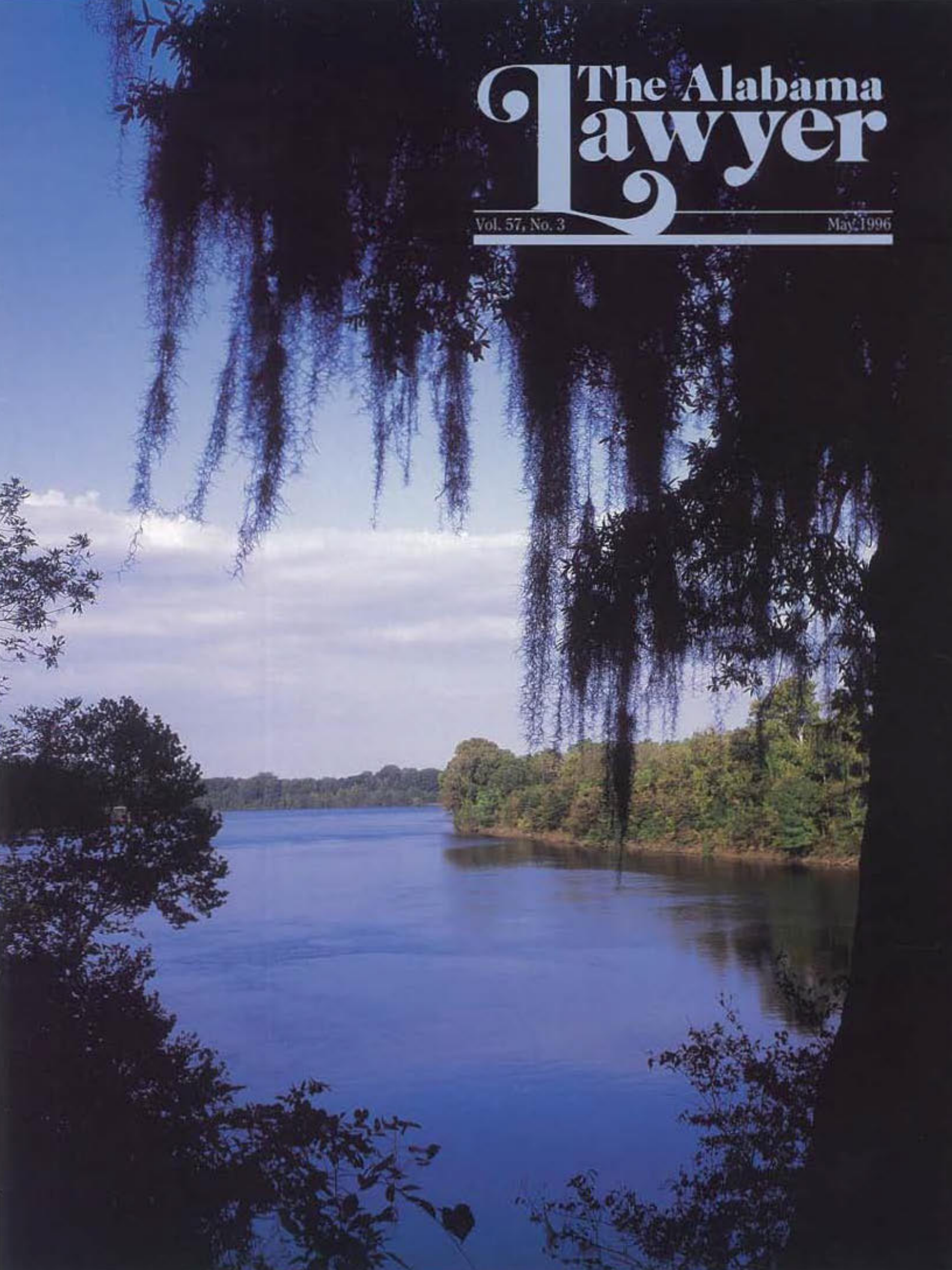
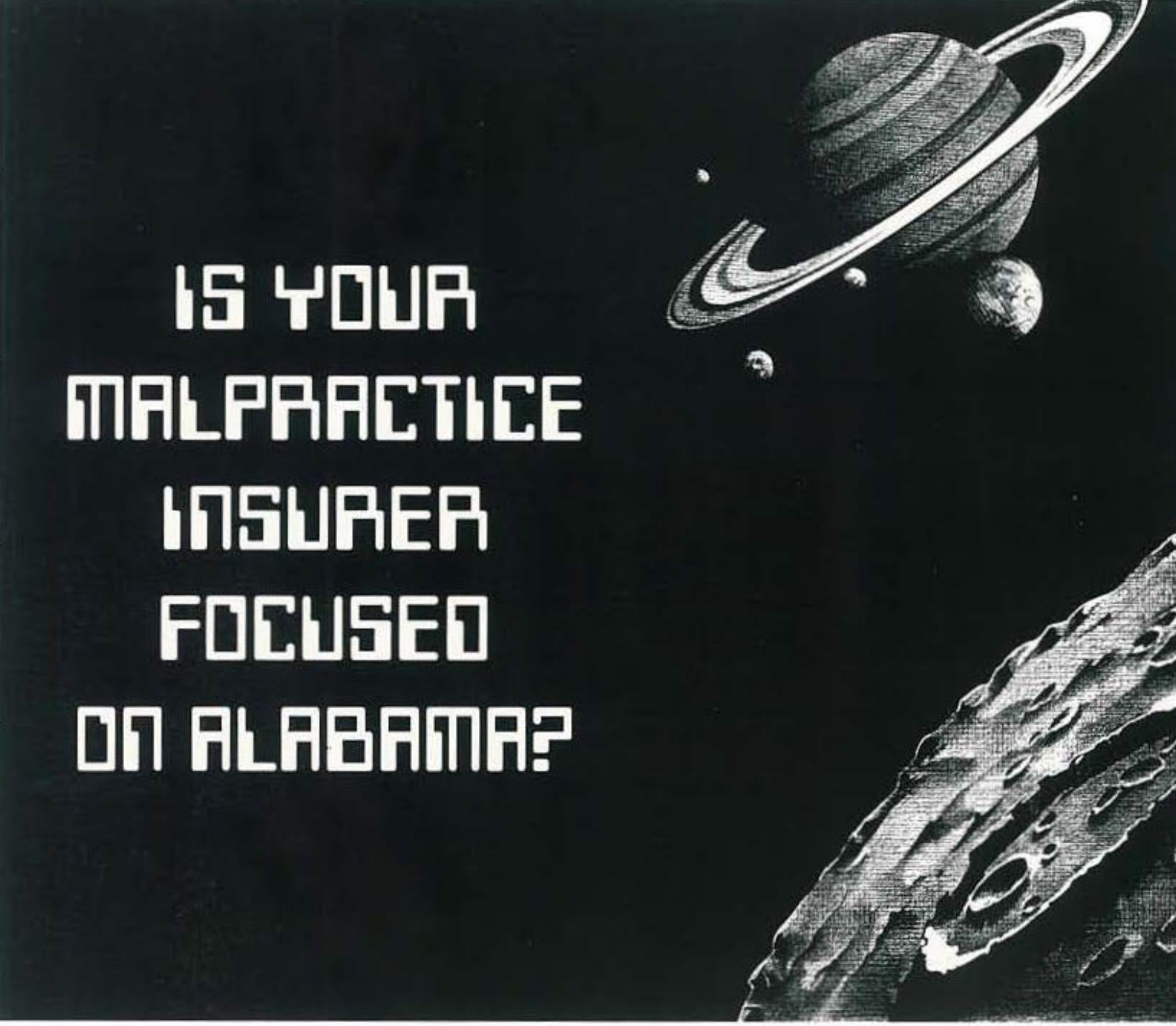


The Alabama Lawyer

Vol. 57, No. 3 May 1996



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IN BRIEF

May 1996 Volume 57, Number 3

ON THE COVER:

The Coosa River flowing through Elmore County, Alabama. Alabama's rivers have played an important role in the history of the state, providing an inexpensive form of transportation for coal, stone, iron, steel, cotton, lumber, clay, and limestone. Years ago, the bed of the Coosa River was dug deeper so that boats could travel all the way from the Gulf of Mexico to Rome, Georgia, a distance of over 550 miles.

The beautiful Spanish moss found in the deep South is technically not a moss, but a flowering plant that belongs to the pineapple family. It absorbs water and nutrients directly from the air.

— Photo by Paul Crawford, JD, CLU

INSIDE THIS ISSUE:

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

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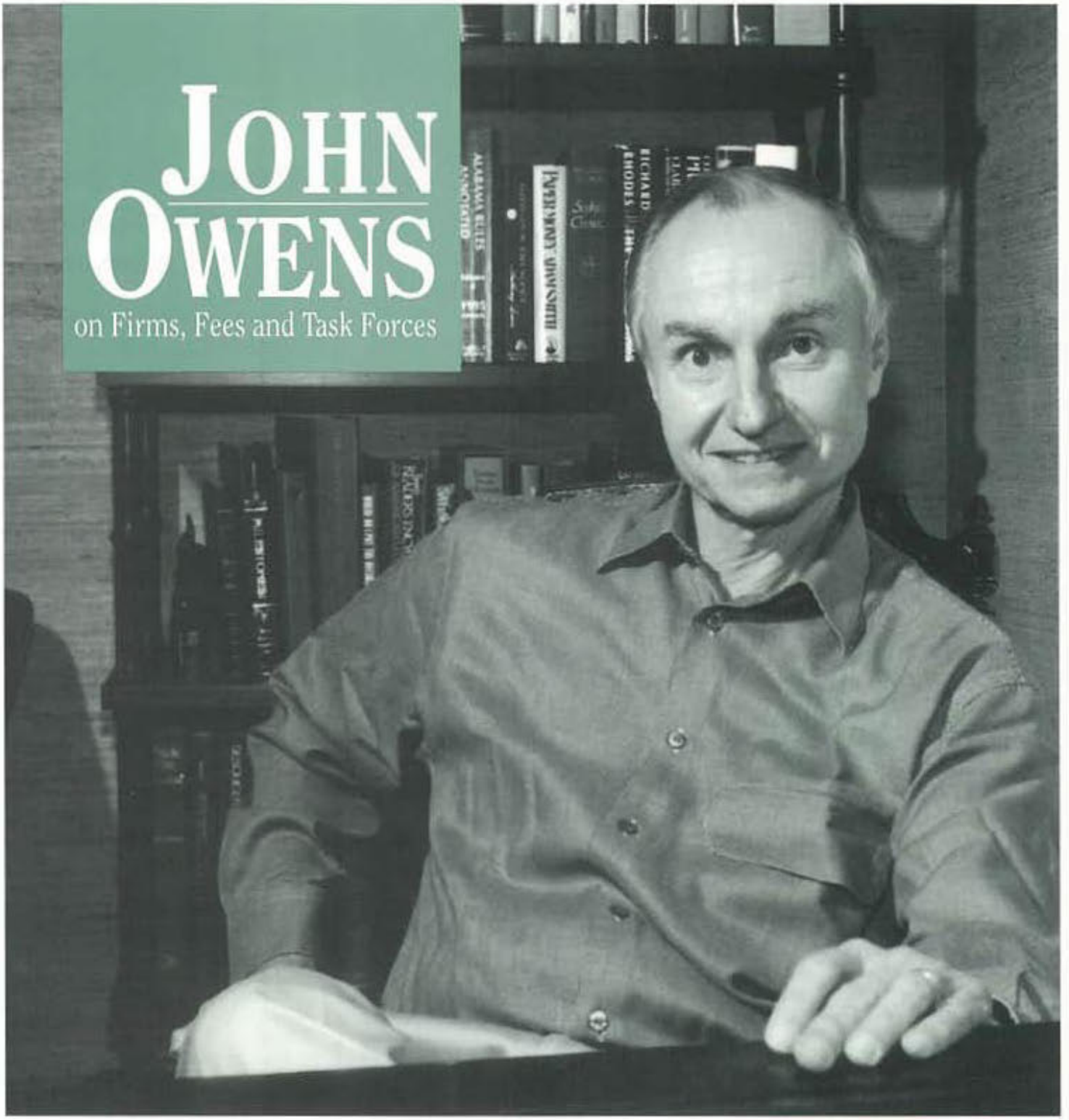
JOHN OWENS

on Firms, Fees and Task Forces



Robert Huffaker, editor of The Alabama Lawyer, *recently "sat down" (over the phone) with John Owens, state bar president, to see how he felt about his year at the bar.*

.....

AL: John, you are about halfway through your term. What do you consider your main accomplishments to be so far?

O: It's hard to say, because several of the things that we've got working have not come to fruition, but I'm very pleased with the work that the Task Force on Solo and Small Firms is doing. They are heading toward recommending to the board of bar commissioners that we adopt a management assistance program similar to that in place in Georgia and North Carolina. This would give us an in-house person at the state bar to give management assistance at a very reasonable rate (the telephone is free), but actually going to firms at reasonable rates and giving assistance with things like billing, timekeeping, document management, file management—just the general "nuts and bolts" business side of practicing law, which a lot of lawyers in small firms don't have access to. It has been a

very successful program in Florida, Georgia and North Carolina. I know that the task force is going to recommend that, and I am reasonably confident that we'll adopt it at some point.

AL: Who is the chair of that task force?

O: The chair is Paul Brantley, and Hal Albritton is vice-chair. I think Hal actually has taken on this responsibility of the management assistance program.

AL: When do you expect the task force to render its report?

O: At our April 12 meeting.

AL: Are there other task forces that you have appointed or that have been active during your tenure that you expect to receive some meaningful reports from?

O: We have a Task Force on Fee Dispute Resolution, and that same task force is undertaking to study the Mississippi Consumer Assistance Program. That is co-chaired by Rodney Max of Birmingham and Woody Sanderson of Huntsville.

AL: What is the charge of that task force?

O: Its charge is two-fold. It is charged with studying a method through which fee disputes could be resolved within the bar. A significant percentage of our grievances are really fee disputes, and people who make a grievance are simply told that this is a fee dispute, and the bar does not handle these. We are trying to come up with a mechanism within the bar itself, so that we can offer arbitration or mediation. The logistics have been a problem, because most of these are pretty small disputes. We've had a recommendation from the task force. It is a very elaborate and well-done fee dispute arbitration (not mandatory but voluntary) procedure. Tony McLain (general counsel) has some concerns about the workability of it. In many of these disputes, we are talking about $100 or $200 or something like that. We are now scratching our heads over whether it's really workable to centralize all of them in Montgomery, because so many are small. We have asked that task force to consider this. Maybe the larger disputes should go to Montgomery. Maybe we should have mechanisms within the various local bars for smaller disputes. There is a need for it, but we don't seem to have hit on the right formula yet. I hope we will come out with a plan, if not this year, then at least the groundwork will have been laid for next year. We can have something available so if somebody calls in a grievance that's really a fee dispute, we can say we do have the voluntary arbitration procedure, and here's how you go about it if you want to take advantage of that.

AL: You mention grievances, and, of course, in every issue of *The Alabama Lawyer*, we see disciplinary action taken against attorneys. Do you think the grievance process is working properly?

O: It is working very well. The backlog is way down. General Norris worked very hard in getting the procedure working more effectively, and, of course, Tony grew up under General Norris, and he is continuing that. The grievances seem about steady in numbers, and they seem to be moving through quite well. Each panel now has one lay person. That seems to be working well, although this is still new. It's still in its first year, but I think our disciplining procedure is moving along just fine.

The other charge to the task force, on fee dispute resolution, is to study Mississippi's Consumer Assistance Program. Mississippi started looking at a program to divert grievances that were management problems to a management assistance program. In looking at that, Mississippi decided to hire a lawyer, whose full-time job is to handle any complaint which comes in if it's anything less than a formal grievance. He immediately calls the complainant and the lawyer, and tries to work it out, just to talk through it. Maybe the lawyer is not returning calls. Maybe the lawyer is not answering correspondence. Mississippi's bar is very pleased with the program, so pleased with it, that they think they will be able to drop one person from their disciplinary staff, so they will have no net increase in employment. That same task force is looking at the Mississippi program to see if some form of it may be workable, and I hope they will report back on that before the year-end.

AL: Are there other task forces that you expect to receive reports from?

O: The Task Force on the Judiciary chaired by Bob Denniston is one of the most active task forces that we have, year in and year out. He has inquired as to where we are on several of their reports from the past, particularly one having to do with judicial election, a voluntary system of judicial election reform. They've recommended, and, of course, the bar has adopted, a position in favor of nonpartisan election of judges. They've recommended that the state go to the merit selection of judges. The board of bar commissioners has not, and probably will not, take a stand on that, but we've got his reports before us, and we are going to take a look at them at our April meeting and see what, if anything, we do there.

AL: We just finished the special session that the Governor called on tort reform. Summarize for our readers what position the bar took on tort reform.

O: We took a position similar to our position in 1987. The bar cannot take a political position, except when it comes to regulation of lawyers or if it affects the administration of justice. We did, in 1987, pass about six points essential to consideration of tort reform legislation which we have reiterated this time. At least two of them in particular must be considered before anything is passed. One is that it is very sweeping legislation, that it affects everybody, and that everybody, sooner or later, is either potentially a plaintiff or a defendant. Secondly, somebody does pay the price of all injuries and frauds, whether it's the individuals themselves or the wrongdoer or society through social programs. We reiterated those in a press release when we got concerned about the package which passed the House without debate and without a dissenting vote. It was so sweeping that we thought that it needed more study. We issued a press release saying that whatever is done should not be done in that fashion. It deserves study, it deserves debate, and we offered the bar as a resource to help draft and perform other services, etc. Again, we are not taking a position for or against caps, we are not taking a position for or against any sort of

reform, but we are taking the position that whatever comes down needs to be workable, and needs to be fairly debated and fairly considered. For example, they had a 30-day rule in one of the bills. Anybody could move for summary judgment 30 days after a suit was filed, and the court had to hear it 30 days later. That's not workable, and they shouldn't do that without some judicial input and bar input as to what works and what doesn't work. They need judiciary input, and that's been our position. We want to try to steer a course of reason and just say look, this is very sweeping and very important legislation. After all, we send things like the Uniform Commercial Code, the Probate Code and the Corporate Code through the Law Institute. It's studied by scholars, and they report back with recommendations. Why should tort reform get less serious study than the Probate Code and the Uniform Commercial Code? That's been our position, that we simply need to go slowly, and we need to thoroughly think through this. It needs to be well-debated, and it needs to be well-crafted.

AL: If you could give a state of the bar speech, how would you characterize the condition of the bar?

O: I think the state bar is outstanding. We are financially healthy, we've got excellent facilities, we've got a first-rate staff. Our grievances procedure is working and keeping up with its backlog. The bar is doing so much and accomplishes so much work. We have added, of course, as you know, the *ADDENDUM* this year, which gets more information out to our membership. I think the bar is very healthy. I just try to sort of stay out of Keith and his staff's way and let them keep doing the fine job they're doing.

AL: What else remains to be done during the John Owens administration?

O: The conclusion of the programs we are talking about. I made the solo and small firms issues a focal point, because so many of our members are there. Basically, over a third of our lawyers are solo practitioners. The American Bar Association says that 48 percent of all lawyers in the United States are in firms of five or fewer. I don't mean we've neglected those people before, but I thought we could do a lot for those people, and so I want to see these programs come to fruition. I want to see us have a well-attended convention at Orange Beach. It's another opportunity down there. We've made a special effort to coincide with the judges and try to get a maximum judge attendance at the convention, particularly the Bar and Bench Luncheon, the kickoff of the state bar.

AL: John, is it your sense that the bar association is serving the needs of the junior and younger members of the bar?

O: I hope we are. We have a very active Young Lawyers' Section, and Buddy Smith wanted his centerpiece to be a mentoring program. That's also a charge of the solo and small firm practitioners, to try to come up with a mentoring program idea. I haven't heard that part of the report yet, but it would be a tough thing to do to set up a mentoring program on a statewide basis. My view is that possibly the state bar could come up with a framework that local bars could then emulate, or maybe a regional program. Maybe you could have a mentoring program set up in central Alabama that would be out of Tuscaloosa and north central out of Huntsville that you could pair senior lawyers with young lawyers. There has been a lot of thought on that in other bars. Our YLS is focusing on it and working with our solo and small firm task force. I think that would be a very good thing to do for the young lawyers if we can provide that framework.

AL: If a young lawyer wanted to become actively involved in or participate in one of the sections, how would he or she do that?

O: They are automatically a member of the YLS for the first three years they are in practice (no matter what age they are admitted) or until they turn 36. They would get all the mailings. All they have to do is show up and volunteer for the committees and run with it. They have a very successful annual seminar down at Sandestin that usually draws really well. It is more difficult for them to be active in the other bar, because though we've got some 826 members working on state bar committees and task forces (39 of them), they are usually three-year term appointments. I had around 278 new appointments, and about triple that number who sent in a questionnaire saying they would like to serve on a committee. We just don't have enough committee slots for everybody who wants to serve, but I do think there is an opportunity in the YLS to be more active.

AL: Bring us up to date on the activities of the Alabama Law Institute.

O: There has been discussion in the Legislature about the ALI. Several legislators are interested in relocating the Law Institute to Jones Law School in Montgomery. The Law Institute was started by the Alabama State Bar under a legislative act. The Legislature gave us the power to start it, and we did, and it's worked extremely well where it is. A lot of lawyers give a lot of voluntary time through the Law Institute. It has considerable prestige. We think part of that is because it is located at the University of Alabama School of Law. It is apolitical and it's away from politics, and I am very supportive of keeping it there. I feel certain that the board of bar commissioners will feel the same way, but this has only recently come up. We had no idea that there were any thoughts of doing anything to it. It's not broken and it doesn't need fixing. I have spent a lot of time in the last couple of days on the phone on that issue. It is a fine institution. It's one that the state can be proud of—moving it would hurt it.

AL: When your term is up, are you going to retire?

O: I serve a year as immediate past president. It is an office. It is a post on the Executive Committee. It is usually sort of an advisory post, and I plan to participate in that. That will have me going to Executive Committee meetings and bar commissioner meetings, and I hope I can make all of those. No, I am not going to totally retire. I'll be there to work with Warren as he needs me to, but it will be his show.

The Alabama Law Institute—
"If It Ain't Broke, Don't Fix It"

For the past quarter century, the Alabama Law Institute (ALI) has played a significant role in improving the law of Alabama as the state's chief law reform agency. Although it is a legislative agency, the ALI depends on the legal expertise of lawyers, judges and law school teachers who volunteer their time. The ALI works with a small but dedicated staff of four: Bob McCurley, who has served as director since 1975; Penny Davis, associate director since 1979; and two assistants, Jackie Sartain and Linda Wilson, who have been with the ALI for more than 20 years.

The ALI has gained a sterling reputation for thorough and efficient drafting of major legislation. Indeed, though it receives an appropriation from the state's general fund (approximately $350,000 in FY 1995-96), the ALI could not be effective without committed volunteers. Because of the volunteer work by some 590 lawyers from across Alabama serving on 39 committees, the state's small appropriation is leveraged into millions of dollars of free legal work on important law reform and law revision projects.

Keith B. Norman

The creation of a permanent law reform agency was due largely to the efforts of Howell Heflin and Hugh Merrill. Patterned after the Louisiana Law Institute, legislation was enacted in 1967 setting forth the purposes and duties of the ALI and authorizing the Alabama State Bar Board of Commissioners to create it. (See Section 29-8-1, *et seq.*) As stated in the enabling legislation:

> "The general purposes of the Alabama Law Institute shall be to promote and encourage the clarification and simplification of the law of Alabama to secure better administration of justice and to carry on scholarly legal research and scientific legal work."

The ALI was funded and began operation in 1969. It is housed in the law center on the University of Alabama campus. This location provides it access to the extensive collection of material at the law school library which is vital to its mission as a law reform agency.

The membership of the ALI is composed of a diverse group of 150 bar members who are elected for fixed terms—justices of the Alabama Supreme Court, judges of the courts of appeals, circuit court judges, federal judges residing in Alabama, full-time law faculty members of the Cumberland and Alabama law schools, all lawyers licensed to practice in Alabama who are members of the Legislature, and all members of the Institute Council. The Institute Council, which is the supervising body of the ALI, is composed of six practicing attorneys from each congressional district as well as representatives from the appellate courts, the Attorney General's Office, the Alabama State Bar, all law schools in Alabama, the Legislature, and the Governor's Office.

The high quality law revision work of the ALI, for which it has been widely recognized and acclaimed, is staggering. From 1975 through 1995, the ALI has facilitated 34 major law revisions including: Administrative Procedures Act; Banking Code; Criminal Code; Business Corporation Act; UCC; revised Article IX; Probate Code; Uniform Transfers to Minors; Uniform Guardianship; Alabama Securities Act; Limited Liability Corporations; Adoption; revised Business Corporation Act; and Uniform Condominium Act.

Similarly, during the same 20-year period, the ALI has completed 18 projects and studies including: *The Alabama Government Manual*, Sixth, Seventh, Eighth and Ninth editions; *Handbook for Tax Assessors, Tax Collectors and License Commissioners*; *Sheriff's Desk Manual*; *Model City Ordinances*; Family Violence Study; *Circuit Judges Trial Manual*; Medicaid Study; and Study of Tax Structure in the State of Alabama.

In addition, the ALI regularly plans and hosts a number of training conferences including the Legislative Orientation Conference, the Probate Judges Orientation, and an Orientation for Sheriffs. These and its many other works have resulted in a list of more than 100 titles published by the ALI.

I am concerned, however, that the good and important

work of the ALI could soon end. Several legislators have indicated that the ALI should be moved to Montgomery, have its responsibilities meshed with the Legislative Reference Service, or have a different oversight authority. None of these purported changes seems to be appropriate or necessary. I have been familiar with the work of the ALI for more than 18 years and I have never heard a single criticism, only praise for its operation, work product and personnel. Bob McCurley has done a superlative job as its director. He has provided competent and effective leadership for more than two decades. The work product of the ALI is highly respected and *trusted* because it has *credibility*. I believe any of the mentioned changes could seriously jeopardize the ALI's independence and, thus, the impartial fashion in which the ALI conducts its revision work. A loss of credibility by this important agency could be its death knell.

Our bar played an important role in the creation of the ALI and therefore has a valuable stake in its future. We should be proud of what the ALI has accomplished and concerned about any changes that would compromise its credibility or impartiality. Although the expression may be a trite one, it certainly rings true in this instance: "If it ain't broke, don't fix it.'" I encourage you to let your state senator and representative know your feelings about the important work of the Alabama Law Institute and its continued operation as an *independent* and *impartial* law reform agency.

PROFILE

Pursuant to the Alabama State Bar's rules governing the election of president-elect, the following biographical sketches are provided of Lynn Robertson Jackson and Dag Rowe. Jackson and Rowe were the qualifying candidates for the position of president-elect of the Alabama State Bar for the 1996-97 term, and the winner will assume the presidency in July 1997.

Lynn Robertson Jackson

Lynn Jackson was born in Montgomery, Alabama. She has a home in Eufaula, Alabama and a horse farm in Clayton, and is a partner in the firm of Jinks, Smithart, Jackson & Daniel. Jackson received her undergraduate degree from the University of Alabama. She attended the University of Missouri School of Law and graduated from Jones Law School. She was admitted to the Alabama State Bar in 1981.

Jackson served as secretary of the Third Judicial Circuit Bar from 1984-85, as vice-president from 1985-86, and as its president from 1986-87. She has served as bar commissioner for the Third Judicial Circuit since 1985, when she was selected to take the place of Alabama Supreme Court Justice Gorman Houston (upon his election to the Alabama Supreme Court). She has also served on the Permanent Code Commission (assisted in writing the new Code of Professional Responsibility); the Task Force on Facilities for the Alabama State Bar; *The Alabama Lawyer* Board of Editors; Disciplinary Panel I for nine years; the Board of Trustees of the Alabama Law Foundation (one of the original board members); as the board of bar commissioners liaison to the Task Force on Bench and Bar Relations; as the board of bar commissioners liaison to the Unauthorized Practice of Law Committee; as the board of bar commissioners liaison to the Character and Fitness Committee; as a member of the Volunteer Lawyers Program; and as a member of the Alabama State Bar Mandatory Legal Education Commission (appointed chairperson by President Harold Albritton in 1990). She also was a member of the Task Force on Women in the Profession and now serves on that committee.

Jackson is a member of the American Bar Association, the Alabama State Bar, the American Trial Lawyers Association, the Alabama Trial Lawyers Association, and the Third Judicial Circuit Bar Association.

She also serves on the board of directors of her municipal and county libraries and her local United Way chapter; as a city attorney for Clayton, Alabama from 1984-95; and was selected as an Outstanding Young Woman of America in 1982. She is a regular speaker to schools and local civic groups on law-related topics, and was recently appointed to the Barbour County Personnel Board.

She is married to G. Thomas Jackson, an attorney, and they have two children, Katherine Robertson Jackson and William Borders Jackson. Jackson and her family attend St. James Episcopal Church in Eufaula. ■

PROFILE

Dag Rowe

Dag Rowe was born in Athens, Georgia, on March 25, 1947, to Henry G. Rowe and Virginia Jackson Rowe. His family moved to Alabama and Rowe grew up in rural Madison County, where his father was a school principal and his mother a second-grade teacher. He was educated in the public schools of Madison County and graduated from Lee High School in 1965.

Rowe graduated from the University of Alabama in 1969, where he was a member of Omicron Delta Kappa and Jasons, and was president of the College of Arts and Sciences. He was listed in Who's Who in American Universities and Colleges.

Rowe graduated from the University of Alabama School of Law in 1972, where he served as president of the law school student body. In 1972-73, Rowe attended New York University School of Law where he received the LLM Degree.

In 1973, Rowe began practice with the firm of Bell Richardson in Huntsville. In 1977, he and four other lawyers formed the firm which became Cleary, Lee, Morris, Smith, Evans & Rowe. Rowe practiced with that firm until 1987, when he became a partner of Burr & Forman in Huntsville. He is in general practice, typically representing individuals and small businesses.

Rowe has served three terms on the board of bar commissioners and on several committees of the state bar, including the MCLE Commission and the Permanent Code Commission. He is currently a trustee of the Alabama Law Foundation. Rowe served for four years as an examiner on the Alabama State Bar Board of Bar Examiners. From 1977 until 1982, he also served on the Editorial Board of *The Alabama Lawyer*.

Rowe is a member of the Huntsville Bar Association, American Bar Association and the North Alabama Estate Planning Council. He is a member of the Alabama Trial Lawyers Association and the ATLA Public Relations Committee and Committee 2000. He is a frequent speaker at CLE seminars and is a co-author of the following CLE publications, "Estate Planning," *Basic Legal Skills* (1993), "Taxation in Divorce," *Marital Law* (1976), and "Sub-Chapter S Corporations," *Basic Legal Skills* (1974). He is listed in Who's Who in American Law.

In civic and community service, Rowe is a member of the Huntsville Rotary Club (past president), Board of Trustees of the University of Alabama in Huntsville Foundation, Board of Directors of United Way of Madison County, and Board of Directors of Volunteers of America. He is a graduate of Huntsville Leadership and now serves as its chairman-elect. He formerly served on the Board of Trustees of the Huntsville Public Library (16 years), the Huntsville Board of Zoning Adjustment (12) years, state Board of Directors of the Alabama Wildlife Federation, and Board of Directors of Ducks Unlimited. In 1978, he was listed in Outstanding Young Men in America.

Rowe serves as chairman of Oakwood College's Capital Campaign Advisory Committee. In June 1995, he received Oakwood College's annual Distinguished Service Award. Rowe has also received distinguished service awards or presentations from the Boy Scouts of America, Volunteers of America, and the Huntsville Public Library.

Rowe is an elder at First Presbyterian Church where he is a past moderator of the board of deacons and past clerk of the board of elders. He has frequently been an adult Sunday School teacher.

Rowe married Melissa Holliman on August 25, 1979. They have two children, Dag, Jr. (15) who is an Eagle Scout and interested in guitar, and Anna (10), who is interested in dance and drama.

Rowe's interests include farming, hunting, and fishing. ■

BAR BRIEFS

Gray

• Alabama attorney **Fred D. Gray** has been named one of the recipients of the American Bar Association's First Annual Spirit of Excellence awards.

Gray, a senior partner in the Tuskegee and Montgomery firm of Gray, Langford, Sapp, McGowen, Gray & Nathanson, was honored during the ABA Annual Meeting at a luncheon February 3 in the Baltimore Convention Center.

The award celebrates "the achievements of lawyers of color and their contributions to the legal profession." It also recognizes "their commitment to pave the way to success for other lawyers of color and commemorates the rich diversity that lawyers of color bring to the legal profession and to society."

Judge Bernice Donald, chair of the ABA Commission on Opportunities for Minorities in the Profession, which presented the awards, said of the seven minority attorneys receiving the awards, "These recipients exemplify what the award is all about—the highest achievement of excellence in the legal profession and advocacy for diversity for the profession. They exemplify the spirit necessary to continually achieve excellence despite the obstacles that they faced." It was said of Gray that, "His passion for attacking segregation has earned him an honored place in American history."

For over 40 years, Fred Gray has been in the forefront of the Civil Rights movement—as Rosa Park's lawyer when she was arrested for violating the segregated seating ordinance on a Montgomery city bus and as Martin Luther King, Jr.'s lawyer.

Honors presented at Cumberland School of Law banquet

United States **Senator Howell Heflin** was honored in March by Samford University's Cumberland School of Law with its Lifetime Achievement Award.

Heflin, who will retire in January after three terms in the Senate, received the honor during law Week banquet activity. Cumberland Dean Parham H. Williams presented the award.

The award recognizes individuals in the legal profession who have improved the quality of life for others over a sustained period.

"Cumberland is proud of its long association with Senator Heflin," said Williams. "He has been a frequent visitor to the campus and has always made himself available to our students."

"His contributions to the legal profession, the state of Alabama and the nation are many. We will miss his legislative skills and his wonderful sense of humor as he concludes his career as Alabama's senior senator," said Williams.

Heflin was reelected to a third U.S. Senate term in 1990. Prior to his first election in 1978, he served eight years as chief justice of the Alabama Supreme Court.

Also at the banquet, Cumberland Alumni of the Year honors were presented to **Sharon Lovelace Blackburn**, judge, U.S. District Court, Northern District of Alabama, and Charles H. O'Brien, retired chief justice, Tennessee Supreme Court. ■

(L to R): Sharon L. Blackburn, Howell Heflin, Charles H. O'Brien, and Parham H. Williams

Currier

• **Barry A. Currier**, associate dean of the University of Florida College of Law in Gainesville, has been named dean of Samford University's Cumberland School of Law.

Currier will succeed **Parham H. Williams**, who retires as Cumberland's Dean this month but will continue to teach in the law school.

Currier has served as associate dean at Florida since 1990, with responsibility for planning and execution of the college's academic program, faculty recruitment and development, and serving as liaison with the legal profession and various other committees.

A political science graduate of the University of California at Los Angeles, Currier earned his law degree at the University of Southern California in 1971. He served as law clerk for the U.S. Court of Appeals for the District of Columbia Circuit during 1971-72.

• The **Magic City Bar Association, Inc.** recently elected new officers. They are:

President: **Raymond L. Johnson, Jr.**

Vice-President: **Eric Fancher**

Treasurer: **Tammy J. Montgomery**

Recording Secretary: **Vicky Bradley**

Corresponding Secretary: **Tamara Harris Johnson**

Parliamentarian: **Abdul Khallon**

Board Members: **Michael K.K. Choy**
Carolyn Shields
Byron Perkins

Birmingham Bar Liaison: **Robert Jones**

Raymond L. Johnson, Jr., the newly-elected president, is assistant U.S. Attorney for the Northern District of Alabama. He also has been an adjunct professor of law at Cumberland School of Law since 1989. He is a 1976 graduate of Howard University Law School.

Phillips

• Assistant United States Attorney (AUSA) **James E. Phillips** was awarded the Department of Justice Director's Award for superior performance as an AUSA, on March 8, 1996 in Washington, D.C. Phillips was recognized for his skills and dedication in a long-term undercover operation involving complex insurance fraud investigations. These investigations began in 1991 and, to date, have resulted in the prosecution of more than 73 individuals in the Northern and Middle districts of Alabama.

Simmons

Assistant U.S. Attorney **Sharon Simmons** was presented the Department of Justice Mark Gallinghouse Memorial Award for Excellence in Financial Litigation. Simmons was recognized for her successes in debt collection and the work she has done to improve collection totals within the Northern District of Alabama.

The awards ceremony honored less than two percent of the nearly 10,000 men and women who contribute their time and talents to the mission of the offices of the U.S. Attorneys.

Both Phillips and Simmons are members of the Alabama State Bar.

• The Tallapoosa County Bar Association recently elected new officers. They are:

President: **Braxton Blake Lowe**, Alexander City

Vice-President: **Faye Edmondson**, Dadeville

Secretary: **Tom F. Young, Jr.**, Alexander City ■

William N. Clark, commander of the 87th Division (Exercise) and a partner in the Birmingham firm of Redden, Mills & Clark, was recently promoted to the rank of major general in the United States Army Reserve.

General Clark has received awards recognizing his service to the legal profession, including the Alabama State Bar's Award of Merit, the Walter P. Gewin Award for Outstanding Service in Continuing Legal Education, and the Roderick Beddow, Sr. Award for distinguished service in the area of criminal law. He is an elected Fellow of the American College of Trial Lawyers.

General Clark is a graduate of the U.S. Military Academy. He also holds a law degree from the University of Alabama School of Law. ■

Major General (Ret.) L. Drew Redden, who conducted the promotion ceremony, and General Clark's wife, Faye, affix the two-star insignia of rank on MG Clark's uniform.

About Members, Among Firms

ABOUT MEMBERS

Scott Donaldson announces the opening of his office at Suite 520, The Financial Center, 550 Greensboro Avenue, P.O. Box 2344, Tuscaloosa, Alabama 35403. Phone (205) 750-0098.

Anne R. Strickland announces the relocation of her offices to 5330 Stadium Trace Parkway, Suite 250, Birmingham, Alabama 35244. Phone (205) 733-1303.

G. Barker Stein, Jr. announces the opening of his office at Delta Center, 23710 U.S. Highway 98, Suite D-2, Montrose, Alabama 36559. The mailing address is P.O. Box 1186, 36559. Phone (334) 928-9597.

G. Sage Lyons announces his withdrawal from the firm of Lyons, Pipes & Cook. His new location is 51 Tacon Street, P.O. Box 7414, Mobile, Alabama 36670. Phone (334) 470-0902.

Charles L. Miller, Jr. announces the relocation of his office to 150 Government Street, Suite 1000-A, Mobile, Alabama 36602. The mailing address is P.O. Box 2232, 36652. Phone (334) 433-5080.

K. David Sawyer announces the opening of his office at 4790 Cascade Road, SE, Grand Rapids, Michigan 49546. Phone (616) 975-3193.

Richard H. Ramsey, IV announces the relocation of his office to 313 N. Foster Street, Suite 6, Dothan, Alabama 36302. The mailing address is P.O. Box 6595, 36303. Phone (334)792-2553.

Joseph Robert Kemp announces that he is no longer with the firm of David P. Shepard. His new address is 1601 Cogswell Avenue, Pell City, Alabama 35125. Phone (205) 338-1170.

Sterling L. DeRamus announces the opening of his office at 2000 First Avenue, North, Suite 708, Brown-Marx Tower, Birmingham, Alabama 35203. Phone (205) 322-8066.

Pamela J. Gooden announces the relocation of her office to 1138 S. McDonough Street, Montgomery, Alabama 36104. The mailing address is P.O. Box 11208, 36111. Phone (334) 834-5335.

Robert W. Gwin, Jr. announces the relocation of his office to 2102-D Cahaba Road, Birmingham, Alabama 35223. Phone (205) 870-8655.

Lange Clark announces the opening of his office at 505 N. 20th Street, Suite 1010, Birmingham, Alabama 35203. Phone (205) 322-1300.

Terry G. Hutcheson announces his departure from the DeKalb County District Attorney's Office. His new address is P.O. Box 637, 108 Alabama Avenue, South, Fort Payne, Alabama 35967. Phone (205) 845-8884.

AMONG FIRMS

Thompson & Carson announces the relocation of their offices to 521 Montgomery Highway, Suite 300, Vestavia Hills, Alabama 35216. Phone (205) 824-0203.

Campbell & Campbell announces the relocation of their offices to 718 Union Bank Tower, 60 Commerce Street, Montgomery, Alabama 36103. The mailing address is P.O. Box 5018, 36101. Phone (334) 262-0232.

Dianne J. Davis and **Timothy B. Davis** announce the opening of **Davis & Davis.** Offices are located at 5 Lee Street, Alexander City, Alabama. The mailing address is P.O. Box 1778, 35011. Phone (205) 329-8100.

Brown & Turner announces the opening of new offices at 304 S. 5th Street, Gadsden, Alabama 35901. Phone (205) 546-1714. Birmingham offices are located at 211 22nd Street, North, 35203. Phone (205) 320-1714.

James Melvin Burns, W. Gregory Biddle and **Alecia Hilliard-Smith** of **Mel Burns & Associates** announce the relocation of their office to Medical Forum, 950 22nd Street, N., Suite 605, Birmingham, Alabama 35203. Phone (205) 731-7777.

Lisa Naas, formerly a corporate attorney for Mid-South Credit Collections, Inc., announces that she is now working for **Westinghouse** as the senior contract representative for Westinghouse Remediation Services. Her new address is 261 Eisenhower Lane, South, Lombard, Illinois 60148. Phone (708) 261-7900.

Angela G. Caine announces the relocation of her office to The Benson Building, Suite 220, 1824 29th Avenue, South, Birmingham, Alabama 35209, and that **Michael I. Fish** has joined as an associate. Phone (205) 871-6202.

Killion & Vollmer announces a change of their mailing address to P.O. Box 7807, Mobile, Alabama 36670. The physical address will remain 2513 Dauphin Street. Phone (334) 476-5900.

Pittman, Hooks, Marsh, Dutton & Hollis announces that **Jeffrey C. Rickard** has become a partner. Offices are located at 1100 Park Place Tower, 2001 Park Place, North, Birmingham, Alabama 35203. Phone (205) 322-8880.

Janecky, Newell, Potts, Hare & Wells announces that **Susan Gunnells Smith** and **Kevin F. Masterson** have become members. Offices are located in Mobile. Phone (334) 432-8786.

Burr & Forman announces that **Mark M. Lawson, Nancy L. Carter** and **Harri J. Haikala** have become partners, and that **R. Michael Yarbro, Cary D. Tynes, Patrick G. Nelson, Edward R. Christian, Harlan F. Winn, III, C. Gregory Burgess, Jerry J. Crook, II, Wendy L. Love, Catherine A. Loveless, Shannon G. Marty,** and **Anna L. Spencer** have become associated with the firm. Offices are located in Birmingham, Atlanta and Mobile.

Lloyd, Schreiber & Gray announces that **Daniel S. Wolter, Stephen E. Whitehead** and **Stuart Y. Johnson** have become members. Offices are located at Two Perimeter Park, South, Suite 100, Birmingham, Alabama 35243. Phone (205) 967-8822.

Timothy L. Dillard, Stevan K. Goozee and **Lawrence T. King** of **Dillard & Ferguson** announce that with the investiture of the **Honorable R.A. Ferguson, Jr.** to the position of Circuit Court Judge of the Tenth Judicial Circuit of the State of Alabama, the name of the firm has been changed. The new name will be **Dillard, Goozee & King.** Offices are located at The Massey Building, Suite 600, 290 21st Street, North, Birmingham, Alabama 35203. Phone (205) 251-2823.

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About Members, Among Firms

Continued from page 140

Cabaniss, Johnston, Gardner, Dumas & O'Neal announces that **Richard E. Davis** has become a partner. Offices are located at 700 Park Place Tower, Birmingham, Alabama 35203. Phone (205) 716-5200.

David M. Dunlap announces the formation of **Dunlap & Russell**. Offices are located at 1300 Riverplace Boulevard, Suite 601, Jacksonville, Florida 32207. Phone (904) 346-4480.

Steptoe & Johnson announces that **T. Robert Rehm, Jr.** has become associated with the firm. Offices are located in Washington, D.C., Phoenix, Arizona and Moscow, Russia.

Hand, Arendall, Bedsole, Greaves & Johnston of Mobile and **Tingle, Watson & Bates** of Birmingham announce that they will merge the practices of the two firms, and the new name of the firm is **Hand Arendall**. Offices are located in Mobile, Montgomery, Birmingham, and Washington, D.C.

W.N. Watson, Terry Gillis and **Sheri W. Carver** announce the formation of **Watson, Gillis & Carver**, a successor to Watson & Watson. Offices are located at 305 Grand Avenue, South, Fort Payne, Alabama 35967. Phone (205) 845-0410.

Clifford L. Callis, Jr. announces that **Barbara Lee Barnett** has joined the firm. Offices are located at Church Street Professional Center, 101 Church Street, Rainbow City, Alabama 35906. Phone (205) 442-6102.

Crownover, Coleman & Standridge announces that **W. Eason Mitchell** has become a partner. Offices are located at 2600 7th Street, P.O. Box 2507, Tuscaloosa, Alabama 35403. Phone (205) 349-1727.

Jack B. Hinton, Jr. and **Philip S. Gidiere, Jr.** announce the formation of **Gidiere & Hinton**. Also, **Steven K. Herndon** has become associated with the firm. Offices are located at 60 Commerce Street, Suite 904, Montgomery, Alabama 36104. Phone (334) 834-9950.

Ted L. Mann and **Gary J. Bone** announce the formation of **Bone & Mann**. Offices are located at 756 Walnut Street, P.O. Box 8433, Gadsden, Alabama 35902. Phone (205) 543-1244.

Taber & Folmar announces that **A. Kelli Wise** and **Michael Rountree** have joined the firm in the new Montgomery office, located at 200 Interstate Park, Suite 237, Perry Hill Road, Montgomery, Alabama 36109. Phone (334) 270-8291.

Pierce, Carr, Alford, Ledyard & Latta announces that **Caroline Wells Hinds** has joined the firm. Offices are located at 1110 Montlimar Drive, Suite 900, Mobile, Alabama 36609. Phone (334) 344-5151.

Dominick, Fletcher, Yeilding, Wood & Lloyd announces that **Judy Bateman Shepura** has become a member. Offices are located at 2121 Highland Avenue, Birmingham, Alabama 35205. Phone (205) 939-0033.

Mark G. Montiel announces that **Kathleen A. Brown**, formerly of Devereaux & Associates, has become an associate. Offices have been relocated to 5748 Carmichael Parkway, Suite E, Montgomery, Alabama 36117. Phone (334) 277-7525.

Smith, Spires & Peddy announces that **Thomas Coleman, Jr.** has become a member. Offices are located at 650 Financial Center, 505 N. 20th Street, Birmingham, Alabama 35203. Phone (205) 251-5885.

Adams & Reese announces that **William E. Pritchard, III** has become a partner. Offices are located in New Orleans, Baton Rouge, Mobile, Houston and Washington, D.C.

Rives & Peterson announces that **Roger C. Foster, Eugenia Hofammann Mullins** and **Rhonda Pitts Chambers** have become members. Offices are located at 1700 Financial Center, 505 N. 20th Street, Birmingham, Alabama 35203. Phone (205) 328-8141.

Lange, Simpson, Robinson & Somerville announces that **Neil Richard Clement, E. Berton Spence, William B. Stewart, David J. Duke,** and **James C. Pennington** have become partners. Offices are located in Montgomery, Birmingham and Huntsville.

Welsh & Katz announces that **Philip Dale Segrest, Jr.,** formerly law clerk to Judge Marion T. Bennett of the United States Court of Appeals for the Federal Circuit, has joined the firm. Offices are located at 120 S. Riverside Plaza, 22nd Floor, Chicago, Illinois 60606. Phone (312) 655-1500.

Donna Wesson Smalley and **Lauren Wilson-Carr** announce the formation of **Smalley & Carr**. Offices are located at 601 Greensboro Avenue, First Floor Alston Building, Tuscaloosa, Alabama 35401. Phone (205) 758-5576.

Schoel, Ogle, Benton & Centeno announces that **David O. Upshaw** has become a member of the firm. Offices are located at 600 Financial Center, 505 N. 20th Street, Birmingham, Alabama 35203. Phone (205) 521-7000.

Mary Ann Stackhouse, formerly of Floyd, Keener, Cusimano & Roberts, announces she is now a deputy law director in the **Office of the Knox County Law Director**, Knoxville, Tennessee. Her new address is 400 Main Street, Suite 612, City-County Building, Knoxville, Tennessee 37902-2405. Phone (423) 215-2327.

Feld, Hyde, Lyle & Wertheimer announces that **J. Fred Kingren** has joined the firm. Offices are located at 2100 SouthBridge Parkway, Suite 590, Birmingham, Alabama 35209. Phone (205) 802-7575.

Gregory O. Griffin, Sr. announces his departure from the Office of the Attorney General and that he is the newly-appointed general counsel for the **Alabama Board of Pardons and Paroles**. His new mailing address is 500 Monroe Street, Lurleen B. Wallace Building, Montgomery, Alabama 36130. Phone (334) 242-8710.

Bennett L. Bearden announces he has left Parsons & Sutton and is now with the **Office of the District Attorney** in Tuscaloosa, Alabama. His new address is Office of the District Attorney, Sixth Judicial Circuit of Alabama, 410 County Courthouse, Tuscaloosa, Alabama 35401-1894. Phone (205) 349-1252.

Frances Parker Tankersley has accepted the position of compliance officer with **SouthTrust Bank of Alabama.** Her mailing address is P.O. Box 2554, Birmingham, Alabama 35209. Phone (205) 254-5543.

Ford & Associates announces that **Bradley W. Cornett** has become associated with the firm. The address is 645 Walnut Street, Suite 5, P.O. Box 388, Gadsden, Alabama 35902. Phone (205) 546-5432.

Berkowitz, Lefkovits, Isom & Kushner announces that **Andrew J. Potts, Walton E. Williams, III** and **Nancy C. Hughes** have become members of the firm and that **N. Andrew Rotenstreich** has become an associate. The address is 1600 SouthTrust Tower, 420 N. 20th Street, Birmingham, Alabama 35203-3204. Phone (205) 328-0480.

Richard Breibart and **David N. Lichtenstein** announce the formation of

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About Members, Among Firms

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Breibart & Lichtenstein. Offices are located at 651 Beacon Parkway, West, Suite 115, Birmingham, Alabama 35209. Phone (205) 945-2202.

Lightfoot, Franklin & White announces that **William H. King, III** and **William S. Cox, III** have become members of the firm. Offices are located at 300 Financial Center, 505 20th Street, North, Birmingham, Alabama 35203. Phone (205) 581-0700.

Taylor & Smith announces that **Aimee B. Bogard** has become associated with the firm. Offices are located at 300 N. 21st Street, 600 Title Building, Birmingham, Alabama 35203. Phone (205) 252-3000.

Byrd & Spencer announces that **Gregory B. McCain** has become a partner and the new name is **Byrd, Spencer & McCain**. Offices are located at 211 W. Main Street, Suite 1, Dothan, Alabama. The mailing address is P.O. Box 536, Dothan 36302. Phone (334) 794-0759.

Bradford & Donahue announces that **J. Paul Sizemore** and **John Cox Webb, V** have become associated with the firm. Offices are located at 2100-A SouthBridge Parkway, Suite 585, Birmingham, Alabama 35209. Phone (205) 871-7733.

Hollingsworth & Associates announces that **Jill T. Karle** and **Dennis R. Weaver** have become associated with the firm. Offices are located at 15 S. 20th Street, Suite 1100, Birmingham, Alabama 35233. Phone (205) 323-2226.

John G. Scherf, IV, Rick E. Griffin and **Brent W. David** announce the formation of **Scherf, Griffin & Davis**. Offices are located at 2122 First Avenue, North, Birmingham, Alabama 35203. Phone (205) 324-9991.

Lanier, Ford, Shaver & Payne announces that **Jeffrey T. Kelly** and **Paul A. Pate** have become members and **Gregory M. Taube, Rachel Self Howard** and **Melissa J. Long** have become associates. Offices are located at 200 West Court Square, Suite 5000, Huntsville, Alabama 35801. Phone (205) 535-1100.

Pate, Lewis, Lloyd & Fuston announces that **Julia Truesdell Cochrun** has become a partner and **William R. Lewis** is now of counsel. The new name is **Pate, Lewis, Lloyd, Fuston & Cochrun.** Offices are located at 400 Title Building, 300 21st Street, North, Birmingham, Alabama 35203. Phone (205) 323-3900.

Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves announces that **Clifford C. Brady** and **Richard W. Franklin** have become members. Offices are located at 1300 AmSouth Center, P.O. Box 290, Mobile, Alabama 36601. Phone (334) 405-1311.

Johnstone, Adams, Bailey, Gordon & Harris announces that **Robert S. Frost** has become a member. Offices are located at 104 St. Francis Street, Royal St. Francis Building, Mobile, Alabama 36602.

Edward B. Parker, II and **H. Dean Mooty, Jr.** announce the formation of **Parker & Mooty**, and the association of **R. Sean McEvoy** and **Paul P. Telehany**. Offices are located at 235 S. Court Street, Montgomery, Alabama 36014. The mailing address is P.O. Box 4992, 36103-4992. Phone (334) 264-0400.

Andrew P. Campbell and **Jonathan H. Waller** announce the formation of **Campbell & Waller** and that **David M. Loper** and **Charles M. Elmer** have joined the firm as associates. Offices are located at Suite 330, 2000-A SouthBridge Parkway, Birmingham, Alabama 35209-1303.

Rogers, Young & Wollstein announces that **Patrick P. Hughes** has become a partner. The firm's new name will be **Rogers, Young, Wollstein & Hughes**. Offices will remain at Suite 1100, Williamson Commerce Center, 801-30 Noble Street, Anniston, Alabama 36201. Phone (205) 235-2240.

Bruce Maddox announces that **Maryanne Melko** has joined the firm as an associate. Offices are relocated to 529 S. Perry Street, Suite 12-A, Montgomery, Alabama 36104. Phone (334) 264-7200.

Douglas J. Fees announces that **Valerie L. Acoff, Kimberlyn P. Malone** and **Ollie W. Coggin, III** have joined the firm. Offices are located at 401-403 Madison Street, Huntsville, Alabama 35801. Phone (205) 536-1199.

Enslen & Johnston announces that **Patrick D. Pinkston** has become a member of the firm. The new name is **Enslen, Johnston & Pinkston**. Offices are located at 499 S. Main Street, Wetumpka, Alabama 36092. Phone (334) 567-2545.

Woodall & Maddox announces that **Thomas A. Woodall** has been appointed a circuit court judge for the 10th Judicial Circuit, and the firm name is now **Maddox, Austill & Parmer**. Offices are located at 3821 Lorna Road, Suite 101, Birmingham, Alabama 35244. Phone (205) 733-9455.

Montedonico, Hamilton & Altman announces that **John Daniel Reaves** has become an associate. Offices are located at 5301 Wisconsin Avenue, N.W., Suite 400, Washington, D.C. Phone (202) 364-1434.

Lyons, Pipes & Cook announces that **Caroline C. McCarthy, Kenneth A. Nixon, Daniel S. Cushing, Allen E. Graham,** and **Michael C. Niemeyer** have become members, and **Mary Lauren Lemmon, J. Murphy McMillian, III** and **S. Wesley Pipes, V** have become associates. Offices are located at 2 N. Royal Street, Mobile, Alabama 36602. Phone (334) 432-4481.

G. Williams Davenport, an administrative law judge for the **U.S. Government** and formerly a senior trial attorney for the Equal Employment Opportunity Commission in Birmingham, announces that his new address is U.S. Social Security Administration, Office of Hearings & Appeals, 460 Mall Boulevard, Savannah, Georgia 31406. Phone (912) 652-4302.

Letter to the Editor

Please allow this letter to serve as an apology to the members of the Alabama Bar for my actions which may have reflected upon the Bar for my failure to file income tax.

The lessons which I learned from my experience have come at an extremely high price. I did not fully realize the significance of my actions.

It is imperative that others who do not file a return be aware of the consequences. I do not wish others to undergo the same experience which I have undergone.

Johnny M. Lane, Saraland, Alabama

BUILDING ALABAMA'S COURTHOUSES

BULLOCK COUNTY COURTHOUSE

By SAMUEL A. RUMORE, JR.

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

BULLOCK COUNTY

Bullock County was the 55th county established in Alabama. Like 15 other Alabama counties, its existence began after the Civil War. Yet, its significant history began much earlier.

The area that is present-day Bullock County is located in the extreme southern section of the former Creek Indian lands. After the Treaty of Fort Jackson in 1814, the Indians ceded the western portion of the future county to the United States. This territory became part of Montgomery County, established in 1816, and Pike County, established in 1821. In a second treaty, the Treaty of Cusseta of 1832, the Indians gave up the eastern portion of the future Bullock County. This portion was divided between Barbour County and Macon County which were both created on December 18, 1832.

Though Indians lived in the Bullock County area, this territory was not thickly settled. There were no major Indian settlements or villages. The most significant Indian activity to take place within the confines of present-day Bullock County was a battle fought near Midway in January 1837. This engagement preceded the Indian removal to the West and marked the last battle white men fought with Indians on Alabama soil.

First Baptist Church of Union Springs' basement auditorium served as the First Bullock County Court.

Present-day Bullock County is roughly divided into two parts by the Chunnenuggee Ridge. "Chunnenuggee" is a Creek Indian word meaning "long ridge." North of the ridge is the prairie land of the Black Belt region. South of the ridge is the sandy soil of the Wiregrass region. Within the county, the ridge marks the watershed boundary of four river basins. Streams flowing off the ridge enter the Coosa-Tallapoosa, Chattahoochee, Conecuh, or Pea Rivers.

The source of water on the ridge gave the county's largest town its name. When settlers began moving into the area shortly after the Treaty of 1832, they originally named the principal settlement Spring Camp because of the underground springs that provided them water. In 1835 the residents discovered that springs on the north side of the settlement were actually united with springs on the south side, forming one underground spring. Thus the community on Chunnenuggee Ridge acquired the name Union Springs. The town, located at that time in Macon County, was incorporated in 1844.

The Union Springs area became not only a center for agriculture but also for education and refinement. The new settlers came from the Carolinas, Virginia, and Georgia. They brought with them

the ideals of a cultured society. Two of their first projects were to build a female college and a school for boys on Chunnenuggee Ridge. The citizens took pride in these institutions.

Perhaps the most significant example of their cultural activity took place on March 6, 1847. On that day a group of men and women met to establish the Chunnenuggee Horticultural Society. On March 31, 1847, the group passed a resolution to establish a "public garden". A five-acre plot at Peachburg became Alabama's first public garden, and the Chunnenuggee Society became one of the first horticultural societies in the South.

Bullock County Courthouse

Each year the organization held the Chunnenuggee May Fair. Activities included exhibitions on gardening, the awarding of prizes, and concerts. People came from all over, drawn by such attractions as the garden's "Lover's Knot" maze. On the grounds were a garden house and an exhibition house which contained a large salon, a dining room, a hall, and an open pavilion. This event, held in a rural Alabama locale, was quite popular with citizens throughout the region for many years. The fair and a portion of the garden have been revived today.

By 1858 Union Springs was still a small place, numbering less than 100 residents. It had two stores and one church. In that year, the Mobile and Girard Railroad was completed through the town. Its future significance became more certain with the arrival of the railroad. Later, a second line, the Montgomery and Eufaula Railroad, would pass through Union Springs, making it a rail center with freight and passengers moving in four directions.

After the War Between the States, the economic and social conditions in the area were at a low ebb. Road conditions were deplorable. During the rainy season, roads were so bad that the residents of the area were cut off from their respective county seats of Tuskegee, Montgomery, Troy, or Clayton. Poor roads were the single most significant factor that led to the creation of a new county carved from portions of Macon, Montgomery, Pike, and Barbour counties. The new county was established on December 5, 1866. It was given the name Bullock to memorialize Edward C. Bullock.

Edward C. Bullock was born in Charleston, South Carolina, on December 7, 1822. His father was a merchant who had come to South Carolina from Rhode Island. Bullock graduated from Harvard in 1842 and moved to Eufaula, Alabama the next year. He spent two years teaching and reading law. In 1845 he was admitted to the Alabama Bar.

He initially entered a partnership with John A. Calhoun, nephew of South Carolina Senator and Vice-President John C. Calhoun, and then practiced with the Eufaula firm of Pugh, Bullock, and Buford. James Lawrence Pugh would later serve as a United States Congressman and Senator from Alabama.

Young Edward Bullock also engaged in politics. He was elected to the state Senate in 1857 and served until 1861. He delivered a formal address of welcome to Jefferson Davis when Davis arrived in Montgomery for his inauguration as President of the Confederacy. When war broke out, Bullock resigned his seat in the Senate and enlisted in the Eufaula Rifles as a private. When the 18th Alabama Regiment was organized, he was appointed its colonel. While stationed in Mobile he contracted typhoid fever and died at Montgomery on December 23, 1861, at the age of 39.

Historic marker at Bullock County Courthouse

Bullock's life and service to Alabama were cut short. His former partner, Senator James L. Pugh, said of him: "He was the best organized man I ever knew. His temper and taste were perfect. His whole nature was genial, refined, and gentle. His mind was remarkable for its activity and brilliancy. His personal integrity and devotion

to principle, duty, and truth were very striking. He was a fine lawyer and an able advocate; and his high personal character, honorable nature, and irresistible wit and elegance made him a lawyer and statesman of as high promise as any man who ever lived in Alabama." The Alabama Legislature of 1866 agreed with that assessment and named the new county established in southeast Alabama for Colonel Bullock.

The Act creating Bullock County named James T. Norman, Joel T. Crawford, and Malachi Ivey as commissioners to hold an election for the selection of county officers and a county seat location. The election took place in 1867 and Union Springs became the county seat. Union Springs is centrally located in Bullock County; in addition, its position on the railroad line significantly enhanced its campaign to become the county seat.

The next task for the new county was to find a place to conduct public business. The First Baptist Church of Union Springs was chosen. It had been established in 1849. Its original frame building dated from 1850. And its present brick structure was originally constructed in 1860. The Committee on Renting Church Property reported to the membership on April 6, 1867, that it had rented the church's basement auditorium to the county for use as a courtroom. Certain repairs and alterations had to be made, and the county agreed to pay for all improvements provided that their cost would serve as rent. On these conditions, the county and the church entered into a rental contract through the year 1868. One local historian humorously claimed that the county government headquarters, though located underground, had the advantage of being in a temple, and the probate judge had the church over him, whether or not it was behind him.

In November 1867, Thomas Pullum and his wife deeded to the Bullock County Commission a lot for a courthouse and jail. M.M. Tye of Union Springs was selected as architect and builder. The county initially appropriated $31,000 for the courthouse construction; however, the project did not get underway for several years. Finally, in August 1871, the cornerstone of the courthouse was laid with the appropriate pomp, ceremony, and Masonic ritual.

Coins, newspapers and other artifacts were placed in the cornerstone. Members of the Bullock County Bar wrote messages on their business cards for inclusion. Two examples follow.

Scaffolding at courthouse for repairs due to Hurricane Opal damage

Safe in vault room at the Bullock County Courthouse

On the card of H.C. Tompkins: "To the future generations, greeting. You may have advanced far beyond us in literature, in science, and in art, but you can never excel us in courage on the battlefield, and in patience under suffering."

On the card of Colonel R.H. Powell: "To future generations, greeting. For my sentiments see the card of my brother, Henry C. Tompkins."

After the ceremonies, the gathered citizens processed to the Masonic Lodge where the best in genial hospitality was dispensed, according to the accounts of the day.

The courthouse was ready for occupancy in September 1872. A newspaper of that time described the edifice as follows: "Symmetrical in design, the building is a two-story red brick structure with an end gable roof. The main feature is the three-story Second Empire style towers flanking the front entrance. The towers topped with classical mansard roofs form a recessed portico area on both the first and second floor. The offices open from a central hall with the courtroom located in the rear of the second floor."

The Second Empire style was popularized by French architects during the reign of Napoleon III, 1852 to 1870, and was much utilized in America until the 1880s. The Executive Office Building in Washington D.C. is an example of this style. In Alabama, the Coosa County Courthouse was originally designed in the Second Empire style, but later changes have altered some of its features.

Another comparision between the Bullock County Courthouse and the Coosa County Courthouse is that neither has a court square. Most pre-1900 courthouses were either built in the middle of a traditional court square or they face an open area or court square. These two courthouses were built flush against the sidewalk in their respective towns, detracting somewhat from the concept that a courthouse should be the center of attention in a community.

Nevertheless, the Bullock County Courthouse is a well-preserved example of a post-bellum courthouse. Due to inflation, the final cost of the building was approximately $60,000. This structure is an architectural treasure for a small, rural Alabama county. It was a symbol of community pride when constructed and remains one today.

It should be noted that the first public building in the new Bullock County was the county jail completed in 1868. This building served the county for almost 30 years until the second county jail was built in 1897. This structure is architecturally significant in its own right.

The 1897 jail is located behind the courthouse and was built by the Pauley Jail Company of Montgomery. It cost $7,250. This three-story jail is unique because of its castle-like appearance. It was constructed in the Victorian Gothic style. The dark, red brick structure has small, square-shaped brick turrets on each of the four corners topped with spiked metal caps. The gallows and trap door for hangings remain on the third floor. This building deteriorated over the years and was replaced by the third county jail which was completed in 1984. The old jail building is leased by the Bullock County Historical Society, which may one day establish a local museum there.

The exterior of the Bullock County Courthouse has changed little since it was constructed. However, there have been renovations and repairs made to the building over the years. In 1954, the County Commission authorized $100,000 to remodel the courthouse. The contract was awarded to Henderson, Black, and Green of Troy. The electrical sub-contract went to Floyd Plumbing and Electrical Company of Union Springs. The architect was Carl Cooper of Montgomery.

This project included the construction of side wings on both sides of the building that blended with the architectural design of the structure. These additions are one-story in height and were built to house the tax collector and tax assessor offices.

Other improvements included new wiring, a new heating plant, a safety vault for storage of county records, and sand blasting of the exterior. As an aside, the vault room was built around a large iron safe. This safe cannot be removed without tearing out a wall of the vault.

In 1972, a proposal was made to build a new courthouse and jail complex and to convert the old courthouse into an office building. The architectural firm of Sherlock, Smith, and Adams of Montgomery submitted plans for the project. However, due to high cost estimates, among other factors, this project never materialized.

On October 8, 1976, the Bullock County Courthouse Historic District was entered on the National Register of Historic Places. The courthouse together with 46 other buildings located along Prairie Street in Union Springs were recognized for their historical significance and because, together, they retained the appearance of a late 19th Century county seat town. This designation heightened interest in preserving the historic character of the district.

Old Bullock county jail – built in 1897

Jail (1897) following external renovation

Another significant event took place in the 1980s when the Bullock County Planning Commission obtained a matching survey and planning grant from the Alabama Historical Commission for a Main Street Revitalization Project. The result was publication of a *Guide for Downtown Union Springs, Alabama.* This book gave specific proposals to each property owner on restoring and preserving the historic properties.

This project also focused attention on the maintenance of the courthouse. In the early 1980s water-damaged plaster in the courtroom was replaced after roofs and leaking gutters were repaired. The two third-floor rooms in the towers were also cleaned and made available for storage after the roofs were repaired.

Bullock County Commission Administrator Sylvia Dismukes related two interesting incidents concerning a nasty problem in the courthouse. For years the building was infested with bats and pigeons. Their droppings created a foul odor. At one point the county purchased a BB gun to eliminate the pest problem. This purchase was questioned by the State Examiner of Public Accounts as a personal expense, but was approved when the examiner learned the use for the purchase.

Later, it was discovered that the bats in the courthouse were of an endangered species. They could not be killed. Therefore, according to Mrs. Dismukes, the county used ultrasonic devices to repel the creatures. Ultimately the remaining bats had to be removed by hand and set free in another location. The clean-up in the courthouse of the bat and bird refuse that had accumulated over the years was a monumental undertaking.

In 1984, the historic marker in front of the courthouse was officially unveiled. One of the key supporters of the courthouse preservation effort was District Judge Dwight Hixon. He summed up the sentiments of the citizenry on that occasion when he made the following remarks: "Preservation of our courthouse is an ongoing responsibility which the County recognizes

must be continued without undue expense for the present, and without creating an expensive burden of restoration or replacement for our future generations."

Unfortunately, Judge Hixon did not live to see the complete remodeling of the courthouse. The county awarded a contract to Goodwyn, Mills, and Cawood, Inc., architects from Montgomery, to design interior renovation plans and to make the courthouse handicapped accessible with the addition of an elevator. The building contract was awarded to Construction Consultants, also of Montgomery. The cost of the project was $1.2 million. Funding came from a one million dollar bond issue where repayment was secured by sales tax monies pledged until November 2010. Also, the county applied $200,000 to the project from a Community Development Block Grant awarded by the State of Alabama.

While the courthouse renovation took place, all county offices moved to the old Cowikee Mills building on Abercrombie Street. The county had purchased this property many years before. This structure served as the Bullock County Annex Building for approximately 13 months until the project was completed.

The ribbon-cutting ceremony for the newly remodeled courthouse took place on Sunday, May 17, 1992, at 2 o'clock p.m. A crowd estimated at 500 persons heard the comments of John Will Waters, then chairman of the County Commission and later probate judge of Bullock County. The honor of cutting the ribbon at the ceremony was given to Mrs. Darlene Hixon, widow of Judge Hixon, who had cared so much about the traditions of the courthouse and worked to save it.

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.

The newly renovated courthouse interior represents a remarkable transformation from the previous interior. The courthouse is thoroughly modern; however, in recognition of the past, enlarged historic photos of Union Springs and Bullock County grace the walls. All offices pertaining to the courts and the courtroom are located on the second floor. The probate judge, sheriff, revenue commissioner, and board of registrars are located on the main floor. The county commission courtroom, probation offices, Soil Conservation Service, and the Historical Society office are all located in the basement.

Marker in downtown Union Springs

When Hurricane Opal passed through the county on October 4, 1995, rain and winds estimated at 100 miles per hour pelted the courthouse, causing some obvious water damage. Further, apparently due to the porous nature of the hand-made bricks, there was additional undetected damage to the structure which made itself known several weeks later. Around 10:30 p.m. on November 27, 1995, a large section of bricks from the south tower fell to the ground. Luckily no one was injured due to the late hour. Still, walls had to be boarded up and the structure secured. Repair work began on January 29, 1996, which included repairs to the leaky roof and the replacement of matching bricks to restore the structure's historic appearance. Cost of the repairs was $50,000, with the county only paying the $2,500 insurance deductible.

The 1871 Bullock County Courthouse still stands today in Union Springs. It can serve as an excellent example of successful historic preservation for other communities. However, to be successful, as evidenced by the Hurricane Opal repairs, the process of preservation must constantly continue.

The author expresses thanks to Union Springs attorney Lynn W. Jinks, III; Sylvia Dismukes, administrator of the Bullock County Commission; and Annie Mae Turner, formerly of the Bullock County Development Authority, for their help with information used in this article. ■

Sources: *Collections And Recollections of Bullock County History*, Bullock County Historical Society, 1977; *Bullock County Courthouse, The County Capitol*, Annie Mae Turner (draft manuscript); *History of the First Baptist Church of Union Springs, Alabama*, E. S. Pugh, 1949.

Dedication of Seybourn H. Lynne Federal Courthouse

Decatur, Alabama, February 4, 1996

United States District Judge Seybourn H. Lynne, the nation's longest serving federal judge, was honored recently when the Federal Building in Decatur, Alabama was dedicated in his name. U.S. Bankruptcy Judge Jack Caddell, U.S. Senator Howell Heflin, U.S. Senator Richard Shelby, and Warren B. Lightfoot, president-elect of the Alabama State Bar, presented remarks honoring Judge Lynne at the ceremony. Also attending was Chief Judge Gerald Tjoflat of the 11th Circuit Court of Appeals. U.S. Representative Bud Cramer was unable to attend due to scheduling conflicts. Opening remarks were presented by Chief U.S. District Judge Sam C. Pointer, Jr.

Judge Seybourn Lynne, John A. Caddell and Judge Jack Caddell

Judge Lynne began his judicial career in 1934 as a Morgan County Circuit Court judge. In 1941, he took over the duties of judge of the 8th Judicial Circuit. The next year, he resigned to volunteer for military duty during World War II. In 1946, he was appointed to the U.S. District Court for the Northern District of Alabama by President Truman. In 1953, he became its chief judge and in 1973, a senior judge.

Following are portions of the remarks presented honoring Judge Lynne:

John A. Caddell,
special master of the ceremony

"Being appointed as special master for this ceremony is one of the greatest privileges and pleasures that I have had. It was my honor to serve as special master for the investiture ceremony when Judge Lynne was invested with the office of United States District Judge on January 9, 1946. Judge Lynne is my closest lifelong friend and has been my mentor and guide ever since he took me under his wing when I was a freshman in college. He has continuously supported me and guided me since that time."

U.S. Senator Howell T. Heflin

"[Judge Lynne] has served more than 60 active years as a trial judge. I am convinced he is the holder of a world record that will never be surpassed.

Judge Lynne has also been a community leader of note, serving in church, civic, school and professional organizations. He has served both the Crippled Children's Clinic of Birmingham and the Eye Foundation Hospital of Birmingham as a trustee. In 1967, he served a term as president of the University of Alabama's Alumni Association.

"By naming these buildings for distinguished citizens like Judge Lynne, we designate them as landmark symbols of freedom and hope for those seeking fairness and justice who pass through their doors—doors usually located underneath the words 'Equal Justice under the Law.'

"Judge Lynne will go down as one of the great jurists of our time, and this building—a temple of justice—will be a reminder of that greatness. He is entirely deserving of the honor that we are bestowing upon him today, and this building will be a long-lasting testament to his life and work."

U.S. Senator Richard C. Shelby

"Judge Lynne embodies the qualities we look for in any jurist, and I am proud to be here today to share in the recognition of his 50 years of service. In dedicating this courthouse, we can hope that those who will work here will share the same commitment to the ideals of service, justice and knowledge that Judge Seybourn Lynne has pursued throughout his distinguished career."

U.S. Representative Bud Cramer

"With the courtly manners of a true Southern gentleman, you have shown that a judge can be in complete control of a courtroom by the sheer force of his integrity and his intellect.

"The length of your service as the senior federal judge in the United States of America is uniquely and profoundly impressive. But even more impressive is the extraordinary quality of your service as a judge. May this building stand as a lasting tribute to a truly great jurist and a truly great human being."

ASB President-elect
Warren B. Lightfoot

"...one word that describes our regard for you is 'revered.' I speak for thousands of fellow lawyers when I say we revere you, and we think it singularly fitting that this building be named for you, to remind us and the generations who come after us of what you have meant to our justice system.

"It is because of what Judge Lynne stands for: five attributes, really—probity, compassion, good judgment, intellect and decisiveness.

"You have been an inspiration to generations of lawyers; you have made us better advocates; you have made us better persons; you have set high standards for all of us; and you have established a legacy that will remain undiminished. This courthouse will serve as a great and constant reminder of what we all know to be true: we shall not look upon your like again." ■

Judge James Hancock and Judge Lynne

Screened behind this article is the Seybourn H. Lynne Federal Courthouse (center) and the home where Judge Lynne was born and raised (opposite upper right-hand corner of courthouse property).

OPINIONS OF THE GENERAL COUNSEL

By J. Anthony McLain, general counsel

QUESTION:

"I have been employed to represent the wife of a physician in a county approximately one hundred miles from Montgomery, Alabama. The parties entered into an antenuptial agreement which is subject to legal attack as to the validity of the agreement in that there was no financial disclosure and the wife did not have independent counsel. The agreement references that there did occur a financial disclosure and in fact names a lawyer who provided independent counsel to the wife at the time of her signing. Under the terms of the agreement the wife would be entitled to only $2,000 per month for 24 months. She estimates the marital estate to be worth between $3 million and $4 million. If she is bound by the agreement she will not receive any division of the estate. She also alleges physical abuse and I have advised her concerning her rights for a separate tort claim with jury trial or for the matter to be decided by the divorce court. She has advised me that reconciliation is a remote possibility and only then under certain circumstances and parameters.

"It appeared to me under the facts of this case as pertains to the contract of the antenuptial agreement and the damages claims that a fee utilizing a percentage contingency as a guideline with an offset for any fees actually paid on hourly charges would be appropriate. I am enclosing herewith my fee agreement for your review and presentation to any commissioners. Please advise if this contract would be approved as an exception to the prohibition against charging contingent fees in domestic relations matters. I have drafted the agreement taking into consideration recent opinions and discussions concerning these issues."

ANSWER:

A lawyer may not enter into an arrangement for, charge or collect a fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof.

DISCUSSION:

Preamble

The Disciplinary Commission of the Alabama State Bar, in formal opinion RO-88-103, concluded that a lawyer could represent a spouse on a contingent fee basis in an action for breach of an antenuptial contract, said action seeking money damages. The Commission, deciding the matter pursuant to DR 5-103(A) and EC 2-20 of the former Code of Professional Responsibility, acknowleged the pending adoption of Rule 1.5(d), Alabama Rules of Professional Conduct, and its direct prohibition of contingent fees in domestic relations matters. The Commision noted a prior opinion (RO-83-22) which had listed the only approval of a contingent fee contract in a domestic relations matter, that being collection of child support or alimony arrearage in a completed divorce.

REASONING:

Rule 1.5(d) (1) prohibits a lawyer from entering into an arrangement for, charging, or collecting any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof. Under the former Code of Professional Responsibility, DR 2-107(A) prohibited "a contingent fee for representing a defendant in a criminal case." EC 2-20 provided that, "Contingent fee arrangements in domestic relation cases are rarely justified." According to the *Annotated Model Rules of Professional Conduct*, Second Edition, Rule 1.5(d) reflects the public policy concern that an attorney-client fee arrangement should not discourage reconciliation between the parties. The Annotated Model Rules also point out that the counterpart provision in the predecessor Model Code discouraged but did not flatly prohibit such agreements. Several illustrative cases are set forth in the *Annotated Model Rules*:

> A contingent fee agreement that gave a lawyer a percentage of property received on behalf of a client in excess of that negotiated in a settlement at the time of separation was improper—*Coons v. Kary*, 263 Cal. App.2d 650, 69 Cal. Rptr. 712 (1968).
>
> Lawyer forfeits rights to collect any fee, including quantum meruit, by representing client under contract that included contingency fee and action for modification of divorce judgment and property settlement—*Licciardi v. Collins*, 180 Ill. Ap. 3rd 1051, 536 N.E. 2nd 840, 129 Ill. Dec. 790 (1989).
>
> Arrangement whereby lawyer would receive contingent fee of $60,000 from settlement proceeds improper —*Shanks v. Kilgore*, 589 S.W. 2d 318 (Mo. Ct. App. 1979).
>
> Contingent fee contracts for legal services are generally permitted in actions brought by one spouse to recover property from other spouse or to settle property rights among spouses, including equitable distribution proceeding separate from divorce action: Agreement may not be used in action for child support—*Davis v. Taylor*, 81 N.C. App. 42, 344 S.E. 2d 19 (1986).
>
> While predecessor Model Code had no disciplinary rule prohibiting lawyer from representing client in action for breach of prenuptial agreement on contingency basis, Model Rules make such agreement unethical. Ala. Bar, Disciplinary Comm'n, Op. 88-103 (1989).
>
> Implied agreement between lawyer and client for reasonable fees in connection with client's divorce not voided by subsequent invalidation of contract because of contingency fee—*Morfeld v. Andrews*, 579 P.2d 426 (Wyo. 1978).

The historical perspective on Rule 1.5 is enunciated in the *Law of Lawyering* by Hazard and Hodes:

"The rule against contingent fees in domestic relations matters is of more recent origin, and may have a sounder public policy rationale. Basing a lawyer's fee on the amount of alimony or support recovered seems no more objectionable than basing it on the amount of a jury verdict. Public policy is offended, however, when the fee is made contingent upon the lawyer's obtaining a divorce for his or her client, for the lawyer would then have no incentive to help bring the parties to a settlement that might preserve the marriage.

"Rule 1.5(d) (1) does not engage in such fine distinctions, but provides that lawyers may not use contingent fee arrangements in any domestic relations matter. Since questions of alimony and support are inextricably intertwined with the question of whether the marriage itself will continue, this broadened ban seems reasonably related to the purposes of the rule." Section 1.5: 501

According to Wolfram's *Modern Legal Ethics*, Practitioner's Ed. (1986), most American jurisdictions hold that it is improper for a lawyer to charge a fee in a divorce case that is either contingent on a favorable judgement or settlement or proportional to the recover of a certain amount of alimony or property settlement. Section 9.4.4. This is consistent with the first Restatement of Contracts that a promise by a spouse to pay a lawyer a contingent fee to obtain a divorce or annulment is illegal and thus void as a matter of contract law. Restatement, Contracts §542(2) (1932). The Second Restatement of Contracts states that:

"A promise that undermines [the marriage] relationship by tending unreasonably to encourage divorce or separation is unenforceable." Restatement (Second), Contracts §190, Comment C (1979).

One basis upon which the prohibition may be justified is that a contingent fee contract would place strong economic pressure on the lawyer to assure that reconciliation did not occur. However, this approach should not be so absolute as to prohibit contingent fees in all domestic relations litigation, as indicated below.

The second basis for the prohibition concerns the ability of a client to employ counsel. Contingency fee arrangements enable financially strapped litigants to obtain counsel. The argument can be made that such need does not exist in a divorce matter. The spouse in possession of the majority of the marital assets should have no difficulty retaining counsel. The spouse with little or no assets would be protected in most jurisdictions by the court's ordering the spouse with the greater assets to pay the other spouse's attorney fee.

Another point of concern is that a lawyer's taking a percentage of any property or monies awarded to a client by the court would unnecessarily and unfairly skew the division of property as envisioned by the court independent of such contractual attorney's fee. This could possibly place the lawyer at odds with his client, as well as with the client's children, in that the lawyer's fee would diminish the court's award of support, alimony, or property.

Where a separate tort, contractual or fraud claim exists independent of the divorce matter representation of the client could be undertaken on a contingency fee basis. However, where these claims are so intertwined with the divorce matter that they are inseparable and so related to one another not only with regard to the legal rights of your client, but also as to the computation and assessment of your fee, then the contingent fee provisions of the contract would be prohibited.

Rule 1.5 is very absolute in its terms. If the fee in any way is contingent upon the granting of the divorce then such would be prohibited by Rule 1.5. It appears from your contract that if the antenuptial agreement is upheld, then you will be compensated on an hourly basis per the terms of the contractual arrangement with the client. If, on the other hand, you are successful in having the antenuptial contract set aside or invalidated, your fee would then be contingent upon the assets which the client could receive from the divorce in the event one is granted. This would violate the letter and purpose of Rule 1.5. While the rules allow a "fee plus" arrangement as stated in your contract whereby you would be compensated above and beyond your hourly fee basis based upon those factors enumerated in the contract, such cannot be contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof.

The contract which you have submitted for review concurrent with your ethical inquiry appears to establish a contingency fee for your representation of the client in the divorce proceeding. The antenuptial agreement is so interwoven with the divorce matter that the two cannot be distinguished or separated sufficient to allow a conclusion that the contingent fee as proposed does not violate Rule 1.5.

[RO-96-01]

Parham H. Williams, Jr.

Showing the Way to What is Best in Our Profession

By Howard P. Walthall

Late in the summer of 1924, a young Mississippi couple, Parham H. Williams and Mary H. Williams, both intent on obtaining a legal education, loaded their Model T Ford with their belongings and drove from Pickens, Mississippi to Lebanon, Tennessee, then the home of the historic Cumberland Law School. With the lack both of money and motels, Parham and Mary carried with them a tent, and camped along the way. After each had earned a Cumberland law degree, their faithful car and tent were ready for the return trip to Mississippi.

Driving from Birmingham to Oxford, Mississippi on a December Saturday in 1984 to attend a basketball game between Samford University and the University of Mississippi, Samford President Thomas E. Corts necessarily intersected the route taken 60 years earlier by that young Mississippi couple. Had Corts thought of the fact that he was crossing the elder Williamses' path, he would have appreciated the irony. Corts's visit to Oxford, Mississippi had a purpose in addition to cheering for the Samford basketball squad. Samford University was now the home of Cumberland Law School, which was engaged in a dean search. One name suggested to the Dean Search Committee was that of Parham Williams, Jr., son of the young couple who long ago had left Mississippi to attend Cumberland. Accompanied by a member of the Cumberland Dean Search Committee, Corts had arranged his schedule to include a visit with Dean Williams prior to the basketball game.

Dean Williams and family

Samford lost the basketball game, but Williams agreed to become a candidate for the Cumberland deanship, was selected, and on July 1, 1985 assumed the deanship.

This year Dean Williams has announced his retirement from the Cumberland deanship on June 1, 1996. Dean Williams will have served a total of 25 years as a law school dean, 14 at Ole Miss and another 11 at Cumberland. Asked the number of law school diplomas he has signed in those years, Williams does a rough calculation, and concludes that the number would exceed 4,000. Each diploma signifies a life that Williams has touched in some way, sometimes only indirectly but often in a very immediate way. Williams' tenure as a law school dean is such that his title has become virtually a part of his name. Even his grandchildren call him "Dean."

Alabama bar members—judges, practicing lawyers, and Cumberland alumni—who have gotten to know Williams during his tenure at Cumberland emphasize a variety of points in praising the man, his involvement in the Alabama legal community, and his performance as dean. Cumberland alumnus and United States Court of Appeals Judge Joel F. Dubina points to the ways in which Williams has been able to strengthen Cumberland's program. Dubina characterized the construction of the new Lucille Stewart Beeson Law Library as the "crown jewel" of Williams' deanship, but also took note of the

(From L to R) Keith Norman, Leslie Wright, Dean Williams, Thomas Corts, Lucille Stewart Beesson at the Law Library dedication in February 1996

strength of the faculty members added during Williams' deanship who had added "a diversity of talents and ideas" and Cumberland's reduction in the size of its entering class at a time of an increase in the number of applicants.

Former Alabama Governor Albert P. Brewer, who teaches at Cumberland as Distinguished University Professor of Law and Government, emphasizes the degree to which Williams has involved himself in the civic life of Alabama, including service on the Citizens' Conference of Alabama State Courts. Birmingham attorneys S. Eason Balch and Thomas N. Carruthers (the latter a distant relative of Cumberland's founding faculty member, Abraham Carruthers) underscore the importance of a law dean's activities in the larger community. They point out that the dean of a law school is the person primarily responsible for creating an image of the law school for lawyers who did not go to that school. Carruthers notes that Williams has "brought Cumberland into the life of Birmingham and Alabama more than ever before." Balch notes Williams' polished, Southern, pleasant manner, and declares: "You just can't out-pleasant him; if he says something kind or pleasant to you, and you reciprocate, he comes right back with some statement even more generous." Both credit Williams with fixing in their minds an image of civility and learning in connection with Cumberland.

Dean Williams and Stan Starnes Law Week '95

Supreme Court Luncheon – Law School Orientation 1993

Parham and Polly Williams

Cumberland alumnus and Birmingham attorney W. Stancil Starnes also picks up the theme of Williams' impact on the community, noting that it is "real and lasting and of equal importance to his unparalleled professional achievements at Cumberland." Starnes, a member of the Dean Search Committee that recommended Williams, says that he counts it a privilege to have participated in that process, stating "it's nice to be right about someone."

The image of the law school that a dean conveys is important to others in legal education (including prospective faculty members). Cumberland Professor Thomas C. Berg, Rhodes Scholar and a graduate of the University of Chicago Law School, recalls that he knew very little about Cumberland when he accepted an invitation for a preliminary half-hour interview at a national hiring conference. In that situation, Berg observes, "first impressions are all-important, for the school and for the candidate." He recalls that Dean Williams "made a terrific first impression as a person of dignity and weight."

Richard E. Davis, a Birmingham lawyer, has had the opportunity to observe first-hand Williams' qualities as an educator. His is one of the Cumberland diplomas signed by Williams. He cites Williams as a role model even for Cumberland students who were not personally enrolled in Williams' Evidence class. Davis declares that Williams is "an educator, not only in the classroom, but by example. He shows the way to what is best in our profession: exercise of sound judgment, lifelong pursuit of learning, civility, and concern for others." Davis, an Auburn graduate, concludes that "Charles Barkley may not want to be a role model, but Parham Williams is one." James S. Garrett, judge of the Tenth Judicial Circuit and president of the Cumberland National Alumni Association, puts it succinctly: "Dean Williams is all you could want a dean to be."

Ask Williams about the accomplishment of his deanship, and he gives responses that are careful, guarded, and modest. But there is one subject on which Williams has no reluctance in expressing an unequivocal and totally one-sided opinion: that is the future of legal education and of the legal profession generally. In an increasingly heterogenous culture in which not only technology but also human relationships are becoming more complex, Williams sees the rule of law as the essential glue that holds together society. If that is right, then there is a corresponding need for competent, ethical lawyers to apply the rule of law. "People can bash the legal profession all they want to," says Williams, "but we will still need lawyers." ■

LEGISLATIVE WRAP-UP

By ROBERT L. McCURLEY, JR.

1996 Crime Package

The 1996 Regular Session of the Legislature which began February 6, 1996 must adjourn by May 20, 1996. Usually all major legislation passes the Legislature in the last two weeks. In addition to "tort reform" bills (see January 1996 *Alabama Lawyer*) Governor James and Attorney General Sessions have proposed 31 crime bills, that they propose will "fix a broken system."

(1) Determinate Sentences -
Abolishes parole and implements determinate sentencing similar to the federal system.

(2) Drug Trafficking Enterprise Act -
H.B. 242, S.B. 291
Replaces the punishment for a second conviction from mandatory life imprisonment to a sentence of death.

(3) General Fraud -
H.B. 73, S.B. 179
Creates a new fraud offense where reliance on a fraudulent act is not a necessary element, nor does anyone have to incur a loss.

(4) Window Tinting -
H.B. 487, S.B. 309
Limits the amount of tint in vehicle windows and violation of this Act is a misdemeanor.

(5) Obscenity -
H.B. 57, S.B. 165
Creates a progressive three-tier level of punishment instead of one punishment for distributing obscenity. Second conviction results in a Class C felony, with third or subsequent convictions a Class B felony. It exempts those convicted from the Habitual Offender Act and increases the punishment of a wholesale distributer from a misdemeanor to a felony.

6) Sex Crime Notification -
H.B. 482, S.B. 176
Mandates that prison wardens, law enforcement officers and the attorney general notify the community of the sex offender's proposed residence 30 days before release. Regulates and prohibits the offender from living in a residence where a person 19 years of age or younger is also living and the offender cannot live within 1,000 feet of a school or child care facility.

(7) Death Penalty Appeals -
H.B. 44, S.B. 136
Eliminates the court of criminal appeals from review of death penalty cases and provides that a death penalty appeal will go directly to the Alabama Supreme Court.

(8) No Bail on Appeal -
H.B. 117, S.B. 118
Revokes the opportunity for bail where the accused has been found guilty of a crime that carries a term of imprisonment and appeals the sentence, unless the judge makes a specific finding that the defendant will not flee or that the case is likely to be reversed on appeal.

(9) Speedy Trial -
H.B. 279, S.B. 134
Mandates that indictments must be filed within 30 days of arrest unless in a circuit with two or more counties; then the indictment must be filed within 90 days. Mandates that the trial must begin within 90 days following the indictment or dismissed. Allows the court to consider extenuating circumstances when determining whether to dismiss with or without prejudice.

(10) Bail Reform -
H.B. 144, S.B. 172
Bill expands the number of persons ineligible for bail from only those convicted of a capital offense to include those charged with a Class A or B felony. A hearing is allowed for those charged with Class A and B felonies to determine if he or she may be detained without bail. Provides that a person who is detained without bail may be tested for a controlled substance and creates a rebuttable presumption that no bail should be allowed when charged with a capital offense or who meets certain other prescribed criteria.

(11) Venire Size-
S.B. 248
Supersedes Rule 18.4 of the Alabama Rules of Criminal Procedure which would effectively lower the number of possible jurors on a jury pool to 20, thereby limiting the number of peremptory strikes.

(12) Victims Present at Executions -
H.B. 552
Will allow the victim's family or

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.

their representative to be on the list allowed to be present at the execution of a defendant.

(13) Telephone Search Warrants - H.B. 219, S.B. 305
Allows for search warrants to be issued by phone or fax machine when circumstances make it reasonable to dispense with a written affidavit.

(14) Information Pleas - H.B. 226, S.B. 222
Supersedes Rule 2.2 of the Alabama Rules of Criminal Procedure. The Constitutional amendment eliminates the 15-day waiting period after arrest before arraignment and will allow a defendant to plead guilty at any time after arrest and before indictment.

(15) Juvenile Information - H.B. 465, S.B. 264
Expands the list of individuals permitted to inspect juvenile records. Also allows the Criminal Justice Information Center to obtain and disseminate information about serious juvenile offenders. Requires law enforcement agencies to report all pertinent information to the Alabama Criminal Justice Information Center. Furthermore, the bill will change the law by requiring the retention of the juvenile's fingerprint records regardless of the outcome of the case. Allows for photographs, blood and DNA samples of alleged juvenile delinquents.

(16) Juvenile Capital Crimes - H.B. 172, S.B. 455
Children under the age of 14 who commit a capital offense may be tried as an adult, but may not receive the death penalty, and cannot receive juvenile offender status.

(17) Juvenile Detention Act - H.B. 91, S.B. 119
Allows children to be detained in jail if kept separate and apart from adults for up to 60 days. Further mandates that pistols and guns possessed by a child be destroyed by the court.

(18) Curfew Law - H.B. 75, S.B. 272
Allows municipalities to detain curfew violators.

(19) Charitable Frauds - H.B. 160, S.B. 244
Creates an organization file in the Attorney General's office that all charitable organizations must register, file annual reports, pay a yearly fee, and file any contract between charitable organizations and commercial co-venturers.

(20) Deceptive Trade Practice - H.B. 190 , S.B. 158
Enhances the penalty from a misdemeanor to a Class C felony.

(21) Assault Crime - H.B. 296, S.B. 459
Amends the criminal law to make any physical injury of a law enforcement officer or teacher the same punishment as serious physical injury to any other individual.

(22) Sex Victims - H.B. 229, S.B. 497
Eliminates common law marriage as a defense to sexual crimes. Anyone 16 years of age or older who has sexual intercourse with a 12-year-old is guilty of rape in the first degree.

(23) Warrantless Searches - H.B. 228
Allows warrantless searches for violations as well as felonies and misdemeanors.

(24) Unlawful Distribution of Drugs - H.B. 474
Includes in the definition of a person who commits the crime of unlawful distribution of drugs those who dispense controlled substances rather than those who do so for a legitimate and professionally recognized purpose.

(25) Drug Distribution and Firearms - H.B. 477, S.B. 45
Adds five years with no chance of probation to any punishment of one convicted of unlawful distribution of controlled substance.

(26) Possession of marijuana - H.B. 606, S.B. 477
Provides that the first conviction for the use of marijuana for personal use may be a misdemeanor conviction but any repeated offender would be punished as a felony irrespective of "personal use".

(27) Drug Crimes Pistol - H.B. 570
Bill provides that anyone who is in possession of a pistol who is convicted of any drug crime would get enhanced punishment.

(28) Possession of Gambling Devices - H.B. 530,
Will make possession of a "slot machine" illegal and allow the state to seize the machine upon finding it.

(29) Definition of Protected Person - H.B. 529, S.B. 494
Provides that anyone residing in a nursing home, mental hospital or developmental center is *prima facie* a protected person.

(30) Definition of Felony Murder - H.B. 478,
Expands the definition for culpability of felony murder to include any death that results from a violent felony.

(31) Habitual Felony - H.B. 537, S.B. 471
A plea of nolo contendere will be considered a felony conviction for habitual offenders purposes. Other revisions pending before the 1996 Regular Session.

The Alabama Law Institute has the following bills presently pending before the Legislature:

Revised UCC Article 8 "Investment Securities"
S.B. 218 Senator Steve Windom
H.B. 405 Representative Mark Gaines

Repeal of UCC Article 6 "Bulk Transfers"
S.B. 217 Senator Steve Windom
H.B. 404 Representative Mark Gaines

Partnership with Limited Liability Partnership
S.B. 285 Senator Wendell Mitchell
H.B. 184 Representative Mike Box

Legal Separation
S.B. 372 Senator Chip Bailey
H.B. 238 Representative Marcel Black

Joint Custody
S.B. 267 Senator Roger Bedford
H.B. 21 Representative Howard Hawk

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

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MAY

10 Friday
NUTS & BOLTS: SEMINAR FOR LEGAL PROFESSIONALS
Tuscaloosa
SBI Professional Development Seminars
Credits: 6.0 Cost: $129
(800) 826-7681

17-18
ANNUAL SEMINAR ON THE GULF
Sandestin, Sandestin Beach Resort
Alabama State Bar Young Lawyers' Section
Credits: 6.0
(205) 879-1100

CITY AND COUNTY GOVERNMENTS
Orange Beach, Perdido Beach Resort
Alabama Bar Institute for CLE
Credits: 6.0 Cost: $215
(800) 627-6514

24 Friday
NUTS & BOLTS: A SEMINAR FOR LEGAL PROFESSIONALS
Florence
SBI Professional Development Seminars
Credits: 6.0 Cost: $129
(800) 826-7681

May 31- June 1
BANKRUPTCY AT THE BEACH
Orange Beach, Perdido Beach Resort
Commercial & Bankruptcy Law Section
(334) 343-0800

JUNE

4-5
PREVENTING EMPLOYEE LAWSUITS
Tuscaloosa, Bryant Conference Center
University of Alabama
Credits: 13.0 Cost: $795
(205) 348-6224

7 Friday
NUTS & BOLTS: A SEMINAR FOR LEGAL PROFESSIONALS
Montgomery, Holiday Inn Prattville
SBI Professional Development Seminars
Credits: 6.0 Cost: $129
(800) 826-7681

7-8
DIVORCE ON THE BEACH
Gulf Shores
Alabama State Bar Family Law Section
Credits: 4.8
(205) 870-3363

BRIDGE THE GAP
Tuscaloosa, Law Center
Alabama Bar Institute for CLE
Credits: 12.0 Cost: $195
(800) 627-6514

28 Friday
NUTS & BOLTS: A SEMINAR FOR LEGAL PROFESSIONALS
Birmingham
SBI Professional Development Seminars
Credits: 6.0 Cost: $129
(800) 826-7681

JULY

25-27
ANNUAL MEETING
Orange Beach, Perdido Beach Resort
Alabama State Bar
(800) 354-6154

26 Friday
NUTS & BOLTS: A SEMINAR FOR LEGAL PROFESSIONALS
Huntsville
SBI Professional Development Seminars
Credits: 6.0 Cost: $129
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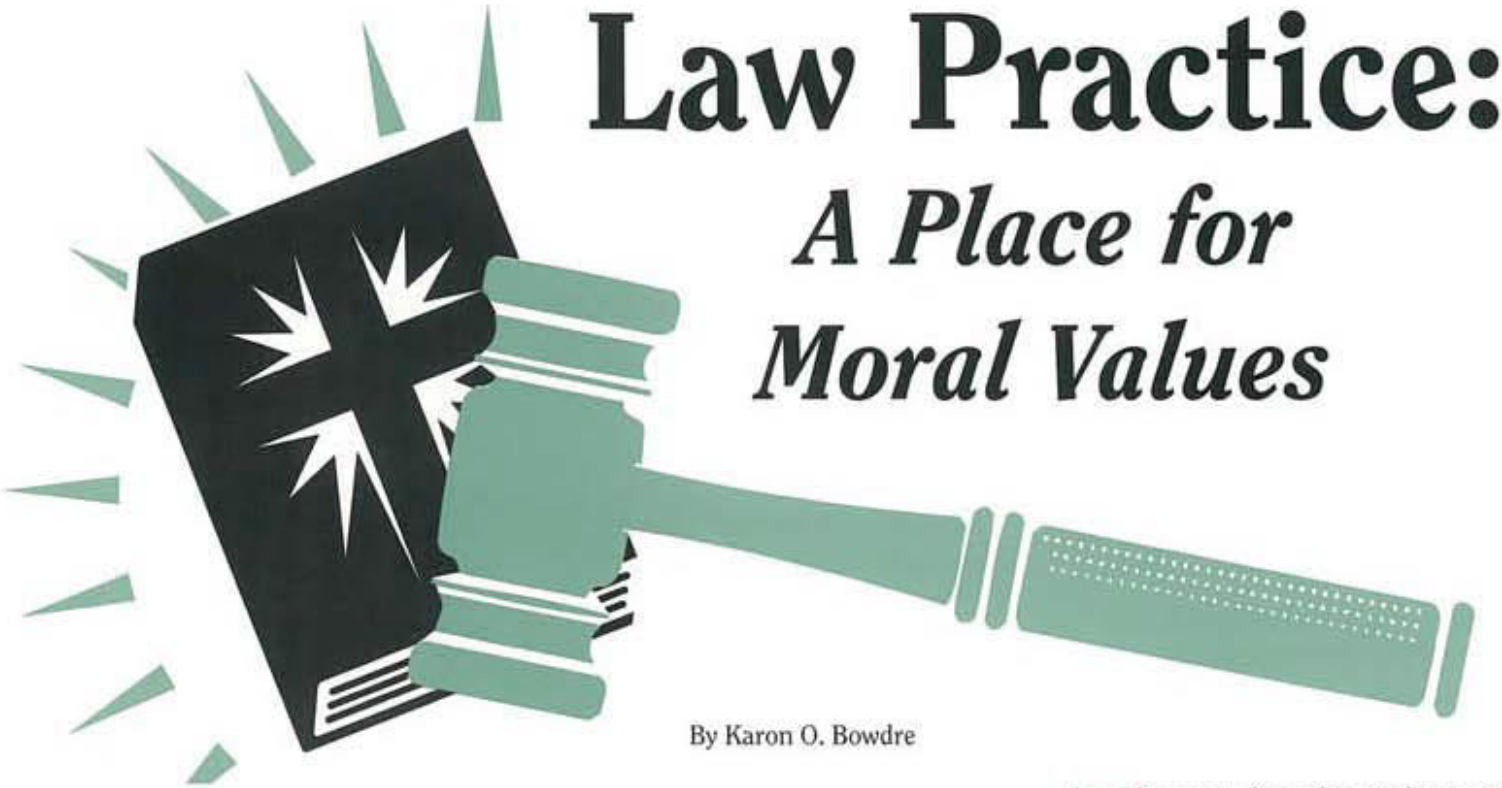
Law Practice: *A Place for Moral Values*



By Karon O. Bowdre

No one calls for justice;
no one pleads his case with integrity.
They rely on empty arguments and speak lies;
they conceive trouble and give birth to evil.
The way of peace they do not know;
there is no justice in their paths....
So justice is far from us,
and righteousness does not reach us.....
So justice is driven back,
and righteousness stands at a distance;
truth has stumbled in the streets,
honesty cannot enter.
Truth is nowhere to be found,
and whoever shuns evil becomes a prey.
Isaiah 59:4, 8-9, 14-15.[1]

This quote from the prophet Isaiah written 8,000 years ago accurately reflects the problems—or at least, the perceived problems[2] —of the American justice system. We all know the symptoms of the problem: the proliferation of lawyer jokes that are less than complimentary of the profession; the cynicism shown whenever one refers to an "honest lawyer" and the obligatory reference to an oxymoron[3]; the disillusionment with the justice system expressed in the aftermath of the O. J. Simpson trial and the McDonald's hot coffee case; and who can forget the glee of the movie-going public when tyrannosaurus rex devoured a lawyer in "Jurassic Park."

These symptoms underlie a basic disrespect for lawyers that has been increasing during this century. Disdain for lawyers is not new,[4] but we cannot ignore the increasing public perception that lawyers are less than honorable.[5] Whether one accepts as true the public's perception of lawyers, we cannot afford to ignore that some kernel of truth may be at the heart of that perception. However, whether the perception is correct is not the issue; the issue is what can we do to remedy that perception.

What are some of the causes of this distressing attitude and what can we in

the legal community do to change that perception? One of the root causes of the disrepute of lawyers lies in the abandonment of moral values that formed the fibre of the practice of law in the early days of our country. Too many lawyers leave at the law office door the moral values with which they grew up, practicing law as if those moral principles have no place in the law. One solution to this problem, then, must be a return to those core values of justice, mercy and truthfulness. Along the way, perhaps we can also acquire the virtue of peacemaking and cast off the vice of stirring up dissension.

A place for moral values

Whenever morality is discussed, someone inevitably comments that we "can't teach morals to law students," or that we "can't legislate morality." Maybe these idioms are true, but we can remind law students and lawyers that the moral values taught to them by their families, religious organizations, and communities need not be checked at the law office door. When people do not put their moral principles into practice in the law office, the actions taken in the law office become routinely self-serving.[6]

Contrary to the thought in academic and legal circles, ours is not a truly secular society; studies reveal that the "vast majority of Americans look to religious sources for moral wisdom."[7] This religious nature of people finds particular strength in the South, still referred to as "the Bible belt." The fact, however, that people have religious convictions does not mean that those convictions affect the way they handle their business affairs or the way they act in legal dealings[8]—especially if their attorney does not raise the moral issues and discuss their relevance to business or legal action.

Although a significant percentage of Americans believe the Bible to be the inspired word of God,[9] we do not have to limit our source of moral values to Judeo-Christian principles. At the heart of moral teaching of most Americans lies the principle that other people have value. "Moral choices in legal representation are important because they affect other people and people are important."[10]

The moral virtues of justice, mercy, truthfulness and peacemaking are part of the religious and moral framework of almost every culture.[11] These moral values do have a place in the law office and the courtroom.[12] Indeed, they were a major part of the practice of law in earlier days of our country. For example, David Hoffman, the grandfather of American legal ethics, relied on the "soundest of morals" of the beginning student of the law; to those sound morals, Hoffman only added a few rules that mixed moral principles and regulation. Indeed, in Hoffman's view, the lawyer's role included moral leadership and guidance of the client.[13]

We cannot return to the role of moral leader unless we embrace basic moral principles and apply them to the practice of law. Although many moral principles would be at home in the law office, this article will focus on only four basic virtues: justice, mercy, truthfulness and peacemaking.

Justice

Where is justice today? To answer this question, we must ask an even more basic question: what is justice? To many, justice represents what is right and fair and just. Justice should be impartial and in conformity with truth and reason. Justice encompasses more than individual rights; it considers the good of others.[14] Unfortunately, many Americans believe that the legal system has betrayed "our most dearly held convictions about fairness, justice and truth—undermining the belief that what is legal and what is right should be one and the same."[15]

Many people have lost faith that the judicial system renders justice. "The general futility of litigation has given rise to the view that the principal benefit derived from a lawsuit is that the controversy is ended rather than that justice is done."[16]

The much-discussed O.J. Simpson trial left its mark on the public's perception of lawyers and the justice system. Whether we agree with the verdict, "the Simpson case is now part of our culture, along with a magnified sense that something is seriously wrong with our justice system...This will affect lawyers for the foreseeable future."[17] The cynical effect that the Simpson verdict had on the public is reflected in this quote: "If you talk long and hard enough about something, and have enough money, you can raise reasonable doubt about anything—including the sun rising tomorrow."[18] Regardless of our personal views of the verdict, we cannot ignore the cries of many who believe that justice failed.

How can we restore faith in the judicial system? By seeking justice. To seek justice, we need to first review some of its moral roots.

The Hebrew Torah contains many state-

ments about justice and the Hebrew prophets measured society's justice by the way society cared for the poor and powerless.[19] For example, "Do not deny justice to your poor people in their lawsuits." (Exodus 23:6) "Do not pervert justice; do not show partiality to the poor or favoritism to the great, but judge your neighbor fairly." (Leviticus 19:15) The writer of Proverbs also says much about justice: "It is not good to be partial to the wicked or to deprive the innocent of justice." (Proverbs 18:5) "Evil men do not understand justice, but those who seek the Lord understand it fully." (Proverbs 28:5) "When justice is done, it brings joy to the righteous but terror to evildoers." (Proverbs 21:15)[20]

Justice is important to God: "For the Lord is righteous, he loves justice." (Psalms 11:7). The prophet Micah gave an instruction that has particular application to lawyers:

> He has told you, O man, what is good;
> And what does the Lord require of you
> But to do justice, to love kindness,
> And to walk humbly with your God?

Micah 6:8[21]

These Biblical references to justice do not imply that justice comes from the government or from a court. "To assume that court is the place where people find justice is to assume that justice is something the state gives to people. More often, we suspect, justice is something people give to each other....[J]ustice is most likely to emerge if lawyers and clients on both sides seek it than if they rely upon the state to provide it."[22]

How do we seek justice with our clients? We need to take them beyond their personal interest and help them see what is fair, right and just—the foundation of justice. We should help them see not only their own rights but the rights of others. A view of justice that includes the rights of others will lead us to the application of another moral virtue—mercy.

Mercy

A beautiful picture of the role of mercy in the judicial system is depicted by the statue in the courtyard between Robinson Hall and the Lucille Beeson Law Library at Cumberland. The sculpture, specially commissioned by Mrs. Beeson, shows Lady Justice, blindfolded, seated with the scales of justice. Behind her stands the Angel of Mercy. Mercy is whispering to Justice, portraying Mrs. Beeson's view that justice should be tempered with mercy.[23]

If justice concerns what is right and just, what we deserve, mercy reflects concern for the needs of others, irrespective of what is fair or deserved. Mercy seeks to avoid needless harm to others. Mercy focuses on the importance of relationships and of people.[24]

Before we can expect our clients to welcome our entreaties to be merciful to their legal opponent, lawyers must first learn to demonstrate mercy to other lawyers. Many persons within and without the legal system have pointed to the decline of civility among attorneys. Civility or mercy finds its base in the premise that all people have worth and should be treated with respect.[25] The treatment many lawyers give each other belies any mutual respect.

Not only did the outcome of the Simpson trial challenge many people's sense of justice, the public had the right to be appalled at the antics of the trial lawyers.[26] The continuous snipping between lawyers may have contributed to the defense. The "theatrics" diverted the jury's attention from the evidence to the personalities and disrupted the prosecution's momentum.[27]

The inability—or lack of desire—of lawyers to get along with each other also plays out in civil cases and appears to be as much a tactic as general personality flaws. A recent example was spotlighted in the *ABA Journal*: the Phillip Morris/ABC debacle. The cover story narrated in great detail the lack of civility among lawyers.[28] The article implies that Phillip Morris hired attorneys not based on any specialized knowledge of libel law (they had none), but on their willingness to trade insults and to push their opponents.[29] The ugliness at depositions grew so bad that the parties had to hire a special master to referee a deposition in an effort to control warring lawyers. The court had to intervene almost weekly in discovery disputes as lawyers accused each other of "heinous conduct."[30]

Such conduct should not be condoned by a profession. Indeed, "when lawyers cannot get along, the quest for truth suffers."[31] We must learn to get along again.

One lawyer can make a difference in the tone of a trial or deposition or negotiation. When another attorney begins throwing insults, do not respond in kind; keep control of your temper. Remember that it takes two to argue. A gentle answer can turn away wrath (Proverbs 15:1) Your client will benefit as the judge and jury and other observers respect you for taking the "high road" and not letting someone else control your temper.

As we ponder mercy, we would do well to remember that the Bible teaches that we should love our enemies and do good to those who curse us.[32] The beautiful story of the Good Samaritan[33] illustrates who is our neighbor and how we should care for our neighbor. Jesus told this story in response to a question by a lawyer who sought to limit his duty of care. The lawyer asked Jesus, "Who is my neighbor?" We may ask today whether the opposing counsel and party are our neighbors. The teachings of Jesus place no limit on the scope of our neighbor whom we are to love and treat with respect.

Mercy also dictates how we treat other parties and witnesses. The Ten Commandments[34] illustrate that God is not only concerned with how we treat him; he is concerned whether we lie, cheat, or steal from others. How we treat each other interests God.

The role of advocate rarely conjures up the picture of mercy. If the basic premise of mercy is respect for other people, why cannot the advocate demonstrate basic respect for witnesses and parties? Should the advocate cross examine a truthful witness so as to harass, intimidate, and abuse the witness for the purpose of raising a doubt as to the witness' veracity?[35]

Perhaps the most common moral issue arising in law practice is whether to take actions that will disadvantage other people.[36] Lawyers must struggle with these and other questions about the applicability of mercy to the practice of law.

Truthfulness

Walking hand-in-hand with justice and mercy comes the virtue of truthfulness. Honesty should be such a common virtue among attorneys that no one would joke that an honest lawyer is an oxymoron. Daniel Webster found no place for dishonesty in a lawyer: "Tell me a man is dishonest, and I will answer that he is no lawyer. He cannot be, because he is careless and reckless of justice; the law

is not in his heart, and is not the standard and rule of his conduct."[37]

Abraham Lincoln earned his nickname "Honest Abe" while a practicing attorney. He admonished fellow lawyers: "Resolve to be honest at all events; and if, in your own judgment, you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave."[38]

Lawyers have traditionally been viewed as officers of the court whose job was to seek truth. But the role of the lawyer now seems to be one of distorting the truth by using any method the law allows while relying on the opposing interest to do the same, with the hope that the end result may approximate justice.[39]

The importance of integrity to the lawyer cannot be overemphasized. When judges and other attorneys can trust a lawyer's word, the wheels of justice turn more smoothly. When a lawyer lacks credibility with a judge or other counsel, every statement is doubted and every promise must be confirmed in writing. When a lawyer lacks credibility, the client suffers.

A lawyer should at least appear honest and reasonable in trial. As James W. McElhaney recently admonished through his sage lawyer Angus: "'I want to be the most reasonable lawyer in the courtroom.... I want to be considerate. I want to be fair. I never want to look technical or tricky. But more than anything, I want every argument I make to appeal to the inherent sense of fairness of the judge or jury. If they can't trust me, they can't trust my case.'"[40]

Being truthful with one's client or with the court may not always be easy. Disclosing adverse controlling authority is no fun, but must be done to maintain our duty of candor with the court. If the client has a weak case or wants to assert a less-than-honest position, as his legal advisor, the attorney should discuss the matter truthfully with the client. We cannot expect our clients to embrace the idea of perfect honesty if we are not honest with them on such matters as fees. We should not shirk our responsibility to act as moral advisor to our clients,[41] and truthfulness with them forms a good starting place. We may need to truthfully discuss with the client alternatives to litigation, including foregoing a legal right, overlooking a wrong, or reconciliation.

Peacemaking

The examples of lack of civility among the bar are only one reason for the public's disdain of lawyers. The perceived litigation explosion[42] also reflects badly on lawyers. The public reads newspaper accounts, not of the "everyday" automobile accident case, but of the unusual and questionable cases. The public rightly feels outrage about the woman who sued McDonald's when she spilled hot coffee on her lap. The public should be equally outraged by other cases that should not be filled. A case recently reported by the Associated Press falls into this category.

Two three-year-old children could not get along in a Boston neighborhood playground. The mother of the little girl sued the three-year-old boy and his mother, seeking an injunction to prevent the boy from playing in the playground while her daughter was present. The judge ordered the mothers to keep their children supervised and separated while at the playground. As the attorney for the defendants commented, the case "should never have left the playground."[43]

Although litigation does—eventually—resolve the dispute, the mere solution of

Karon O. Bowdre
Karen O. Bowdre is an associate professor of law and the director of legal research and writing at Cumberland School of Law, Samford University. She is a 1977 graduate of Samford University and a 1981 graduate, *cum laude*, of Cumberland School of Law. She served as law clerk to United States District Judge J. Foy Guin, Jr. from 1981-82. She is a member of the American, Alabama and Birmingham bar associations, and is on the board of directors of the Christian Legal Society.

the controversy does not satisfy the parties. Rarely does the verdict comport with the litigants' sense of justice. Although litigation produces a winner and a loser, it exacts such great financial and emotional tolls that no one really wins.

The financial costs of litigation are well known and frequently discussed among lawyers;[44] the emotional costs, often observed, receive rare attention.[45] After listening to their attorneys rant and rave about how "all right" their actions were and how "all wrong" the opponent was, the clients believe their attorneys' version of the "truth" regardless of the verdict. They either feel somewhat vindicated or believe that justice was not served by the decision. The litigation drove a wedge deep into any friendship or kind feelings one party may have had for the other. "Lawyers stand between the client and the opponent; they free clients from the responsibilities of relationships and in the process destroy relationships."[46] No passing thought was given to the needs or feelings of the other party, or to what was "right." The dispute dragged emotions to the surface and left them there, raw and bleeding. And the advocacy system does nothing to heal those wounds, or reconcile the parties to each other.

Attorneys have rejected their historic role as "healers of human conflicts;"[47] instead, as trained advocates, they serve as hired guns, doing the client's dirty work; they push cases to the polar extremes and stir up dissension and controversy, leaving the clients wounded and bitter. As Justice Burger said, "Isn't there a better way?"[48]

Attorneys must take some responsibility for the filing of suits and the reconciliation of clients. Not every wrong demands a *judicial* remedy. Many of the disputes clogging our courts should be resolved outside litigation, by neighbors and family members, friends and associates calmly discussing the problem and negotiating a result. But our society has lost the skill of peacefully resolving disputes; we tend to love to fight. When a person with one of these disputes seeks legal counsel, the attorney, as counselor, should recommend alternatives to litigation.

As Former Chief Justice Burger observed,

> One reason our courts have become overburdened is that Americans are increasingly turning to the courts for relief from a range of personal distresses and anxieties. Remedies for personal wrongs that once were considered the responsibility of institutions other than the courts are now boldly asserted as legal 'entitlements.' The courts have been expected to fill the void created by the decline of church, family and neighborhood unity.[49]

Did Chief Justice Burger mean that at one time "church, family and neighborhood" played a role in dispute resolution? Yes! The Torah discouraged taking a fellow Hebrew to court. Instead, Rabbinical courts, Bet Din, include dispute resolution as an alternative to civil courts. The sources of authority and guiding principles come from the Torah and Rabbinical teachings. Numerous Jewish arbitration centers and conciliation efforts exists, including the well-known Jewish Conciliation Board of New York.[50]

Christians also have various organizations designed to resolve disputes according to Biblical principles. The most active in Alabama is the Institute for Christian Conciliation.[51] The Institute traces its roots to seeds planted by members of the Christian Legal Society in 1980. Its twin missions are to educate and train people in the skills of resolving conflict through Biblical principles and to apply those Biblical principles in conciliation efforts between disputing parties. Unlike litigation or traditional methods of mediation or arbitration, Christian conciliation focuses on the relationships involved. It is a process that "gives priority to restoring the relationship, with the ultimate goal being reconciliation between the disputing parties, and reconciliation between each party and God."[52]

The New Testament teaches, most notably in Matthew 18:15-17 and I Corinthians 6:1-8, that Christians should resolve their disputes among themselves or with the help of the church. Justice Antonin Scalia commented on the passage from Corinthians:

> Paul is making two points: first, he says that the mediation of a mutual friend, such as a parish priest, should be sought before parties run off to the law courts... I think we are too ready to seek vindication or vengeance through the adversary proceedings rather than peace through mediation..... Good Christians, just as they are slow to anger, should be slow to sue.[53]

Attorneys should once again embrace the traditional role of "healers of human conflict," of peacemaking.[54] Sometimes the best approach for the client would be to acknowledge her part in the conflict (every dispute has two sides), accept responsibility and apologize.[55] For another client, the best counsel may be to overlook a wrong instead of destroying a relationship, or to practice true forgiveness.[56] To lead our clients to points of confession and forgiveness, we must help them see people and relationships as more important than always exercising all our legal rights. Remember, that "[b]lessed are the peacemakers for they shall be called the children of God."[57]

This short article could only begin to raise issues about the role of moral values in the law office. May we continue to examine the questions raised here as we struggle to be honest lawyers and healers of conflict.

Endnotes

1. (New International Version). (All quotes from the Bible are from the NIV unless otherwise indicated.)
2. For a discussion of the perceived problems with the legal profession see Anthony Kronman, *The Lost Lawyer* (1993); Marvin E. Aspen, *The Search for Renewed Civility in Litigation*, 28 Val. u.L. Rev. 513 (1994); Warren Burger, "Isn't There a Better Way?" 68 *A.B.A. Jo.* 274 (March 1982). For a contrary view, see George E. Bushnell, Jr., "Time to Shift Focus: Bar needs to emphasize public service, worry less about 'image problem,'" 81 *A.B.A. Jo.* 6 (Jan. 1995).
3. *See e.g.*, Rita Henley Jensen, "Lawyers Snared in Alleged Scam," 81 *A.B.A. Jo.* 28 (Nov. 1995). When the district attorney explained that a multi-million dollar bribery scheme was uncovered by an "honest attorney," the press corps laughed and mumbled about an oxymoron.
4. *See* Phillip J. Nexon, "The Business of the Law in the 1990s", 45 *So. Carolina L. Rev.* 1063 (1994); articles in Geoffrey C. Hazard & Deborah L. Rhode, *The Legal Profession: Responsibility and Regulation Part.* 1 (2d ed. 1988).
5. American Bar Association, Commission on Professionalism, In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism, (1986) as reprinted in Geoffrey C. Hazard, Jr., & Deborah L. Rhode, *The Legal Profession: Responsibility and Regulation 28* (2d ed. 1988).
6. Thomas L. Shaffer & Robert F. Cochran, Jr., *Lawyers, Clients, and Moral Responsibility* 60 (1994).

7. *Id.*
8. *Id.*
9. *Id.*, citing The Gallop Report, *cited in* National and International Religion Report, March 9, 1992, at 8.
10. Thomas L. Shaffer & Robert F. Cochran, Jr., *Lawyers, Clients, and Moral Responsibility* 1 (1994).
11. *Id.* at 61; *see also* R. George Wright, "Cross-Examining Legal Ethics: The Roles of Intentions, Outcomes, and Character," 83 *Ky. L. Jo.* 801, 810-820 (1994-95) citing to philosopher Kant and ethicist Thomas Nagel as sources of moral values.
12. The author acknowledges that convincing the reader of the place of morals in the practice may be an ambitious undertaking. A more thorough analysis of the issue would include an examination of legal history and jurisprudence, but time nor space do not permit such exhaustive apologetics here.
13. Thomas L. Shaffer & Robert F. Cochran, Jr., *Lawyers, Clients, and Moral Responsibility* iv (1994).
14. *Id.* at ch. 6.
15. J. Warren Kniskern, *Courting Disaster* 95 (1995), quoting David Margoleck, "Hollywood's Love-Hate Affair with Lawyers," *The Miami Herald*, July 5, 1993, 1c.
16. A. A. Berle, Jr., "Legal Profession and Legal Education," 9 *Ency. of Soc. Sciences* 340-45 (1933), as reprinted in Geoffry C. Hazard, Jr., and Deborah L. Rhode, *The Legal Profession: Responsibility and Regulation* 12 (2d ed. 1988).
17. Steven Keeva, "Circus-Like Trial Colors Expectations," 81 *A.B.A. Jo.* 48c (Nov. 1995).
18. Henry J. Reske, "Verdict on Simpson Trial," *81 A.B.A.* Jo. 48 (Nov. 1995). Although the quote was made by Georgetown University law professor Paul Rothstein, such a cynical comment by one familiar with our legal system could be illustrative of the attitude of the many of the general public.
19. Thomas L. Shaffer & Robert F. Cochran, Jr., *Lawyers, Clients, and Moral Responsibility* 62-63 (1994).
20. For more discussion of the relevance of Proverbs to legal ethics see Gordon J. Beggs, "Proverbial Practice: Legal Ethics from Old Testament Wisdom," 30 *Wake Forest L. Rev.* 831 (1995).
21. New American Standard version.
22. Thomas L. Shaffer & Robert F. Cochran, Jr., *Lawyers, Clients, and Moral Responsibility* 67 (1994).
23. From the dedicatory program for the Lucille Stewart Beeson Law Library at Cumberland School of Law, Samford University (1996).
24. Thomas L. Shaffer & Robert F. Cochran, Jr., *Lawyers, Clients, and Moral Responsibility* 71-72 (1994).
25. R. George Wright, "Cross-Examining Legal Ethics: The Roles of Intentions, Outcomes, and Character," 83 *Ky. L. Jo.* 801, 810-811 (1994-95).
26. Keeva, *supra* n. 17.
27. *Id.* at 48a.
28. *See* Steven Weinberg, "Hardball Discovery," 81 *A.B.A. Jo.* 66 (Nov. 1995).
29. *Id.* at 69.
30. *Id.* at 69-70.
31. *Id.* at 70.
32. Luke 6:27; Proverbs 25:21-22.
33. Luke 10: 25-37.
34. Exodus 20:1-17. The first four commands deal with our relationship to God. The remaining six commands deal with our relationship to other people.
35. For an indepth analysis of this ethical dilemma, see R. George Wright, "Cross-Examining Legal Ethics: The Roles of Intentions, Outcomes, and Character," 83 *Ky. L. Jo.* 801 (1994-95).
36. Thomas L. Shaffer & Robert F. Cochran, Jr., *Lawyers, Clients, and Moral Responsibility* 3 (1994).
37. J. Warren Kniskern, *Courting Disaster* 97 (1995) *quoting* Daniel Webster's 1847 address to the Charleston, South Carolina Bar Association.
38. *Id.* at 239, n. 9.
39. A.A. Berle, Jr., "Legal Profession and Legal Education," 9 *Encyclopaedia of the Social Sciences* 340-45 (1933), as reprinted in Geoffry C. Hazard, Jr., & Deborah L. Rhode, *The Legal Profession: Responsibility and Regulation* 11 (2d ed. 1988).
40. James W. McElhaney, *Reasonable Arguments*, 82 A.B.A. Jo. 87 (March 1996).
41. See Louis D. Brandeis, *The Opportunity in the Law*, as reprinted in Geoffrey C. Hazard, Jr., & Deborah L. Rhode, *The Legal Profession: Responsibility and Regulation* 16 (2d ed. 1988).
42. See J. Warren Kniskern, *Courting Disaster* (1995); Derek C. Bok, "A Flawed System of Law Practice and Training," 33 *Jo. Leg. Ed.* 570, 571-74 (1983); but see Marc Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society," 31 *U.C.L.A. L. Rev.* 4 (1983) for an argument that our society is not overly-litigious.
43. Judge draws line in sandbox, tells three-year-old not to cross it, *The Montgomery Advertiser*, March 8, 1996, p. 2A.
44. *E.g.*, Deborah L. Rhode, "The Rhetoric of Professional Reform," 45 *Md. L. Rev.* 274 (1986); William G. Ross, *The Honest Hour: The Ethics of Time-Cased Billing by Attorneys* (1996); Derek C. Bok, "A Flawed System of Law Practice and Training," 33 *Jo. of Leg. Ed.* 570 (1983).
45. See J. Warren Kniskern, *Courting Disaster* 4 (1995).
46. Thomas L. Shaffer & Robert F. Cochran, Jr., *Lawyers, Clients, and Moral Responsibility* 73 (1994).
47. Justice Warren Burger, "Isn't There A Better Way?," *68 A.B.A. Jo.* 274 (March 1982).
48. *Id.*
49. *Id.*
50. Judith M. Keegan, "The Peacemakers: Biblical Conflict Resolution and Reconciliation as a Model Alternative to Litigation," 1987 *Mo. Jo. Dispute Resolution* 11, 15 (1987).
51. Members of the Christian Legal Society of Alabama have been working with Ken Sande of the Institute for Christian Conciliation to establish a conciliation effort in Alabama. Separate groups have formed in Montgomery and Birmingham for training in conciliation. A practicum of in-person training will be offered in Birmingham in July. For more information, contact the author or the Institute for Christian Conciliation, 1537 Ave. D, Suite 352, Billings, MT 59102, (406)256-1583, fax (406) 256-0001.
52. *Id.* at 12.
53. Justice Antonin Scalia, "Teaching About Law," 7 *Christian Legal Society Quarterly*, 8-9 (Fall 1987).
54. For a more indepth discussion of Biblical principles of resolving conflict, see Ken Sande, The Peacemaker: A Biblical Guide to Resolving Personal Conflict (1991).
55. "The Seven A's of Confession," Institute for Christian Conciliation (1995); see Matthew 7:3-5, I John 1:8-9; Proverbs 28:13.
56. See Matthew 6:12, I Corinthians 13:5, Ephesians 4:32.
57. Matthew 5:9.

Have You Met the New Kid on the Block?

The *ADDENDUM*, the new bi-monthly newsletter published by the Alabama State Bar, is now three issues old—and "growing great!" As proud parents, the sub-committee of the editorial board thought you might find the following facts interesting:

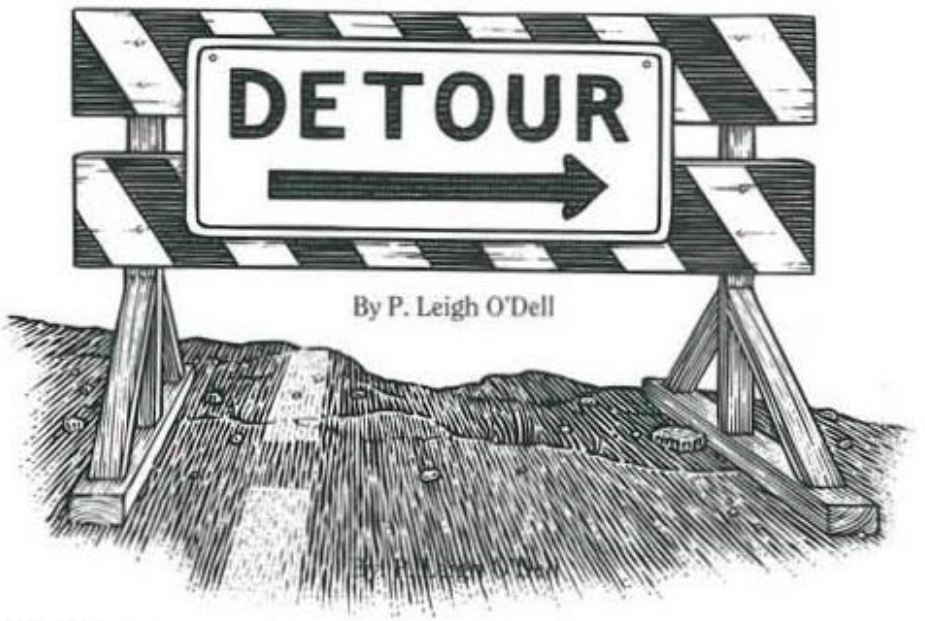
- The Administrative Office of Courts was inundated with calls following the first *ADDENDUM* cover story, "Alabama Courts in Cyberspace", about their new remote access system.
- The second *ADDENDUM* cover story on the mentoring program of the Birmingham Bar Association prompted the president of the Mobile Bar Association to put the wheels in motion for a similar program there.
- John Gunn's article on client relations mentioned a free video available from the ASB and dozens of lawyers have called to request it.
- An ASB member working in Panama responded by e-mail to get information on having a peer mediation program in a local school there after reading about the successful program in Judy Keegan's "ADR Around the State" column.
- A state trade association director called to ask permission to re-print a Point/Counterpoint article in their association publication, saying it was the best article he had read covering both sides of the tort reform issue.
- A law office administrator took the time to write a letter saying how much good information he was able to get and use from the newsletter.

So the good news is that the "new kid on the block" is doing just what was hoped for—bringing members timely, concise and practical information that can help attorneys in the practice of law today. And the way to insure that the *ADDENDUM* continues to do the job it was created to do is for you to get involved! Editor Susan Shirock DePaola invites you to send in your opinions, share information about articles you have read that you think would be of interest to others, and even volunteer to serve as a reporter from your area of the state! You can reach her at (334) 262-1600.

One more way to help? The next issue of the *ADDENDUM* will include a **fax poll**. Please take a moment to fill it out and let us know what you like or don't like and what you want to see included in future issues.

FRAUD:

Recent Developments In Alabama



By P. Leigh O'Dell

The landscape of fraud in Alabama is ever mercurial. Particularly in an era when reform is on the minds of lawyers and legislators alike, the jurisprudential landscape is always shifting. Recent decisions of the Supreme Court of Alabama have wrought numerous developments in the law relating to fraud. The following is a brief description of relevant issues that practitioners might consider when prosecuting, or defending, an action for fraud.

Venue

Is venue proper?

Venue is the initial skirmish in fraud litigation. Lawyers battle over whether venue is proper, and ultimately, what statute controls that issue. This is particularly true in the area of insurance fraud litigation. Questions have arisen concerning the application of §6-3-5 and §6-3-7 of the *Code of Alabama* in actions for fraud against corporate insurers.

In the most recent venue case, *Ex parte Gauntt*, No. 1940591, 1996 WL 55604 (Ala. Feb. 9, 1996), numerous plaintiffs brought separate actions in the Circuit Court of Macon County, Alabama, containing both contract and fraud claims against United Insurance Company of America ("United"), Unitrin, Inc., and United National Fire Insurance Company. Plaintiffs lived in either Elmore, Montgomery, Chilton, or Tallapoosa counties. It was undisputed that United "does" business in Macon County, but otherwise, there was no connection to Macon County. Plaintiffs submitted that because fraud is a personal injury action, venue was proper in Macon County pursuant to §6-3-5 of the *Code of Alabama*.

Defendants filed a motion to transfer all of the pending cases to Shelby County, arguing that venue in Macon County was improper, or in the alternative, that the convenience of the parties warranted transfer. Defendants argued that §6-3-7 controlled the question of venue and that venue was proper where the wrongful act occurred, not where the resulting nonbodily injuries occurred. Based on the Supreme Court of Alabama's holding in *Ex Parte Bloodsaw*, 648 So. 2d 553 (1994), the trial court transferred the cases to Shelby County, finding that the Circuit Court of Shelby County would be significantly more convenient.

Plaintiffs petitioned the Supreme Court of Alabama for a writ of mandamus. The Supreme Court of Alabama, in an opinion that was later withdrawn, granted the writ, ordering the court to transfer the cases back to Macon County and holding that the trial court abused its discretion by transferring the cases to Shelby County because the convenience of the parties did not outweigh the deference that should be shown to the plaintiffs' choice of forum.

On rehearing, the Supreme Court addressed in detail the legislative development of the venue rules codified at §6-3-5 and §6-3-7. The court concluded that §6-3-5 was enacted to supplement venue as established by §6-3-7, not replace it, as to corporate insurers. Section 6-3-5 expanded the proper forums for actions against corporate insurers by allowing actions to be brought in counties where the insurer does business,[1] as opposed to "doing business by agent."

Fraud is a "personal injury" action for purposes of venue. The Court held that: "Any complaints alleging contract claims were properly filed in Macon County, under §6-3-7; any complaints alleging personal injury claims only are subject to the clause in §6-3-7 that limits personal injury actions against domestic corpora-

tions...either to the county of the plaintiff's residence or to the county where the wrongful act occurred." *Gauntt*, No. 1940591, 1996 WL 55604, at * 10. The supreme court granted the writ, ordering the trial court to determine which cases involved personal injury actions and to transfer them to the county where the injury occurred or the county where the plaintiff resides. The court directed the trial judge to retain those stating both contract and personal injury claims.

Forum Non Conveniens

Section 6-3-21.1 of the *Code of Alabama* codifies the doctrine of *forum non conveniens* and provides that "[w]ith respect to civil actions filed in an appropriate venue, any court of general jurisdiction shall, for the convenience of the parties and witnesses, or in the interest of justice, transfer any civil action...to any court of general jurisdiction in which the action might have been properly filed...." *Ala. Code* 6-3-21.1 (1993). The doctrine of *forum non conveniens* is applicable only when an action is commenced in a county in which venue is appropriate. *Montgomery Elevator Co. v. Pinkney*, 628 So. 2d 767 (Ala. Civ. App. 1993). The law in Alabama has consistently mandated that trial courts show great deference to a plaintiff's choice of forum. In recent cases, however, the supreme court has rendered differing decisions about when transfer for the convenience of the parties is warranted. Though unclear at this time, these decisions may signal a growing openness to transfer of cases from proper forums for the convenience of the parties.

In *Ex parte Bloodsaw*, 648 So. 2d 553 (Ala. 1994), plaintiff Hazel Bloodsaw filed an action for bad faith refusal to pay insurance claims in the Circuit Court of Macon County, Alabama, against United Insurance Company of America ("United") and its subsidiary, Union National Life Insurance Co. Bloodsaw was a resident of Elmore County. United does business in Elmore and Macon counties, having sold policies in both counties. Venue was proper in Macon and Elmore counties.

United moved the trial court to transfer the case to the Circuit Court of Elmore County, stating that prosecution of the case in Elmore County would be much more convenient than Macon County. Section 6-3-5 of the *Code of Alabama* provides that an insurance corporation may be sued in any county in which it conducts business. Because United conducted business in Macon County, venue was proper, but United sought transfer under §6-3-21.1. In support, United put forth evidence that their legal counsel resided in Jefferson County, its regional manager lived in Shelby County, (which, according to United, are both closer to Elmore County), and documents and witnesses were located in Elmore County. The only connection between Bloodsaw, a resident of Elmore County, and Macon County was that United conducted business in Macon County. The trial court transferred the case to Elmore County.

Plaintiffs filed a petition for writ of mandamus. In granting the writ, the Supreme Court of Alabama noted that deference must be given to a plaintiff's proper choice of forum and that transfer of a case for the convenience of the parties should *only* be ordered if the forum to which the case is to be transferred is significantly more convenient than the forum in which the action was filed. *Bloodsaw*, 648 So. 2d at 555. In *Bloodsaw*, the court noted that Elmore and Macon counties were contiguous and that witnesses for plaintiffs were willing to travel to Macon County. *See Ex parte The Prudential Ins. Co. of Am.*, Nos. 1941037 and 1941038 (Ala. Feb. 9, 1996) (holding that where plaintiff resided in Tuscaloosa County, but filed her lawsuit in Greene County, venue was not significantly more convenient in Tuscaloosa County). As a result, the supreme court held that United failed to prove that Bloodsaw's right to choose the proper forum in which to bring her lawsuit was not outweighed by the convenience of the parties. Furthermore, the supreme court cautioned that a case should not be transferred unless a court is "convinced that the right of the plaintiff to choose the forum is outweighed by the inconvenience of the parties." *Id.* (quoting *Ex parte Johnson*, 638 So. 2d 772, 774 (Ala. 1994)).[2]

In *Ex parte New England Mutual Life Insurance Co.*, 663 So. 2d 952 (Ala. 1995), the supreme court held that the circumstances of the case warranted transfer. In 1984, while a resident of Montgomery County, George Smoot purchased an insurance policy from New England Mutual Life Insurance Co. At the time of purchase, New England's agent allegedly represented to Smoot that he would not have to pay premiums on the policy after nine years. In 1989, Smoot moved to Barbour County, Alabama, and in 1994, ten years after purchasing the policy, Smoot learned for the first time that he

would have to make additional payments under the policy even though the nine-year time period had expired. Smoot brought an action for fraud in Barbour County.

New England Mutual moved the trial court to transfer the action to Montgomery County, arguing that venue in Barbour County was improper, and in the alternative, that prosecution of the case in Montgomery County would be more convenient to the parties. While stating that the purpose of the doctrine of *forum non conveniens* is to minimize expense and the inconvenience of the parties, the supreme court held that defendants carried their burden of proving that the inconvenience of the parties outweighed Smoot's right to choose the forum. *New England Mutual*, 663 So. 2d at 956. Favorable factors considered by the court in granting the writ were: 1) all events occurred in Montgomery County; 2) fourteen of 15 witnesses were located in Montgomery; and 3) ten additional, similar actions were pending in the Circuit Court of Montgomery County. *Id.; see Ex parte Cordell*, 555 So. 2d 148 (Ala. 1989). The court held defendants had met their burden of proving that Montgomery County was significantly more convenient than Barbour County in this particular case. *Id.* (citing *Ex parte Ford Motor Credit*, 561 So. 2d 244 (Ala. Civ. App. 1990)).[3]

Venue is an important consideration for plaintiffs and defendants alike. If a plaintiff files an action in an appropriate forum, efforts should be made early in discovery on both sides to develop a record of the connections that a claim may or may not have with the forum county. In so doing, each party will be prepared to properly support or oppose motions to transfer for the convenience of the parties. Recent decisions indicate the supreme court is much more open to granting motions to transfer based on convenience. Preparation will prevent the discomfort of being caught unaware of and unprepared for the impending battle.

Substantive Developments

Fraudulent misrepresentation

To recover for fraud, there must be a misrepresentation of a material existing fact on which the plaintiff relied and which was the proximate cause of damages to the plaintiff. *Harmon v. Motors Ins. Corp.*, 493 So. 2d 1370, 1373 (Ala. 1986). The Supreme Court of Alabama, particularly in the area of fraud involving credit life insurance, issued several decisions concerning what constitutes a misrepresentation upon which a claim for fraud may be based:

***McCullar v. Universal Underwriter's Life Insurance Co.*, No. 1930246, 1995 WL 577025 (Ala. Sept. 29, 1995).**

In *McCullar v. Universal Underwriter's Life Insurance Co.*, No. 1930246, 1995 WL 577025 (Ala. Sept. 29, 1995), Cindy and Allen McCullar purchased a new Oldsmobile Cutlas Cierra from Regency Chevrolet-Olds, Inc. The purchase price of the automobile was $14,248.19. The McCullars made a paid $1,500, leaving an unpaid balance of $12,748.19, which they financed. As a part of the transaction, Regency employees, acting as agents of Universal, sold the McCullars credit life and credit disability insurance on Allen McCullar. The cost of credit life insurance was $1,037.10 and $1,306.75 for the credit disability insurance—increasing the balance of the loan to $15,108.54. To the close the transaction, the McCullars signed a contract to finance $15,108.54, plus pre-computed interest. The total to be repaid over 60 months, with payments of $345.70 per month, was $20,742.

On May 7, 1993, McCullar sued Universal, Regency, and Regency's individual employees in Macon County, alleging fraud. McCullar charged that Regency represented to her that they were selling to her the amount of insurance "needed," but sold to her credit life insurance with the amount of insurance based on the total amount of the contract instead of the amount financed under the contract. In other words, McCullar charged that Regency defrauded her by basing the amount of insurance on $20,742 instead of $15,108.54. As a result of the manner in which Regency structured the transaction, Regency and Universal charged $1,037.10 in premiums for the credit life insurance instead of $755.45, and similarly, charged a higher than necessary premium for credit disability coverage. McCullar alleged that Regency failed to disclose to her that the amount of the insurance was more than she and her

former husband needed to repay the debt owed on the vehicle in the event that Allen McCullar became disabled or died.

In support of their motion for summary judgment, defendants submitted affidavits from Robert Floyd, supervisor of the Alabama Banking Department's Bureau of Loans, and Harland Dyer, an employee of the Alabama Department of Insurance. Floyd, an administrator responsible for the enforcement of the "Mini-Code," testified that the premium for decreasing credit life insurance can be written for the total amount of payments due on add-on/precomputed interest credit sales transactions, instead of the amount of principle. Furthermore, Dyer, an actuary who interprets Alabama's insurance regulations, testified that the Insurance Department interprets "amount of credit" to mean the total amount of payments plus precomputed interest on the credit transaction, an interpretation he felt was consistent with that of Banking Department Regulation No. 28. Regulation No. 28 provides: "The amount of individual credit life insurance written under one or more policies issued by the same lender shall not exceed the original face amount of the specific contract of indebtedness...; the amount of insurance shall never exceed the approximate unpaid balance of the loan." *McCullar*, No. 1930246, 1995 WL 577025, at *4.

The trial court entered summary judgment in favor of the defendants. The Supreme Court of Alabama reversed. Section 5-19-20 states insurance on a "credit transaction shall not exceed the approximate amount... of the credit." The supreme court further noted that Regulation No. 28 required that the amount of insurance shall not exceed the approximate unpaid balance of the loan. According to the court, Regency clearly charged McCullar premiums on credit life and credit disability insurance on the amount of the unpaid balance plus accumulated interest, not the unpaid balance of the loan. The court held that the State Department of Insurance interpretation of Regulation No. 28, as enforced by Alabama's Banking Department, is inconsistent with the plain meaning of §5-19-20(a). The court, therefore, held that the amount of credit life and credit disability insurance should be based on the original face amount of the specific contract's indebtedness, without including precomputed interest. Consequently, the court ruled that McCullar had presented a genuine issue of material fact from which a jury could find that the defendants committed fraud.

Justice Butts concurred specially to note that "even if the credit life transaction at issue in the appeal did not violate Regulation 28, mere compliance with that regulation is not a shield broad enough to protect a defendant who has otherwise committed a fraudulent act as a party of a credit life insurance sales contract." *McCullar,* No. 1930246, 1995 WL 577025, at *8. Justice Houston concurred in the result, but not the reasoning, stating that summary judgment was improper because discovery was incomplete and because the meaning of Regulation 28 was and is not at all clear as interpreted under §5-19-20.

The Supreme Court of Alabama granted an application for rehearing in *McCullar* and has scheduled oral argument on April 1, 1996. The future impact of the court's decision is, therefore, presently unsettled.

***Brown Machine Works & Supply Co. v. Insurance Co. of N. America*, 659 So. 2d 51 (Ala. 1995).**

The Supreme Court of Alabama answered the following questions certified by the United States District Court for the Middle District of Alabama, the Honorable Ira DeMent presiding:

(1) In a breach of contract action, when an insurer fails to deliver a copy of the policy to an insured in accordance with Alabama Code 1975, § 27-14-19, but does provide a certificate of insurance which sets out the general coverage without enumerating the limitations and exclusions, is the insurer estopped from asserting an otherwise valid exclusion?

(2) Would it alter the opinion of the Court if, in addition to the above facts, the insurer's agent made misrepresentations to the insured that the insured had full coverage under the policy, upon which [representations] the insured relied to its detriment?

In answer to the first question, a question of first impression in Alabama, the Supreme court of Alabama created an exception to the general rule in Alabama that insurance coverage cannot be created or enlarged by estoppel. In so holding, the court concluded that §27-14-19 of the *Code of Alabama* requires that an insurance policy be "mailed or delivered" to the purchaser of a policy and to the named insured and that an insurer may be estopped from asserting conditions of, or excluding from, coverage where such a purchaser or insured is prejudiced by the insurer's failure to comply with the statute. Additionally, the supreme court held that because a purchaser and the named insurer are so obviously included within the terms of §27-14-19, the mere delivery of a certificate of insurance, even one disclaiming any effect on the purchaser's or the named insured's legal right under the policy, will not be sufficient to comply with the statute.

In response to the district court's second certified question, the supreme court found that alleged misrepresentations of the defendants do not alter their answer to

the first question. The fact that the defendants committed fraud does not change the plaintiff's status under §27-14-19 and the requirements thereunder, but it may be relevant in determining whether the plaintiff was prejudiced by the insurer's failure to comply with the statute.

***Miller v. Dobbs Mobile Bay*, 661 So. 2d 203 (Ala. 1995).**

On February 28, 1989, Mearl Miller purchased a 1985 Ford LTD Crown Victoria automobile from Treadwell Ford. During the negotiations for the sale, a Treadwell salesman asked Miller if he intended to purchase credit life insurance coverage. Miller replied that he did not want coverage, and he informed the salesman that he was ill and would not qualify.

Later, after agreeing to the purchase, Miller dealt with another Treadwell employee who represented Ford Life Insurance Company. The employee asked Miller if he would like to purchase credit life insurance coverage. Again, Miller answered that he did not want the coverage and told the employee that he was ill. Moreover, Miller, after examining the form, was aware that coverage was optional. The Treadwell employee stated that if Miller did not buy the credit life coverage, he could not buy the car. When Miller again raised his health difficulties, the employee represented to Miller that his health would not be a problem and that the insurance would be effective notwithstanding the state of his health. Miller signed the necessary paperwork for credit life insurance coverage, including a health certificate stating that he was in good health. Soon after purchasing the car, Miller was diagnosed with lung cancer and died approximately eight months later.

Joyce Miller, administratrix of Mearl Miller's estate, brought an action against Ford Life Insurance Company and Dobbs Mobile Bay, d/b/a Treadwell Ford. While affirming the trial court's dismissal of Miller's claims for fraud, which expired at her husband's death, the Supreme Court of Alabama held that sufficient evidence was presented at trial to proceed under the breach of contract claim against Ford Life Insurance Company. In so holding, the supreme court held that while viewing the evidence in a light most favorable to Mrs. Miller, Mr. Miller never contended that he was in good health. In fact, the supreme court noted that the Treadwell salesman and Ford Life representative were aware of Mr. Miller's health and that he did not want credit life coverage. Sufficient evidence was presented that Mr. Miller purchased the insurance only after the Ford Life representative insisted that his poor health would not be a problem. The supreme court held that an insurance company is bound by the actions of its agent when the agent knows of an applicant's adverse health history and yet sells a policy without regard to that knowledge.

Fraudulent suppression

To establish a prima facie case of suppression, a plaintiff must show: (1) that the defendant had a duty to disclose a material fact, (2) that the defendant concealed or failed to disclose this material fact, (3) that the defendant's concealment or failure to disclose this material fact induced the plaintiff to act or to refrain from acting, and (4) that the plaintiff suffered actual damage as a proximate result. *Dodd v. Nelda Stephenson Chevrolet, Inc.*, 626 So. 2d 1288, 1293 (Ala. 1993). "Mere silence is not fraudulent in the absence of a duty to disclose. A duty to disclose may arise from a confidential relationship, from a request for information, or from the particular circumstances of the case." *Hines v. Riverside Chevrolet-Olds, Inc.*, 655 So. 2d 909, 918 (Ala. 1994). Recent decisions by the Supreme Court of Alabama recognize a duty to disclose in circumstances where a defendant has superior knowledge or a relationship of trust with a plaintiff.

***Union Security Life Insurance Co. v. Crocker*, 667 So. 2d 688 (Ala. 1995).**

In *Union Security Life Insurance Co. v. Crocker*, 667 So. 2d 688 (Ala. 1995), the Supreme Court of Alabama held that an agent of a credit life insurer, who has superior knowledge, has a duty to disclose to an unsophisticated insured that benefits may not be paid under the policy in the event it is discovered the insured has known health problems. Evelyn and Coleman Crocker discussed with Sammy Taylor, an employee of First Alabama Bank of Choctaw, the possibility of obtaining a

consolidation loan. On the application to Union Security Life Insurance Co. for credit life insurance, Taylor pre-marked separate health disclosure statements for both Mr. and Mrs. Crocker. Taylor marked "no" on nine health questions, indicating that neither Crocker had previously been ill. Mr. Crocker suffered, however, from Parkinson's disease and heart disease, having undergone serious heart surgery twice within the last ten years. Both Evelyn and Coleman Crocker signed their individual disclosure forms.

Later, Mr. Crocker died of heart disease. Mrs. Crocker submitted a death certificate to Union Security in an effort to make a claim under the credit life insurance policy. Union Security denied coverage based on Mr. Crocker's history of heart disease and his failure to disclose the condition. Mrs. Crocker sued Union Security and other defendants for fraud; the trial court granted summary judgment in favor of the defendants.

At the time Taylor prepared the health disclosure statements for the Crockers, Taylor was acting as an agent for Union Security and due to years of experience, was quite knowledgeable about the qualifications necessary to obtain credit life insurance. Taylor testified that he knew that Union Security could investigate the Crockers' medical history within the first year of coverage, but felt that there was no other way that the couple could obtain insurance. Moreover, Taylor received a commission on each policy issued, regardless of whether benefits under the policy were ever paid by the company.

According to the evidence before the trial court, Taylor also was well aware of Mr. Crocker's health condition. Evidence indicated that Mr. Crocker noticeably tremored on a continuous basis, that Taylor had visited in their home, and that Taylor and his wife had vacationed with the Crockers. Although knowledgeable about Mr. Crocker's poor health, Taylor purposefully falsified the health disclosure forms, indicating that the couple was in good health and had no history of illness.

The Supreme Court of Alabama held that substantial evidence of fraud was presented to the trial court, precluding summary judgment. The supreme court further held that no evidence was presented that the Crockers had any knowledge or experience concerning credit life insurance. The Crockers relied on Taylor's friendship, expertise and superior knowledge. The court, therefore, held that Taylor had a duty to disclose to the Crockers that benefits under the policy might not be paid if Union Security rejected Mr. Crocker's application because of his poor health.

***Liberty National Life Insurance Company v. McAllister*, No. 1931163, 1995 WL 129224 (Ala. Feb. 24, 1995).**

In *Liberty National Life Insurance Company v. McAllister*, No. 1931163, 1995 WL 129224 (Ala. Feb. 24, 1995),[4] the Supreme Court of Alabama held that where an agent has a relationship of trust with an insured, the agent has a duty to explain and fully disclose differences between insurance policies. Edith McAllister, a widow, had been a Liberty National Life Insurance Co. ("Liberty National") policyholder since 1947. In 1982, she purchased a Liberty National cancer insurance policy for herself, which provided coverage for various costs associated with cancer treatment, including limited hospital expenses, surgical expenses, private nursing costs, and unlimited coverage for radiation, chemotherapy drugs, and prescription drugs. Later, Liberty National embarked on a program to persuade its cancer insurance policyholders to exchange older policies, such as the one McAllister owned, for new cancer policies. The new policies increased coverage in certain areas, but limited coverage for radiation and chemotherapy treatments as well as prescription drugs.

In 1987, Rick McLendon, McAllister's Liberty National agent, represented to McAllister that the new Liberty National cancer policy "was a better policy and had better coverage" than the existing 1982 policy. McLendon failed to disclose to McAllister that certain benefits under the 1982 policy would be limited or eliminated by the 1987 policy. McAllister did not review the new policy at the time she agreed to purchase it, but testified that

P. Leigh O'Dell
P. Leigh O'Dell is an associate with Beasley, Wilson, Allen, Main & Crow in Montgomery, Alabama. She is a former law clerk to the Honorable Ira DeMent, United States District Judge for the Middle District of Alabama and a graduate of Auburn University and the University of Alabama School of Law.

she "trusted" him. Moreover, at the time she agreed to switch policies, McAllister was given a brochure describing the coverage provided by the new policy, but the brochure failed to contain any comparisons between the coverage under the 1982 policy and that of the 1987 policy.

In 1992, McAllister's aunt was diagnosed with cervical cancer. McAllister's aunt had previously purchased an old cancer policy, which she had exchanged for the newer policy. After McAllister's aunt was diagnosed, McAllister's aunt learned that the policy would not cover many of her medical bills. After discussing this with McAllister, McAllister discovered the differences between the 1982 policy and the 1987 policy for the first time.

McAllister sued Liberty National for misrepresentation, deceit, and fraudulent suppression; a jury awarded her $1,000 in compensatory damages and $1 million in punitive damages. On appeal, Liberty National contended that the trial court erred by submitting McAllister's fraudulent suppression claim to the jury. According to Liberty National, the sales brochure provided to McAllister fully disclosed all material facts pertaining to the policies, and therefore, Liberty National was entitled to judgment on McAllister's claim for suppression as a matter of law.

The Supreme Court of Alabama held that McAllister had presented substantial evidence from which a jury could find that Liberty National was under a duty to explain to McAllister the differences between the 1982 policy and the 1987 exchange policy before selling her the new policy, either directly through its agents or through a sales brochure. McAllister had a relationship of trust with McLendon. Based on that evidence, the supreme court held that it could be found that McLendon had a duty to assist McAllister in understanding the differences between the old and new policies and that the brochure which McLendon provided did not fully disclose all of the material facts relating to the reduction of coverage under the 1987 policy.

***Smith v. First Family Financial Services, Inc.*, 626 So. 2d 1266 (Ala. 1993).**

In *Smith v. First Family Financial Services, Inc.*, 626 So. 2d 1266 (Ala. 1993), the Supreme Court of Alabama held that a mortgage lender has a duty to fully disclose a yield spread premium to a borrower. Billie Jo Smith and Thomas L. White sued First Family Financial Services, Inc. and others for fraud for failure to disclose all finance charges relating to a residential mortgage and for charging plaintiffs points in an amount in excess of that allowed by statute.

Plaintiff Smith's house was destroyed by fire. Smith purchased a shell of a house with the fire insurance proceeds and sought a loan from EquiSouth to finish the dwelling. EquiSouth submitted Smith's application to First Family for approval. First Family conditionally agreed to loan Smith the money when her brother agreed to co-sign the note and application. The annual interest rate charged by First Family on the loan was 16 percent, with EquiSouth, in accordance with its arrangement with First Family, able to add up to 2 percent to the interest rate. In addition, First Family paid EquiSouth 75 percent of the present value of the 2 percent spread as an additional fee, which was not disclosed to the plaintiffs. The loan was to be closed with funds provided by First Family, with the note immediately being assigned from EquiSouth to First Family following the closing. Plaintiffs contended that Alabama law required EquiSouth and First Family to disclose the origination fee and yield spread premium as a finance charge and that the payment of 75 percent of the additional 2 percent origination fee violated Alabama law because EquiSouth collected in excess of the 5 percent origination fee permitted by statute.

Neither First Family nor EquiSouth disputed that the plaintiffs paid an amount in excess of the 5 percent maximum origination fee under the loan nor the fact that the loan was a consumer loan transaction covered by the Mini-Code of Alabama, which requires that all finance charges be disclosed by the lender. Section 6-5-102 of the *Code of Alabama* codifies the common law rule that an action for fraud arises where one with a duty to disclose conceals or withholds a material fact. *See Ala. Code* §6-5-102 (1993). The Alabama Consumer Credit Code, codified at §5-19-1 to §5-19-31 of the *Code of Alabama*, "makes material all finance charges payable

directly or indirectly by the borrower as an incident to credit." *Smith*, 626 So. 2d at 1268. Furthermore, §5-19-4(g) allows a creditor in a contract involving real property to charge and collect points not to exceed five percent of the original balance of the principal.

The Supreme Court of Alabama opined that "[t]here is no question that such payments [75 percent of the 2 percent spread] are part of the total finance charges borne by the borrower under the Mini-Code and, as such, are required to be disclosed to the borrower under Alabama law." *Id.* at 1272. Consequently, the court reversed the circuit court's grant of summary judgment and found that substantial questions of material fact existed as to whether the defendants had a duty to disclose the overcharge of points. The court held that although there was nothing illegal about EquiSouth acting as a mortgage broker to First Family's role as mortgage lender, questions of fact existed as to whether the defendants violated Alabama law by not properly disclosing their relationship and more importantly, not disclosing all of the finance charges incurred by the plaintiffs as a result of the loan.

***Hines v. Riverside Chevrolet-Olds, Inc.*, 655 So. 2d 909 (Ala. 1994).**

Richard and Linda Hines purchased an Oldsmobile automobile from Riverside Chevrolet. Apparently, the left rear quarter panel of the car had been repainted by General Motors Corporation before delivery of the vehicle to the dealer. After several months, Mr. Hines noticed a slight discrepancy in color between the paint on the left rear quarter panel and that on the rest of the car. When he was unable to resolve this problem with the dealer, he filed this lawsuit alleging fraudulent suppression and misrepresentation. The trial court granted summary judgment finding that the defendants had not suppressed or concealed any material fact because the repainting of the car was not a material fact and that the evidence was insufficient to support a "claim for punitive damages," because the plaintiffs failed to present clear and convincing evidence that the defendants had an intent to deceive or had committed gross, oppressive, or malicious conduct. Hines appealed.

This case is important in several respects. First, the supreme court, emphasizing the defendants' superior knowledge that the car had been repainted and the likelihood that the plaintiff would not otherwise have purchased the vehicle if he had known that fact, held that the question of whether the defendants had a duty to disclose should have been submitted to the jury.

> Because the Hineses were members of a group or class of persons who General Motors expected or had special reason to expect would be influenced by its decision not to disclose information about the repainting of damaged automobiles, General Motors and the Hines have a sufficient relationship on which to base a duty to disclose.

Hines, 655 So. 2d 920. The suppressed fact was material because the Hineses presented sufficient evidence from which an impartial trier of fact could infer that the process employed to repaint cars with damaged or defective paint produces a markedly inferior paint finish.

Perhaps the most important issue presented by this case is whether the plaintiffs were required to present "clear and convincing evidence of intent for the purpose of submitting the issue of punitive damages to the jury." To resolve that issue, the court considered the interaction between the requirement of proof by substantial evidence to submit an issue of fact to a jury provided by *Code of Alabama* §12-21-12 and the requirement of clear and convincing evidence for imposition of punitive damages provided by *Code of Alabama* §6-11-20(a). After considering the purpose of those statutes, the court reasoned:

> Section 12-21-12(a) establishes the quantum of evidence necessary to submit an issue of fact to the trier of fact, when the sufficiency of the evidence to support an issue of fact is tested. Unless a higher standard is provided by statute, rule or decision, substantial evidence is required to submit an issue of fact to the trier of fact. §12-21-12(c). This statute limits the authority of a

trial court to submit an issue of fact to the trier of fact.

Section 6-11-20(a), however, limits the authority of the trier of fact to award punitive damages—that is, a trier of fact may award punitive damages unless the plaintiff proves by "clear and convincing" evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff. Thus, by its very language, §6-11-20 does not define the standard for determining whether a genuine issue of fact, material to a claim alleged by the plaintiff, exists for the trial court to submit to the trier of fact; rather, it defines a standard of proof for determining whether the trier of fact has, or had, the authority to award punitive damages.

Hines, 655 So. 2d at 925; *see Ex parte Norwood Hodges Motor Co.*, No. 1930150, 1995 WL 560027 (Ala. Sept. 22, 1995).

The court emphasized that there is no "claim for punitive damages," but rather certain claims (such as wantonness) will support both compensatory and punitive damages. The Court appeared to leave to the trial court the authority to refuse to instruct the jury on punitive damages when the plaintiff has not submitted clear and convincing evidence of intent to authorize the trier of fact to award punitive damages. This case should be studied in detail by any attorney who practices in the areas of litigation often involving punitive damages.

Damages

***Life of Georgia v. Johnson*, No. 1940357, 1995 WL 683857 (Ala. Nov. 17, 1995)**

On November 17, 1995, in *Life of Georgia v. Johnson*, No. 1940357, 1995 WL 683857 (Ala. Nov. 17, 1995), the supreme court made major changes in the Alabama system for awarding punitive damages. The court held that in the future where punitive damages claims are made, the jury will be given a special interrogatory to determine whether or not punitive damages should be awarded against a defendant. Assuming the jury finds punitive damages are appropriate, a second phase of the trial will begin during which the jury will be provided additional evidence and instructed to apply a number of factors in determining the appropriate amount of punitive damages. In addition, 50 percent of any punitive award (after attorneys' fees and expenses) will be paid to the State General Fund.

This remarkable opinion arose out of a rather ordinary set of facts. Daisey L. Johnson sued Life Insurance Company of Georgia alleging that it had engaged in intentional and reckless fraud by selling her a Medicare supplement insurance policy that was worthless to her because she was eligible for Medicaid. Although Johnson, an 84-year-old woman with a third-grade education, was already paying premiums to Life of Georgia on nine different policies, she was approached by an agent who recommended that she purchase a Medicare supplement policy. The agent told Johnson she needed that policy so that if she went to the hospital "you wouldn't have to worry about your doctor's bill." Johnson purchased the policy and within a few years the premium had escalated to the point where it represented one-third of Johnson's fixed income. The jury awarded $15 million in punitive damages. The trial court, applying the factors from *Hammond* and *Green Oil*, reduced the verdict to $12,500,000. The supreme court, without condoning the obviously egregious conduct of Life of Georgia, reduced the verdict to $5 million.

The court used this case as a vehicle to make two substantial changes in Alabama's system for awarding punitive damages. First, the court provided for a bifurcated trial on the issue of punitive damages.

> The trial court shall charge the jury on the appropriate law, and the jury shall first determine liability and the amount of compensatory damages, if any. The jury will also decide by special verdict whether the evidence justifies the imposition of punitive damages. If the jury answers the special verdict in the affirmative, the trial shall resume.

In the second part of the bifur-

cated trial, the parties shall be permitted to introduce all evidence, financial or otherwise, that is relevant to the question of what amount the verdict should be to accomplish the purpose punitive damages were designed to serve. All evidence presently admissible at a post-verdict *Hammond/Green Oil* hearing may be introduced before the jury retires to consider its punitive damages verdict. The jury is to be guided not only by the factors set forth in *Hammond* and *Green Oil*, but also by those factors stated in the statute and in other case law. Davis Carr, writing in *The Alabama Lawyer*, has offered the following compilation of factors, drawn from both case law and statute, that can be considered:

From the statute [§ 6-11-23, Ala. Code 1975 (Supp. 1989)]:

1. Nature, extent and 'economic impact' of verdict on plaintiff or defendant.
2. Amount of compensatory damages.
3. Whether defendant has been guilty of similar acts in the past.
4. The nature and extent of any effort by defendant to remedy the wrong.

From *Green Oil*:

1. Does the punitive damages award bear a reasonable relationship to the harm likely to occur from the defendant's conduct?
2. The degree of reprehensibility of defendant's conduct, including:
   (a) the duration of this conduct;
   (b) the degree of defendant's awareness of any hazard which this conduct has caused or is likely to cause;
   (c) any concealment or cover-up of the hazard;
   (d) existence and frequency of similar past conduct.
3. Punitive damages should remove the profit, if any, from the defendant and should be in excess of the profit so that defendant recognizes a loss.
4. Defendant's "financial position."
5. Cost of litigation to the plaintiff.
6. If defendant has received criminal sanctions, that should be taken into account in mitigation.
7. If there have been other civil actions against the same defendant based on the same conduct, this should be taken into account in mitigation of the punitive damages.

From *Hammond*:

1. Culpability of defendant's conduct.
2. The desirability of discouraging others.
3. "The impact" on the parties.
4. "Impact" on innocent third parties.

From *Holloway [Ridout's-Brown Service, Inc. v. Holloway*, 397 So. 2d 125, 127 (Ala. 1981)]:

> The punitive damages award should sting, but ordinarily it should not destroy.

From *Wilson [v. Dukona Corp. N.V.*, 547 So. 2d 70 at 73 (Ala. 1989)]:

> Defendant's "right to fair punishment" must be considered above plaintiff's right to recover the fullest amount of punitive damages.

From *Lavoie [Aetna Life Ins. Co. v. Lavoie*, 505 So. 2d 1050 at 1053 (Ala. 1987):

> "A comparative analysis with other awards in similar cases."

Life of Georgia, No. 1940357, slip op. at 22-24. The decision to establish this bifurcated process was unanimous including the vote of the new Chief Justice Perry O. Hooper, Sr.

The court then considered the severe criticism of recent years "that punitive damages awards sometime amount to an undeserved windfall to the prevailing plaintiff." *Id.* at 25. The court concluded: "It is appropriate and fair that some part of the civil fine imposed by juries in the form of punitive damages awards should be devoted to the general welfare of all citizens of Alabama." The court, therefore, held:

> Hereafter, all punitive damages judgments that have not been paid and satisfied shall be allocated as follows: After any post-verdict review is concluded by the trial court, and after appellate review, if any, the amount of the judgment as finally determined shall be paid into the trial court. The trial court shall order all reasonable expenses of the litigation, including the plaintiff's attorney fees, paid. The trial court shall then order the clerk of the court to divide the remaining amount equally between the plaintiff and the State General Fund.

Id. at 28.

Justice Maddox dissented from the portion of the Opinion allocating a portion of the punitive damage award to the state. In his opinion, that issue is one solely directed to the responsibility of the Legislature. Justice Butts issued a separate dissent on the allocation issue. He agreed with Justice Maddox that it was the Legislature's determination whether a portion of an award should be paid to the state, if so, what percentage the state should receive, and to what fund or agency the monetary awards should be allocated. Justice Butts also indicated his strong opinion that any change in the allocation of punitive damages should begin only in the future.

The court has agreed to rehear the case. It is unclear if the court will persist in the direction of reform direction or withdraw its earlier decision. If the court chooses to reaffirm their earlier decision, material and sweeping changes will result in the way fraud actions are litigated in Alabama.

***Boswell v. Liberty National Life Insurance Co.*, 643 So. 2d 580 (Ala. 1994).**

In *Boswell v. Liberty National Life Insurance Co.*, 643 So. 2d 580 (Ala. 1994), the Supreme Court of Alabama held that a plaintiff who alleged that a defendant fraudulently induced the plaintiff to purchase "less valuable" cancer policy stated a claim for fraud even though no claim had been made under the policy. Wilhelmena Boswell sued Liberty National Life Insurance Company alleging misrepresentation and fraudulent suppression in the sale of cancer insurance.

Plaintiff alleged that Liberty National,

through its agents, told her that a "newer and better cancer policy" would provide additional benefits and more complete coverage than the old policy had provided to induce her to exchange the old policy for the new one. In fact, the new policy not only cost more, but offered less coverage. Defendants filed a Rule 12(b)(6) motion contending that accepting the allegations of the plaintiff's complaint as true, she had suffered no injury because she had not made a claim under either policy. The trial court granted that motion, and Boswell appealed. The supreme court reversed:

> The injury or damage alleged is that the plaintiffs were persuaded, through the fraudulent acts of the defendants, to pay for something they did not receive. In other words, the alleged injury or damage was the payment of greater premiums than were necessary because the plaintiffs received no additional coverage in return for the greater premiums and lost benefits they already enjoyed under the old policy.

Boswell, 643 So. 2d at 582.

The court recognized the potential for confusion by the trial bar in light of the two distinct lines of cases on the issue of whether damage has been suffered from an insurer's fraud where no claim has been made under the policy. *Compare Moore v. Liberty Nat'l Life Ins. Co.*, 581 So. 2d 833 (Ala. 1991) *with Liberty Nat'l Life Ins. Co. v. Waite*, 551 So. 2d 1003 (Ala. 1989). The court overruled the *Moore* line of cases to the extent those cases are inconsistent with the ruling in *Boswell*.

Conclusion

The evolution of fraud as it relates to consumers is never-ending. This process has become intensified by the continuous introduction and debate of reform legislation in the Alabama Legislature. This chronology highlights recent decisions of the Supreme Court of Alabama and remarks on how they have, and will, impact the litigation of fraud claims throughout the state. ■

Endnotes

1 In *Ex parte New England Mutual Life Insurance Co.*, 663 So. 2d 952, 956 (Ala. 1995), the Supreme Court of Alabama held that an insurer "does" business under § 6-3-5 in a county where its policyholders reside and where it engages in systematic correspondence.

2 In *Ex parte Toyota Motor Credit Corp.*, 644 So. 2d 870 (1994), the supreme court also held that defendants had failed to prove that the transferee county would be significantly more convenient that the plaintiff's choice of forum, where the plaintiff filed the action in a county where Toyota Motor Credit and fellow defendant World Omni Financial Corporation regularly entered into retail sales and financing agreements with residents of the forum county. To examine similar cases where the supreme court has ruled that an action should not be transferred for the convenience of the parties, see *Ex parte Swift Loan & Finance Co.*, No. 1940384 (Ala. Aug. 11, 1995); *Ex parte Ala. Power Co.*, 640 So. 2d 921 (Ala. 1994); *Ex parte Johnson*, 638 So. 2d 772 (Ala. 1994); *Ex parte AmSouth Bank, N.A.*, 589 So. 2d 715 (Ala. 1991); *Ex parte W.S. Newell, Inc.*, 569 So. 2d 725 (Ala. 1990); *Ex parte Ford Motor Credit Co.*, 561 So. 2d 244 (Ala. Civ. App. 1990).

3 *Ex parte Integon Corp.*, No. 1941911 (Ala. Dec. 15, 1995) (holding that transfer warranted where none of the events occurred or parties or witnesses resided in the forum selected by plaintiffs); *Blair v. Container Corp. of America*, 631 So. 2d 919 (Ala. 1994).

4 This case may be more clearly understood by examining the supreme court's prior decisions in *Kelly v. Connecticut Mut. Life Ins. Co.*, 628 So. 2d 454 (Ala. 1993), and *Hickox v. Stover*, 551 So. 2d 259 (Ala. 1989).

Injuries and Loss of Earnings

By James B. Smith, Jr. and Jack A. Taylor

An accountant was disabled in an automobile accident and is incapable of continuing his full practice. A mother of young children is disabled due to an injury and is not able to continue working in her part-time job. A factory worker whose job requires significant physical activity has a hand injury from a job-related accident.

Besides the physical injuries, what do these individuals have in common? Their future earnings may be reduced due to the injury. Because of the financial impact on their clients, both plaintiff and defense attorneys should be interested in the quantification of reduced earnings. This quantification should be objective, and provide neither a financial windfall to the plaintiff nor penalize the defendant. It should simply make the injured party economically whole.

But how can this loss of earnings be quantitatively determined? We suggest the following as a straight forward and objective method of determining the loss:

Loss of Earnings =
Future Lost Wages
+ Future Fringe Benefits
+ Future Nonmarket Services
- Future Earnings from Alternative Employment

Let's take a look at each component of the loss of earnings formula.

Lost Wages

First, the plaintiff's lost wages are the future wages that are foregone because of an injury. Lost wages depend on the current wage, wage growth rate, and the number of years remaining in the plaintiff's work life. After collecting this information, the current wage is projected over the future work life using the wage growth rate. Thus, a stream of future wages is determined. The three components of lost wages are discussed below:

Current Wage. The current wage may be based on last year's wage if that is an accurate representation of the plaintiff's current earnings' capacity. A tax return can often be used to confirm the last year's wage. If the plaintiff only worked for a portion of the year due to the injury, last year's wage may need to be annualized in order to project the earnings for the entire year. For an hourly worker, an alternative to using last year's wage might be the current hourly rate multiplied by the expected number of work hours in a year. The expected hours may need to be adjusted for any expected periods of sickness or unemployment. For young people still in school, the impact of college education on future earnings can be determined by reviewing school records, educational level of parents and siblings, college major, and any hobbies indicating employment interest.

Wage Growth Rate. The next component is the wage growth rate, which is used for projecting future wages. The wage growth rate may be determined from the wage history of the plaintiff's employer or governmental census statistics. The rate may vary by the plaintiff's age due to seniority, experience and personal productivity. Over a person's career, the wage growth rate may increase rapidly at the younger ages, increase more slowly in the middle ages, and level off or even decline in the years before retirement.

Remaining Work Life. The last component in calculating the lost wages is the number of years remaining in the work life of the plaintiff. The work life may vary by occupation, sex, education and other variables that are specific to the plaintiff, such as medical history. Certain events may shorten the remaining work life and may be considered when calculating the lost wages. Those events might include:

- Reduced work life expectancy resulting from an early retirement program offered by the plaintiff's company.
- Plaintiff's failure to minimize damages. For example, the plaintiff may fail to accept alternative employment or vocational training, fail to take medication, fail to follow a doctor's recommendations for therapy or recovery, or decline rehabilitative surgery that does not impose a substantial health risk.

- Phasing out of the plaintiff's occupation as a result of technological advances.

Fringe Benefits

Besides the loss of future wages, the plaintiff may also lose future fringe benefits. Fringe benefits include the employer's cost for the medical insurance plan, dental and vision insurance plans, private pension plan, savings or thrift plan, company car available for family purposes, and Social Security. Information about fringe benefits may be taken from employee handbooks and labor contracts.

Loss of earnings should consider fringe benefits because they may be affected by the reduction in wages. Double counting of wages and fringe benefits should be avoided when considering bonuses, vacation pay, sick pay, holiday pay, cost of unemployment compensation, severance pay, and tools, equipment and uniforms provided by the employer. To avoid double counting, the employer's Social Security payments on behalf of the plaintiff may be considered if Social Security income after retirement is also considered. Also, the employee's portion of the Social Security tax should not be counted as a fringe benefit if it is already included in wages.

The cost of employer-paid medical benefits should not be projected after the plaintiff becomes eligible for Medicare, and the employer's cost ceases. Further, employer-paid medical costs might reduce when children are no longer covered by the plan because the premium is usually lower without the children's coverage.

Nonmarket Services

The loss of earnings may also include nonmarket services that were provided by the plaintiff, but are no longer performed by the plaintiff due to the injury. These nonmarket services might not be performed by anyone, or they might be performed by someone else. The nonmarket services will vary significantly by individual. While some are very active around the house, others may have a lack of time, interest or desire for such activities. These services might include car repairs, lawn care, carpentry, plumbing repairs, and cooking. Leisure activities, such as shopping and gardening, might not be included. Information on nonmarket services may be based on information from the plaintiff and family.

The value of the nonmarket services might be the number of hours needed to perform the service multiplied by an appropriate hourly rate. The hourly rate should be reasonable; e.g., the rate for car repairs will generally be higher than the rate for lawn care. If a professional rate is used, apply the hourly rate to the number of hours that a professional would take, which is usually fewer than the number of hours required by a nonprofessional.

Earnings from Alternative Employment

Although the injured party may not be able to return to full capacity in his or her prior employment, there may be alternative employment that will generate a future flow of earnings. The future lost wages and fringe benefits from the *alternative employment* are deducted from the future lost wages and fringe benefits from the *prior employment*. The quantification of the future wages and benefits from the alternative employment will follow the approach described in the previous sections.

Having considered the specific components of the loss of earnings equation, we turn now to other considerations.

Taxes

Taxes are not normally required in the calculation of loss of earnings except for federal cases. Tax calculations can be quite complicated because of the general complexity of the tax law; e.g., tax deductions, dependents moving out of the household, and tax bracket changes. If taxes are considered in the calculation of loss of earnings, the calculation must consider taxes paid on both investment income and lost earnings.

Under the U. S. Tax Code, awards for actual damages due to personal injury are generally not taxable. However, the interest earned on a lump sum settlement is taxable in the year that the interest is earned. Rules in some states specify the treatment of taxes in the present value calculation.

Cases Involving Death

Although this article primarily addresses loss of income due to injury, many of the methods and assumptions will also apply to the loss of income due to death.

In cases involving a death, the expenses related to the injury, such as medical and funeral expenses, may be included in the loss of earnings. However, the expenditures related to the personal consumption of the decedent should be deducted from the loss of earnings since those expenditures cannot occur.

The consumption expenditures include all personal consumption (not just economic necessities, such as food, clothing and shelter), and typically exclude non-personal expenditures (such as family housing costs). Personal consumption expenditures include the costs of gambling, alcohol and hobbies. A review of the decedent's life style, reputation and morals may indicate the spending habits.

For young people, future personal consumption might be determined by examining the following:

- Educational level of parents, siblings and decedent.
- School records of decedent — written comments in the file may be as important as the grades.
- Family's value of education.
- Work history of parents.
- Work ethic of parents.
- Court records, if any, of the decedent.

Present Value Calculation

After projecting lost earnings for each year of the remaining work life, the income stream is normally discounted at an appropriate interest rate to determine today's value (present value). The present value calculation is necessary because today's money is worth more than tomorrow's money. For example, $1,000 today is worth more than $1,000 in one year because today's $1,000 can earn interest during the year. Stated another way, less money is required today to fund a future payment because of the interest earned.

The interest rate used in the present value calculation may vary by state. Generally, a state requires an interest rate that is based on (a) state legislation, (b) rules of the court, which is usually set by the state's highest court, or (c) case law. The interest rate can also vary by the type of case.

If there is latitude in selecting an interest rate, most courts will accept a rate based on a safe investment, such as U. S. Treasury Bonds. Depending on the circumstances, AAA corporate bonds might also be considered because of their higher yield and high investment quality.

There needs to be a consistency in the treatment of inflation on interest rates and wage rates. An inflation adjustment should apply to both the interest rate and wage growth rate, or should apply to neither. Otherwise, the present value calculation may be materially misstated.

The valuation date for the present value calculation should be as close as possible to the current date so that the latest information on interest rates can be employed. Further, if lost income has occurred after the date of injury and before the valuation date, those losses should be accumulated at interest to the valuation date. The total lost income as of the valuation date is the (a) accumulated value of past losses and (b) present value of *future* losses.

Summary

The many assumptions and methods used in calculating the loss of earnings must be selected carefully because they may have a material impact on the final settlement. Because each situation is unique, a significant amount of expertise and judgment is necessary in selecting the most appropriate assumptions and methods. ■

James B. Smith
James B. Smith, Jr., FSA, MAAA, is a consulting actuary with KPMG Peat Marwick in Birmingham, Alabama, and his practice includes product development, financial reporting and litigation support. He is a Fellow of the Society of Actuaries and a member of the American Academy of Actuaries. He received his B.B.A. from Georgia State University in 1970, and his M.S. from the University of Nebraska in 1972, both in actuarial science.

Jack A. Taylor
Jack A. Taylor is the Joseph S. Bruno Associate Professor at Birmingham-Southern College where he teaches marketing and insurance. He received his law degree from the Birmingham School of Law in 1985 and his Ph.D. from the University of Alabama at Birmingham in 1992. He is a member of the Alabama State Bar.

Each of us has, on many occasions throughout our lives, hurriedly chanted the "Pledge of Allegiance," rushing through its powerful words to get on with the game, class or other event. How often have we reflected on the vision expressed in just four short words, the ending phrase of our national pledge, "and justice for all?"

"And justice for all," a basic tenet of our society, remains the core value and mission of the Legal Services programs in Alabama. Day to day, Legal Services lawyers provide quality legal representation in civil matters to low income persons, thus guaranteeing access to a justice system otherwise available only to those who can pay the price for a lawyer's services.

The Legal Services programs in Alabama gratefully acknowledge and thank the following individuals and firms who made a financial contribution to the 1995 Partners for Justice, a fundraising project of the Legal Services programs in Alabama. In doing so, they have joined with Legal Services attorneys around the state who daily keep alive for all people the vision and pledge, "and justice for all."

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DISCIPLINARY REPORT

Reinstatement

• Tuscaloosa attorney **William Eason Mitchell** was removed from disability inactive status and reinstated to the active practice of law, effective January 26, 1996, by order of the Alabama Supreme Court dated February 12, 1996. [Pet. No. 95-004]

Disbarment

• Birmingham attorney **John Freeman Tanner** was disbarred by order of the Supreme Court of Alabama, effective January 24, 1996. The order of disbarment was based upon Tanner's affidavit and consent to disbarment wherein he admitted that he had pled guilty to felony charges in state and federal court, specifically, a charge of theft of property in the Circuit Court of Shelby County, and a two-count information filed in the United States District Court for the Middle District of Alabama charging conspiracy to commit mail fraud and tax evasion. [Rule 23(a); Pet. No. 96-01]

Suspension

• Mobile attorney **William Grover Jones, III** was interimly suspended by order of the Supreme Court of Alabama, said suspension effective January 22, 1996. Jones was suspended pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure.

The Office of General Counsel had filed a petition pursuant to Rule 20(a) based upon an affidavit of a member of the Mobile Bar Association Grievance Committee to the effect that Jones was being investigated on a bar complaint which alleged that he had misappropriated funds of a client. The affidavit further stated that documentation obtained during the investigation of the complaint showed that Jones had received checks from the Mobile County District Court pursuant to a garnishment proceeding he was processing on behalf of a client, but that none of these monies had been remitted to the client. Further, Jones had failed to respond adequately to the complaint and could not be located by the investigator for the Mobile Bar Association Grievance Committee.

Based upon the Office of General Counsel's petition, the Disciplinary Commission interimly suspended Jones. Thereafter, the supreme court entered an order consistent with the order of the Disciplinary Commission which suspended Jones from the practice of law and restricted him from maintaining a trust account on the grounds that his actions caused great public harm. [Rule 20(a); Pet. No. 95-08]

Public Reprimands

• Phenix City attorney **Gregory Kelly** received a public reprimand with general publication on February 9, 1996. Kelly was employed by a client to obtain an uncontested divorce and was paid his fee, in full, in advance. Thereafter, Kelly failed or refused to take any action with regard to obtaining the divorce as he had been paid to do. Despite repeated attempts on the part of the client to obtain information from Kelly concerning her case, Kelly consistently failed or refused to return telephone calls, respond to written correspondence or otherwise communicate with the client concerning the status of her case. When the client filed a complaint against Kelly with the Alabama State Bar, Kelly failed or refused to respond to the complaint in a timely manner. Approximately two years after having been paid in full by the client, and only after the client had filed a complaint with the Alabama State Bar, did Kelly obtain the uncontested divorce as he had been paid to do. Discipline was imposed for having violated the following Rules of Professional Conduct of the Alabama State Bar: Rule 1.3 which provides that a lawyer shall not willfully neglect a legal matter entrusted to him; Rule 1.4 (a) which requires a lawyer to keep a client reasonably informed about the status of a matter and to promptly comply with reasonable requests for information; and Rule 8.4 (g) which provides that it is professional misconduct for a lawyer to engage in conduct that adversely reflects on his fitness to practice law. [ASB No. 94-345]

• Pelham attorney **John E. Medaris** received a public reprimand without general publication on February 9, 1996. In 1992, Medaris represented a bank in Pelham and in the course

of his representation assisted the bank in an attempt to defraud the bank's insurance carrier. Medaris represented the bank in a number of legal matters, one of which was a lawsuit that had been filed against the bank concerning checks which the bank had accepted and which allegedly contained forged endorsements. The bank had insurance coverage for any liability resulting from the suit, but the deductible was $25,000. Medaris billed the bank on a monthly basis for work done on the lawsuit and for work done on matters unrelated to the lawsuit. Each month during the representation, Medaris sent the bank two bills. The first was itemized and reflected charges for work done on the lawsuit and separate charges for work done on other unrelated matters. The second bill, however, was not itemized and falsely reflected that the entire amount of the bill was for the work done on the lawsuit when, in fact, part of the bill was for work done on other unrelated matters. Medaris advised the bank to use whichever of the two bills "would be most helpful". The second bill constituted a willful misrepresentation of the amount the bank owed Medaris for his services in connection with the lawsuit. This willful misrepresentation was made by Medaris for the specific purpose of allowing the bank to falsely represent to its insurance carrier that the bank had paid a greater percentage of the $25,000 deductible than had actually been paid. Discipline was imposed for violation of the following Rules of Professional Conduct: Rule 8.4 (c) which provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation and Rule 8.4 (g) which provides that it is professional misconduct for a lawyer to engage in other conduct that adversely reflects on his fitness to practice law. [ASB No. 93-070]

* Tuscaloosa attorney **Darryl C. Hardin** received a public reprimand without general publication on February 9, 1996. In May 1991, Hardin was employed by a client to probate the estate of a deceased relative. After having been so employed, Hardin failed or refused to probate the estate in a timely fashion and, in fact, did not complete a petition for final settlement until September 1995, some nine months after the client had filed a complaint against Hardin with the Alabama State Bar. As a result of Hardin's delay in probating the estate, the client incurred substantial costs for the administrator's bond. During the course of the representation, Hardin failed or refused to communicate with the client or to respond to requests for information concerning the status of the estate. Discipline was imposed for having violated the following Rules of Professional Conduct: Rule 1.3 which provides that an attorney shall not willfully neglect a legal matter entrusted to him, and Rule 1.4 which requires an attorney to adequately communicate with a client and to properly respond to reasonable requests for information concerning the status of the representation. [ASB No. 94-363]

* Mobile attorney **John T. Kroutter** received a public reprimand with general publication on February 9, 1996. Kroutter was employed by a client in connection with a claim for a defective automobile which the client had purchased from a local automobile dealership. The client paid Kroutter a retainer of $500.

After having been employed and retained by the client, Kroutter failed or refused to file suit against the automobile dealership or to take any other action on behalf on the client in connection with her claim. Furthermore, Kroutter falsely represented to the client that he had filed suit against the automobile dealership when he had not done so. On at least seven occasions, Kroutter represented to the client that a date had been set for the trial of her case and on each occasion he contacted her prior to the alledged court date to tell her that it had been postponed.

Eventually the client made inquiry of the clerk of the circuit court and was informed that no lawsuit had been filed on her behalf. Thereafter, Kroutter acknowledged to the client that he had falsely represented to her that a lawsuit had been filed and also admitted that he had allowed the statute of limitations to run on at least some of the relief to which she may have been entitled. Kroutter represented to the client that he would provide her with a replacement vehicle at his own expense but subsequently failed or refused to comply with this promise. When the client filed a complaint against Kroutter, he was requested on at least five occasions, two of which were by certified mail, to respond to the complaint but he failed or refused to do so.

Discipline was imposed for violation of the following Rules of Professional Conduct: Rule 1.1 which requires a lawyer to provide competent representation to a client; Rule 1.3 which

provides a lawyer shall not willfully neglect a legal matter entrusted to him; Rule 1.4 which requires a lawyer to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information; Rule 8.1 which provides that a lawyer shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority; Rule 8.4 (c) which provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation; and Rule 8.4 (g) which provides that it is professional misconduct for a lawyer to engage in any conduct that adversely reflects on his fitness to practice law. [ASB No. 95-004]

• On February 9, 1996, Montgomery attorney **Elna Lee Reese** received a public reprimand without general publication from the Alabama State Bar for engaging in conduct that was prejudicial to the administration of justice. The reprimand was the result of a plea agreement with the bar. In November 1991, Reese was serving as county administrator for Montgomery County. During November, another lawyer called her and asked if she would open an estate for him so he could sue the estate and an insurance company. Reese filed a petition for letters of administration on behalf of the estate. Her petition stated that the deceased had died intestate and had no heirs and no assets in his estate. This was not correct. Reese did not check the probate court records to determine if there had been a prior estate. The probate court treated her petition as a re-opened estate. On January 14, 1992 a suit was filed in Barbour County against the insurance company and the estate opened by Reese. During September 1992, the widow learned from someone in the probate court office that her deceased husband's estate had been re-opened, and that Reese was the administratrix thereof. The widow contacted Reese about her reasons for taking this action. She also hired a lawyer to talk with Reese. Reese told the lawyer that the only reason the estate had been sued was so the case against the insurance company could not be removed to federal court from Barbour County, Alabama. In December 1992, Reese notified the plaintiff's lawyer that there had been a prior estate, and that the widow had been in contact with her. However, neither of them took any further action. After the one-year period for removal ran, the plaintiffs moved to dismiss the estate. Within another month, the insurance company settled with the plaintiffs for $750,000. Reese was paid $1,000 for her "administrator ad litem fee" by the plaintiff. [ASB No. 94-001]

• Birmingham attorney **Dorris M. Samsil, Jr.** was administered a public reprimand without general publication by the Alabama State Bar on February 9, 1996.

Samsil was hired to represent an individual in a municipal election dispute in Delaware. Suit was eventually filed on behalf of the client in the federal District Court of Delaware. After being unsuccessful in the Delaware federal court, an appeal to the United States Court of Appeals for the Third Circuit was filed. Following procedural machinations and proper filing of the notice of appeal, the client was made to understand that Samsil would draft the opening brief and prepare the appendix for appeal which were due on or about August 8, 1994.

A complaint filed by the client against Samsil disclosed that Samsil failed to prepare and file the brief as promised. Thereafter, the Third Circuit Court of Appeals dismissed the appeal. By and through other counsel, the client was eventually able to have the court reopen the appeal and extend the briefing schedule.

The Disciplinary Commission concluded that Samsil's actions violated Rule 1.1, in that he willfully neglected a legal matter entrusted to him, Rule 8.4(a), in that he knowingly violated the Rules of Professional Conduct, and Rule 8.4(g), in that he engaged in conduct which adversely reflects on his fitness to practice law. [ASB No. 94-314]

• On February 9, 1996, Anniston attorney **Hilliard Wayne Love** received two public reprimands with general publication from the Alabama State Bar. In ASB No. 95-054, Love was hired to foreclose on some property for a client. Love delayed filing the foreclosure, and the debtor filed for bankruptcy and sold a mobile home located on the property that belonged to Love's client. During this same period of time, Love began serving a 45-day suspension arising out of another disciplinary matter. However, Love never notified this client of his suspension. A creditor's meeting was held on January 26, 1995, but Love did not attend because he was unable to practice at that time. The Disciplinary Commission found that Love had engaged in willful neglect of a legal matter and a failure to communicate with his client about the status of the matter. In ASB No. 95-073, Love was hired by a South Carolina woman to handle an ancillary probate of her mother's estate. Most of the property was in Florida. Love was paid $500 plus a $60 filing fee. From that point on, Love did little or nothing on the case. He failed to communicate with the client and the estate's primary attorney in Florida. Six months after hiring Love, the client learned that nothing had been filed for probate of her mother's Alabama property. Love refunded the fee, but his inaction caused a delay in the Florida probate proceedings. This case also involved violations of Rules 1.3 and 1.4 regarding willful neglect and failure to communicate. [ASB Nos. 95-054 & 95-073]

• Birmingham attorney **Margaret S. Alford** was issued a public reprimand without general publication on March 8, 1996 for having violated the Rules of Professional Conduct of the Alabama State Bar. Pursuant to a disciplinary investigation, Alford was requested to produce her trust account records for the period of time covered in the complaint. Alford was able to produce a portion of these records but was unable to comply with the request in its entirety. The disciplinary board determined that her conduct constituted a violation of Rule 1.15(a) which requires attorneys to maintain complete records of their trust account funds for a period of six years after termination of the representation. [ASB No. 91-686]

• On February 9, 1996, Eufaula attorney **Christie Gregory Pappas** received two separate public reprimands without general publication, pursuant to Rule 8(3)2, Alabama Rules of Disciplinary Procedure.

In ASB No. 94-037, Pappas filed a collections lawsuit against a couple. The couple filed an answer in the lawsuit, stating their understanding that they had made adequate arrangements with Pappas' office to satisfy the debt in question by making monthly payments. Consent judgments against the couple were then entered. However, Pappas subsequently filed a garnishment against the husband at his place of work. The

husband filed a motion contesting the garnishment, which was scheduled for a hearing before the trial court judge. All parties, as well as their counsel, including Pappas, were subpoenaed and/or ordered to appear for the scheduled hearing before the trial court. However, Pappas failed to attend the hearing. Evidence received at the hearing established that the couple had fully satisfied the debt in question prior to Pappas' pursuing garnishment of the husband's wages.

Pappas entered a plea of guilty to having violated the following provisions of the Alabama Rules of Professional Conduct: (1) Rule 3.1(a), for filing a suit merely to harass another; (2) Rule 3.3(a) (3), for offering evidence that he knew to be false, and failing to take reasonable remedial measures; (3) Rule 3.4(c), for disobeying an obligation under the rules of a tribunal; (4) Rule 4.1(a), for knowingly making a false statement of material fact or law to a third person; (5) Rule 8.4(c), for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; (6) Rule 8.4(d), for engaging in conduct prejudicial to the administration of justice; and (7) Rule 8.4(g), for engaging in conduct that adversely reflects on a lawyer's fitness to practice law.

In ASB No. 94-040, Pappas had sued a woman for her breach of a promissory note due to Pappas. He obtained a default judgment against the woman and filed a garnishment directed to the debtor's employer. The employer answered that there was a prior garnishment in another matter against the judgment debtor, and that the judgment debtor's wages were too low to satisfy both the prior judgment and Pappas' judgment.

Thereafter, on behalf of the judgment debtor, Pappas filed a motion to dismiss the prior judgment's existing garnishment with the claim of personal property exemption. Pappas was successful in the prior garnishment seized. Pappas then proceeded to have the judgment debtor's wages garnished to satisfy the judgment which had been rendered in Pappas' favor.

Pappas pled guilty to having violated the following provisions of the Alabama Rules of Professional Conduct: (1) Rule 1.7(b), for representing a client wherein his representation was materially limited by his own interest; (2) Rule 1.8(a), for knowingly acquiring a pecuniary interest adverse to a client; (3) Rule 3.1(a), for filing a suit merely to harass another; (4) Rule 3.3(a) (3), offering evidence that he knew to be false, and failing to take reasonable remedial measures; (5) Rule 3.4(c), for disobeying an obligation under the rules of tribunal; (6) Rule 4.1(a), for knowingly making a false statement of material fact or law to a third person; (7) Rule 8.4(c), for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; (8) Rule 8.4(d), for engaging in conduct prejudicial to the administration of justice; and (9) Rule 8.4(g), for engaging in conduct that adversely reflects on his fitness to practice law. [ASB Nos. 94-037 & 94-040] ■

RECENT DECISIONS

By WILBUR G. SILBERMAN

Bankruptcy

The column for this issue contains some interesting decisions of bankruptcy judges in the Northern District of Alabama. These decisions should apply to current matters, and can be used as authority for the particular position espoused. The last issue contained U.S. Supreme Court decisions. The reader can decide which are liked better.

Support payments not dischargeable because child becomes of age

In re Ehlers, 189 B.R. 835 (Bktcy N.D. Ala., 1995, Judge Benjamin Cohen). This case concerns dischargeability of child support debt, which reached the bankruptcy court after the child was legally of age, and support no longer payable. In reaching his decision Judge Cohen first discussed law and procedure of motions for summary judgment in bankruptcy courts, and thus the first three pages of the opinion can be used as a primer on that subject. He then held that the mother (defendant) was entitled to summary judgment against the father (debtor), reasoning that the past due obligations remain as due even after the cause of the obligation ceases; and that they were non-dischargeable when incurred. Thus, the character of the debt did not change, even though the child had become of age.

Comment: It also is to be remembered that in Alabama every omitted periodic court-ordered payment for alimony or support is tantamount to a judgment against the obligor.

Student loan debt to Pennsylvania Higher Education Assistance Agency not dischargeable as constituting undue hardship

In re Halverson, 189 B.R. 840 (Bktcy. N.D. Ala. 1995, Judge Benjamin Cohen). The United States Attorney, as an unnamed party on behalf of the U.S. Department of Education, filed a motion for summary judgment against debtor's complaint for dischargeability. The debtor contended the debt was an exception to the exception in Bankruptcy Code Section 727(a)(8) as to student loans. The United States met the burden of the subsection by proving that the debt was less than seven years old before the bankruptcy filing, that it was owed to a governmental agency, and that it was a student loan debt. The debtor attempted to prove under §727(a)(8)(b) that there was "undue hardship". The bankruptcy court admitted that the Eleventh Circuit has not defined "undue hardship," but relied upon other circuits, and adopted the holding in *Brunner v. N.Y. State Higher Education* that the debt is dischargeable if by being required to pay: (1) the debtor could not maintain a minimum standard of living, (2) additional circumstances exist which are likely to continue for most of the loan period which will keep such state of affairs, and (3) debtor has made a good faith effort to pay. Taking these matters in the conjunctive, the debtor in this case could not prove all of these elements, and thus the exception to discharge was denied.

Comment: The opinion mentions decisions by other bankruptcy judges which should be reviewed before relying entirely on this case. However, Judge Cohen should be pleased in that the Third Circuit on November 28, 1995 in *In re Faish*, 72 F.3d 298, in a fairly lengthy opinion which discussed other decisions, adopted the *Brunner* standard of "undue hardship", and affirmed the district court which had reversed the bankruptcy court. *In Faish*, the bankruptcy court in attempting to do equity had held that the debtor only had to repay half of the obligation.

Bankruptcy Court in Chapter 13 case holds that value of collateral in adequate protection motion is determined by adopting date of confirmation approach for valuation

In re Horace Christopher and Teresa Dianne Cason, 190 B.R. 917; 1995 Bankr. LEXIS 1706 (Bkrcy. N.D. Ala., Judge Sledge). The issue arose in connection with a motion for adequate protection. The court discussed Section 506(a) which provides that value is determined in light of the purpose of the valuation, and the disposition or use in conjunction with a hearing on use or disposition. It discussed the three ways in which value for confirmation purposes has been found:(1) date of petition, (2) effective date of plan, and (3) multiple valuations or date of confirmation. The court took issue with prior decisions which rejected multiple valuations. Some of the decisions based rejection on the grounds of economy and efficiency. Judge Sledge stated that this was not the province of the court. He decided that it was more realistic, as well as fairer to the creditor, to establish value at the time of the motion, as values can vary considerably

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Recent Decisions

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between the date of the petition and the date of filing the motion.

The court emphasized that adequate protection can be provided only if requested and, therefore, upon a debtor filing a petition, the creditors should promptly pursue their rights and not simply rely on the plan of the debtor. This case involved a 1994 Ford truck on which there was a balance of $14,689.15. The debtor scheduled $2,864.45 as unsecured, zero to be paid unsecured creditors, but for the trustee to distribute $255.59 monthly to Ford Motor Credit Corp. (FMCC). FMCC filed a proof of claim for its balance, in which it set out a higher market value and higher contract interest and monthly payments. FMCC objected to confirmation contending that the interest rate on its contract and the value it placed on the truck should control. Judge Sledge discussed super priority administrative expense under §507(b) citing the mandatory three tier test of (1) failure of adequate protection, (2) having an allowable claim under §507(a), and (3) a claim arising under §§362, 363, or 364. He held that FMCC could not qualify for a super priority administrative claim as adequate protection had not failed. He added that when granted prepetition in a Chapter 13, the payments must be retained by the trustee (pursuant to §1326(a)(2)) until confirmation. The opinion mentioned that procedurally in Judge Sledge's court and in approximately one-third of the other bankruptcy courts in the nation, confirmation is not heard until after the claims bar date which is approximately four months after filing.

Finally the court ruled upon priority of adequate protection, as FMCC contended that its adequate protection should have priority over administrative expenses. The court first commented that there is no accrual of payments post-confirmation because the confirmation order will preclude this, since the rights are provided for in the plan. Insofar as the accrued pre-confirmation amounts are concerned, these should be paid concurrently with administrative expenses and if insufficient, each should be paid prorata, but that under *Timbers*, no interest can be paid to an undersecured creditor.

Comment: The court in several instances cited Judge Mahoney's opinion in *In re Kennedy*, 177 B.R. 967 (Bankr. S.D. Ala. 1995), and the Eleventh Circuit case of *In re Delta Resources*, 54 F.3d 722 (11th Cir. 1995). The opinion indicates much thought was given to the issues and ultimate conclusions. Although some of the conclusions may be controversial, the reader will find many citations which together with this case will be of aid in similar Chapter 13 cases. ■

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.

• M·E·M·O·R·I·A·L·S •

Robert Jerome Teel, Sr.

Coosa County lost a distinguished scholar, statesman and well-respected trial lawyer on November 11, 1995 with the passing of Robert J. Teel. Teel had practiced law in Rockford for the past 45 years following his graduation, *cum laude* (number two in his class), from the University of Alabama School of Law in 1949. At the time of his graduation Teel joined practice with his father, the late Henry A. Teel, in Rockford, where the Teels have practiced law continuously for the past 80 years.

During his practice Teel acted for a number of years as county solicitor, served in the Alabama legislature for two terms and represented defendants in murder cases involving over 30 trials. In 1958, Teel obtained acquittals by jury verdicts for four defendants in four separate criminal trials, all of which were tried during the same week.

Notwithstanding his ability in the courtroom, Teel will best be remembered for his quality of always having time to advise clients and young attorneys. He believed that a client deserved help, whether or not they could afford representation. Such attorneys this day and time unfortunately appear to be more and more in the minority. Teel will long be remembered in Coosa County by the citizens of the county of which he was a part.

Teel is survived by his wife, Ruth Teel; sons Judge Robert J. Teel, Jr., Frank S. Teel and Carlton L. Teel, who practiced law with him at the time of his death, and George W. Teel. Our affection goes out to his family.

—John K. Johnson
President, Coosa/Clay
Bar Association

Joseph Whitcomb Adams
Birmingham
Admitted: 1945
Died: December 23, 1995

William A. Barnett
Florence
Admitted: 1932
Died: February 7, 1996

Jean Kitchell Bynum
Birmingham
Admitted: 1940
Died: December 12, 1995

Charles Ray Gaddy
Millbrook
Admitted: 1982
Died: March 12, 1996

Curtis McLarty Holder
Fayette
Admitted: 1935
Died: January 2, 1996

William Charles Hughes
Birmingham
Admitted: 1936
Died: February 14, 1996

James Morgan Prestwood
Andalusia
Admitted: 1937
Died: February 18, 1996

Benny Lloyd Roberts
Gadsden
Admitted: 1969
Died: October 27, 1995

Kathryn McDuff Rossback
Tuscaloosa
Admitted: 1936
Died: January 22, 1996

Clarence M. Small
Montgomery
Admitted: 1932
Died: February 20, 1996

Ernest Wilkerson Weir
Birmingham
Admitted: 1950
Died: December 28, 1995

William David Wilkes, Jr.
Guntersville
Admitted: 1956
Died: February 6, 1996

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• M·E·M·O·R·I·A·L·S •

Judge Michael E. Zoghby

Whereas, Judge Michael E. Zoghby, a distinguished member of this association and a retired judge of the Circuit Court of Mobile County, passed away on September 7, 1995 and the association desires to remember his name and recognize his contributions to our profession, to the bench and to this community;

Now, therefore, be it resolved that Judge Zoghby, who was born in Mobile and attended parochial elementary and high schools in this city, graduated from Spring Hill College, *cum laude*, in 1954 and the University of Alabama School of Law in 1957 when he entered the private practice of law. He then entered the U.S. Air Force, Judge Advocate General's Department, where he remained until September 1960. He was awarded the Air Force Commendation Medal for Outstanding Performance as a Judge Advocate; and

Whereas, Judge Zoghby has presided over many difficult, highly publicized and emotional cases and handled the same in an exemplary manner befitting and consistent with his oath of office with dignity, wisdom and impartiality; and

Whereas, Judge Zoghby was truly a "judge's judge" and possessed all of the following eight cardinal virtues to consider in evaluating an excellent judge:

1. The virtue of independence;
2. The virtue of courtesy and patience;
3. The virtue of dignity;
4. The virtue of openmindedness;
5. The virtue of impartiality;
6. The virtue of thoroughness and decisiveness;
7. The virtue of social consciousness; and
8. The virtue of an understanding heart; and

Whereas, Judge Zoghby held memberships in the Alabama Association of Circuit Judges; American Judicature Society; American and Alabama and Mobile bar associations; was a past president and a member of the advisory board of St. Mary's House of Children; was a recipient of the O'Leary Award from Spring Hill College in recognition of his distinguished career as a jurist and untiring work for the improvement of the Mobile community; was a Fellow in the International Academy of Trial Judges: a faculty member of the Alabama Bar Institute of Continuing Legal Education and a Spring Hill College professor teaching courses in "Business Law" and "Legal Environment of Business"; and was a member of other distinguished organizations.

He was a devoted father and family man, leaving surviving him his wife, Mary Jo Zoghby; two daughters, Michele Marie Zoghby and Stephanie Josephine Zoghby; two sons, George Michael Zoghby and Christopher Michael Zoghby, all of Mobile; four sisters, Frances Zoghby, of Denver, Colorado; Mrs. Lawrence E. (Isabel) Ackels of Dallas, Texas; Miriam T. Zoghby; and Cecilia T. Zoghby, both of Mobile; and two brothers, Kaleel A. Zoghby and Raymond J. Zoghby, both of Mobile.

Now therefore, be it further resolved by the association on this 19th day of January 1996, that the association mourns the passing of Judge Michael E. Zoghby and does hereby honor the memory of our friend and fellow member who exemplified throughout his long career the highest professional and judicial principles to which the members of this association aspire and request this resolution be spread upon the minutes of this association and of the Alabama State Bar and that a copy be presented to his family.

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

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• N O T I C E •

Anyone who videotaped the October 1993 admissions ceremony please contact Frank Patterson in Montgomery at (334) 242-3012.

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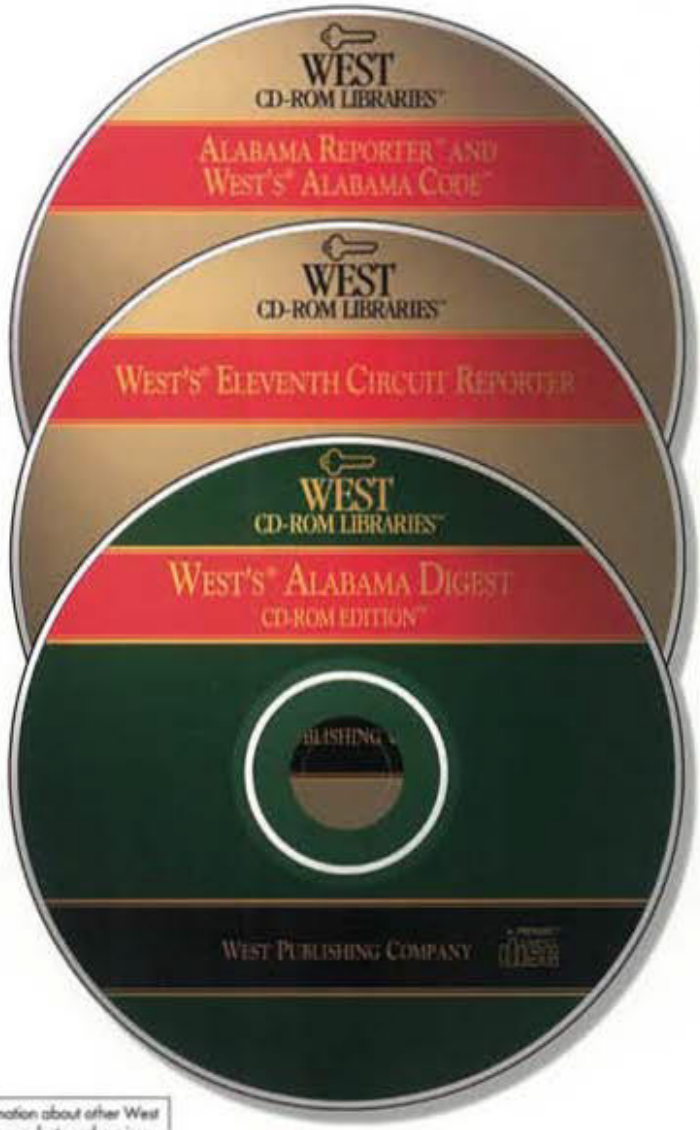

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