handle Y2K. See *Washington Post*, April 28, 1998, "Bug."

### Potential Liability

Officers and directors of corporations, particularly public companies, are probably the individuals who are most at risk at this time. Alabama recognizes a cause of action against officers and directors for breach of their fiduciary duty. See, e.g., *Boykin v. Arthur Andersen & Co.*, 639 So.2d 504, 508 (Ala. 1994) (shareholder suit against officers and directors of bank based on alleged mismanagement, among other things). See also *Elgin v. Alfa*, 598 So.2d 807, 814 (Ala. 1992) (shareholder derivative action under Rule 23.1; discussion of when prior demand is "futile"). However, officers and directors also have the opportunity to take actions that could serve them well in the future against a shareholder derivative action or a breach of fiduciary action. Vendors of hardware, software and microprocessors may also find themselves subject to breach of warranty claims; however, there are significant legal hurdles which would have to be crossed, specifically, whether or not a software license is a "sale of goods" under the U.C.C. See e.g., *Advent Systems, Ltd. v. Unisys Corp.*, 925 F.2d 675 (3d Cir. 1991) (software is a "good" so U.C.C. does apply); but see *Conopco v. McCreadie*, 826 F. Supp. 855, 868-71 (D.N.J. 1993) (U.C.C. does not apply to agreements that are predominately for service). One area of potential Year 2000 problems is "microprocessors" or chips that are imbedded in machinery or equipment. (Hospitals and common carriers may find themselves the unexpected defendants in legal actions resulting from equipment failures from microprocessors. Some have wondered whether the avionics systems of aircraft would suffer from a similar danger.)

### Legal Thicket

More state governments are taking action relative to Year 2000. For example, Georgia has passed legislation that excuses the state government from civil liability resulting from problems associated with the Year 2000 "bug." The statute excuses the state from liability under sovereign immunity. See Georgia Senate Bill G38 Georgia 144th General Assembly enacted 4/10/98.

One issue is whether "raiding" your competitor's Y2K remediations can constitute tortious interference. Alabama case authority provides examples of the circumstances under which this kind of "employee poaching" will be permitted. See, e.g., *Birmingham Television Corp. v. DeRamus*, 502 So.2d 761, 766 (Ala. Civ. App. 1986) (description of essential elements for

claim of when inducing employee thereby constituting intentional interference with contractual relations: enforceable contract, absence of justification and injury). Additionally, the statute of limitations for contractual and warranty claims may be deemed to run from the time of sale of equipment. See *Liecor Liquors Ltd. v. CRS Business Computers Inc.*, 613 N.Y.S. 2d 298 (N.Y. App. Div. 1994) (reversal of denial of defendant's motion for summary judgment) (delivery of light pen scanner started the running of the statute of limitations).

Insurance coverage presents its own special challenge relative to Y2K problems. Comprehensive General Liability ("CGL") policies may include an exclusion for "expected injuries" which arguably would include the expected coming of the millennium. Business interruption policies may only cover "chance" or "fortuitous" events which might not include the natural coming of the Year 2000.

Whether Y2K problems should be fixed without charge, as opposed to being fixed by an upgrade for which users must pay money, is the subject of a recent class action lawsuit in

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California. See *Altaz Int'l Ltd. v. Software Business Techs. Inc., et al.*, No. 172535 (Cal. Sup. Ct., Marin County) 12/3/97. See also <http://securities.milberg.com/mw-cg>. Vendors will likely argue that industry custom protects them. See, e.g., *Thomas v. Principal Finance Corp.*, 566 So.2d 735 (Ala. 1990) (industry practice is important on the question of whether the defendant acted in good faith). However, industry custom is not an absolute defense. See, e.g., *The T. J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932) (Hand, J.) (fact that tug boats did not customarily carry a radio was *not* a factor in determining liability). ("Court must in the end set what is required; there are precautions that are so imperative that even their universal disregard will not excuse their omission.")

### Difficult Solutions

The business solutions for Year 2000 problems are particularly hard to swallow because they do not increase the company's "bottom line" and involve highly technical issues concerning which officers and directors are often unwilling to have direct involvement. Additionally, one of the major components of a Year 2000 corrective plan is testing, which may take at least half of the amount of time required to complete the project. Once the actual remediation project is underway and programmers are onsite taking corrective action, a company may find itself particularly vulnerable to "poaching" or "raiding" of these programmers who are a highly scarce commodity.

Companies may find that the original writers of the software object to modifications or derivative works being made of their software and threaten a copyright infringement action against the company pursuing a remediation effort. There may be some help under the copyright statute for such a copyright challenge. See 17 U.S.C. § 117 ("it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided: (1) that such new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that is used in no other manner.") Although courts around the country have not squarely addressed remediation as to Year 2000 problems in the context of a copyright law question, there are cases interpreting § 117 that go both ways. See *Aymes v. Bonelli*, 47 F.3d 23 (2d Cir. 1995) (modification maintenance of software by licensee is authorized by § 117), but see *MAI Systems Corp. v. Peak Computer Inc.*, 991 F.2d 511 (9th Cir. 1993) (licensee is not an "owner of a copy" for section 117 purposes).

Even more troubling are problems associated with testing for possible problems created by microprocessors. It is possible that the only way to test a microprocessor for a Year 2000 problem is to actually "break open the box" and test the actual chips and microprocessors in the box. However, by taking this

action, the tester may also void whatever warranties are associated with that machine.

Solutions to solve the Year 2000 problem can be through a tedious "remediation" effort in which the two-digit date identifiers in legacy software are expanded to four-digit identifiers, or a "windowing" technique is employed in which the computer is essentially "fooled" into understanding the Year 2000 because it is told that dates that end in a year from zero to 50 will be deemed to be Year 2000 years which occur *after* years ending in 51 through 99, which will be deemed to be "1900" year dates. Unfortunately, these and other techniques may not be compatible with one another. Therefore, a company that solves its own Year 2000 problems may find that its particular form of Year 2000 compliance is incompatible with another company's Year 2000 compliance.

### Year 2000 is Sooner Than You Think

It was a common technique for data entry personnel when faced with a document that did not have certain "date information" in it to simply use the highest number they could which was 1999. This means that there may be a "mini-crash" on January 1, 1999. Another common "placeholder" date is 9/9/99. Again, these "crashes" (if there are any) could be hard crashes, meaning that all the equipment shuts down, or they could be soft crashes in which the effects are much more difficult to discern but no less real.

One of the few certainties about Year 2000 problems is that steps can be taken now for these problems. These steps can include testing and remediation programs, inquiries to vendors about Year 2000 questions, letters to business partners about the exact form of their remediation efforts, and contractual provisions addressing Year 2000 problems for future or renewed contracts. For those who casually dismiss the predictions of Year 2000 problems, remember Noah. ■

### Endnotes

1. Some commentators have characterized the Y2K problem as a "logic bomb" rather than a virus. See Robert Slades *Guide to Computer Viruses*, 450 (Springer Verlag 1994).
2. Kelley also speculated that some of the Y2K remedial costs might include already budgeted amounts for regularly scheduled hardware and software upgrades.
3. Source code is the human readable code in various languages such as COBOL, C++, Fortran and the like. "Object code" is the computer readable language that results from "compiling" the source code.
4. See Jack Kemp, "Common Good Above Profits," *The National Law Journal*, Nov. 4, 1996 at p. 20. See also, Moskowitz and Wallace, "Loser Pays: A Deterrent to Frivolous Claims," *New York Law Journal*, Mar. 7, 1996 (American Tort Reform Association estimate of cost litigation cited as \$200 billion to \$300 billion per year).



## Winner of Two Awards

The Alabama State Bar's public service video and the bar's Web site recently received national awards, a 1998 TELLY award and a 1998 Luminary Award.

The ASB video, "To Serve the Public," from which radio and television announcements have been excerpted, won a TELLY award for outstanding video program in the public relations category. Leo Tichell Productions of Birmingham, producers of the video, entered it in the competition, which was founded in 1980 to showcase and recognize outstanding commercials, and film and video programs. This year there were 10,000 entries in 150 categories.

(The video also received a 1997 Medallion Award of Merit from the Public Relations Council of Alabama in the category of Special Public Relations Effort and was included in public relations programming offered at the National Association of Bar Executive's 1997 Communications Section Workshop.)

The Luminary Award, from the National Association of Bar Executives Public Relations/ Communications Section, is for excellence, creativity and professionalism in bar communications. The

bar's Web site received the honor in the 5,000-to-15,000-member category in the section's annual meeting in September. This is the first year that an award has been presented in the Web site category and recognizes a Web site effort that exemplifies excellence in usefulness, ease of use, content and design in meeting the needs of its targeted audience.

James M. Locke, ceo of KNOVA, serves as the consultant for the bar's Web site, which provides information and resources for both bar members and the public.

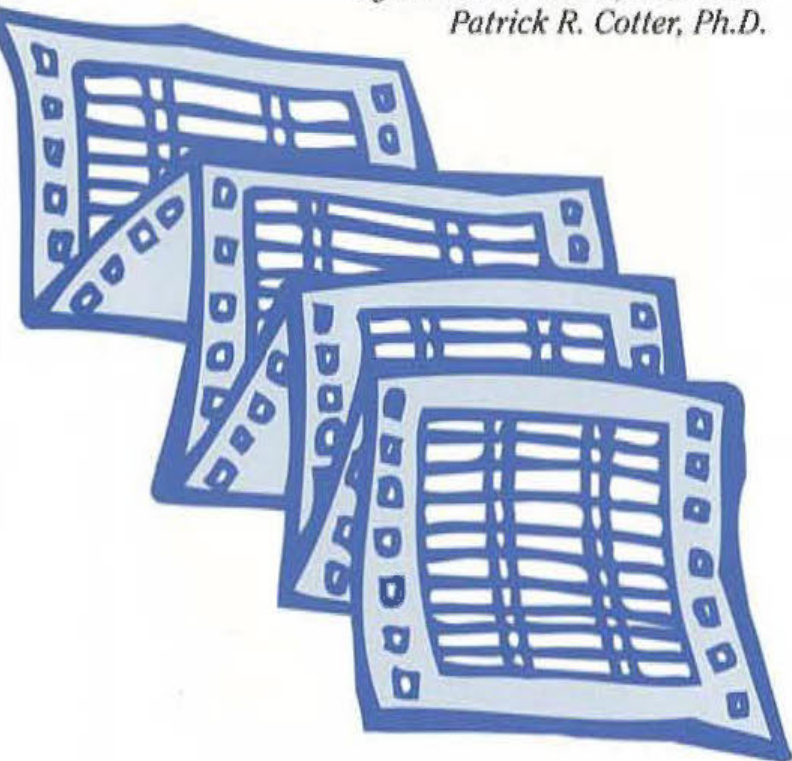
The next time you're in Montgomery, stop by the state bar and check out these awards. You can also view them at [www.alabar.org](http://www.alabar.org) ■





# A SURVEY OF ALABAMA LAWYERS: 1998

*By James G. Stoval, Ph.D. and  
Patrick R. Cotter, Ph.D.*



## INTRODUCTION

This article presents the results of a survey of attorneys in Alabama. In this survey, information was collected concerning (a) the characteristics of Alabama lawyers; (b) opinions about several issues related to the legal profession; (c) attitudes concerning topics related to the performance of the Alabama State Bar; (d) information about the administration and economics of private law practices in Alabama; and (e) the activities of employed attorneys.

The survey was sponsored by the Alabama State Bar and was conducted by Southern Opinion Research, a private survey research firm located in Tuscaloosa, Alabama. In 1986, the state bar commissioned a similar survey. That study was conducted by the University of Alabama's Capstone Poll. When possible, this article will compare the results of the two surveys.

In the current survey, telephone interviews were completed with a random sample of 400 individuals selected from the in-state membership of the Alabama State Bar. Prior to the interviews, the state bar mailed a letter to the lawyers included in the sample, explaining the purpose of the project and asking them to participate in the survey. A Southern Opinion Research interviewer then called the respondent and either conducted the interview at that time or scheduled an appointment to conduct the interview. The interviews lasted between 20 and 30 minutes and took place between May 11 and June 5, 1998. Similar procedures were used to conduct the 1986 survey and, whenever possible, the same questions were used.

All probability samples contain some sampling error—the extent to which the views of respondents differ from the views held by the entire population from which the sample was selected. For this survey, one can be 95 percent confident that the results for each part of the sample are not more than 5 percent different from that of the entire population of Alabama attorneys. Sampling error is larger when subgroups of respondents are examined. Sampling error does not reflect the influence of other factors, such as question wording, question order, or interviewer effect, which can also influence the results of the survey.

**Copies of the full report, including additional economic, salary and equipment information, are available from the Alabama State Bar, P.O. Box 671, Montgomery, Alabama 36101-0671.**



# PROFILE OF ALABAMA ATTORNEYS—1998

In 1998, the typical Alabama attorney is a white male in his early 40s. He is married to his first wife and has one or two children. The typical Alabama attorney works in one of the state's largest metropolitan counties and is in private practice. Most of the government employed attorneys in Alabama are working at the state level.

The median annual personal income of Alabama attorneys is between \$70,000 and \$90,000. Almost all of this income comes from law-related work. More private practice (43 percent) than "other" attorneys (23 percent) have reported annual income of more than \$100,000. More than half (57 percent) of those admitted to the bar in 1986 or before have incomes of more than \$100,000, compared to 17 percent of those admitted since 1986.

The income of Alabama attorneys has risen in the last decade. In 1986 the median income of the state's attorneys was between \$40,000 and \$60,000, compared to the current \$70,000 to \$90,000. In 1986, about 17 percent of the state's attorneys reported an annual income of \$100,000 or more. Today, about four-in-ten Alabama lawyers earn more than \$100,000 annually. Similarly, in 1986 only 3 percent of attor-

neys had an income of more than \$200,000, compared to 12 percent today. (Figure 1)

The typical Alabama lawyer is quite satisfied with his career as a lawyer. On a ten-point "very dissatisfied" to "very satisfied" scale, Alabama attorneys give an average response of "7.5." Only about 5 percent of the state's lawyers express dissatisfaction with their career (i.e. scores 1 to 4), while 17 percent rate their career as a "10."

In many respects, the typical Alabama attorney today is very similar to what was found in 1986. There are, however, a few differences in the characteristics of Alabama lawyers. There are now more women who are attorneys. In 1998, about one-in-five (18 percent) Alabama lawyers are female, compared to about one-in-ten (11 percent) in 1986. The proportion of attorneys who are black, however, has remained about the same (1 percent in 1986 and 3 percent in 1998). The typical Alabama attorney is also now older than was the case in 1986. Then about 37 percent of lawyers were 41 years of age or older, compared to 57 percent currently.

## BAR ISSUES

### Quality of Legal Education

About 80 percent of the state's attorneys believe that "Alabama law schools adequately prepare law students to become legal practitioners." Only about 15 percent say that the state's law schools are not adequately preparing students to practice law.

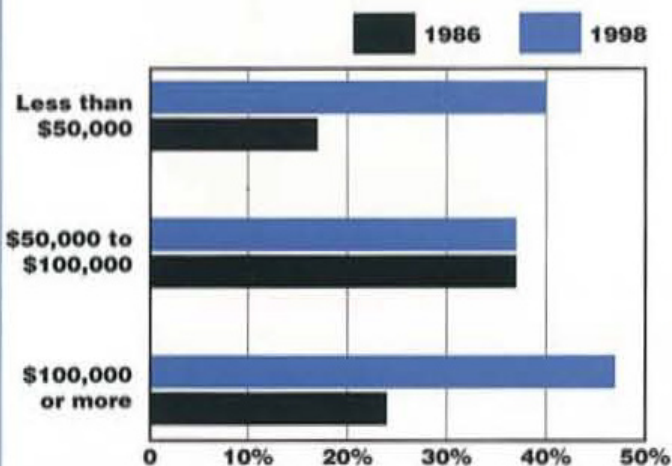
When asked about specific "lawyer-related skills," respondents are most likely to say that the state's law schools are adequately preparing students in the areas of "legal analysis and reasoning" (89 percent) and "legal research" (87 percent). About seven-in-ten respondents say Alabama law schools are adequately preparing students in the areas of "recognizing and resolving ethical dilemmas" (72 percent) and "problem solving" (68 percent). A smaller number of respondents say that law students are being adequately prepared with regard to "communication" (60 percent) or "litigation and alternative dispute resolution" (50 percent). Less than half of the respondents believe that Alabama law schools are adequately preparing students in the areas of "counseling and advising clients" (44 percent), "factual investigation" (35 percent) or "negotiation" (34 percent). Only about one in four (26 percent) of the respondents say that law students are being adequately prepared regarding the "organization and management of legal work."

About 83 percent of Alabama attorneys say that the state's law schools are "adequately impressing upon law students the need to adopt the value of "striving to provide competent representation." Similarly, about three-quarters (75 percent) of the respondents say that the state's law schools do an adequate job in promoting the value of "striving to continue

Figure 1

### INCOME OF ATTORNEYS 1986 AND 1998

The reported income of attorneys in Alabama has changed dramatically. While 37 percent reported incomes of between \$50,000 and \$100,000 in both surveys, the number making \$100,000 or more has risen two and a half times.



#### Dr. Patrick R. Colter

Dr. Patrick R. Colter is a widely published scholar in the field of survey research and is currently an associate professor of political science at the University of Alabama. From 1980-1987, Colter served as co-director of the Capstone Poll, the University of Alabama's survey research unit.

#### Dr. Jim Stovall

Dr. Jim Stovall is a former newspaper reporter and editor who has worked for the Bristol (Tenn.-Va.) *Herald Courier*, *Knoxville News-Sentinel*, the *Birmingham News* and the *Tuscaloosa News*. He is a professor of journalism at the University of Alabama. From 1983-1987 he was co-director of the Capstone Poll.



individual professional development." Also, most respondents say that Alabama law students are adequately prepared regarding the need to "improve the profession" (65 percent) and to "promote justice, fairness, and morality" (62 percent).

### Internship Requirement

About 71 percent of Alabama lawyers favor "a formal internship requirement for new lawyers." Such a program would ensure that new lawyers were "being mentored by a veteran practitioner." About 26 percent of the respondent oppose an internship requirement.

Private practice attorneys (68 percent) are less in favor of an internship requirement than are others (82 percent). Also, about 66 percent of the attorneys working in one of the state's major metropolitan areas (i.e. Jefferson, Madison, Mobile, Montgomery, or Tuscaloosa County) favor an internship requirement, compared to 82 percent of "non-metropolitan" attorneys.

### Disciplinary Actions

Most Alabama lawyers believe that the state bar is doing a good job investigating and prosecuting ethics violations. About 32 percent say that the state bar is accomplishing this responsibility "very well." These results are slightly better than those that were obtained in the 1986 survey. (Figure 2)

Respondents are evenly divided on the decision to "add lay members to the Bar's disciplinary panels." About 49 percent approve of the decision, while 48 percent disapprove. Private practice lawyers (45 percent) are less in favor of the decision to add lay members of the disciplinary panel than are other attorneys (63 percent).

Figure 2

### THE STATE BAR'S IMAGE AS A DISCIPLINARY UNIT HAS IMPROVED SINCE 1986

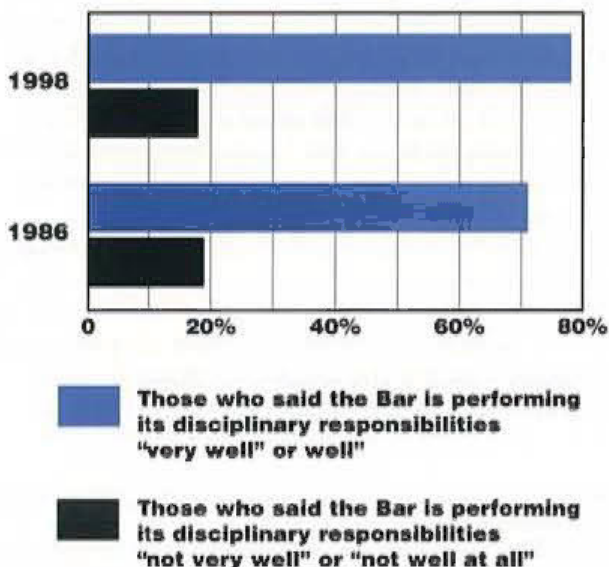
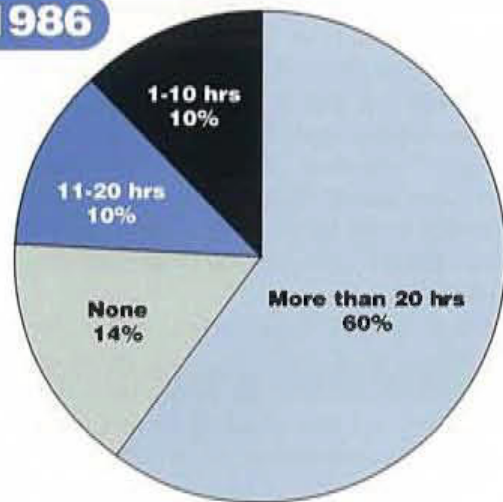


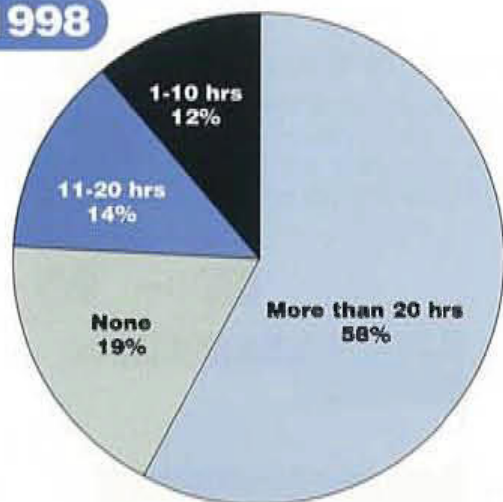
Figure 3

### THE NUMBER OF HOURS SPENT DOING PRO BONO LEGAL WORK HAS DECREASED SLIGHTLY SINCE 1986

1986



1998



### Continuing Legal Education Programs

About 33 percent of the respondents give an "excellent" rating to the "overall quality" of the "continuing legal education programs" they attended in Alabama during the last several years. An additional 48 percent say that the quality of these programs has been "good." In 1986, respondents gave similar ratings to the continuing legal education programs they had attended within the state.

When asked about alternative methods of presenting continuing legal education programs, respondents indicate that they are most interested in attending traditional "classroom instruction and lecture" programs. About 90 percent of the respondents say that they are interested in enrolling in this type of program. Fewer respondents expressed interest in



attending CLE programs offered through "video cassettes" (56 percent), "satellite TV networks" (55 percent) or "over the Internet" (40 percent).

### Specialization

Only one-in-three of the state's attorneys are "aware that a specialization plan for Alabama lawyers is now in place." About 58 percent of the respondents are, however, interested in being "certified as a specialist."

Non-private practice lawyers (51 percent), and those admitted to the state bar before 1988 (51 percent) are less interested in being certified as a specialist than are private practice (62 percent) or "newer" (66 percent) attorneys.

### Pro Bono Work

About 51 percent of Alabama attorneys say that their employer has "a policy which encourages you to devote time to providing free legal services for low-income individuals." About 39 percent of the respondents say that their organization does not have such a policy, while 10 percent are uncertain of their employer's policy regarding pro bono work. Similar results were found in the 1986 survey.

Alabama attorneys provided an average of 65 hours of free legal services during the past year. This figure is affected by the fact that some attorneys provide a large number of pro bono hours. The median amount of free legal service hours provided by Alabama attorneys during the last year is 27 hours. About 19 percent of the respondents (compared to 14 percent in 1986) say that they did no pro bono work during the past year. An additional 19 percent provide ten or fewer hours of free legal services. (Figure 3)

About 84 percent of Alabama attorneys are aware of the "State Bar's Volunteer Lawyers Program." About 24 percent of the respondents say that they have participated in the program. Those who have not participated in the Volunteer Lawyers Program explain this decision by citing a lack of time for pro bono work (30 percent) or the fact that they already are involved in such activities in their local area (20 percent).

## ADMINISTRATION AND ECONOMICS OF PRIVATE PRACTICE

### Composition of Law Firms

Private practice attorneys were asked a number of questions about their firms. In terms of the number of various types of attorneys, the composition of Alabama law firms has changed little since 1986. For example, about 38 percent of private practice attorneys are in organizations with one or more "solo practitioners or proprietors." In 1986, about 40 percent of private practice attorneys were in such organizations. Similar results were found when respondents were asked about the number of lawyers "who are partners or shareholders," "who are of counsel," or "who are associates."

Compared to 1986 (30 percent), more respondents (48 percent) now report working in an organization which employs one or more "non-lawyer administrators." Less change is found when respondents are asked about the employment of "accountants or bookkeepers," "secretaries and clerical staff," or "messengers."

### Fees

The relative importance of factors affecting the fees charged by private practice firms has changed little since 1986. About 64 percent of the respondents say that the "amount of time spent on a project" is a "very important" factor in determining the fees charged by their organization. An additional 33 percent say that time spent is an "important" factor in determining fees.

About 40 percent of respondents say that the "experience of the lawyer working on a project" is a very important factor in determining fees. About 40 percent say that experience is an important factor.

About three-fourths of the respondents say that the "custom of the community" and "the client's ability to pay" are either very important or important factors in determining the fees charged by their organizations. About 60 percent

give similar very important or important ratings to the "results accomplished or the size of the settlement" (63 percent), the "preclusion of other work" (59 percent) or the "novelty of questions presented" (59 percent).

About 42 percent say that they "always" enter into an "employment contract with a client before performing service." In 1986, about 27 percent of private practice attorneys always used an employment contract.

Some 46 percent of private practice attorneys say they "always" keep time records. About 52 percent say that they always "actively use time records to bill clients." About one in five Alabama private practice attorneys say that they never handle a case on a contingency basis. About 17 percent say that more than half of their cases are handled on a contingency basis.

About half (53 percent) of the private practice attorneys handling contingency cases say that, if they win, they receive, on average, 33 percent of the award. About 11 percent receive less than 33 percent of the reward, while about 25 percent receive, on average, at least 40 percent of the reward.

Among private practice attorneys who, at least sometimes, use an hourly rate, the average rate charged is \$129 per hour, while the median rate is \$125. About 19 percent charge more than \$150 per hour. Only about 14 percent charge less than \$100 per hour. In 1986, only 18 percent of Alabama private practice attorneys charged more than \$100 per hour.

### Overhead

About one-fifth of private practice attorneys say that "overhead costs" consumed 50 percent of their organization's gross income during the last accounting year. An additional 33 percent say that overhead costs consumed between 40 and 50

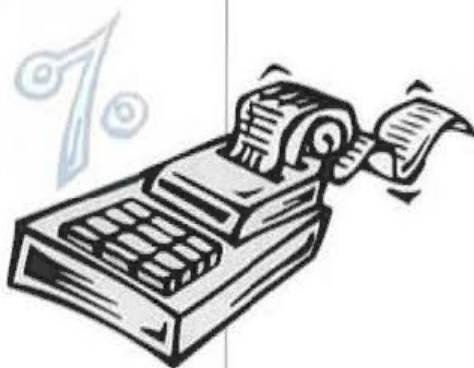
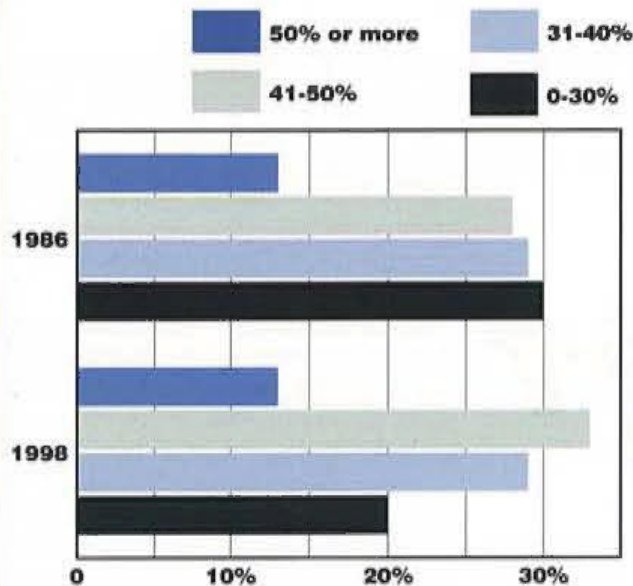




Figure 4

### PERCENTAGE OF GROSS INCOME DEVOTED TO OVERHEAD COSTS HAS GONE UP



percent of their organization's gross income. Overall, overhead costs consumed more of private practice organizations' income in 1998 than it did in 1986. (Figure 4)

#### Time

About 73 percent of employed attorneys (i.e. individuals currently working as an attorney) say that in 1997, on average, they spent more than 40 hours each week doing "professional work and related activities." About 37 percent say that they work more than 50 hours a week, on average, on professional work, and 8 percent report working more than 60 hours each week. Overall, the number of hours private practice attorneys report working in 1998 is about the same as that found in 1986. (Figure 5)

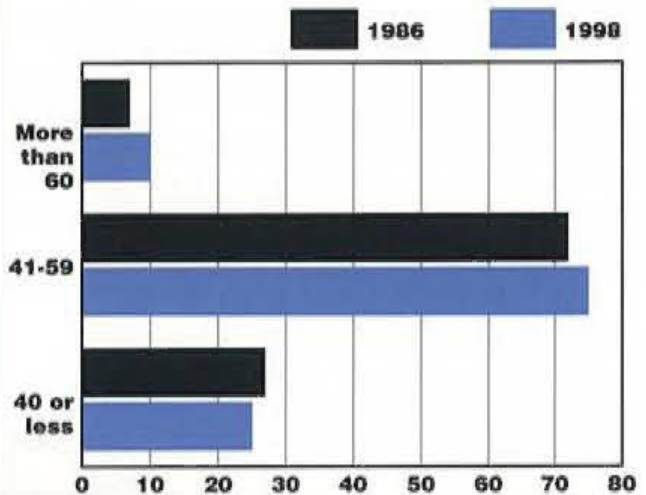
As was the case in 1986, private practice attorneys report that they spend less than half of the time consumed by legal matters on litigation activities. About 12 percent (compared to 13 percent in 1986) say that all their legal work is taken up with litigation.

#### Office Equipment

About nine in ten employed attorneys have access within their organization to a personal computer (88 percent), a fax machine (88 percent) and a photocopier (86 percent). Most also have access to "electronic or computerized phone systems" (78 percent), "telephone conferencing capabilities" (75 percent), a "terminal for computerized legal research" (66 percent), a postage meter (60 percent), an "automated answering/call routing" system (56 percent), voice mail (54 percent), and cellular telephones (54 percent). Most respondents say that their organization does not have any memory typewriters, word processors, telex machines or video-conferencing capabilities.

Figure 5

### HOURS WORKED PER WEEK, THEN AND NOW



#### Computerized Legal Research

About 77 percent of the employed attorney respondents say that their organization used a "computerized legal research service in the past year." Private practice attorneys (78 percent) are more likely than others (61 percent) to say that their firm had used a computerized legal research service. Similarly, metropolitan attorneys (79 percent) are more likely to be in organizations using such services than are others (67 percent). In 1986, less than half (42 percent) said their organization used a computerized legal research service within the past year.

Among those reporting the use of a computerized research service, about 46 percent say that their organization had used the Westlaw service, while 16 percent said the LEXIS service was used. About 18 percent say their organization used both the Westlaw and LEXIS service.

#### Use of Internet

About three-quarters of employed Alabama attorneys say that they have access to the Internet. Of those with access, about 65 percent say that they have used the Internet within the past three months. Those not using the Internet explain this by saying they lack information about computers (49 percent), or are not interested in using the Internet (17 percent).

Among users, most respondents (54 percent) say that they are most likely to use the Internet "at the office" rather than "at home" (28 percent). About one-third (36 percent) say they use the Internet seven or more times a week. America On-Line is the most frequently used service to gain access to the Internet.

#### Amount of Work

Most employed Alabama lawyers say that they (52 percent) and their organization (55 percent) have "about the right amount of work." About 38 percent of Alabama attorneys say that they have "more work" than they can handle. In 1986,



about 31 percent said they had more work than they could handle. About 8 percent (compared to 7 percent in 1986) say that they do not have "enough work" to keep them busy.

Similarly, by a 35-to-6 percent margin, respondents say that their organization has too much rather than too little work. In 1986, about 27 percent of respondents said their organization was overloaded with work.

## BAR SERVICES AND RESPONSIBILITIES

### Alabama State Bar Publications

Respondents are generally satisfied with the publications of the state bar. About 48 percent say that *The Alabama Lawyer* performs "very well" in its efforts to provide "information and substantive articles of interest to members." An additional 48 percent believe that the publication performs this function "adequately." Respondents gave a similar positive evaluation to *The Alabama Lawyer* in the 1986 survey.

Another publication of the state bar, the *ADDENDUM* newsletter, is rated as "very useful" by about 18 percent of the respondents. An additional 65 percent say that the *ADDENDUM* is "somewhat useful." Only about 8 percent of the respondents say the publication is "not useful at all."

### State Bar Staff

About 59 percent of Alabama lawyers say that they are "generally familiar with the state bar staff and their functions." In 1986, about the same number, 63 percent, said they were familiar with the state bar staff. Attorneys admitted to the Alabama bar in 1986 or before (66 percent) are more familiar with the state bar staff than are "newer" Alabama lawyers (51 percent).

Of those who say they are familiar with the state bar staff, about 72 percent say the size of the staff is "about right." Almost all (95 percent) of these respondents say that the staff is "courteous and helpful." Similar results were found in the 1986 survey.

### Annual Meetings

About 11 percent of the respondents say that they attended the 1997 Annual Meeting of the Alabama State Bar. In the 1986 survey, about 17 percent of the respondents said that they had attended the previous year's meeting of the state bar.

Similarly, almost half (47 percent) of the respondents say that have not attended any of the last five annual meetings of the state bar. An additional 25 percent have attended only one of the last five annual meetings. About 3 percent of the respondents have attended each of the last five annual meetings. In the 1986 survey, about 35 percent of the respondents said that they had not attended any of the state bar's annual meetings within the last five years. (Figure 6)

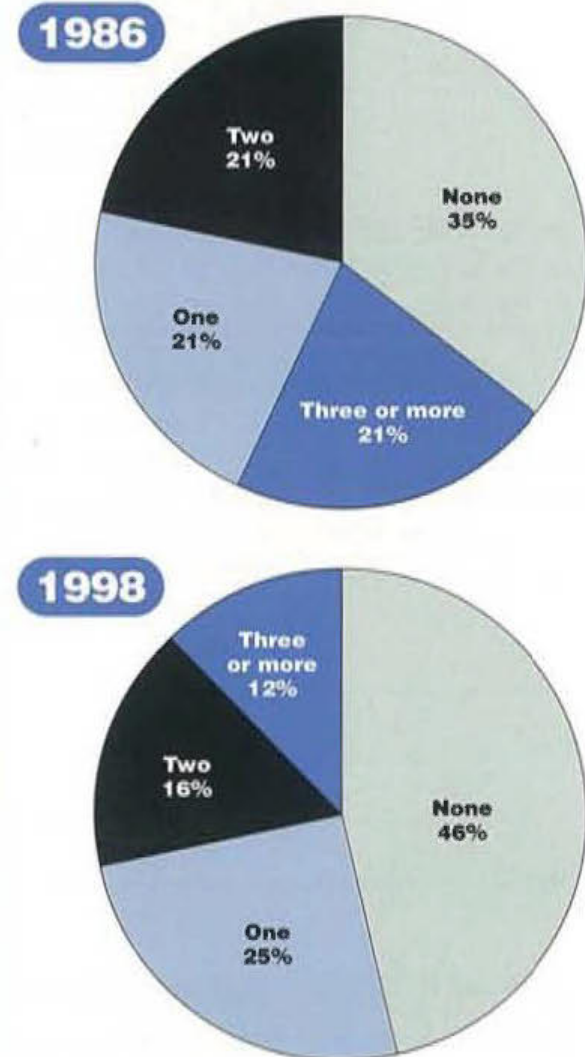
Failure to attend any of the last five annual meetings is higher among non-private practice attorneys (57 percent) and those from non-metropolitan counties (54 percent) than it is among private practice (44 percent) or metropolitan (44 percent) lawyers.

Among those who did not attend the 1997 Annual Meeting, about 59 percent say their decision was affected by scheduling problems. About 31 percent of these respondents say that

Figure 6

### ATTENDANCE AT ANNUAL MEETINGS IS SLIGHTLY DOWN.

How many Alabama State Bar Annual Meetings have you attended during the last five years?



they did not attend the meeting because of a "lack of interest." About 18 percent did not attend because of "the location of the meeting." Less than one in ten respondents say their decision not to attend the annual meeting was affected by "the high cost of attending" (9 percent), or because "the meeting was not educational enough" (8 percent), or because of a "poor choice of social events at the meeting" (2 percent).

Overall, the reasons the 1998 respondents gave for not attending the annual meeting were similar to those found in the 1986 survey. The exception to this pattern is that more 1998 respondents (31 percent) say that they did not attend because of a "lack of interest." In 1986, about 17 percent of the "non-attendees" gave this response. ■



# Joint Meeting of the Bench and Bar & The State and Federal Council

Embassy Suites Hotel • Montgomery, Alabama  
January 21-22, 1999

A joint meeting of the Bench and Bar and the State and Federal Council will be held January 21-22, 1999 at the Embassy Suites Hotel in Montgomery. The meeting is sponsored by the Alabama Judicial College, the Administrative Office of Courts, the Circuit and District Judges Association, and the Alabama State Bar.

A total of 8.3 CLE hours has been approved. The \$60 registration fee includes lunch on January 21. Tickets to the joint reception at 6 p.m. on January 21 may be purchased for \$15 each. Seminar topics include: "Courts Under Attack: Problematic Communication"; "Scheduling Conflicts: Attorney Client Calendar Conflict Resolution Order"; "Discovery in Federal and State Courts"; "Federal and State Courts—Comparing Issues in Criminal Matters"; "Standards of Civility in the Alabama Legal Community"; and "Civil Law and Domestic Relations Law Updates."

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone: \_\_\_\_\_

- Enclosed is my registration fee of \$60.00 for this training session.
- I will attend the reception at 6:00 p.m. on January 21, 1999
- I will have a guest (s) at \$15.00 each at the reception.
- I will not attend the reception.
- Total amount of check enclosed.
- Make check payable to: AJCFA

Mail the form and check by January 7, 1999 to:  
The Alabama Judicial College  
300 Dexter Avenue  
Montgomery, Alabama 36104

Sponsored by the Alabama Judicial College, the Administrative Office of Courts,  
the Circuit and District Judges Associations and the Alabama State Bar Association.



# O YEA! O YEA!

## An Alabama Lawyer Goes to London

*Allison Alford was one of two recipients of the 1997 Pegasus Trust Scholarship. The Pegasus Trust Scholarship enables American lawyers to study with British Law Lords and Barristers throughout Great Britain. The scholarship is made available to members of the American Inns of Court. Alford is a member of the Hugh Maddox Inn of Court, Montgomery, Alabama.*

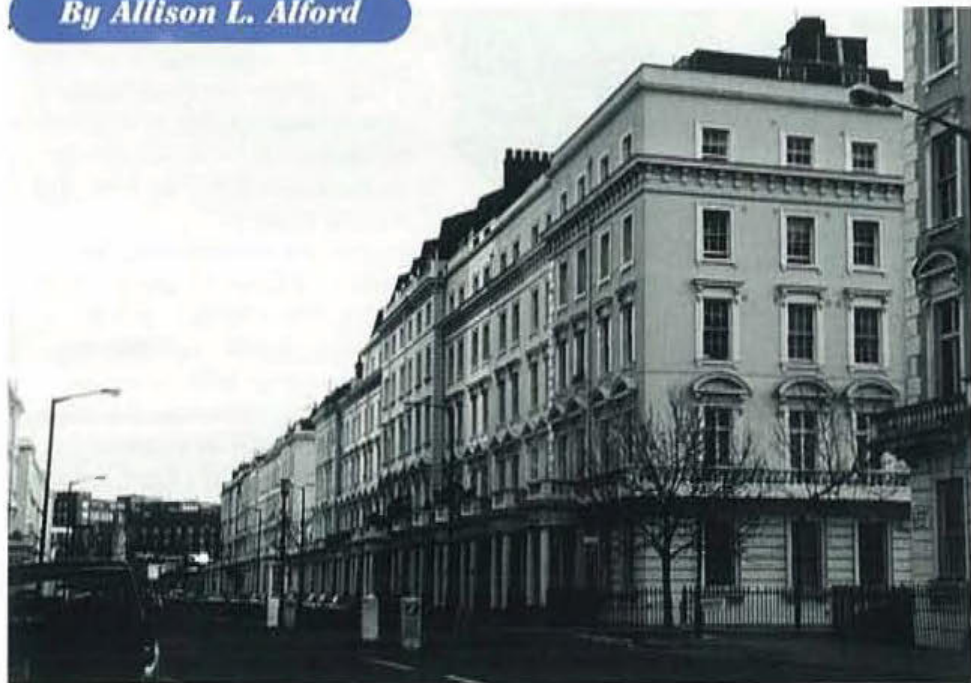
**M**arvelous! Brilliant! Superb! Stupendous! Words simply cannot describe the fabulous experiences I had on my Pegasus Trust Scholarship.<sup>1</sup> In the early morning hours of February 1, 1997, Jan Michelson, my fellow Pegasus Scholar, and I arrived in London's Heathrow Airport, via British Airways. The Honorable Society of the Inner Temple<sup>2</sup> sent a car and we were whisked away from the airport to the city. As the sun was rising, I caught my first

glimpse of London. I will never forget the ride into town. The fog was lifting in the air and smoke was rising from chimneys as Londoners were waking up to begin their day. Everything was unfamiliar – the buildings, homes, cars, and people – and so much was passing before my eyes; I felt as though I had stepped into a page in history. I could not wait to see and experience everything firsthand.

My British hosts arranged a tiny basement flat in the fashionable London neighborhood known as Pimlico prior to our arrival. Although it was quite different from my American home in Montgomery, Alabama, the accommodations were comparable to those young Barristers and Solicitors might hold. Esther Radcliff, a kind representative from the Inner Temple Treasurer's Office, rang shortly after our arrival and offered to bring over a few staple items from the local grocer, as well as some helpful words of advice on transportation, shopping and our first work assignment. After meeting briefly with Esther, both Jan and I decided to sleep off some of the jet lag from our trip and gather our bearings the next day.

The next day, I set off reading every Londoner's necessary city map encompassed in the book called "London A to Z" (pronounced "A to Zed"). After I walked a few blocks, the subway system, known as "the tube" or "the Underground," was located, and I got my first glimpse of the

By Allison L. Alford



My flat in Pimlico



people and personalities of London. I learned very quickly that my Southern ways would require some adaptation if I wanted to experience my time as a Pegasus Scholar in true British style. I was ready to accept the challenge and excitedly prepared for my legal and ambassador experiences.

Since 1993, I have worked as an associate in a 16-attorney litigation firm in Montgomery, Alabama. At the firm, I have had a wide and varied "insurance defense" practice involving personal injury, medical and legal malpractice, employment law, product liability, fraud, and civil rights litigation. As such, I was interested in observing Barristers<sup>3</sup> with general law practices, as well as seeing the English jury system. Because Montgomery has a rich civil rights heritage, I thought it would be wonderful to observe and learn about the development of civil rights in England. In addition, having clerked for United States District Judge Harold Albritton, I was engaged with the idea of serving as a Judge's Marshal.

The English Inns of Court did an excellent job accommodating my requests. I was assigned to the Chambers of some outstanding Barristers and had a delightful week of Marshal service in Bristol, England. In addition, visits to various courts in and around London were arranged, and informative court experiences extended to Belfast, Northern Ireland, and Edinburgh, Scotland.

The English legal system is quite different from that of the American system. One could almost say that it would be hard to imagine that the two legal systems shared a common foundation. English judges at all levels are appointed by a Parliamentary Committee. Since England has no individual geographical areas such as states, there is likewise no federal and state system; rather, there is just one system and body of law, that being English law. Although England does not have a federal and state court system, the courts function in a similar respect to American courts. The Royal Courts of Justice, or High Courts, are located in



*The Royal Courts of Justice*

London, and hear more complex and subject-oriented type matters. For example, a case sounding in admiralty or commercial law would typically be

lower local state courts do, hearing local matters and some High Court matters where the parties have selected a County Court.

On the criminal side, there is an entirely separate court system. Unlike American trial courts, which hear both civil and criminal matters, England, for the most part, separates criminal and civil matters. For example, a criminal case pending in London would be heard by a judge specializing in crime in one of the Crown Courts rather than in a High Court. The Old Bailey is a famous Crown Court handling only serious criminal matters. At the County Court level, however, judges hear both civil and criminal matters.

Both civil and criminal cases are appealed to the Court of Appeals, which is made up of 36 members who sit in three-member panels when hearing appeals. Any appeal taken from the Court of Appeals is taken to the House of Lords. One final level of appeal lies in the Privy Council, which hears appeals from England, Wales, Scotland, Northern Ireland, and all of the British Commonwealth countries.

On the first official day of the scholarship, Pegasus Scholars from the United States, as well as those from the British Commonwealth countries, were treated



*Participating Pegasus Scholars*

heard before a High Court judge in London rather than a county judge in a particular county. There are exceptions, however, and some actions that fall within the jurisdiction of the High Court may be heard by a High Court judge traveling on circuit, or, if the parties agree, a County Court judge. A County Court is located in each English county. They function much as the



to a tour of the House of Lords and the House of Commons. We then watched part of a Scottish appeal being argued before the House of Lords, the British version of the United States Supreme Court. A special luncheon had been arranged for us in a private conference room in the House of Lords, with the Rt. Hon. the Lord Goff of Chievely, the Senior Law Lord and equivalent to the Chief Justice of the United States Supreme Court.<sup>3</sup>

After lunch, we were able to observe an appeal from Hong Kong being argued in the Privy Council. The Privy Council handles the appeals from the House of Lords and all of the British Commonwealth countries. As luck would have it, the Privy Council is located next door to No. 10 Downing Street, the British Prime Minister's residence, and we were able to pop over for a treasured photograph.

During the first month of the scholarship, I was assigned to the Chambers of Brian Doctor of Fountain Court.<sup>4</sup> During my assignment, I actually shared Mr. Doctor's office. He cleared off a spot for me on the end of his desk. I sat through all of his telephone calls and meetings. At first, this practice was very uncomfortable for me, because I was accustomed to a single office and privacy. It was somewhat unnerving to hear Mr. Doctor make calls to his wife and work on his kitchen renovations, in addition to handling legal matters. After a while, however, I grew accustomed to our arrangements and saw it for what it really was—a fabulous opportunity!

The practice of allowing younger Barristers to share office space with senior Barristers is an old one, and I believe it offers many benefits to the young Barrister. Young Barristers observe more experienced Barristers in everyday activities of the practice of law and learn "up close" how phone calls, meetings with Solicitors or clients, trial preparations and virtually every facet of the practice of law are handled. In addition, another person is immediately available with whom to discuss potential ideas. All in all, I believe it promotes the ethics of the profession, as well as provides a great learning tool for everyone involved.



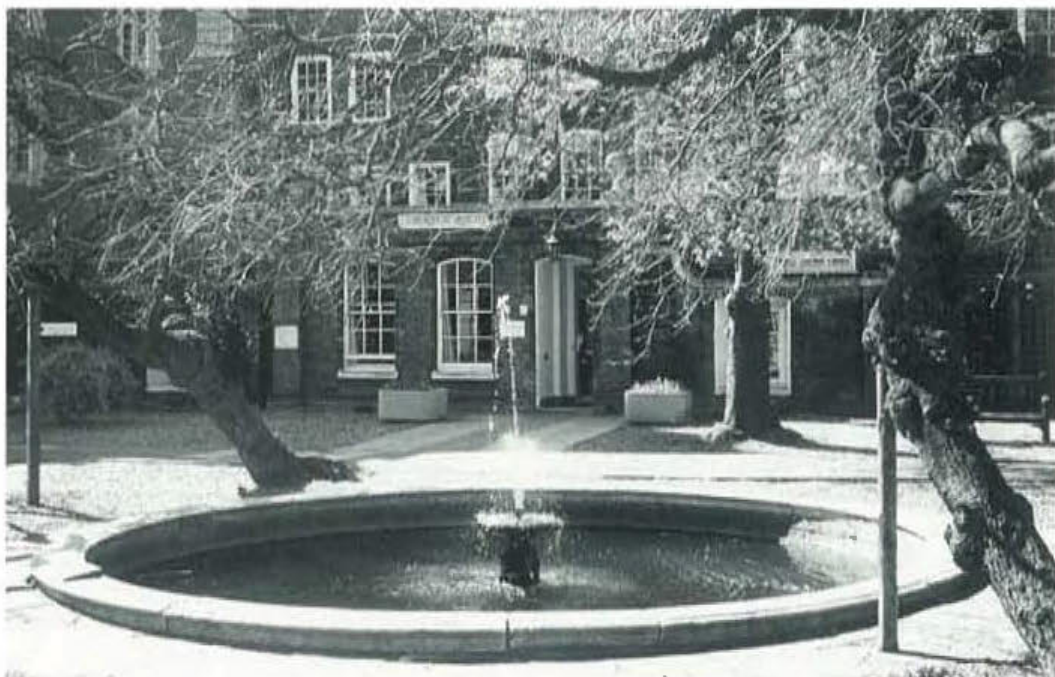
*With Jan at No. 10 Downing Street*

While interning at Fountain Court, I was primarily involved in an extradition matter between South Africa and England. I assisted Mr. Doctor by conducting research on the extradition statutes in various countries around the world. I learned very quickly that few of the statutory systems are as indexed and cross-referenced as those in America. I then conducted research in the American Reporter System and Digests to verify the opponent's authorities and determine if any jurisdiction in America

provided authority to support the position of Mr. Doctor's client. It was quite comforting to find myself in the very familiar American research system.

The extradition matter was being prepared for a trial to commence during the last week of my assignment at Fountain Court. As such, I was able to observe final trial preparations. Since the matter was proceeding without a jury, as almost all civil actions do in England, trial preparations were quite different than those in which I would have engaged. For example, in Alabama, during the weeks leading up to trial, I would have been preparing questions for witnesses, marking exhibits, preparing witnesses, drafting motions in limine, preparing charges for the jury, drafting jury voir dire, and studying juror information. By contrast, Mr. Doctor met with Solicitors who were familiar with the witnesses and prepared the witnesses for trial, reviewed prior witness statements, prepared a skeleton argument (brief for the court) and updated bundles of indexed documents and papers for the court.

I had the privilege of sitting alongside Mr. Doctor during the trial of the extradition matter. I will never forget the feelings I experienced as I walked into a



*Fountain Court*



courtroom in the Royal Courts of Justice. The walls were made of dark wooden panels. An intricate carving of the royal insignia was mounted on the framework of the judge's bench above his head. Shelves and rows of books lined the walls of the courtroom. It looked positively ancient. I could only imagine the countless matters over hundreds of years that had been argued in the room.

As I watched the proceedings, I was struck by the level of professionalism among the Barristers and Solicitors, and the deference to the Court. During the week of trial, I noticed quite a number of differences between the British system and the American system. First, there is the obvious difference in the dress and headdress of the parties involved. Judges are referred to as "My Lord" or "Your Lordship." British Judges and Law Lords are dressed in a shortly cut wig with long curls in the back. Depending upon which division of court in which they sit, they wear a black robe with different types and colors of insignia. Barristers also wear wigs and gowns. The wigs of the Barristers are different from those of the judges in that they have tightly wound curls on the side of the wig.

A Barrister may wear one of two types of robes, depending upon his or her status. The Queen designates a Barrister who has reached the pinnacle of the profession by being awarded the honor of "Queen's Counsel" or "Q.C." Queen's Counsel wear robes made of silk, cut slightly differently from the more ordinary and plain black robes worn by other Barristers. Barristers receiving the "Q.C." designation are often referred to as "silks" because of the silk robes they wear. Solicitors, on the other hand, wear dark suits with plain shirts or blouses and normal headdress.<sup>9</sup>

The judge's entrance into the courtroom is announced by two knocks just before his or her arrival. The judge enters the courtroom and bows to the Barristers, who return a simultaneous

bow. Anyone entering or leaving the courtroom during any proceeding must bow to the judge upon entry and departure. Although the formality of the dress and manner of persons involved in court proceedings is somewhat dry and outdated, it seems to invoke a higher level of professionalism among all who are involved in court proceedings.<sup>6</sup>

*"You do not have to say anything, but it may harm your defense if you do not mention when questioned something upon which you later rely in court, and anything you say may be given in evidence."*

The next most obvious difference lies in the amount of time spent on matters before the Court. Time never appeared to be a concern in the proceedings. The Judges and Law Lords were content to hear all arguments, ask many questions, and make sure that they completely understood the issues before them. For example, the trial that I observed while interning at Fountain Court was originally scheduled to begin on a Monday. The Barristers received word on the prior Thursday that the Judges in charge of the trial had decided to take a "reading day" so that they could familiarize themselves with the facts, submitted testimony, and bundles of documents filed by the parties. As the trial proceeded over the next three days, the parties directed the Court to relevant submitted evidence, discussed legal authorities and spent a substantial amount of time answering questions from the Court. Members of the British legal system at all levels are amazed that the United States Supreme Court, as well as many appellate courts in the federal and state systems, limits the argument of the parties to 30 minutes or less.

At the conclusion of the trial, the Court announced that it would render its decision the next week. Typically, a

decision is handed down shortly after the trial concludes. This is very different from the court practices in Alabama. Unless the trial is by jury, judges typically wait weeks or months before reaching a decision.

One aspect of procedure that amazed and baffled me was the lack of new technology to record testimony. With the exception of one matter that I observed in the Old Bailey, none of the proceedings was taken by a court reporter, and only one other was taken down by tape recorder. The judges maintained trial notebooks in which they took copious notes. This provided for a high level of interest on their part, as well as an intense understanding of matters before them.

During all proceedings, Solicitors, who sit on the row in front of or behind their respective Barristers, take very detailed notes of the proceedings. In the event an appeal is taken, the Solicitors must agree on the testimony presented before the Court to be forwarded to the Appellate Court. It would appear, however, that this methodology would leave open for dispute certain matters of witness testimony. While this may not create problems in England, in America I am afraid it often would be virtually impossible for zealous opposing counsel to agree upon certain important or controversial aspects of a witness's testimony.

My time with Brian Doctor also provided me with the opportunity to see the English legal aid system. Unlike America, all Solicitors and Barristers are paid an hourly rate. If a litigant does not have sufficient funds to pursue litigation, or runs out of funds during the process, he or she can apply to the Legal Aid Board, which in turn makes a decision about whether the litigant's case merits funding. If legal aid is approved, the litigant then selects a Solicitor of choice, and the Solicitor then selects a Barrister. The Solicitors and Barristers are paid their usual rate, rather than a "court-approved" rate, and the litigant has the right to pick representation of his or her



own choosing. If legal aid is denied, then the litigant can appeal this decision.

In Mr. Doctor's case, the litigant had run out of funds during the proceedings. The Legal Aid Board approved funding for the continuation of the trial level proceedings, which the litigant ultimately lost. After losing at the trial level, the litigant applied for funding to appeal the case. The Board denied the litigant's request for appellate funding, and the litigant was appealing this decision. Apparently, the potential success of the merits plays a substantial role in this decision. The Board ultimately denied the litigant's request. Since England employs the "loser pays" rule, a litigant's costs can be quite expensive, including attorneys' fees and costs for both the plaintiff and defendant.

At the end of February, Jan and I prepared to attend a legal retreat sponsored by the Inner Temple. Unfortunately, we got off to a slow start because the London underground transportation system was closed due to a bomb threat. During my three-month stay in London, bomb threats were frequent occurrences. Londoners seem to take these kinds of annoyances and inconveniences in stride and simply adjust by using alternative transportation. After a brief period, I, too, learned to plan for these potential interruptions.

Many Alabama legal seminars are held in fun-filled locales at various beaches or in the mountains. In England, the legal seminar was held at an historic building. We were fortunate enough to join members of the Inner Temple at Cumberland Lodge in Windsor Great Park, not too far from London. Cumberland Lodge is a former royal residence, and special permission must be given to use its facilities. Since Cumberland Lodge is a

somewhat isolated facility, the atmosphere was almost like that of a weekend camp. We ate all of our meals together, attended seminars and group sessions together, and participated in a cabaret and "talent show" production on Saturday evening. Song books were passed out and everyone sang along. It was much fun and provided a great opportunity to get to know the people in attendance.

An invitation to Cumberland Lodge brings with it the opportunity to attend Sunday services next door. The residence next door happens to belong to HRH Queen Elizabeth, the Queen Mother. On her private estate there is a small chapel where the Royal Family regularly attends services. The chapel is small, but beautiful. On the Sunday I attended, approximately 30 to 40 people were in attendance, including HRH Queen Elizabeth

II, HRH Prince Edward and his girlfriend, and HRH Queen Elizabeth, the Queen Mother. It was quite an experience!

During the second month of the Pegasus Trust Scholarship, I was assigned to a set of Barristers' chambers practicing criminal law, located at 5 Paper Buildings. I was assigned to Oliver Sells, Q.C. While interning at 5 Paper Buildings, I was able to observe many criminal courts, both inside and outside of London. The opportunity to spend an entire month in and around the criminal practice allowed me to experience England's jury system to the fullest.

As expected, the criminal practice is quite different from that in America. The Crown Prosecution Service (CPS) is the closest equivalent to the American U. S. Attorney or state district attorney's office. CPS acts as a Solicitor and is

responsible for liaising the various law enforcement agencies, as well as engaging a Barrister to prosecute the case. As with civil cases, criminal barristers practice from both sides of the Bench. For instance, at a morning "bits and pieces" (what we would refer to as a docket call or scheduling conference), I observed a Barrister addressing two cases as a prosecuting attorney and two cases as a defense attorney. This "switch hitting" is quite a novel concept in America, where it is felt that prosecuting attorneys should be totally committed to prosecuting wrongful offenders. It is my belief, however, that the opportunity to both prosecute and defend allows Barristers to engage in a more even-handed approach to the law.

During my internship at 5 Paper Buildings, I was able to observe the selection of several English juries. The 12-person jury is still the fundamental foundation of the jury con-



5 Paper Buildings





*Judges' lodgings in Bristol*

cept. The selection process, however, plays a much less important role in the English system than it does in America. For example, the first jury which I observed being struck was completed in a matter of minutes. The Judge's Clerk had a large list of index cards which contained names of potential jurors. The names of 12 persons were drawn from this potential panel, and the persons were brought into the courtroom and placed in the jury box. At that point, the Clerk called the name of the first potential juror. If the Barristers or defendants had any objection to any of the potential jurors, they must have objected within a few seconds, or else the person was sworn in as a juror in the case. The Clerk would then call the next name on the list. In regard to the potential jurors, no prospective jury lists were circulated in advance of the trial, no juror questionnaires were completed, and certainly no juror consultants were involved in the selection process. As expected, not a single objection was made to a potential juror, and each was

quickly sworn in and seated to become a member of the jury.

There are further differences in the operation of the jury. Although the seated jury begins with a panel of 12, the case can continue so long as ten jurors are present. In addition, after deliberations begin, the judge can make certain decisions with regard to the jury. For example, if the jury has been deliberating for an hour or two and has not reached a verdict, the judge can bring it back in and instruct it that a verdict may be accepted from ten persons. There is no requirement of a "unanimous" decision.

The layout of the courtroom facilities is also different than that of an American courtroom. The defendant is placed in a "dock," which is typically located in the center rear of the courtroom, facing the judge. The dock is usually a box protected from the public by some sort of plastic glass or other type of barrier. The Defense Barrister may be off to the side, or several rows in front of his or her client. In any event, the defendant does not sit next to his

Solicitor or Barrister. This would appear to be a tremendous disadvantage to the representation of the defendant.

As concerns the "rights" of the accused, there is obviously no such thing as a *Miranda v. Arizona* warning. Apparently, England did at one time have a warning similar to that utilized by American law enforcement officers. A need was seen, however, in recent years, to change the format of the warning, and it now is as follows:

"You do not have to say anything, but it may harm your defense if you do not mention when questioned something upon which you later rely in court, and anything you say may be given in evidence."

During the trial, the jury is advised as to whether this warning was given to the potential defendant. Law enforcement officers are able to comment on whether the defendant was silent or provided some relevant information to a potential defense to the crime. The Judge may also comment to the jurors



on the inferences they may draw if the defendant chose to be silent when questioned or when testifying in court.

One final notable difference lies in the Trial Judge's role in jury matters. In England, the Judge is free to sum up the testimony of the trial. As indicated above, he or she is responsible for taking copious notes during the trial of matters which he or she perceives to be relevant to a determination in the matter. As a result, the Trial Judge is free, at the end of the trial, to draw attention to or place emphasis on certain evidence for the jury. Obviously, this right can play a very powerful role in the outcome of a case.



No. 14 Took's Court

During March, I was also able to observe proceedings in the Scottish court system. Although Scotland is under the authority of Great Britain, it has maintained its own lower level legal system and terminology. For example, there are no lawyers, attorneys or Barristers. A member of the legal profession is an Advocate who is a member of the Faculty of Advocates, rather than a bar association, or an Inn of Court. It appears that Scottish Advocates refer to themselves as a Faculty because of the collegiate atmosphere in which they work. Indeed, they keep "office" in the library, which is

housed as a part of the Scottish court system. In the library, Advocates find a spot at a library table where they can spread out papers or do research.

In the corridors surrounding the library, all of the Advocates, for there are only about 350 in all of Scotland, have a large wooden box in which they receive papers from Solicitors or their clients. Since they do not have offices, Advocates wear beepers or pagers, and if a Solicitor, clerk or other person calls the library, a page is placed, and they walk to one of the few public phones in the library. If they have a large case, the Advocate may take papers home to work, but by and large, they work out of their box or at their spot at the library table.

The Scottish Advocates wear English-style dress, including a robe and wig. Their necktie style of dress is a bit different. For younger Advocates, it is a white bow-tie, and for silks, it is a longer style necktie. The Advocates Hall and Courtroom are what used to be Scottish Parliament buildings. They have about four trial level courts and three to four rooms to hear cases before the Court of Appeal. About 20 judges fill the various courtroom facilities. As in the English system, Appellate judges sit in three or four judge panels. For criminal cases, the Court of Appeal is the final level of appeal. In civil cases, however, there is the ability to go to the House of Lords in London.

Included in the Scottish Court System is the old Parliament Hall, which is now an empty, wide-open building. Groups of Barristers and Solicitors, or groups of Barristers and clerks, pace up and down the long hall by tradition. As they pace down one end of the long hall, they discuss or work out legal issues. When they reach the end, they simply turn and begin walking back the other way. As I walked into this room, I saw large numbers of people simply pacing back and forth. It seems to be a quite effective way to discuss a case because no one can overhear a conversation, as people are pacing back and forth.

Typically, approximately 15 young Advocates join the Faculty every year. We were presented with a unique opportunity during our visit, in that one

Advocate was joining on the day that we were present. The Advocate and family members are invited to a small service in a room near the Courtrooms. A number of Advocates were present for the ceremony which consisted of a reading about the individual being presented for admission. At the conclusion of the presentation, Advocates were given the opportunity to make any objection to the new Advocate's admission. After the question is put and time has passed, Advocates stomp the floor as a sign of approval. At that time, the Master of Ceremonies leads the procession of individuals present at the admission ceremony into the middle of an ongoing court proceeding. The Master of Ceremonies and Advocate then bang into the courtroom, pass the bar, and present themselves to the Judge. The Master asks the Judge to recognize the new Advocate. The Judge swears in the new Advocate during the middle of the



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trial proceeding and the Advocate then dons his or her robe and wig. The Judge typically is aware in advance that this will happen and is prepared to make a few comments about the Advocate. At the conclusion of the Judge's comments, the admission proceeding leaves the courtroom, and the Judge resumes with his prior trial proceedings.

During April, the third and final month of my visit, I interned with a set of Barristers practicing civil rights work at No. 14 Took's Court. The specialization in the area of civil rights or human rights is a very new thing in England. I attended hearings and trials concerning family court matters, as well as matters involving the preservation of basic human rights in criminal cases. During a family court trial, the mother decided not to take the stand or call any witnesses. The Judge decided he wanted to hear from the mother and thus called and questioned her himself.

I was also able to observe quite a number of extradition matters in which return to a requesting country was denied on human rights grounds because there was concern about fair treatment by the requesting country's legal system, or about their methods of punishment. The typical route for an appeal in a human rights case would follow a normal route from the High Court, to the Court of Appeals to the House of



*Luncheon with Mr. Justice Neal Butterfield and His Honour John McNaught in Swindon*

Lords. At that point, however, there is the possibility of a further appeal to the European Court of Human Rights. Most of the European nations are members, and they provide representatives who sit on the Court. The Court of Human Rights is located in Brussels, Belgium. Unfortunately, I did not have an opportunity to see the enforcement of law at this level on a firsthand basis.

During the month of April, arrangements were made for us to attend court proceedings in Belfast, Northern Ireland. Upon our arrival into Belfast, our taxi driver offered us an unofficial tour of the city. Since it did not appear

that Belfast had an official "tourism bureau," we decided to take our taxi driver up on his offer. He took us around the Falls Church Road area where a lot of the Protestant-Catholic fighting has occurred. There were barricade walls in place with barbed wire at the top. Armed officers in camouflage uniforms were placed in various locations throughout the area. The police stations were completely barricaded with bomb-proof walls, barbed wire and surveillance cameras. It was quite a change from the places I had seen in my sheltered American life.

Arrangements had been made for us to observe ongoing court proceedings. We were able to observe jury selection for a case about to begin trial in the Crown Court. Jury selection in Northern Ireland is slightly different than that in England. The Clerk draws the names of 20 people who are placed in the jury box. Each side has the right to strike 12 jurors without cause. At that point, the parties are given the opportunity to strike 12 more persons for cause. Once 12 jurors are settled into the box, the Clerk confirms their names and advises that the first one named in the box is the foreperson of the jury.

During our brief visit, we also had the opportunity to observe a portion of a murder trial involving an Irish Republican Army member. Since the trial involved a member of the IRA, no jury was present, and witnesses were



*Sightseeing at Leeds Castle*



protected from sight by the use of curtains surrounding the jury box where the witness provided testimony. Obviously, there is no right of confrontation of witnesses in terrorist cases. The absence of a jury in a case such as this and the protection of the witness is referred to as the Diplock System, after Lord Diplock, who fathered the practice. Apparently, at some point, it became too hazardous for the Northern Irish to function in the Court System either as a witness or a juror. As a result, this system was created so that decisions are made by the judge rather than a jury and witnesses are provided with as much protection as possible.

The final week of the Scholarship was spent "marshaling" for a High Court Judge on Circuit. Typically, High Court Judges are located in London and will hear matters in their jurisdiction out on Circuit, much the way our federal court judges do within their district. I was assigned to spend a week with The Honorable Mr. Justice Neal Butterfield, who specializes in criminal law. My time on Circuit was in the beautiful city of Bristol, England.

Judges in England do not have law clerks to assist them as American federal court judges and many state court judges do. They are, however, provided with a "Clerk" who handles all scheduling, reviews papers, and serves many of the functions of a law clerk, with the exception of assistance in research, and the drafting of decisions and/or opinions. Mr. Justice Butterfield's Clerk, Norman Davies, was a most informative asset and a delightful individual.

The position of Marshal is quite a historical one. It originated when Marshals were essentially responsible for the protection of the Judge as he traveled from Circuit to Circuit. These days, however, the High Court Judges are occasionally allowed the privilege of having a

Marshal assist them with minor matters. Judge Butterfield and Mr. Davies decided to put me to the test. I opened Court with the traditional, "O Yea, O Yea" entrance, swore in witnesses with my Southern Alabama accent, and said "grace" at dinner parties during which we entertained local Barristers and dignitaries. The expressions on the faces of some of the witnesses whom I swore in were quite a treat. They certainly did not expect to be asked to repeat the oath for the English court system from a young, female American attorney.

A three-story home referred to as "Judge's lodgings" was my home for the week. Homes like this are provided for High Court Judges throughout all of England. Mr. and Mrs. Tommy, who were in charge of the household and staff, were present and waiting to assist with any needs or requests. We were treated to a semi-formal breakfast and usually had dinner parties for local counsel and dignitaries during the evening. Our transportation to and from court consisted of a chauffeur-driven Daimler or Jaguar.

On the last day of my marshalling experience, we traveled to the city of Swindon where Judge Butterfield handled some pending matters and met with local judges and barristers. A special luncheon had been arranged for us with His Honour Judge John McNaught and other judicial officers. It was amazing to compare and contrast the way Judge McNaught and the other judicial officers in Swindon handled cases with the way cases are handled in Alabama.

Although the majority of my time was spent working with the Barristers, Solicitors and Judges to whom I was assigned, I was able, due to my proximity to London's West End, to see many wonderful plays and musicals. Also, I was able to spend quite a bit of time sightseeing in London, visiting such places as the British Museum, the National Gallery, the Tower of London, Westminster Abbey, St. Paul's Cathedral, and other wonderful and historical sites. Trips were extended to Bath, Oxford, Cambridge, Stratford, Stonehenge, and many other lovely cities in England.



Visit with the Rt. Hon. The Lord Goff of Chievly at the AIC National Conference in Princeton

My experience on the Pegasus Scholarship exceeded every expectation possible. All of the people with whom I had contact were generous both with their time and energy. As I described my experiences to young local Barristers, they were constantly amazed at the wealth of opportunities that had been



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#### Allison L. Alford

Allison L. Alford is a graduate of the University of Alabama and the University's School of Law. She served as law clerk to the Hon. W. Harold Albritton, III, United States District Judge, Middle District of Alabama. She is an associate with the Montgomery firm of Ball, Ball, Matthews & Novak.



provided to me. The Pegasus Scholarship afforded me every possible occasion to see England and the British legal system that I could have imagined. It was truly a life-changing experience. ■

### Endnotes

1. Awarded annually, the Pegasus Trust Scholarship provides two American lawyers with the opportunity to study with English Barristers in London. Visits to courts in England, Scotland and Northern Ireland are also arranged at various intervals during the three-month scholarship.
2. The Inner Temple, Middle Temple, Lincoln's Inn and Gray's Inn represent the four English Inns of Court which serve as bar association-type organizations for English Barristers. In order to be a practicing Barrister, one must be called to the Bar by one of the Inns. The Inns recruit or "rush" young bar students to join their respective Inn. Each Inn is self-sustaining and seems to be fashioned after a university concept. Barristers' offices are located in buildings which are several stories high. At one time, Barristers worked on the ground floors and lived above their offices. As the number of Barristers has increased, so has the need for office space, and very few individuals use the space for a residence. In addition to the office space, each Inn has a library, a dining hall and a church.
3. Barristers are the individuals responsible for arguing matters before the courts. They receive cases from Solicitors, who are employed by clients, meet with clients, and handle pre-trial matters. Solicitors retain the services of Barristers because Barristers may not accept cases directly from the public.
4. It was quite a privilege to meet Lord Goff on the first day of the Pegasus Scholarship. In addition to his preeminent role in the British legal system, Lord Goff has played a tremendous role in the development of the Pegasus Scholarship Trust.
5. In England, Barristers are prohibited from forming partnerships or corporations as attorneys do in the United States. Instead, they share office space, receptionists, a library, and an administrative staff of clerks (pronounced "clarks"), who manage the assignment of cases from Solicitors. Instead of the group of Barristers being known by the names of the partners, they indicate the address of the set of chambers in which they are practicing, as well as the most senior Barrister in the set.
6. Historically, Solicitors have not been granted the "right of audience" before the courts. This meant that only Barristers were permitted to argue matters before the various courts. This designation has been waning somewhat in recent years. Solicitors who pass the necessary measures to gain the privilege of arguing before the court are permitted to wear a robe, but not a wig. During my time in England, the annual list of persons receiving the "Queen's Counsel" designation was handed down by Queen Elizabeth II. Among those persons on the list were the first Solicitors to ever receive such a designation.
7. During recent years, there has been a debate among the profession as to whether the historical tradition of wearing wigs and gowns should be discontinued. There appears to be a strong split among Barristers as to whether their tradition should continue. For the time being, wigs and gowns are still the dress of the day.

## CLE Opportunities

The Alabama Mandatory CLE Commission continually evaluates and approves in-state, as well as nationwide, programs which are maintained in a computer database. All are identified by sponsor, location, date and specialty area. For a complete listing of current CLE opportunities or a calendar, contact the MCLE Commission office at (334) 269-1515, extension 156 or 158, or you may view a complete listing of current programs at the state bar's Web site, [www.alabar.org](http://www.alabar.org).

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## DISCIPLINARY NOTICE

### Notice

Notice is hereby given to **Charles Timothy Koch** of Mobile, Alabama that he must respond to the charges in disciplinary file ASB No. 98-141(A) within 30 days from the date of this publication, November 15, 1998. Failure to respond shall result in further action by the Office of General Counsel. [ASB No. 98-141(A)]

### Disability

- Birmingham attorney **Wesley Thomas Neill** was transferred to disability inactive status, pursuant to Rule 27(c), Alabama Rules of Disciplinary Procedure, by order of Panel IV of the Disciplinary Board of the Alabama State Bar effective August 20, 1998. [Rule 27; Pet. No. 97-09]

### Reinstatement

- On August 4, 1998, Eutaw lawyer **William Sidney Underwood** was reinstated on the roll of the Alabama Supreme Court as an attorney authorized to practice law in the courts of Alabama. [Pet. No. 97-001]

### Disbarments

- Huntsville attorney **Walter Jasper Price, Jr.** consented to disbarment based upon his felony conviction for bank fraud. By order of the Supreme Court of Alabama, Price's name was stricken from the roll of attorneys licensed to practice law, effective April 25, 1996, consistent with the surrender-of-license date. [Rule 23(a); Pet. No. 97-05]
- Pelham lawyer **William Felix Mathews** was disbarred from the practice of law in the State of Alabama by order of the Supreme Court of Alabama, effective May 8, 1998. Mathews' disbarment was based upon findings by the Disciplinary Board of the Alabama State Bar that he violated the following Rules of Professional Conduct: 1.3 [Diligence], 1.4(a) [Communication], 1.16(d) [Declining or Terminating Representation], 8.1(b) [Bar Admissions and Disciplinary Matters] and 8.4 (a) (c) & (g) [Misconduct]. [ASB Nos. 96-368, 97-115 & 97-193]

### Suspensions

- Birmingham attorney **Carol Ann Rasmussen** was intermily suspended from the practice of law by order of the Disciplinary Commission effective September 15, 1998. [Pet. No. 98-08]

- On April 17, 1998, Birmingham lawyer **Rhonda Nunn** was suspended by the Alabama Supreme Court for a period of 120 days. This suspension is effective on May 15, 1998, and is the result of disciplinary proceedings held before the Disciplinary Board of the Alabama State Bar. [ASB No. 95-116]
- Montgomery attorney **Robert Mitchell Alton, Jr.** was intermily suspended from the practice of law by order of the Disciplinary Commission effective February 13, 1998. [Pet. No. 98-01]

### Public Reprimands

- Birmingham attorney **Joe Wilson Morgan, Jr.** received a public reprimand without general publication pursuant to an order of the disciplinary board of the Alabama State Bar. In 1995, Morgan was employed to handle a criminal appeal. Morgan was paid a total of \$2,500 for his services. After being so employed Morgan failed or refused to file the appeal or to take any other legal action on behalf of his client. Another attorney was appointed by the trial court to handle the appeal and the attorney did so. In 1996, Morgan refunded the client \$2,000 of the \$2,500 fee paid to him, but the remaining amount was not refunded until formal charges were filed against him by the Office of General Counsel. [ASB. No. 96-200(A)]
- On September 18, 1998, Mobile attorney **John William Parker** received a public reprimand without general publication in three separate cases. The reprimand was a result of Parker's having entered a conditional guilty plea in each of the following matters:
  - In ASB No. 97-168, the Disciplinary Commission found that Parker failed to provide competent representation to a client and that he failed to reasonably communicate with his client during the course of the representation. This finding was based upon Parker's failure to engage in any meaningful discovery, his failure to offer legally sufficient expert testimony in response to the defendant's motion for summary judgment and his failure to advise the client of the court's adverse ruling, thus denying the client her right to appeal. The Commission considered Parker's agreement to make restitution to this client in excess of \$8,000.
  - In ASB No. 97-125, the Disciplinary Commission found that Parker willfully neglected a legal matter, failed to reasonably communicate with the clients during the course of the representation and charged a clearly excessive fee. This finding was based upon Parker's repeated advice to his clients of the certainty of their legal position when, in fact, their legal position was not as certain as he represented, and his unnecessary delay of the resolution of the matter, while





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at the same time billing the clients for additional attorney's fees which he could not document. It is noted that the Disciplinary Commission considered that Parker agreed to make restitution to these clients in excess of \$12,000.

In ASB No 96-184, the Disciplinary Commission found that Parker had willfully neglected legal matters entrusted to him, failed to reasonably communicate with clients and charged clearly excessive fees. In this matter, a grievance was filed against Parker by two former employees which contained a "laundry list" of allegations of misconduct with reference to specific clients' cases. A review of the files submitted by Parker at the request of the Office of General Counsel revealed that he failed to account for time spent and fees charged in each case, that he failed to reduce contingency-fee agreements to writing, that he amended contingency fee agreements during the course of his representation, and that he failed to communicate with clients regarding the status of their cases, scheduling appointments or court appearances.

In ASB No. 97-246, the Disciplinary Commission found Parker guilty of violating Rule 1.15 because of his failure to maintain a trust account as required by that rule. Parker admitted that, for a significant period of time, he operated with one account and commingled both attorney and client funds in that account. As discipline in this matter Parker was ordered to be suspended from the practice of law for a period of 91 days, the imposition of that suspension was suspended and Parker was placed on probation for a period of two years. As a condition of probation, Parker agreed to maintain \$25,000 on deposit in trust in the event of future client claims and to abide by other conditions of probation as ordered. [ASB Nos. 96-184, 97-125, 97-168 & 97-246] ■

## IMPORTANT!

### Licenses/Special Membership Dues for 1998-99

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

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

If you are actively practicing or anticipate practicing law in Alabama between October 1, 1998 and September 30, 1999, please be sure that you purchase an occupational license. Licenses are \$250 for the 1998-99 bar year and payment should have been RECEIVED between October 1 and October 31 in order to avoid an automatic 15 percent penalty (\$37.50). Second notices will NOT be sent!

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

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## RECENT DECISIONS

By William M. Bowen, Jr., Rachel Sanders-Cochran and Wilbur G. Silberman

### Recent Decisions— Civil

#### **Alabama Supreme Court enforces parties' agreement to arbitrate although court finds remainder of contract non-binding; court finds doctrines of unconscionability and mutuality of remedy inapplicable to arbitration agreements**

*Ex parte McNaughton* (*McNaughton v. United Healthcare Services, Inc.*) \_\_\_ So. 2d \_\_\_, Ms. 1961708 (Ala., August 28, 1998). Plaintiff, upon accepting at-will employment with defendant, acknowledged receipt of an employee handbook. The handbook expressly stated that it was non-binding, *other than as to the arbitration provision contained therein*. Although the arbitration provision required the plaintiff to submit all employment-related claims against the employer to arbitration, the employer retained the right to pursue judicial remedies against the plaintiff. Moreover, the handbook reserved to the employer the right to "alter, amend, modify, or revoke this [arbitration] poli-

cy at its sole and absolute discretion at any time with or without notice." When an employment-related dispute arose between the plaintiff and the employer, the trial court compelled plaintiff's claim to arbitration. Plaintiff petitioned for a writ of mandamus directing the circuit court to vacate its order compelling arbitration of her claims. In support of her mandamus petition, plaintiff argued that the employee handbook, including the arbitration agreement, was non-binding and, therefore, unenforceable. Alternatively, plaintiff argued that the arbitration clause was void under the doctrines of unconscionability/lack of mutuality of remedy.

The court rejected plaintiff's first argument, noting that under general contract principles, parties may agree to be bound by certain clauses contained in a standard contract while refusing to be bound by other clauses contained in that same contract. The court found that the plaintiff and employer in this case had agreed to be bound by the arbitration agreement while expressly agreeing that they would not be bound by any of the remaining terms contained in that employee handbook. Further, the court found that the employer's provision of at-will court held that the plaintiff's agreement to arbitrate was binding. To hold otherwise, the court concluded, would violate the mandate of *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), in which the United States Supreme Court held that, "Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'"

The court also rejected plaintiff's claim that the arbitration agreement was void under the doctrines of uncon-

scionability/mutuality of remedy. In arguing that the arbitration agreement was unconscionable and lacked mutuality of remedy, plaintiff relied heavily upon the case of *Northcom, Ltd. v. James*, 694 So. 2d 1329 (Ala. 1997), in which two justices of the court had previously stated, *in dictum*:

[I]n a case involving a contract of adhesion, if it is not shown that the party in an inferior bargaining position had a meaningful choice of agreeing to arbitration or not, and if the superior party has reserved to itself the choice of arbitration or litigation, a court may deny the superior party's motion to compel arbitration based on the doctrines of mutuality of remedy and unconscionability.

*Northcom*, 694 So. 2d at 1338. A five-to-four majority of the court rejected the dictum of *Northcom*, stating that "[a]rbitration is not inherently unconscionable." Moreover, because arbitration is not a remedy, but a choice as to the forum in which remedies may be sought, the court found the mutuality of remedy doctrine inapplicable to agreements to arbitrate.

#### **Alabama Supreme Court addresses circumstances under which nonsignatory may compel arbitration and propriety of class-wide arbitration proceedings**

*Med Center Cars, Inc., d/b/a Med Center Mazda v. Smith et al.*, \_\_\_ So. 2d \_\_\_, Ms. 1960214 (Ala., September 4, 1998). In this group of consolidated cases involving claims of conspiracy to violate the Alabama Mini-Code against automobile dealers and financing companies arising from the plaintiffs' purchase of new vehicles, the Alabama



**Rachel Sanders-Cochran**

Rachel Sanders-Cochran attended Cumberland Law School, where she graduated *cum laude* and was a member of the Cumberland Law Review and Curia Honoris. She practices with the Montgomery firm of Rushton, Stakely,

Johnston & Garrett, P.A. She covers the civil decisions.



Supreme Court addressed the circumstances under which a non-signatory may compel arbitration and whether, in a class action, a trial court may properly certify an arbitration sub-class.

In affirming the trial court's refusal to allow the non-signatories to compel arbitration, the court noted that the arbitration agreements named only the plaintiffs and the signatory dealers; the agreements to arbitrate did not specifically reference third parties nor did they contain general language that could be construed to reach the claims asserted against non-signatories. Moreover, the court refused to allow the non-signatories to compel arbitration on the basis of plaintiffs' conspiracy allegations. The Alabama Supreme Court held that, based on the language of plaintiffs' complaints, it was unclear whether the claims asserted against the non-signatories were "intertwined" with those claims asserted against the signatories as required for application of equitable estoppel. The court found it significant that the plaintiffs' claims of conspiracy specifically alleged that *any combination of defendants* conspired to violate Alabama's Mini-Code, an allegation that could be found to include only signatories or only non-signatories. Under either of those scenarios, the court noted, the claims asserted against the non-signatories would not be intertwined with those asserted against the signatories. However, the court recognized that, if the evidence supported the proposition that signatories and non-signatories had conspired together, the trial court could then properly compel the plaintiffs to arbitrate their claims against the non-signatories.

Additionally, a significant number of the proposed plaintiff class had signed pre-dispute arbitration agreements with the defendants. The defendants opposed class certification on the ground that the existence of these arbitration agreements precluded class treatment, unless the language in their arbitration agreements specifically provided for class-wide arbitration. Over the defendants' objections, the trial court certified three subclasses, one including all plaintiffs who signed arbitration agreements.

The Alabama Supreme Court acknowledged that class-wide arbitration offered certain benefits, such as efficient resolution of common claims

and judicial economy. However, the court reasoned, allowing class-wide arbitration proceedings, absent an express provision in the arbitration agreement itself, would alter the agreement of the parties and contravene the requirement of section 4 of the Federal Arbitration Act to "rigorously enforce arbitration agreements." Thus, the court reversed the trial court's certification of an arbitration subclass. In so holding, the Alabama Supreme Court adopted the rationale of the Second, Fifth, Sixth, Eighth, Ninth, and Eleventh circuits.

**Overruling prior cases, Alabama Supreme Court holds that, for purposes of suppression claim, existence of duty to disclose is always question of law for trial court**

*State Farm Fire & Cas. Co. v. Owen*, \_\_\_ So. 2d \_\_\_, Ms. 1961950 (Ala., August 21, 1998). Plaintiff insured a diamond engagement ring under a State Farm personal articles policy. She alleged that State Farm's agent told her she needed to have the ring appraised "to see how much insurance she needed." The ring appraised for \$1,000 and State Farm issued a "replacement cost" policy. The ring was later stolen and plaintiff filed a claim under the policy, seeking to recover the value of the ring. State Farm paid plaintiff \$898.70, the amount it would have cost State Farm to replace the ring through its discount vendors, as expressly authorized under the terms of the policy. Plaintiff sued State Farm and its agent, alleging they misled her into believing that her policy would pay the appraised value of the ring in the event of a loss, and that they failed to inform her that appraisal values are often inflated, and that State Farm would never pay plaintiff more than its discounted replacement cost, even though her premium was based on an inflated appraisal value. The trial judge granted a directed verdict on plaintiff's misrepresentation claims but submitted to the jury the question of whether State Farm had a duty to disclose and whether it had breached that duty. The jury returned a verdict for plaintiff, awarding \$1,339 in compensatory damages and \$1,300,000 in punitive damages.

On appeal, the Alabama Supreme Court reversed the judgment in favor of plaintiff and rendered a judgment for State Farm. Noting the prior conflict in Alabama's law on this issue, the court overruled the line of cases that give to the jury the responsibility of determining whether the defendant had a duty to disclose. The court analyzed the various functions of the trial judge and jury and held that, for purposes of a suppression claim, the question of whether a duty to disclose exists is *always* a question for the trial court. The court also offered suggested revisions to Alabama Pattern Jury Instruction 18.08, to further clarify the respective roles of the trial judge and the jury.

## Recent Decisions—Criminal

*I am privileged and honored to have been asked to participate in the preparation of summaries of recent criminal cases for The Alabama Lawyer. My objective is to present as many important cases as possible within the limited space requirements of this publication. While this format differs from that presented by David B. Byrne, Jr., I will endeavor to maintain the scholarship and excellence David has established.*

Without question, the criminal law case which has created the most controversy most recently is *United States v. Singleton*, (No. 97-3178, July 1, 1998, 10th Circuit). There, a three-judge panel held that the federal bribery statute is



**William M. Bowen, Jr.**

William M. Bowen, Jr. is a *cum laude* graduate of Samford University and received his J.D. degree from Cumberland School of Law. He served as an assistant attorney general from 1973-76 and was elected to the Alabama Court of Criminal Appeals in January 1977 (at age

29, was the youngest appellate judge in the nation). After serving three full terms, Bowen retired in January 1995. He practices with the Birmingham firm of White, Dunn & Booker. Bowen has received numerous awards and has served as a frequent lecturer and instructor. He covers the criminal decisions.



applicable to the government and includes plea agreements between a defendant and a prosecutor: "We conclude that [18 U.S.C.] § 201(c)(2) applies to federal prosecutors who make promises [of leniency] for or because of testimony on behalf of the government." That decision was vacated and rehearing *en banc* was granted on July 10, 1998, with oral argument set for November. Be aware that one federal district judge for the Southern District of Florida reached the same conclusion in *United States v. Lowery*, (No. 97-368-CR-ZLOCH, August 4, 1998), while another federal district judge in the same district found that such an interpretation works an "obvious absurdity." *United States v. Guillaume*, (No. 97-6007-CR, August 3, 1998).

*Ex parte Donald Ray Frazier*, No. 1962041 (Ala., July 24, 1998), Justice Almon. Frazier was convicted of robbery. Recounting the dangers inherent in a one-man show-up, the supreme court reversed his conviction because of an improper pretrial identification procedure which occurred at the sheriff's

department between three and four and one-hour hours after the crime. The court found that there were no exigent circumstances to justify the one-man identification, that Frazier was not apprehended in direct flight from the community of the crime, that the identification was not made at the scene of the crime, that the witness's life was not in such peril as would have required her to make an identification immediately, and that no reason was given for not having a photographic array or a true lineup. In finding that the show-up presented a very substantial likelihood of irreparable misidentification, the court noted that the witness did not pay full attention to the robber and her opportunity to observe was fleeting, there was little evidence of how the witness described the robber before the show-up and her description before the show-up was scant, the witness's identification was not corroborated by other witnesses or information contained in the report of the investigating officer, and while the witness was positive in her identifi-

cation she could not state a particular reason for her certainty.

*Ex parte Alonzo Lydell Burgess*, No. 1970146 (Ala., August 28, 1998), Justice Almon. This is a capital case in which the court noted that the fact that the trial court followed the pattern jury instruction in charging the jury does not necessarily foreclose error.

The court also held that the fact that the defendant was on probation under a suspended sentence for violating a municipal ordinance could be an aggravating circumstance. The court held that this circumstance was not given undue weight in imposing the death sentence in this case. The court also held that in capital cases in which an aggravating circumstance is found to exist, on the basis of the defendant's having been under a sentence of imprisonment for violating a municipal ordinance that involved the commission of a relatively minor crime, aggravating circumstance should generally be given little weight. However, it might be afforded greater weight depending on

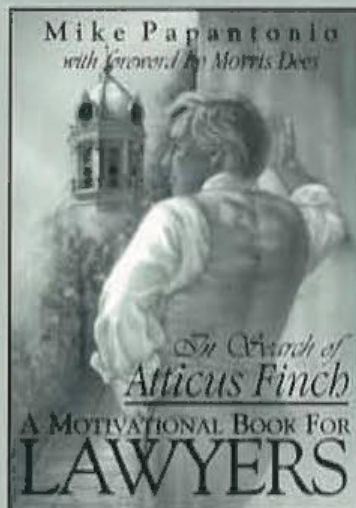
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the circumstances especially where the defendant was under a sentence of imprisonment for already having committed a crime against a person whom he later murdered.

*Ex parte Christopher Lee Price*, No. 1970372 (Ala., September 4, 1998), Justice Maddox. The court held, based upon the evidence and testimony presented at both the suppression hearing and at trial, that the trial court properly overruled the motion to suppress the defendant's second statement over the objection that the prosecution did not prove that the defendant was given all of his *Miranda* rights. The supreme court held that a court cannot presume that a suspect was advised of all of his *Miranda* rights based solely on testimony that the suspect was "Mirandized" from a form. The concept of "Mirandized-by-T.V." and the fact that knowledge concerning the rights established in *Miranda* has become widespread do not "necessarily establish that a court may conclude that law enforcement authorities properly advised a suspect of his rights simply because an officer testifies that the suspect was advised of his 'Miranda rights' from a form." . . . In the absence of any evidence indicating the contents of the form that was read to Price or explaining Sheriff Turner's understanding of what rights must be explained to a suspect, we are forced to conclude that there was no evidence from which the court could have properly concluded that Price was advised of each of the rights established in *Miranda* before he provided his statement to Sheriff Turner. . . . A court cannot fill in an evidentiary gap with suspicion or a presumption concerning a witness's knowledge."

*Kenneth Glen Thomas v. State*, No. CR 93-0823 (Ala.Crim.App., September 4, 1998), Judge Patterson. For all you ever wanted to know about ineffective assistance of counsel in a death case, read this 230-page opinion.

*Ex parte Michael Jeffrey Land*, No. CR 97-1473 (Ala.Crim.App., July 2, 1998), Presiding Judge Long. In this post-conviction capital case, the court held that discovery in a post-conviction proceeding should be allowed only when "good cause" has been shown, and that the extent of that discovery is in the discretion of the trial court. The

application of Rule 16, Alabama Rules of Criminal Procedure to a post-conviction proceeding is "severely limited."

*Ex parte James C. Hutto*, No. CR 97-1717 (Ala.Crim.App., July 16, 1998) Presiding Judge Long. The defendant was arrested on a charge of criminal trespass. After giving a statement he was subsequently charged with sexual abuse in the first degree and was arrested on a warrant while still incarcerated on the trespass charge. Because the defendant was not brought before a judge or magistrate on the abuse charge until 12 days after his arrest, his bail must be set in the minimum recommended amount set out in Rule 7.2, A.R.Cr.P. in accordance with Rule 4.3(b)(3), A.R.Cr.P. even when the trial judge finds that the recommended amount is too low.

*State v. Jeff Allen Seneca*, No. CR 96-1286 (Ala.Crim.App., August 14, 1998) Judge Brown. Although the trial court found that the investigators had promised the defendant that in exchange for his cooperation in locating the missing marijuana, he would not be prosecuted for trafficking in cocaine, that finding did not warrant a dismissal of the indictment for trafficking in cocaine. The most the defendant would be entitled to is the suppression of any incriminating evidence as to the cocaine trafficking charge that the State acquired as a result of promising the defendant that he would not be prosecuted on that charge if he assisted in locating the missing marijuana.

*Robert Battles v. City of Mobile*, No. CR 97-0466 (Ala.Crim.App., August 14, 1998) Judge McMillan. Over the objections that the ordinance was unconstitutionally vague and overly broad, the court upheld the constitutionality of a municipal ordinance for failing to obey a police officer despite the facts that the ordinance was not limited to "lawful" orders and was not limited to orders regarding "traffic control."

*Howard Thomas Goodwin, Jr. v. State*, No. CR 96-0574 (Ala.Crim.App., August 14, 1998) Judge Brown. The implied consent statute is not unconstitutionally vague. Even though sections 32-5-192 and 32-5A-194 require one to submit to a chemical test if lawfully arrested for driving under the influence, they provide no time frame as to when

the test must be administered. However, common sense dictates that the test would necessarily have to be given as soon as practical after the arrest. Any intervening time between the time of the stop and the time of the test does not affect admissibility of the results but rather goes to the weight to be accorded that evidence.

## Recent Decisions— Bankruptcy

### Judge Benjamin Cohen reviews law on compromise settlement approval

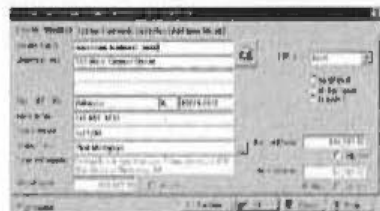
*In re Golden Mane Acquisitions*, 221 B.R. 463 (Bkcty N.D. Ala. Dec. 19, 1997). On October 25, 1996, Glen Mazer recorded a \$250,000 judgment against the debtor, thus causing a lien to attach against the debtor's office building. Debtor filed a chapter 11 case on December 4, 1996, well within the 90-day preference period. In its plan,

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debtor classified the judgment as unsecured on the theory of avoidance under section 547. Mazer objected to the plan claiming no preference because of solvency of the debtor at the time of recording of the judgment lien. A compromise settlement was worked out between the debtor and judgment creditor. Various objections were filed to the settlement, and objections were also made to Mazer's claim. No adversary proceeding was filed to test the alleged preference, but the debtor and judgment creditor filed to approve the compromise.

In his opinion, Judge Cohen reviewed the facts and law pursuant to the directive of the Eleventh Circuit on approval of compromise settlements in *In re Justin Oaks II*, 898 F.3d 1544 (11th Cir. 1990). Judge Cohen first set out the following four points which the court must consider in determining approval: (1) probability of successful litigation, (2) collection difficulties, (3) complexity and expense of litigation, and (4) paramount interest of creditors together with deference to their views. Judge Cohen detailed all of these elements, commenting first on the problem of proof on the solvency issue with particular emphasis on the time and expense involved in valuations. He viewed collection in this instance as not a problem, but the "best interest of the creditors" was a large concern. He reviewed the facts to show that the general creditors would benefit by the settlement. In so doing, he contrasted the facts with prior cases, wherein no benefit would accrue to general creditors. In approving the compromise, he held that it was not necessary to litigate the preference issue, as the compromise would prevent the expense of that determination.



**Wilbur G. Silberman**

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

**Comment:** I have reported this case as I believe that the detailed opinion by Judge Cohen can be referenced by the reader as a textbook dissertation for the Eleventh Circuit practitioner on the question of approval of a compromise settlement.

### **Eleventh Circuit holds that 11th Amendment immunity was waived by State of Georgia when it filed proof of claim**

*In re Burke and Burke*, 146 F.3d 1313, 32 BCD 1147 (11th Cir. 1998). There were two different cases involved in this appeal. In the first case (hereinafter termed the "Burkes case") the Georgia Department of Revenue (GDR), in a chapter 13 case, filed an unsecured priority claim (later determined to be unsecured) for \$12,437.40 for unpaid income taxes during 1980-1984. The case was converted to chapter 7 with the Burkes receiving a general discharge. Neither GDR nor the Burkes sought a determination pre-discharge as to the dischargeability of the taxes. However, three months after discharge, GDR demanded payment. The Burkes reopened the case and filed an A.P. claiming violation of the discharge injunction. GDR moved for dismissal under authority of the *Seminole Tribe* case, 116 S.Ct. 1114 (1996). The bankruptcy court first held that GDR had waived sovereign immunity in filing a proof of claim, and then in response to a motion to alter or amend such holding, determined that §106(a) was enacted under the 14th Amendment. Thus, there were two grounds for holding that state sovereign immunity did not apply, one that the bankruptcy law superceded the 11th Amendment but, if not, that Georgia had waived its immunity.

The other case (the "Headricks case"), although not identical, had the same issues involved in that GDR was attempting to collect taxes during pendency of a chapter 13. After the bankruptcy court's ruling against the GDR, which was affirmed by the District Court, appeal was taken to the Eleventh Circuit.

The Eleventh Circuit held that the 11th Amendment not only bars suits against a state filed by citizens of other states, but also by its own citizens. It ruled that a

state may waive its immunity or Congress, pursuant to a valid exercise of its power, may abrogate the state's immunity. The court then held that in this case it did not have to determine whether Congress had abrogated the immunity, because the filing of the proof of claim constituted a waiver. (See *Gardner v. New Jersey*, 67 S.Ct. 467 (1947)). The court, after so holding, watered its opinion by stating that its ruling should be confined to the facts of the instant case because the debtors sought only to recover the costs and attorney's fee incurred in enforcing the bankruptcy court's automatic stay and discharge injunction.

**Comment:** So after holding that after filing a proof of claim there is a waiver of sovereign immunity, the court limited its ruling. For additional law on the subject, it is suggested that the endnotes, which furnish various other citations pertaining to the cases, be reviewed. I am at a loss to understand why the court felt it should narrow its opinion to the particular facts. It may as well have used the "*de minimis*" doctrine if it felt there was not enough involved.

### **Eleventh Circuit rewrites its rule on "ordinary course of business" defense in preference cases**

*In re A.W. & Associates, Inc.*, 136 F.3d 1439 (11th Cir., 1998). For many years in the Eleventh Circuit, defendants in preference cases took comfort in *In re Craig Oil Co.*, 785 F.2d 1563 (1986) which held that the resolution of the issue was determined by the "specific events surrounding [debtor's] payments to [creditor]. It appeared to be inferred that the relevant industry standard did not have to be addressed. Now in the instant case, the Eleventh Circuit aligned itself with the majority view that §547(c)(2) requires payment not only to have been in the usual custom between the parties, but just as important that it must have been pursuant to industry standards. The Eleventh Circuit adopted the Seventh Circuit standard as enunciated in *Tolona Pizza*, 3 F.3d at 1033 as follows:

Industry standards do not serve as a litmus test by which the legitimacy of a transfer is adjudged, but func-



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tion as a general backdrop against which the specific trans-  
action at issue is evaluated.

"[O]rdinary business terms" refers to the *range* of terms that encompasses the practices in which firms similar in some general way to the creditor in question engage, and that only dealings so idiosyncratic as to fall outside that broad range should be deemed extraordinary and therefore outside the scope of subsection C.

**Comment:** My interpretation of the above is that the defendant may not have an unrealistic burden of proof, but must show that the payment was within the umbrella generally of meeting the industry standards. It remains to be seen how courts will follow the ruling. ■

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- **DOCUMENT EXAMINER:** Certified Forensic Document Examiner. Chief document examiner. Alabama Department of Forensic Sciences, retired. American Board of Forensic Document Examiners, American Academy of Forensic Sciences, American Society of Questioned Document Examiners. Over 20 years' experience in state and federal courts in Alabama. Lamar Miller, 11420 N. Kendall Drive, Suite 206-A, Miami, Florida 33176. In Birmingham, phone (205) 988-4158. In Miami, phone (305) 274-4469. Fax (305) 596-2618.
- **HANDWRITING EXPERT/FORENSIC DOCUMENT EXAMINER:** ABFDE certified; past president, Southeastern Association of Forensic Document Examiners; American Academy of Forensic Sciences fellow. Federal court qualified. Nineteen years' experience. Civil and criminal. Handwriting comparison, forgery detection, detection of altered medical records and other documents. L. Keith Nelson, Stone Mountain, Georgia. Phone (770) 879-7224.
- **ELECTRICAL EXPERT WITNESS:** Steven J. Owen, electrical consultant, 24 years' in electrical industry. Member of BOCA, CABQ, IAEI, ICBO, SBCCI, OSHA authorized instructor. LPI certified lightning protection. NICET-certified. Master electrician/contractor in 39 states. Fee-basis only. Phone (205) 987-2502; Fax (205) 982-9613.
- **LEGAL RESEARCH AND WRITING:** Attorney (former federal law clerk). John Ritondo, #205, 140 Robert

Jemison Drive, Birmingham, 35209. Phone (205) 940-9953. *No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.*

- **FORENSIC DOCUMENT EXAMINATIONS:** Richard A. Raper, Ph.D., 7956 Vaughn Road, #141, Montgomery, Alabama 36116. Phone (334) 260-2552, Fax (334) 260-7929. E-mail: [richraper@aol.com](mailto:richraper@aol.com). Seventeen years' forensic document examinations; 27 years' total forensic experience; retired senior documents examiner and discipline coordinator, Alabama Department of Forensic Sciences; member Questioned Documents Section, American Academy of Forensic Sciences, Southeastern Association of Forensic Document Examiners; Southern Association of Forensic Scientists; Alabama State Association of Forensic Sciences (past president).
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## Correction

The article, "Drinking and Driving in Alabama: The Facts, the Laws and Possible Solutions," published in the September issue of *The Alabama Lawyer*, erroneously stated that the decision of the Alabama Supreme Court in *Ford Motor Company v. Sperau*, 708 So. 2d 111 (Ala. 1997) was authored by Justice Cook. The opinion was, in fact, issued *per curiam*.

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