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On the Cover

The cover photograph features 1998-99 Alabama State Bar President Victor (Vic) H. Lott, Jr. and his family at their home on Dauphin Island. From left to right are daughter Margaret Walsh, wife Austill, daughter Mary Austill and Vic. Mr. Lott is the managing partner of Adams & Reese, L.L.P. in Mobile.

—Photography by Nancy Sledge, Mobile

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In drafting my remarks to you today, I have reflected at length upon the changes in our profession since I was licensed in 1975. If you read the newspapers, or even listen to conversations among our own colleagues at the bar, you will hear concerns about our image, about professionalism, and about greed. In fact, in many of the surveys taken within our own profession, these issues are among those felt to be of highest concern. I can't tell you how many times I have heard, or even thought myself, that the practice was more gentle, more civil, and that lawyers were more highly regarded even as recently as 1975 when I began my practice.

Yet, somehow, I think that we overlook, or perhaps forget, some of the long-standing derision of lawyers. A speaker at one of our own bar's annual meetings delivered a paper addressing the unpopularity of lawyers in which he recalled the innumerable publications by the press of anecdotes and of practical jokes in which lawyers are the subject of ridicule. This was in 1881.

More recently, the American Bar Association's Committee on Professional Ethics, in considering changes in the profession and its resulting decrease in professionalism, remarked that, "We can not be blind to the fact that, however high may be the motives of some, the trend of many is away from the ideals of the past, and the tendency more and more to reduce our high calling to the level of a trade, to a mere means of livelihood, or of personal aggrandizement. With the influx of increasing numbers, who seek admission to the profession mainly for its emoluments, have come new and changed conditions." This report was delivered in 1906.

Has our image in fact changed markedly? Is the professionalism of the great majority of lawyers at a new low and should this rank as our number one concern? One could debate these issues forever, but perhaps the most important fact is that they are issues and they have been issues for well over a hundred years. I do not mean to indicate that the current concern about a lack of professionalism and our poor image is not important or is misplaced. To the contrary, it is my opinion that as officers of the court we are sworn to a higher standard of conduct and I firmly believe that it is the primary role of the Alabama State Bar to enforce that high standard and to lead our members to practice by that ideal.

However, whether our image has changed or not, there are many real, documented changes taking place in our profession today.

In the less populous communities across this state lawyers are besieged by growing numbers of lower and middle income families in need of legal services, but often unable to pay even a modest fee for those services. These same lawyers are also contending with increasing specialization within the law and the demands of clients which range from criminal defense and domestic relations to sophisticated corporate, tax, employment, securities and environmental needs.

In our larger communities lawyers and law firms are striving to create bou-

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tiques, or maintain corporate client bases in an age of rapidly increasing consolidation on a state, regional and, indeed, global basis. This consolidation of business is resulting in the regionalization of legal practices at the corporate level, often depriving established local firms of long-time clients.

All of this is occurring against a backdrop of declining loyalty to firms, clients and practices driven by the demand for profitability and by personal dissatisfaction and unhappiness in the profession which manifests itself in the breakup of law firms and practices.

Changes in technology have an impact on the legal profession daily, increasing the ability, and thus the expectation, for rapid response to issues. Gone are the days when lawyers communicated with typewritten correspondence as a means of exchanging positions, negotiating issues, or responding to a client's needs. Today in the fast-paced world of telefax, e-mail, computerized research and the Internet, issues arise, are investigated, positions taken and responses demanded within 24-hour time frames. Distance is irrelevant, and jurisdictions begin to fade, creating ethical nightmares which are yet to be dealt with at even the national level, much less locally.

Accounting firms, paralegals, title insurers, legal specialists and others, driven by their own profit motives and the relative inaccessibility of legal service to the great majority of our population, increasingly infringe upon our profession, resulting in even greater competition and pressure on courts and legislators to deal with actions heretofore deemed as the unauthorized practice of law.

Trial lawyers versus the defense bar; litigators versus non-litigators; boutiques versus big firms; regional and national law firms versus local and statewide firms; state bars versus specialty bars; business versus non-business lawyers; criminal versus civil—the list of fractionalization and competitive factions within our profession goes on and on, each fighting for a piece of the action as the pendulum of profitability swings back and forth.

What then, does the future hold for our profession? It has changed more in the past 15 years than in the previous 150. In our own state the number of lawyers licensed approaches 12,000 versus the mere 5,500 which were licensed in 1980. On average over 1,100 lawyers sit for the Alabama State Bar exam each year and over 600 receive their licenses, continuing to swell our ranks. Despite these facts, every survey taken indicates the increasingly difficult ability of the indigent and, alas, the middle class in our state (its vast majority) to access affordable, quality legal services for routine needs.

In the midst of all of this change, we, as Alabama lawyers, and our state bar in particular, must attempt to bring focus to our mission, our strategic plan, and the role of the bench and bar in the administration of a fair and impartial judicial system in this state.

In the past several years, we have begun to address many of these issues, putting into place a strategic plan, focusing on the perceived lack of professionalism and unity of the bar, debating the import and answers to challenges to our image, and broadening service programs to our ever-changing profession.

Today, however, in order to keep pace with the ever-changing needs of our profession, its strengths and its weaknesses, we must do a better job of anticipating instead of reacting to paradigm changes in the way we practice law and the respect we hold for its institutions.

How do we intend to deal with the fractionalization and influence of specialty bars and sections? How do we intend to deal with advertising and solicitation on the Internet from the standpoint of enforcing each state’s ethical rules? How do we intend to deal with the growing participation by the undereducated in our legal system and the added pressures which this has placed on lawyers and judges? What can we do to educate the populace of this state in understanding their legal system, and appreciating the role of lawyers and judges? What are we willing to do about the debilitating impact of billable hours, billing goals, contingent fees and alternative billing techniques on the spirit of our practitioners, and our image as professionals? What can we do about the widening gap in both expertise and profitability between rural and metropolitan lawyers, between large and small firms? How can we insure the capability of all of the people of this state to access our legal system for routine needs? What can we do to substantially increase minority participation in the legal profession in this state?

To address these issues we must promptly increase communication among the state and local bars, specialty bars, sections and all factions of our association. We must find better ways to reach out to the citizenry of this state and educate them about our legal system and invite their participation, and we must find a way to allow every man and woman in the state of Alabama who is in need of legal services to find affordable, quality assistance.

We cannot expect understanding of our role in the legal system, or respect for that system, from those who have
no access to it. Most jurisdictions in this country are now concluding that the ability to improve access to justice can only come through a combination of many efforts, including pro bono services, funding for legal services, alternative dispute resolution, 10LTA programs, as well as local plans for providing access to justice in coordination with existing organizations, such as bar associations and United Way. Many other states are considering mandatory pro bono service for licensees, the shifting of punitive damage awards to fund legal services to the indigent, and taxes on legal services for such purposes. We must look at all available avenues in our state to familiarize our citizens with the legal system, such as the pilot program using lay volunteers currently being conducted in Lee County by the Administrative Office of Courts. We should also investigate simplified proceedings in small claims court, and for probate and domestic matters, or even consider the establishment of citizen dispute settlement centers to assist in the resolution of disputes in an efficient and economical manner.

I know that some of these thoughts are of concern to many of our practicing attorneys. But we have a dilemma. We have the opportunity to design a means for Alabama lawyers to provide legal services to those in need in this state, or at least be instrumental in creating other avenues for the underprivileged and middle class to address their legal needs. Failing such, we can watch legislatures or federal courts authorize wholesale changes in our legal system. I think this is the single greatest challenge facing our profession today, and I am convinced that our ability to resolve it is very much intertwined with the solution to our own image problems. We must be willing to assume responsibility, as professionals, for our justice system and its credibility, and we must be willing to lead the membership of our Alabama State Bar to a swift and just resolution of each of these challenges.

Thank you.

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Education Debt for Law School Graduates Has Increased Significantly

In my July 1996 "Executive Director's Report," I expressed my grave concern about the high education debt load carried by many law school graduates sitting for the bar exam. Since my initial report, the educational debt load of law school graduates has increased substantially. The average debt for law school graduates with educational loans who sat for the July 1998 bar exam exceeds $50,000! This tremendous debt load is borne by 60 percent of the first-time examinees. The tables below reflect the increasing debt levels of the February and July examinees over the last three years.

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<td>FIRST-TIME EXAMINEES</td>
<td>293</td>
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<td>EXAMINEES HAVING</td>
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<tr>
<td>EDUCATIONAL DEBT</td>
<td>(44 percent)</td>
<td>(53 percent)</td>
<td>(51 percent)</td>
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<td>$5,235,500</td>
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<td>DEBT SERVICE 7.5% PERCENT FOR TEN YEARS ON AVERAGE DEBT</td>
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<tr>
<td>EDUCATIONAL DEBT</td>
<td>(60 percent)</td>
<td>(68 percent)</td>
<td>(73 percent)</td>
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<td>TOTAL EDUCATIONAL DEBT</td>
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<td>$14,116,221</td>
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<td>AVERAGE DEBT</td>
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<td>DEBT SERVICE 7.5% PERCENT FOR TEN YEARS ON AVERAGE DEBT</td>
<td>$599 per month</td>
<td>$528 per month</td>
<td>$474 per month</td>
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The bar's Character and Fitness Committee expressed its concern about the potential problems such high levels of educational debt pose for the profession at the Board of Bar Commissioners' July meeting. The commission was very receptive to the committee's suggestion that a task force be appointed to study this matter. Clearly, this issue deserves our concern and our attention because of the serious consequences it portends for the future of these new lawyers and the clients they will represent. The recently completed Southern Opinion Research survey of state bar members showed that the median first-year salary for young lawyers is $33,000. With 60 percent of July's first-time examinees saddled with a decade of monthly payments averaging $600 just for their education, the debt-to-income disparity for these young lawyers is a reason for concern. As I stated in July 1996, "We must be concerned that new lawyers entering the ranks of the profession are not so burdened with debt that their ability to practice or to effectively represent their clients is impaired." I am hopeful that we can address this cause for concern before any serious problems develop.

Summit on the Profession: A Successful First Step

Former state bar president Dag Rowe convened the Summit on the Profession on May 14 at state bar headquarters. An outstanding group of law persons, lawyers and judges representing specialty bar, judicial organizations and the appellate courts attended a day-long conference to discuss issues facing the legal profession and the judiciary. Among those attending were Frank Gregory, Judge Ben McLaughlin, Judge Francis A. Long, Sr., Greg Bredlove, Keith Givens, Andrea Summer, Richard Sandefur, Dennis Kaisley, Carol Ann Smith, Kenneth Fuller, Ed Livingston, Thomas Sorrells, Judge Charles Fleming, Laurence Sills, Derek Simpson, Stova McFadden, Fred Killian, Jr., Barbara Rhodes, Dawn Howard, Cary Privett, Vic Lott, and Wade Baxley.

Each person attending the summit was asked to list what he or she perceived as the most crucial issues facing the judiciary and the legal profession. The top three issues of concern were: (1) Judiciary—Selection/Campaign Conduct/Politiciation; (2) Professionalism—Civility/Factionalization of the Profession; and (3) Public Perception—Public Confidence in the Justice System.

Part of the summit agenda included an interactive discussion of the top issues and ongoing efforts by bar groups to address the identified issues of concern. Participants were divided into three working groups to discuss a specific issue and develop a recommended action plan. The final recommendations of the three working groups were as follows:

**Judiciary**

1) Quick and uniform enforcement of Canon 7 violations;
2) Monitor legislation that would adversely affect the judiciary;
3) Remove judicial campaigns from partisanship elections;
4) Address the need for minimum qualifications/standards for judicial candidates;
5) Improve communications between the courts and the bar; and
6) Increase diversity within the bar and on the bench.

**Professionalism**

1) Increase CLE to 14 hours with two hours of professionalism/ethics required, or as an alternative, have two hours of the existing 12 hours required to be professionalism/ethics training;
2) Encourage specialty bars to develop mentoring programs for members with the state bar serving as coordinator for all programs;
3) Promotion by state bar of meetings with various groups within the profession on a periodic basis and inform bar members of recommendations; and
4) Implement good ideas and promote communication among all members about what all professional organizations and groups are doing in behalf of the profession.

**Public Perception**

1) Work to improve access to legal services both for the poor and middle class through such programs as pro bono, free legal advice columns or law lines;
2) Educate and involve the public to de-mystify the system through programs such as the Partnership Program and court volunteer programs;
3) Promote professionalism within the legal profession, and increase factionalization and emphasize civility; and
4) Have the state bar serve as the umbrella organization for lawyers working together to help local communities and provide visibility for those efforts to help strengthen the profession's unity and improve the public's perception of the profession.

Alabama State Bar President Vic Lott has appointed summit participants to a Task Force on Intra-Bench/Bar Communications to both facilitate communications within the profession and work on these recommendations.

Few members of the profession will fail to appreciate the importance of the three issues selected and considered at the summit. No doubt there are other issues and problems that will need to be addressed too. But, our profession has taken a bold and important step forward to replace factionalism with cohesion in order to work on solutions for these three problem areas. Only through our mutual cooperation as a profession can we realistically expect to be successful in solving these and the other problems that face the legal profession.
About Members

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David P. Dorn, formerly with Durward & Cromer, announces the opening of his office at 205 N. 20th Street, Suite 210, Birmingham, 35203. Phone (205) 322-3300.

Ray M. Thompson announces the opening of his office at 107 Saint Frances Street, Suite 1504, First National Bank Building, Mobile, 36602. Phone (334) 690-7799.

Sondra K. McDaniel announces a change of address to 1134 22nd Street, North, Suite 101, Legal Arts Building, Birmingham, 35234. Phone (205) 297-9888.

Rebecca Narmore Pace, formerly with Rosser, Marthaler & Narmore, announces that she has relocated her office to 301 N. Dickson Street, Tuscumbia, 35674. Phone (256) 314-6300.

About Members

Among Firms

Longshore, Buck & Longshore, P.C. announces the relocation of its offices to the Longshore Building, 2009 Second Avenue, North, Birmingham, 35203. Phone (205) 252-7661.

Beasley, Wilson, Allen, Crow & Methvin, P.C. announces that Stephen W. Drinkard, R. Graham Esdale, Jr., L. Landis Sexton, Julia Anne Beasley, and Rhon E. Jones have become members of the firm. Offices are located at 218 Commerce Street, P.O. Box 4160, Montgomery, 36103-4160. Phone (334) 269-2343.

Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves, L.L.C. announces that Stephen R. Copeland has become a member and that Timothy D. Ryan, Leah P. Ladd, J. Walton Jackson and Sam David Knight have joined the firm as associates and that Tamela E. Esham has joined as staff attorney. Offices are located at 1300 Riverview Plaza, 63 S. Royal Street, Mobile, 36602. The mailing address is P.O. Box 290, Mobile, 36601. Phone (334) 405-1300.

Miller, Hamilton, Snider & Odom, L.L.C. announces that Willard H. Henson, Jean M. Powers and Michael M. Shipper have become members. Offices are located in Mobile, Montgomery and Washington, D.C.

Arter Hadden, L.L.P. announces that Madeleine H. Dobbins has joined the firm as of counsel in the Washington, D.C. office, located at 1801 K Street, N.W., Suite 400K, 20006-1301. Phone (202) 775-7130.

Lehr, Middlebrooks, Price & Proctor announces the opening of its office in Decatur, located at 303 Cain Street, N.E., Suite E, P.O. Box 1626, 35602, and that Steven M. Stastny and Michael Broom have become shareholders. Phone (205) 308-2767.

Beard & Beard announces that P. J. Harris has joined the firm. Offices are located at 416 Gunters Avenue, P.O. Box 88, Guntersville, 35976. Phone (256) 582-3189.

Sirote & Permutt announces that Katherine N. Barr has joined the firm. Offices are located at 2222 Arlington Avenue, South, Birmingham, 35205. The mailing address is P.O. Box 55727, 35255-5727. Phone (205) 933-7111.

Hand Arendall, L.L.C. announces that E. Shane Black has joined the firm. Offices are located at 900 Park Place Tower, 2001 Park Place, North,
Birmingham, 35203. Phone (205) 324-4400.

Rudolph & Associates, P.C. announces that David L. Johnston has joined the firm. Offices are located at 1130 Quintard Avenue, Suite 500, Anniston, 36201. Phone (205) 237-8663.

Balch & Bingham, L.L.P. announces that Glenn G. Waddell, of counsel, has been named regional director of Peacemaker Ministries, with new offices in Birmingham. The mailing address is P.O. Box 58354, 35259. Phone (205) 290-0347.

Watson, Fees & Jimmerson, P.C. announces that Samuel H. Givhan has become a shareholder. Offices are located at AmSouth Tower, 200 Clinton Avenue, West, Suite 800, Huntsville, 35801. Phone (205) 536-7423.

Jeffrey G. Tickal, formerly with Harris, Cletker, Berg, Rogers & Hollins, has joined the firm of Gullage & Williams. Offices are located at 2400 Frederick Road, Opelika, 36801. Phone (334) 705-0200.

Chenault, Hammond & Hall, P.C. announces that Amelia H. Griffith has become a partner. The new name is Chenault, Hammond, Hall & Griffith, P.C. Offices are located at 117 Second Avenue, N.E., Decatur, 35602. Phone (205) 353-7031.

Michael R. Forrester, formerly with Luther, Oldenburg & Rainey of Mobile, announces he has joined the U.S. Army JAG Corps, and will be stationed in Germany.

Wisner, Adams & Walker, P.C. announces that Donald W. Lambert has become a member. Offices are located at 100 Washington Street, Suite 200, Huntsville, 35801. Phone (205) 533-1445.

Dempsey & Steed, P.C. announces that R.F. Stewart, III and William M. Keever have joined as shareholders. The new name is Dempsey, Steed, Stewart & Keever, P.C. Offices are located at 100 RiverPoint Corporate Center, Suite 205, Birmingham, 35243. Phone (205) 970-0034.

Leitman, Siegal & Payne, P.C. announces that Christopher R. Hood has become an associate. Offices are located at The Land Title Building, 600 20th Street, North, Suite 400, Birmingham, 35203. Phone (205) 251-5900.

Pierce, Ledyard, Latia & Wasden, P.C. announces that Abe L. Philips, Jr. and A. Lewis Philips, III have joined the firm. Offices are located at Colonial Bank Centre, 41 N. Beltline, Suite 400, Mobile, 36608. Phone (334) 344-5151.

Johann G. Moller announces the formation of Moller & Associates, L.L.C. His office is located at 1117 22nd Street, South, Birmingham, 35205. Phone (205) 939-0000.

Gerhard E.W. Kelter, Jr., P.C. announces that Sarah A.A. Ames has joined the firm as an associate. Offices are located at 135 S. LaSalle Street, Suite 1905, Chicago, Illinois 60603. Phone (312) 853-0900. Other offices are located in Stockholm, Sweden, and Frankfurt & Flensburg, Germany.

Hatcher, Stubbs, Land, Hollis & Rothschild announces that C. Morris Mullin, Theodore D. Morgan and Teri Yancey Callahan have become partners and that W. Fray McCormick and Bradley R. Coppege have become associates. Offices are located at 233 12th Street, Suite 500, Corporate Center, Columbus, Georgia 31901. Phone (706) 324-0201.

Robison & Belser, P.A. announces that Terry A. Sides, formerly of Hill, Hill, Carter, Franco, Cole & Black, P.C., has joined the firm as a partner. Offices are located at 200 Coosa Street, Montgomery, 36104. Phone (334) 834-7000.

Gloria McPherson, currently with the United States Attorney's Office in Montgomery, announces that she has accepted a position as assistant professor of justice and public safety at Auburn University at Montgomery.

Brooks & Hamby, P.C. announces that Richard H. Holston and James G. House, III have become associates. Offices are located at 618 Azalea Road, Mobile, 36609. Phone (334) 661-4118.

Andre' M. Toffel, P.C. announces that Kimberly B. Glass has become an associate. She formerly was a law clerk for the Honorable Tamara O. Mitchell. Offices have relocated to the Farley Building, 4th floor, 1929 Third Avenue, North, Birmingham, 35203. Phone (205) 252-7115.

McCartha & Snowden, L.L.C. announces that Jud C. Stanford has become an associate. Offices are located at 2015 1st Avenue, North, Birmingham, 35203. Phone (205) 321-1920.

Bradford & Donahue, P.C. announces that its offices have relocated to 2000-A Southbridge Parkway, Suite 525, Birmingham, 35209, and that David D. Schoel and W. Gregory Biddle have become associated. Phone (205) 871-7733.

Mary E. Stansel of The Stansel Law Firm, P.C. announces that the office has relocated to 2015 First Avenue, North, Birmingham, 35203. The mailing address is P.O. Box 2052, 35201. Phone (205) 458-1100.

Wendy Brooks Crew announces her disassociation with Baddley & Crew, P.C. and the formation of Wendy Brooks Crew & Associates. Offices will remain at 550 Park Place Towers, 2001 Park Place, North, Birmingham, 35203. Phone (205) 326-3555.

Parsons & Sutton announces that Angela L. Kimbrough has become an associate. Offices are located at 601 Greensboro Avenue, Alston Place, Suite 700, Tuscaloosa, 35401. Phone (205) 349-5500.

Myron K. Allenstein and Scott Denson announce the formation of Allenstein & Denson, L.L.C. Offices are located at 156 S. Lawrence Street, Mobile 36602. Phone (334) 433-2001.

Gorham & Waldrep, P.C. announces that Tamara Harris Johnson has become an associate. Offices are located at 2101 6th Avenue, North, Suite 700, Birmingham, 35203. Phone (205) 254-3216.
Watson, deGraffenried & Holley, L.L.P. announces that Charles A. Hardin, formerly an associate with Burr & Forman, L.L.P., and Joseph E. Powell have joined as associates. Offices are located at 1651 McFarland Boulevard, North, Tuscaloosa 35406. Phone (205) 345-1577.

Stewart & Smith announces that Jason E. Knowles has joined as an associate. Offices are located at 1131 Leighton Avenue, Anniston, 36207. Phone (256) 237-9311.

Rushton, Stakely, Johnston & Garrett, P.A. announces that Paul M. James, Jr., Chris S. Simmons, D.

Mitchell Henry, Robert C. Ward, Jr., and Bowdy J. Brown have become members. Offices are located at 184 Commerce Street, Montgomery, 36104. Phone (334) 206-3100.

Karl Benkwitl and Cliff Heard announce the relocation of their office to the Sterling Centre, 4121 Carmichael Road, Suite 401, Montgomery, 36106. Phone (334) 395-9899.

William T. Eiland, P. Bradley Murray and Michael D. Sherman announce the formation of Eiland, Murray & Sherman, L.L.C. Offices are located at 3 S. Royal Street, Suite 200, Mobile, 36602. Phone (334) 432-0900.

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

Haygood, Cleveland, Pierce & Speakman announces that John Wesley McCollum, Jr., formerly of Beasley, Wilson, Allen, Crow & Methvin, has become an associate. Offices are located at 611 E. Glenn Avenue, Auburn, 36830. Phone (334) 821-3892.

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Delegates representing the more than 28,000 Rotary Clubs recently elected Mark Daniel Maloney of Decatur to serve as a member of the Rotary International Board of Directors for 1999-2001. Maloney takes office July 1, 1999 and will serve two years as one of 18 members of the Rotary International Board of Directors. The board develops policies and establishes priorities for the global network of 1.2 million volunteers.

Maloney is a member of the firm of Blackburn, Maloney & Schuppert, LLC. He graduated from Harvard College with a degree in history and received a Doctor of Jurisprudence degree from Vanderbilt University and a Master of Laws degree in taxation from New York University.

A Rotarian since 1980, he is a past president of the Rotary Club of Decatur and served as district governor in 1989-90. He has received numerous awards and honors as a Rotarian.

Maloney's wife, Gay, is also an Alabama attorney and Rotarian. She is president of the Rotary Club of Decatur Daybreak, Alabama and will serve as an assistant district governor in 1998-99.

Correction: In the last issue of The Alabama Lawyer, it was incorrectly reported that Gregory S. Cusimano of Gadsden was of counsel to the firm of Floyd, Keener, Cusimano & Roberts P.C. and that William D. Scruggs of Port Payne was of counsel to the firm of Scruggs, Jordan & Dodd P.A.

It should have read that Mr. Cusimano is a partner with the firm of Cusimano, Keener, Roberts & Kimberley P.C., and that Mr. Scruggs is the senior partner with Scruggs, Jordan, Dodd, Dodd & Thompson P.A. The editors apologize for these errors and any inconvenience they have caused.

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Judge David Lee Rosenau, Jr.

Whereas, David Lee Rosenau, Jr. was born on April 2, 1903 in Athens, Alabama. He graduated from Green University in Athens. He then attended Yale University at age 15 and upon graduating, was accepted to the Stanford School of Law at age 19. After receiving his law degree in 1924, he went to work in the legal department of Alabama Power Company in Birmingham. He moved back to Athens in 1925 and opened a law office. During this time, he also worked as a legal correspondent for area newspapers.

In 1937 he was appointed by Governor Bibb Graves to fill a vacancy in the Limestone County Court. That began his 44-year career in the judicial system, one of the longest legal careers in the State of Alabama. In 1954 and again in 1958, he was appointed as one of four American delegates to travel to the International Congress of Juvenile Court Judges in Brussels, Belgium.

After retiring from the Limestone County Court, he was appointed by the Alabama Supreme Court as a special supernumerary judge who heard court cases throughout the state. He began teaching business law classes at Athens State College around 1955 and continued until the late 1960s. During this time, he was awarded many fellowships to universities throughout the country.

He was a life-long member of the First United Methodist Church of Athens, past member of the Lions Club and a member of the Alabama State Bar. Judge Rosenau died on Friday, March 13, 1998, at Athens-Limestone Hospital after a lengthy illness. The service was held at the First United Methodist Church in Athens on Sunday, March 15, 1998, conducted by Dr. Steve Screws and Dr. Curtis Coleman.

Judge Rosenau is survived by his wife, Jewell Hertzler Rosenau; two daughters, Joy Rosenau Graham of Athens, Alabama and Jill Rosenau Hicks of Tuscaloosa, Alabama; two granddaughters, Katharyn Graham of Chapel Hill, North Carolina, and Jobi Hicks of Dallas, Texas; two grandsons, William Rosenau Graham of Newport, RI, and John Jay Hicks of Tuscaloosa, Alabama; one sister, Margaret Rosenau Wilson of Athens, Alabama; and several nephews and one niece.

— Donald B. Mansell
President, Limestone County Bar Association

John Forrest Dillon, IV

Whereas, John Forrest Dillon, IV of Alexander City, Alabama was a member of the Tallapoosa County Bar Association and the Alabama State Bar at the time of his death on May 22, 1998 at the age of 67.

Whereas, John Forrest Dillon, IV was born November 15, 1930 in Alexander City, Alabama, and attended school in Montgomery, Alabama; he received a Bachelor of Science degree from the University of Alabama in 1953 and attended the University of Alabama School of Law where he served as associate editor of the Alabama Law Review. Dillon graduated from the University of Alabama School of Law in 1954, obtaining an L.L.B.

Whereas, John Forrest Dillon, IV served in the Army from 1954 to 1957, obtaining the rank of 1st lieutenant. His military service included a tour of duty in Korea.

Whereas, John Forrest Dillon, IV became a partner in the firm of Wilbanks, Wilbanks, & Dillon in 1958. He was the senior partner of Dillon, Kelley & Brown from 1970 until 1992, when he joined the firm of Morris, Haynes, Ingram & Hornsby and served as of counsel.

Whereas, John Forrest Dillon, IV served as attorney for the City of Alexander from 1972 until 1997, for the Alexander City Board of Education from 1972 until 1996 and for the Tallapoosa County Board of Education from 1958 until 1997. He also served as attorney for the Central of Georgia Railroad and Norfolk-Southern Railroad practicing throughout Alabama, as well as before the Interstate Commerce Commission and the Public Service commissions in Alabama and Georgia.

Whereas, John Forrest Dillon, IV served as president of the Tallapoosa County Bar Association from 1970 until 1987, at which time he additionally served as a member of the Alabama State Bar Board of Bar Commissioners. He was a former president of Kiwanis Club and Willow Point Golf and Country Club, as well as a former director of the Alexander City Chamber of Commerce. He was also past senior warden of the Saint James Episcopal Church and former member of the Board of Directors of the SouthTrust Community Foundation.
J. Connor Owens, Jr.

Whereas, J. Connor Owens, Jr. was born in Roanoke, Alabama on December 30, 1923 and departed this life while residing in Bay Minette, Alabama, on March 13, 1998.

Whereas, prior to beginning his post-secondary education, Connor volunteered for the Army following the outbreak of World War II and distinguished himself in the European theater, earning a Purple Heart and Silver Star for gallantry in action.

Whereas, he attended Clemson University, received his undergraduate degree in the study of history and English at the University of Georgia in 1947, and attained his law degree from the University of Georgia in 1950, while also teaching undergraduate English at that institution.

Whereas, following his admission to both the Georgia State Bar and the Alabama State Bar, he set up practice in Bay Minette, Alabama in 1952, and became involved in the work of the Baldwin County Bar Association, serving as its president from 1972 until 1976.

Whereas, Connor was truly devoted to his profession and gave himself to it, and was recognized as a prominent civil defense lawyer, who served on the Board of Directors of the Alabama Defense Lawyers Association from 1966 until 1969.

Whereas, Connor was always willing to lend advice to younger lawyers regarding problems they were facing in the course of their profession.

Whereas, Connor trod with much success before judges and juries throughout south Alabama where his presence will be greatly missed.

Whereas, Connor was known, not only for his intelligence, but for his compassion, often willing to take up the cause of a poor citizen wronged with no expectation of being paid a fee.

Whereas, he had the panache and learning to appropriately quote Shakespeare in his briefs to support his positions, as well as reasoned argument and case citation.

Whereas, Connor was instrumental in forming important institutions within his community, having participated in conceiving the idea for and organizing the First National Bank of Bay Minette, as well as the Bay Minette Country Club.

Whereas, Connor was a devoted husband and father.

Whereas, Connor was an officer in the First United Methodist Church of Bay Minette and taught Sunday School there.

Whereas, Connor’s life and career set a worthy example for his entire profession and is one that will long be remembered by the Baldwin County Bar.

Whereas, this brief recitation of a few salient facts about Connor’s life presents a pale and indistinct image of the well lived and full life of Connor Owens, a life that touched and improved his community and the lives of many others.

Whereas, the members of the Baldwin County Bar Association express our deep regard and sense of loss at the passing of Connor from this honorable profession.

Be it resolved that this resolution be spread upon the minutes of the Association and that copies be forwarded to his wife, Anne Owens, and to his four children, Margaret Simpson, James Connor Owens, III, Leila Morris, and Elizabeth Frost.

— David A. Simon
President, Baldwin County Bar Association

Norman West Harris

Norman West Harris of Decatur, Alabama, one of the leading lawyers of this state, died on May 27, 1998. He was born in Decatur on June 12, 1907 and lived all of his life in that city. His father, A.J. Harris, was a distinguished lawyer, as was his grandfather, C.C. Harris who, in 1872, moved from Moulton and began his law practice in Decatur. His mother, Edith West Harris, was the daughter of Reverend Anson West who was a renowned bishop in the Methodist Church. He was preceded in death by his brother, Julian Harris, who, like him, for over a half century was a giant of the legal profession in this state.

Harris graduated from high school in Decatur in 1923. In the fall of that year he entered Alabama Polytechnic Institute (now Auburn University) and received a B.S. degree in electrical engineering in 1927. After graduation he worked for Brooklyn Edison Company in Brooklyn, New York for 11 months. He quickly realized that the law had a higher claim on his talents. At the suggestion of his father, he entered the law school of the University of Virginia in the spring of 1928. In the spring of 1931 he received a law degree and entered law practice with his father, A.J. Harris, and his brother, Julian Harris. After their father’s death in 1935, he and his brother formed a partnership, Harris & Harris, a firm that was universally recognized throughout north Alabama for its integrity and surpassing legal skill. In 1989 Harris & Harris merged with Caddell & Shanks and became Harris, Caddell & Shanks, P.C. He continued as a member of that firm until his retirement on October 1, 1992.

Harris was skilled not only as a practicing lawyer, he was distinguished as well in public service. He served in the legislature of Alabama for 12 years, one term in the Senate and two terms in the House of Representatives. He was a long member of the First United Methodist Church where he had served on the board of stewards, including several years as its chairman. Governor Dixon appointed him as a special justice of the Supreme Court of Alabama to sit with the six active justices in the case of Fleetwood Rice vs. Tuscaloosa County
Charles Reeder was a fierce advocate and a feared adversary. He neither asked nor gave quarter in pursuing or protecting his clients' interests. In every matter Harris was always the perfect gentleman. He displayed in every way the highest and most noble standards of ethical conduct. His rate of success in litigation was remarkable. His life and service made a lasting impression for good upon the administration of justice in this state.

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

— John A. Cadell
Decatur, Alabama

Charles Reeder

Whereas, Charles Reeder, a long-standing member of the Mobile Bar Association, died on February 6, 1998, after a courageous battle to recover from a debilitating stroke. Charles was a man of many talents, a restless intellect, learned of the law, a gifted teacher, ardent supporter of many cultural and civic causes, skilled photographer and poet, and perhaps above all, a person truly loved and admired by many hundreds of men and women, boys and girls, whose lives he had touched and enriched.

Reared in Montgomery, with an early career in journalism, Charles served in the U.S. Army Air Corps as a meteorologist during World War II. He subsequently graduated from Jones Law School and obtained his license to practice law. A resident of Mobile since 1975, he regularly participated in the activities of this association and of the state bar, including CLE, until his death, even though he chose not to engage actively in the practice of law.

The principal interest of Charles was as an educator. A renowned mathematician, he chose private tutoring as his special forte. Over many years he literally tutored two, and sometimes three, generations of hundreds of Mobile families through the intricacies of algebra, geometry, trigonometry and calculus at both high school and college levels, and became the admired, respected and loved friend of children and parents alike.

For many years Charles also served Spring Hill College as an expert fundraiser and student recruiter. A lifelong Episcopalian, he was an active member of St. John’s Episcopal Church while in Mobile. He is survived by many nieces, nephews, grandnieces and grandnephews and numerous other devoted relatives who live in Mobile, Montgomery and other cities.

Now, therefore, be it resolved by the Mobile Bar Association, in meeting assembled this day, that the members mourn the death of Charles Reeder, whose exemplary life of service to others has been an inspiration to all who knew him; and whose diverse talents and warm friendship and understanding have enriched the lives of all the members of this Association who have been privileged to know him, as well as the lives of many of their children and grandchildren; and whose career has done honor to his chosen profession.

— Stova McPadden
President, Mobile Bar Association

Charles Albert Lesesne Johnstone, Jr.

Whereas, Charles Albert Lesesne Johnstone, Jr., a distinguished and highly respected member of the Mobile Bar Association, departed this life on March 3, 1998, at the age of 87 years; and

Whereas, the Mobile Bar Association desires to honor his name and recognize his many contributions to the legal profession, City of Mobile and State of Alabama;

Now, therefore, be it remembered that Charles Albert Lesesne Johnstone, Jr. was born on December 3, 1910, in Mobile, the son of Charles Albert Lesesne Johnstone and Virginia Inge Johnstone. Charlie Johnstone grew up on Government Street a few blocks west of Broad Street. He graduated from Murphy High School in 1927, and went on to the University of Alabama receiving his A.B. degree in 1932 and achieved membership in Phi Beta Kappa. In 1934, he earned his L.L.B. degree from the school of law.

In 1937, Charlie Johnstone left his individual law practice to join the firm of Stevens, McCorvey, McLeod, Goode & Turner. That same year, Mr. Tom Stevens left the firm to become vice-president and general counsel of the Waterman Steamship Company,
and Charlie was fond of saying he took Mr. Steven’s place. The year 1940 was not a good one on the world scene, but it marked a high point in Charlie Johnstone’s life because on October 12th of that year, he married the lovely and gracious Olivia Mayton of Mobile, who survives him.

During World War II, Charlie Johnstone entered the United States Army and served as a captain in the legal division of the Office of the Chief of Engineers from 1942 to 1945 in Washington, D.C. and was discharged with the rank of major. He then returned to his law firm and went on to serve for many years as senior partner of that firm, now Johnstone, Adams, Bailey, Gordon & Harris, L.L.C.

Charlie Johnstone was a learned practitioner of the law. When a young lawyer joined his firm, the young lawyer was told by contemporaries not to worry if he or she could not find the answer when assigned a legal research project by Mr. Johnstone. If he ever asked for research, one could be assured that there was not an answer because he would have known it. He also had a good grasp of the practicalities of law practice, counseling young lawyers that if it looks like the judge is leaning your way, get out of the courtroom as fast as you can.

In a major lawsuit in the circuit courts of Conecuh and Monroe counties, he was successful in quieting title to some 40,000 mineral acres. The bill in equity in that case was tried before the Honorable Robert E. L. Key in Evergreen. At the conclusion of the trial which lasted a number of days, Judge Key stated from the bench, “Mr. Johnstone, that is the way a bill in equity should be presented to the court; we should wrap it up and send it to the law school.”

A considerable portion of Charlie Johnstone’s practice related to probate matters, and early in his legal career, Charlie, Ralph Holberg, Jr. and another contemporary spent two or three evenings a week for a period of one to two years assisting the chief clerk, Miss Edith Vaughan, in drafting court orders which were used by the court for a number of years. Miss Edith carefully reviewed pleadings and proposed court orders filed by lawyers in the court with a fine-tooth comb and would frequently send such pleadings and proposed orders back to members of the bar marked in red ink with instructions for redrafting. But Miss Edith stated that she never had to send a pleading or proposed court order back to Charlie Johnstone because whatever he drafted was always in perfect form.

Charlie Johnstone was very organized and used his time at work to the fullest; he was not given to taking coffee breaks. However, it was rare indeed that he did not leave the office at 11:30 a.m. sharp on Wednesdays for his golf game—rain or shine. If it was raining as he left the office, he would tell the receptionist it never rains on the golf course.

Charlie Johnstone served as president of this association in 1956 and was a member of the Alabama State Bar and American Bar Association and the Farrah Law Society. He served as a director of the Merchants National Bank of Mobile and was active in many of the city’s business, civic and cultural organizations.

Charlie Johnstone was admitted to practice before the Alabama and United States supreme courts, the U.S. Tax Court, the U.S. Court of Claims, the U.S. courts of appeals for the Fifth and Eleventh circuits and the United States District courts of the Southern and Northern divisions of Alabama and the Eastern District of Texas.

Charlie Johnstone and his long-time friend and partner, Bob Adams, were honored by their firm with the establishment of the Johnstone Adams Scholarship at the University of Alabama School of Law and the dedication of the room at the Alabama State Bar housing the staff of The Alabama Lawyer as the Johnstone Adams Room.

In every respect, Charlie Johnstone was a lawyer’s lawyer and a gentleman’s gentleman. In addition to Mrs Johnstone, he is survived by his daughter, Virginia Inge Johnstone Smith; son-in-law, Frederic Lee Smith; and grandsons, Frederic Lee Smith, Jr. and Charles Lesesne Johnstone Smith.

— Stova F. McFadden
President, Mobile Bar Association

William Michael Clarke

Whereas, the Mobile Bar Association to honors the memory of William Michael Clarke, a practicing attorney in Mobile for more than 47 years, from 1950 until his death on January 15, 1998.

Now, therefore, be it remembered that William Michael ‘Billy’ Clarke was born in Mobile, Alabama on January 19, 1923. He attended Catholic schools in Mobile, including St. Patrick’s School in “the Grove” and McGill Institute, then located at the northwest corner of Government and Joachim streets. The excellent faculty at McGill was comprised of members of the order of Brothers of the Sacred Heart.

Billy Clarke grew up in “the Grove” and attended St. Patrick’s Church there. “The Grove” is the area of the City of Mobile near Beauregard and St. Joseph streets (now part of the Henry Aaron Loop). Throughout his life Billy Clarke spoke highly of the area and all of the people and friends who lived and grew up there, including the Reverend Oscar H. Lipscomb, now Archbishop of Mobile.

After graduating from McGill Institute, Billy Clarke served in the United States Marine Corps during World War II, from 1942 until 1946, based in the Panama Canal Zone.

After serving his country, he entered the University of Alabama where he received his undergraduate degree. He was admitted to law school at the University of Alabama and received his law degree there in 1950.

He began the practice of law under the tutelage and in the office of Graham A. Sullivan, one of Mobile’s most beloved attorneys. Their offices were in the Van Antwerp Building on the corner of Royal and Dauphin streets. During this time Billy Clarke also was employed part-time at Brookley Air Force Base, the largest employer of the City of Mobile at that time. He lived in the area of “Birdville”
(the home in Birdville having been built as a "Defense Housing Project" for employees and service people at Brookley Air Force Base). While he worked on Brookley, Billy Clarke "discovered" a relatively new field of law, that is, Chapter 13 of the Bankruptcy Act. Many employees at Brookley, because they were not able to pay their debts and were about to lose their jobs, came to Billy Clarke to get relief. Billy Clarke found a way for his clients to pay their just debts with dignity, without fear of harassment, late night phone calls, suits, garnishments, and loss of their jobs. As a result, Billy Clarke established a highly successful practice in handling Chapter 13 petitions in bankruptcy. He became recognized as the "father" of the Chapter 13 practice in Mobile, and he held that reputation until he died.

While he practiced with the Honorable Graham A. Sullivan, Billy was almost another member of Mr. Sullivan's family. Graham Sullivan's son, James Sullivan, recalls fondly that when he expressed a desire to participate in sporting events and fishing, "Mr. Clarke took me to my first college football game at Ladd Stadium at the request of my father, and on many occasions took me crabbing on the Causeway when crabs were plentiful."

Furthermore, James Sullivan remembers Billy Clarke as being "fiercely loyal to his friends and quite influential in judicial appointments."

During the late 1950s Billy Clarke became very active in state politics. He was one of the strongest supporters of the Honorable John Patterson when Patterson ran against, and defeated, the Honorable George Wallace for Governor. Billy had been a classmate of his friend, John Patterson, at law school. Billy Clarke later entered into a law partnership with Mobile attorneys Tom Haas and Douglas Stanard, as Clarke, Haas & Stanard, until his partner, Douglas Stanard, was appointed to a circuit judgeship of Mobile County.

His longtime friend, Tom Haas, described Billy Clarke as a person with a "great sense of humor... He had a keen interest in 'The Grove' and in Mobile County Courthouse activities. He was able to tell many wonderful, colorful and oftentimes humorous tales about the members of the local bar, most of whom have now passed away. But Billy Clarke persevered and worked right until the end."

Billy was particularly fond of telling stories about outstanding attorneys who practiced in Mobile, including the Honorable Sam Johnston, Sr. (grandfather of Mobile Circuit Judge Joseph E. "Rusty" Johnston), the Honorable Harry Seale, and the Honorable Tisdale J. Touart, longtime judge of the Inferior and General Sessions Court of Mobile County.

Not only was Billy Clarke a great storyteller, he in fact started a publication for the Mobile Bar Association, telling fascinating stories about the various members of the Mobile Bar.

He was a true, loyal friend whose legacy with the Mobile Bar should not be forgotten.

William Michael Clarke is survived by his children, Michelle Wells, Mobile; Charles E. Clarke, Irvington; Avril McRae, Mobile; William Michael Clarke, Jr., Pensacola, Florida; Fran Deournouk, Hartford, Connecticut; and Cathy Jones, Mobile; 19 grandchildren and two great-grandchildren.

— Stova F. McFadden
President, Mobile Bar Association
Manchester Press is pleased to announce that Grover S. McLeod has written a third edition of his best-selling lawbook, Civil Actions at Law in Alabama. In many ways, this book is monumental, as it is 872 pages in length and consists of 75 chapter topics, which are the heart of Alabama practice.

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The Family Court of Jefferson County is one of the few specialized courthouses in the state of Alabama. It also has a new facility. At its recent dedication and ribbon-cutting ceremony held on May 26, 1998, Judge Sandra Storm, presiding family court judge, declared that the facility was a "court house for kids." She also stated that good planning went into the courthouse design together with many innovations. Because of this forethought, the courthouse works well. It is no surprise that the experiences of many people over many years went into the planning of the family court facility.

In 1896, Judge N. B. Peagin, a Birmingham police court judge, began the first efforts in Birmingham to treat juveniles differently from adults. He began paroling young offenders to the Birmingham Boys Club. By 1911 the legislature had passed an act which set up a separate juvenile court in Jefferson County. The first session was held May 1, 1911 and Judge Samuel Murphy was appointed by Governor Emmett O'Neal as the first juvenile court judge of Jefferson County. Judge Murphy presided over the court for the next 28 years until his death on October 2, 1939.

The first court sessions were held in a downtown building on 3rd Avenue North between 20th and 21st streets, near the downtown courthouse. The court then rented and later purchased the Debardeleben home located at 206 15th Street South. Court was held here from 1913 to 1916. From 1916 to 1918, the Old Sanatorium located at 1st Avenue and 22nd Street South housed the court. Then from 1918 to 1926, the City of Birmingham allowed the court to use the Southside jail for its proceedings.

Judge Murphy and the Jefferson County Commission recognized the need for a permanent location for the family court and made the decision to purchase the old Ebubank property in the Elyton section of Birmingham for this purpose. Elyton had been the former county seat town of Jefferson County from 1821 to 1873. The new family court was built within two blocks of the location where the Elyton Courthouse had once stood.

In 1927, the juvenile courthouse and detention home, costing $125,000, was completed at 120 2nd Court North. This building was constructed in the Georgian Revival style and was considered one of the best facilities of its kind in the South. The structure was later dedicated as the Samuel D. Murphy Memorial Building.

Following Judge Murphy's death, family court was presided over by judges Walter Emmett Perry, Sr. William L. Hogue and Talbot Ellis. Under Judge Ellis, work was begun on remodeling the main building and constructing a separate detention facility and shelter cottage. Judge Ellis died suddenly in May 1985 and he was succeeded by Judge G. Ross Bell on June 11, 1985.

Judge Bell carried on the efforts of expansion and renovation at family court. A new $700,000 detention home on site was completed in December of 1966. In May 1967 the main court building was renovated. Evan M. Terry served as architect for this project and J. L. Holley Construction Company, Inc. was contractor.
Also in 1967, an act approved by the legislature required the family court judge to be elected rather than appointed. The act elevated the position to that of a circuit judge. Judge Bell was elected as the first presiding circuit judge of the Family Court of Jefferson County. Ten years later, two new district judgeships were created. William G. Fowler became a district judge in the Birmingham division and Ralph D. Cook became a district judge in the Bessemer division.

In 1978, after 18 months of planning and construction, another change was made to the family court physical plant. New offices for juvenile intake and two juvenile courtrooms, presided over by trial referees, were completed. The new facilities were needed because in January 1977, the jurisdiction of all juvenile courts in the state of Alabama was raised to age 17. In January 1978, the jurisdiction was expanded to age 18. Over the next few years, the appointment of new judges highlighted changes at family court. On June 20, 1980, Judge Sandra Ross became the district judge in the Birmingham division. On June 23, 1981, Judge Vincent Schilleci became the district judge in the Bessemer division. And on April 30, 1982, Judge Bell retired as circuit judge and was replaced by Judge Charles M. Nice. The most recent judicial personnel changes took place in November 1988 when Judge Sandra Ross (now Storm) was elected presiding circuit judge and Judge Elise Barclay was elected district judge in the Birmingham division.

The next major improvement at family court was the construction of an 80-bed detention facility completed in 1990. This building was dedicated as the G. Ross Bell Youth Detention Center. The architect was Harmon Collier Associates, Inc. and the general contractor was Miree Construction Corporation.

Planning for the present family court facility began in the early 1990s. Court employees traveled around the country to study successful innovations in other jurisdictions. Construction began in 1995. More than $13,000,000 was spent in renovations, expansion and landscaping.

The interior of the building blends marble, brick and custom woodwork. A two-story atrium with a magnificent staircase is the central feature of the renovated structure. The building is fully handicapped accessible. It contains a children's play area with a TV and VCR as well as a food court highlighted by skylights. There are a dozen glassed-in conference rooms, six courtrooms and a huge reception area.

The project was designed by Giattina Fisher Aycock Architects, Inc. Supervising architect was Jamie Aycock. Bill Harbert Construction Company served as general contractor. The new Jefferson County Family Court facility should serve the citizens, and especially the children, of Jefferson County well into the 21st Century.

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 Miglonico & Rumore. Rumore serves as the bar commissioner for the 10th Circuit, place number four, and is a member of The Alabama Lawyer Editorial Board.
Corporate Representation—Parent Subsidiaries—Conflict of Interest

Question:

"By this letter, our firm requests a written opinion from the Alabama State Bar through its general counsel concerning the following question of conflict of interest in the context of corporation representation under the following facts:

"May a lawyer represent a wholly-owned subsidiary of a publicly traded parent company and then institute separate litigation against the parent company? For purposes of this question, the parent company and the wholly owned subsidiary are separate corporate entities. Further, what other facts or circumstances, if found to exist, would create a conflict of interest assuming that the separate corporate identities of these two corporate entities would normally, in and of itself, eliminate a conflict of interest under the general rule provided in Rule 1.7 of the Alabama Rules of Professional Conduct?

"Our firm would appreciate your written opinion in this regard and is awaiting that written opinion before making its decision to undertake representation of a prospective client in an action against the parent or holding company referred to above which is a separate corporate entity from the firm's existing corporate client ...."}

Answer:

You may represent a wholly-owned subsidiary of a publicly traded corporation while, at the same time, instituting litigation against the parent company if the subsidiary and parent are separate corporate entities. You may represent both entities in unrelated litigation if both entities have separate corporate identities, there is no risk that confidential information will be misused, and your representation of the subsidiary is not limited by your litigation involving the parent.

Discussion:

Rule 1.13 of the Alabama Rules of Professional Conduct recognizes that an organization client is a legal entity and thus, the entity is the client as opposed to its officers, directors, employees, shareholders, or other constituents. Consequently, the parent corporation, even when it owns 100 percent of the stock of the subsidiary, is still a shareholder and constituent of the subsidiary. See California State Bar Ethics Opinion 1989-113 (7/5/90).

The Disciplinary Commission of the Alabama State Bar reached a similar conclusion in RO-90-96 (incorporated and made a party of this opinion) when it held that a law firm may represent a plaintiff in a suit against an insurance company that is a subsidiary of a large corporation, even though the firm represented other subsidiaries of the corporation in unrelated litigation, if each subsidiary has its own corporate identity and there is no risk that the firm will misuse confidential information.

From a practical standpoint, the entity theory has more validity when applied to large publicly held corporations. Professor Wolfram addressed this point in his Hornbook on Modern Legal Ethics, as follows:

"The position of the Code and the Model Rules, that the lawyer represents only the corporate entity, makes sense primarily in the setting of large, publicly held corporations. As corporate stock ownership is concentrated in
fewer and fewer hands, the distinction between corporate entity and shareholders begins to blur. In the case of a sole-owner corporation, they may merge. Often a lawyer for such a partnership corporation will provide personal legal services for corporate principals interchangeably with services to the corporate entity. In recognition of that common reality, one court has held that for conflict of interest purposes, a small and closely held corporation and its shareholders are to be treated as virtually identical and inseparable." Wolfram, Modern Legal Ethics, West Publishing (1986) p. 422, citing In re Brownstein, 602 P.2d 655, 656-657.

Thus, a lawyer may represent a client in an action against a corporation that is a wholly-owned subsidiary of an existing corporate client so long as the parent corporation is not the alter ego of the subsidiary. See also Maryland State Bar Ethics Opinion 87-19. [RO-92-20]

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Business Entities

In the last four years the number of business entities available throughout the United States has greatly expanded and virtually all of the existing entities have been revised. The model acts were drafted by the Business Section of the American Bar Association and the uniform acts are proposed by the Commission on Uniform State Laws. In each case, committees of the Alabama Law Institute reviewed these drafts. After several years' study in each case the Institute committees made changes to conform the new laws with existing Alabama law. Alabama has kept pace with the rest of the nation and in some cases been out front in providing a range of business entities available for use by lawyers as they assist clients.

The Business Corporation Act was revised and became effective in Alabama January 1995. Alabama approved a new general partnership law that became effective in 1997 as well as a limited liability partnership law that was effective the same year. The Limited Partnership Act was revised and it will become effective October 1, 1998.

In 1994, Alabama created the authority for limited liability companies in Alabama and it was revised to meet conformity with other states. The amended LLC law became effective in January 1998. Also revised in Alabama was the Professional Corporation law in 1984 when at the same time it abolished any further forming of professional associations.

The Alabama Nonprofit Business law was revised in 1985 and a new Unincorporated Nonprofit Act became available in 1996.

With eight choices of business entities now available in Alabama, the Institute is looking into areas each has in common with the others. We hope a lawyer will not be caught in a trap of having to distinguish not only between the different benefits each entity offers but needing to know how each differs in technical procedures.

Since November of 1997 a committee of the Institute chaired by James Pruett, a Gadsden attorney, with the committee's chief reporter, Howard Walthall, professor of law at Cumberland, has been reviewing areas of law that are in common to determine uniformity among the various acts. Also, members of this committee are:

- Professor James Bryce, University of Alabama School of Law
- Larry B. Childs, Birmingham
- James R. Clifton, Andalusia
- C. Fred Daniels, Birmingham
- Robert Denniston, Mobile
- Peck Fox, Montgomery
- James F. Hughey, Jr., Birmingham
- Greg Leatherbury, Jr., Foley
- Mark Maloney, Decatur
- Tommy Mancuso, Montgomery
- George Maynard, Birmingham
- E.B. Peebles, Mobile
- James Pruett, Gadsden
- Don Siegal, Birmingham
- Henry Simpson, Birmingham
- Bradley Sklar, Birmingham
- Robert Walthall, Birmingham

Areas that have been identified are:

- (1) Mergers and conversions—Robert Walthall of Bradley, Arant, Rose & White has led the review of this section;
- (2) Definitions—Professor Howard Walthall is comparing the definitions in all the statutes;
- (3) Formations and filing requirements—This study is being led by Mark Maloney of Blackburn, Maloney & Schuppert;
- (4) Foreign qualifications study led by Brad Sklar of Sirote & Permutt; and
- (5) Dissolution and disassociation is being reviewed by Rick Clifton of Allbritton, Civitan, Clifton & Alverson.

Other areas yet to be reviewed are certificates of good standing, fees and purpose. It is expected that as an area under review is completed a bill will be presented to the Legislature so that each can be considered by the Legislature as quickly as possible. The entire study may take several years.

If anyone has a business entity area that you would like for the committee to consider, please direct your concerns to any member of the committee or to the Institute office.

Institute Annual Meeting

The Annual Meeting of the Alabama Law Institute was held Thursday, July 9, 1998 during the Alabama State Bar Meeting. The following persons were re-elected: President—James M. Campbell of Anniston; Vice-President—Temetrius C. Newton of Birmingham; Executive Committee Members: Senator Roger H. Bedford, Jr. of Russellville; George E. Maynard of Birmingham; Oakley W. Melton of Montgomery; Yetta G. Samford of Opelika; Richard S. Manley of Demopolis; Senator Wendell Mitchell of Montgomery; Senator Steve Windom of Mobile; and Representative Mark Gaines of Birmingham.
Legislators Recognized
At the Annual Bench and Bar Luncheon, legislators were recognized for their leadership in passing comprehensive legislation of interests to lawyers.
Sponsors of the Limited Partnership Act:
Representative Mark Gaines
Senator Ted Little
Senator Roger Bedford
Sponsors of the Limited Liability Company Amendments:
Representative Mark Gaines
Senator Steve Windom
Sponsors of the Legal Separation Act:
Representative Marcel Black
Representative Mike Rogers
Senator Roger Smitherman
Senator Sundra Escott-Russell
Senator Roger Bedford
Senator Roy Smith
Senator Ted Little

Laws Being Studied by Institute Committees:
The Uniform Child Custody Enforcement Act, chaired by Gordon Bailey of Anniston with Penny Davis as reporter;
Uniform Management of Public Employee Retirement Systems Act, chaired by Kyle Johnson of Montgomery with Professor Jim Bryce as reporter; Uniform Principal and Income Act, chaired by Leonard Wertheimer of Birmingham with reporter Professor Tom Jones; the ongoing review of Criminal Procedure Law is chaired by Billy Burney of Decatur with the committee’s reporter Bob McCurley.

For more information about the Institute or any of its projects, contact Bob McCurley, director, Alabama Law Institute, P.O. Box 861425, Tuscaloosa, Alabama 35486-0013; fax (205) 348-8411; phone (205) 348-7411; Institute homepage: www.law.ua.edu/ali.

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1999 Joint Meeting of the Federal and State Bench and Bar
The Alabama Judicial College, a division of the Administrative Office of Courts, is joining with the Alabama State Bar Bench and Bar Task Force again this year to sponsor the 1999 Joint Meeting of the Bench and Bar on January 21, 1999 at Embassy Suites in Montgomery. They will also be joined by members and guests of the State/Federal Council.

Registration begins at 8 a.m., with training sessions of interest to federal and state judges and attorneys practicing in these courtrooms to follow. The registration fee of $55 includes a luncheon at noon and a reception at the hotel following the conclusion of the program.

Additional information on the specific training sessions and the registration form will be in upcoming issues of The Alabama Lawyer and the ADDENDUM.
Drinking and Driving In Alabama: The Facts, the Laws and Possible Solutions

By T. Brad Bishop

Introduction
I turned twenty-one in prison doing life without parole.
No one could steer me right but Mama tried.
Mama tried to raise me better but her pleading I denied.
Now there's only me to blame because Mama tried.

The Grateful Dead

Willie C. Mosely never had a driver’s license, but he did
plenty of driving— and drinking. A second conviction
for DUI murder has put the 60-year-old Alabamian in
prison with a 45-year sentence. His latest victims were
a motorcycle driver and passenger. His first were a mother
and two children. During a recent interview at the state prison
in Atmore, Mosely attempted to explain why he drove drunk.

Most of the time when you drink, you ain't hardly
satisfied, and you'll be wanting to go somewhere and do
something when you ain't got no business doing it. At
the time, you don't be thinking because you just say I'll
run right over here and run right back and ain't nothing
going to happen. But it really just don't pay to go.

Although Mosely may regret drinking and driving, he cost
several people their lives and must spend the rest of his own
in prison. Ironically, Mosely’s mother was strict about alcohol
and never allowed it in her house. His victims would be alive
today if Willie had heeded his mother’s warnings.

Unfortunately, stories such as his are not unusual. Mosely is
just one of thousands across the nation who have caused
injury or death as a result of drinking and driving.

Statistical Data

Statistics show that about two in every five Americans will
be involved in an alcohol-related automobile accident at some
time in their lives. On a national level, in 1995, over 17,000
persons died and over one million were injured as a result of
drunken driving accidents. For Alabama drivers, the risks asso-
ciated with drunk driving are even higher.

While the national rate of deaths caused by drunk driving
dropped between 1982 and 1991, the numbers in Alabama
rose by over 36 percent. Between 1992 and 1994, more than
3,000 traffic fatalities occurred on Alabama’s roads and
highways. Over 40 percent of those deaths were alcohol-related.

In Alabama, between 1992 and 1994, the total number of alco-
hol-related traffic accidents rose three percent, from 8,998 to
9,242. Additionally, injuries from alcohol-related crashes rose
16 percent, from 6,301 in 1992 to 7,323 in 1994. In 1995,
Alabama’s annual highway fatality rate was the fourth highest
in the nation. The statistics for 1996 are equally discour-
aging. Although the number of injuries resulting from drunk
driving accidents fell to 5,560, a significant decrease, the num-
ber of alcohol-related deaths increased to 348.

Legislative Response to the Drunk Driving Problem

State legislatures have become increasingly aware of the
dangers and risks associated with drunk driving. In the past
two decades, more than 2,300 anti-drunk driving laws have
been enacted in the United States. The Alabama Legislature
has consistently enacted tougher DUI statutes that have
resulted in increased fines, longer jail sentences and longer
license-revocation periods. In 1994, the Legislature substantially amended the DUI laws in Alabama. The 1994 legislation made a fourth DUI conviction within a five-year period a Class C felony, punishable by a fine of not less than $2,000 and by imprisonment of not less than one year and one day but not more than ten years. More recent amendments to the DUI statute dropped the five-year limitation, and now, a fourth DUI conviction at any time during one’s life constitutes a felony offense. Moreover, the minimum fine for a fourth DUI conviction is now $4,100.

In 1995, the Legislature took further action and lowered the legal blood alcohol level for drunk drivers from 0.10 percent to 0.08 percent. In 1996, the Legislature made it unlawful for any person under the age of 21, or any school bus or daycare driver, to operate a motor vehicle with a blood alcohol content of 0.02 percent or more. In addition, the 1996 legislation set the maximum blood alcohol level at 0.04 percent for commercial drivers.

Despite the strict amendments to Alabama’s DUI laws, the Alabama Department of Public Safety estimates that a driver may drive under the influence between 200 to 2,000 times before being arrested for the first time. Studies also show that drunk driving arrests have fallen each year since 1991. The decrease in DUI arrests and convictions is not, however, evidence that the stricter laws are working. Rather, in spite of the tougher laws, the number of alcohol-related traffic accidents is on the rise.

Conviction rates, which ranged from 95 percent in the 1980s to 98 percent in 1990, have fallen each year and reached a low of 78 percent in 1995. Although Alabama law provides that first-time DUI offenders can be sentenced to a year in jail, and fined $600 to $2,100 or both, first-time offenders are rarely incarcerated. Rather, most Alabama judges impose the minimum mandatory sentence for the first offense. Even for subsequent offenses, maximum sentences and fines are rarely imposed, and offenders do not always serve the entire time of a strict sentence.

Often, maximum sentences are not imposed because the tough mandatory sentencing requirements place judges in a dilemma. The judge must balance the value to society of incarcerating the offender against the realization that the decision could cost the offender his job, the family a breadwinner, and increase welfare costs to the state. The jails are already overcrowded, and once the hard core drinker is incarcerated, the state court or municipality becomes liable for any medical expenses incurred during the period of incarceration.

Some may not sympathize with the judges’ dilemma. Critics have argued that maximum sentences should be imposed unconditionally. However, one must recognize that even when sentences was at its toughest in Alabama, drunk driving did not significantly decline. Statistics seem to indicate that tough DUI laws are no real deterrent to the problem drinker. In Alabama, of the approximately 110,000 people convicted for driving under the influence between 1988 and 1992, more than 25,000 were repeat offenders. Many of those repeat offenders had four or more convictions during that time. “Figures from the Department of Public Safety show that almost 1,400 Alabamians had as many as eight convictions.”

Formerly, habitual repeat offenders benefited from Alabama’s statute because convictions that were more than five years old could not be considered prior offenses for sentencing purposes. If a person with a multitude of DUI convictions avoided arrest for five years, his next conviction would be treated as if it were his first. However, Alabama’s new statute abandoned the five-year limitation with respect to each offense occurring after the second. Under the new statute, once an individual has been convicted twice for DUI, the five-year limitation no longer applies to that individual, and if he receives a DUI at any time after the second conviction, it would be treated as a third offense. A major increase in felony prosecutions for drunk drivers is likely to result.

Other solutions have been offered and implemented to combat Alabama’s drunk driving problem. In addition to incarceration and fines, Alabama law requires an accused to attend a mandatory educational program, often referred to as DUI school. The program is divided into three levels. Level 1 is a 12-hour course directed primarily toward the social drinker who made a bad decision. Level 2 is a 24-hour course aimed at multiple offenders. Level 3 involves state approved treatment programs that last from one to 12 months. The Mandatory Treatment Act of 1990 requires every DUI offender to complete at least Level 1 of the program.

DUI schools have been successful in lowering the conviction rate of repeat DUI offenders. A 1991 Auburn University study concluded that Alabama’s DUI School program reduced the number of repeat offenders, especially in the 31-45 age group.
For that group, 22 percent of those who did not attend the program were convicted of a subsequent DUI within the next two years. Of those who attended the program, only 12 percent were convicted of another DUI within two years.

**ALA. Code § 32-5A-191: Alabama's Current DUI Statute**

Driving Under the Influence (DUI) prosecutions comprise a significant number of the cases brought in Alabama's municipal and district courts. Section 32-5A-191(a) of the Alabama Code prohibits any person from driving while (1) the weight of alcohol in his blood is .08 percent or more; (2) he is under the influence of alcohol, a controlled substance, or both to a degree that renders him incapable of driving safely; or (3) he is under the influence of any substance that impairs his mental and physical faculties to such a degree that he is incapable of safely driving.

Although most prosecutions pursuant to section 32-5A-191 rely upon a chemical analysis of the defendant's blood or breath, the prosecution may establish a prima facie case of DUI without reference to such tests. A prima facie case requires that the prosecution establishes the following: (A) reasonable suspicion to stop the vehicle; (B) proof of operation or actual physical control of a motor vehicle; (C) probable cause that led to the arrest; and (D) the arresting officer's on-the-scene observations and conclusions that (1) the consumption of alcohol or other intoxicants was involved and (2) the consumption affected the physiological coordination and mental faculties of the accused to such an extent that he was incapable of safely driving. Of course, a chemical test, although not required, may be used to substantiate or corroborate the prosecution's case.

**A. Reasonable Suspicion to Stop the Vehicle**

The first element of a prima facie case requires that an officer have reasonable suspicion to stop or approach the vehicle. In *Martin v. State*, the court made it clear that probable cause is not required to stop a vehicle. However, mere suspicion of a violation is not an adequate justification. The officer must demonstrate "independent facts which lead to an 'articulable and reasonable' suspicion" of a violation before stopping a vehicle. Factors that can contribute to a reasonable suspicion include (1) "erratic or evasive" driving such as speeding, running off the road, or crossing the center line; (2) the "appearance of the vehicle" or those in it; (3) the time and location of the vehicle when it is stopped; for example, in an area known for narcotics activity; and (4) the "experience of the police officer." One factor alone will rarely justify an investigatory stop; rather, a totality of the circumstances test is employed which generally requires a showing of a combination of the foregoing factors.

The reasonable suspicion standard, developed by case law, has been codified by the Alabama legislature. Section 15-5-30 of the Alabama Code provides that the officer may "stop any person abroad in a public place who, reasonably suspects, is committing, has committed or is about to commit a felony or other public offense."

**B. Actual Physical Control or Possession of the Vehicle**

In addition to the reasonable suspicion requirement, an officer must prove that the accused was in actual physical control of the vehicle. In *Cagle v. City of Gadsden*, the court stated that proof of control or possession of a motor vehicle while under the influence may be established in two ways. One method is the use of direct evidence, typically, the eyewitness testimony of the arresting officer. Second, circumstantial evidence may establish that the individual, though not actually seen driving, was in "actual physical control" of the vehicle. "Actual physical control" has been defined as the "exclusive physical power, and present ability, to operate, move, park, or direct whatever use or non-use is to be made of the motor vehicle at the moment. Under this approach, convictions have been upheld in cases in which the officer found the defendant asleep behind the wheel of a crashed automobile. In addition, admissions by the defendant that he was driving and eyewitness testimony that the defendant was driving have been held sufficient to support a DUI conviction.

In *Cagle v. City of Gadsden*, the Alabama Supreme Court introduced a "totality-of-the-circumstances" test to determine whether an individual was in actual physical control of a vehicle. In so holding, the court expressly abandoned the three-pronged test enunciated in *Key v. Town of Kinsey*, which previously set forth the elements necessary to establish actual physical control.

Under the *Key* test, the prosecution had to first show that the accused was in actual or constructive possession of the vehicle's ignition key or that the key was not necessary to operate the vehicle. Second, the prosecution had to establish that the accused was in the driver's seat, behind the steering wheel, and in such condition that, but for his intoxication, he was physically capable of starting the engine and causing the vehicle to move. Finally, the prosecution had to establish that the vehicle was operable to some extent. The *Cagle* court concluded that the three-pronged test enunciated in *Key* was too easy to circumvent and that "a more reasonable result would be attained by using a totality-of-the-circumstances test." For instance, under the *Key* test, a driver could avoid a DUI conviction by simply throwing his keys away or moving over to the passenger side of the car before the officer approached the vehicle. However, although the *Key* elements are not the sole factors to be considered, those factors are still relevant in determining whether a person was in actual physical control of the vehicle.

Under the *Cagle* approach, an individual need not be driving to be arrested and convicted for driving while under the influence. For example, a person stopped alongside the road, asleep behind the wheel, is considered to be in actual physical control of the vehicle. Thus, under Alabama law, a driver who knows he has had too much to drink will not avoid prosecution if he pulls over to "sleep it off," because doing so is equivalent to driving while under the influence.

**C. Probable Cause Leading to a DUI Arrest**

Probable cause is an essential element of a prima facie case for DUI. A law enforcement officer must have probable cause to make a DUI arrest. Probable cause to arrest exists if facts and circumstances within the arresting officer's knowledge are sufficient to justify a man of reasonable caution to believe that an offense has been or is being committed. Probable cause for a DUI arrest may be established through evidence indicating that the accused drove in such a manner as to attract the
attention of a law enforcement officer and that the officer’s observation led to the belief that the suspect was intoxicated. The officer’s observations are most often based on the appearance of the suspect, the odor of alcohol, and some type of field sobriety test.

Field sobriety tests are tests administered by law enforcement officers to determine whether there is probable cause to believe that a driver is under the influence. Although the type of test and the manner in which the tests are applied may vary, all field sobriety tests have two essential purposes. The first purpose is to establish probable cause for a DUI arrest. Observations made by an officer administering a field sobriety test can provide the required probable cause for a DUI arrest. The second purpose of field sobriety tests is to produce evidence that can be used by the prosecutor at the DUI trial, although field sobriety tests do not conclusively establish whether a driver was under the influence. Officer testimony of a driver’s performance of the tests is not considered expert testimony and can be used as persuasive evidence of a driver’s faculties at the time of arrest.

Three general types of field sobriety tests are used to determine whether a driver is under the influence. These three are: 1) sensory/nervous system tests, 2) mechanical tests, and 3) physical coordination tests. The sensory/nervous system tests monitor the reactions of the driver’s nervous system. The Horizontal Gaze Nystagmus Test (HGN) is such a test. The HGN test indicates whether a driver is under the influence by measuring jerk nystagmus or quick jerks in eye movements. An officer administering the HGN test will ask the driver to cover one eye. The officer will then move an object, usually a pen or light, gradually out of the driver’s field of vision. As the officer moves the object, he observes the driver’s uncovered eye for involuntary jerking. Admissibility of HGN test results in Alabama courts is unclear. The court of criminal appeals has held that results of the HGN test can be admitted following a statement establishing the “scientific reliability of the test and the officer’s expertise” in administering the test. The Supreme Court of Alabama, however, has held that the court should determine the admissibility of HGN test results. Other states are in disagreement over the admissibility of HGN tests. Arizona holds that: HGN tests satisfy the Frye standard and permits the introduction of HGN test results in DUI cases. Florida, on the other hand, concludes that HGN testing represents scientific evidence that may not be admitted as a lay observation of intoxication.

The second type of field sobriety tests are those that use mechanical devices to obtain an estimate of a driver’s blood alcohol content. The device most commonly used by Alabama law enforcement agencies in the field is the Alco-Sensor which provides the officer with an estimate of the driver’s blood alcohol content after the suspect has blown into the device. Like all other field sobriety tests, the Alco-Sensor can be used as evidence at the DUI trial for the purpose of establishing probable cause for the arrest. The measurements of the Alco-Sensor, however, cannot be used to conclusively establish that the defendant was intoxicated or that the defendant’s blood alcohol level exceeded legal limits.

The third type of field sobriety tests are those that measure the physical coordination of the driver. Examples of such tests include the one-leg stand, the walk-and-turn, the finger-to-nose, and the Romberg alphabet tests. These coordination tests “do not prove absolutely that the subject is illegally intoxicated;” rather, these tests measure whether “the subject’s coordination has been impaired by the consumption of alcohol.”

Therefore, expert testimony regarding the reliability and general acceptance in the scientific community of the particular test is not required to admit the results of these tests into evidence. Observations of the arresting officer, recounting the defendant’s performance of the tests, can be used as evidence of the defendant’s “balance, coordination, and/or mental agility,” which is relevant to the issue of the defendant’s sobriety.

D. Driver Must Be “Under the Influence”

Before making a legal arrest for DUI, a law enforcement officer must have reasonable grounds to believe the individual was driving under the influence. Alabama case law defines “under the influence” as “having consumed such an amount of alcohol as to affect [the driver’s] ability to operate a vehicle in a safe manner.”

Characterizing a person as “under the influence” does not require reliance on a scientific test. For instance, tape recordings and videotape evidence are admissible as proof that a defendant was under the influence. A law enforcement officer may give his opinion as to the sobriety of the accused in a DUI case, and such an opinion may be based on personal observations. Therefore, the arresting officer should state in clear detail his on-the-scene observations of the physical coordination and mental faculties of the accused. This testimony should include the results of field sobriety tests, a description of the manner in which the accused produced his driver’s license, the suspect’s manner of speech, the suspect’s ability to walk, the odor of alcohol, the degree of support needed by the accused to stand erect, the accused’s ability to understand and respond to instructions, and the general appearance and overall mannerisms of the accused.

Although relevant, the mere proof that the arresting officer smelled alcoholic beverages on the accused’s breath will not sustain a conviction for driving under the influence. Intoxication cannot be established by simply proving that the accused drank intoxicating liquor or had an odor of liquor on his breath in the absence of some proof showing that it produced in him some manifestation of intoxication.

Methods of Prosecuting DUI-Alcohol Cases

Driving under the influence may be prosecuted by presenting evidence of (1) driving with an illegal blood alcohol level, (ALA. CODE § 32-5A-191(a)(1)), or (2) driving “under the influence of alcohol” (ALA. CODE § 32-5A-191(a)(2)). These subsections merely represent “two different methods of proving the same offense—driving under the influence of alcohol.”

The relevant proof to be offered in each case will depend on the code section upon which the prosecution’s case is based. Under section 32-5A-191(a)(1), the degree of intoxication as indicated by chemical testing will be the key evidence. Under section 32-5A-191(a)(2), the prosecution is not required to rely on chemical test results but may introduce other direct or cir-
cumstantial evidence that the defendant was under the influence. 17 Unsafe operation of the vehicle, not the degree of intoxication per se, is the relevant evidence. However, even in a prosecution under subsection (a)(2), chemical test results are admissible to sustain the prosecution’s burden of proof. 18 The prosecution’s burden is to prove that the defendant was under the influence of alcohol to the extent that it affected his ability to operate his vehicle in a safe manner. 19 The jury, or trier of fact, must decide if the prosecutor met this burden of proof. 20

Although providing two methods to charge an accused with driving under the influence has its advantages, many DUI appeals focus on the issue of whether a defendant was properly charged under Section 32-5A-191(a)(1) or (a)(2). Accordingly, law enforcement officers and prosecutors should be aware of the proper methods to charge an offender with driving under the influence. For instance, the prosecution is permitted to charge a defendant under both subsections, 21 and it may later elect to proceed under one subsection or to withdraw one of the charges. 22 Because proof of a violation of one subsection does not support a conviction for the other, charging an accused under both subsections may aid in securing a successful prosecution. Moreover, a complaint that merely refers to a code section or that charges the defendant with being “under the influence” is insufficient to put a defendant on notice of the crime for which he is being charged and is insufficient to support a conviction. 23 Conversely, a complaint that tracks the language of a code section is sufficient to put an accused on notice of the charges against him. 24

Prosecutors and law enforcement officers, therefore, should learn the relevant code language and should use that language in the complaint whenever possible. Jury instructions also present problems in DUI cases; therefore, judges should make certain that the jury is charged under the same DUI subsection as that which the defendant is charged. 25

Conclusion

The ideal solution to Alabama’s drunk driving problem would be for people to abstain from drinking after having consumed any alcohol or drugs. Reality indicates, however, that such abstinence is not likely to occur, irrespective of what is done to combat the problem. As long as alcohol is available for consumption, Alabama will have drunk drivers. Consequently, the state’s legislature, courts, law enforcement officials, and private interest groups must work in concert to develop the most effective possible means to contain the problem.

Perhaps the best way to at least mitigate the problem is to educate our youth at an early age of the hazards associated with alcohol. A study conducted by the National Institute of Health found that children who begin drinking before they turn 15 are four times as likely to become alcoholics as those who start drinking at the age of 21. According to Dr. Clarence Chen, “[k]ids start drinking because they think it’s the adult thing to do.” 26 Thus, parents need to be aware that they are role models for kids and they should educate their children on the dangers and consequences of drinking and driving. However, parental guidance does not always work. It certainly had little impact on Willie Mosely, who stated in an interview that his mother “was very strict about alcohol, disapproving of it and never allowing it in her house.” Willie realizes that his mother tried to raise him right, and he now wishes he had listened to her advice. “If I had paid attention to her, I’d be in a whole lot better shape,” he said. 27

ENDNOTES

1. Lyrics taken from Mama Tried, originally written and performed by Merle Haggard.
4. MAD 1990 SUMMARY OF STATISTICS: THE IMPAIRED DRIVING PROBLEM, The Alabama chapter of Mothers Against Drunk Driving may be reached at 1-800-535-0722.
7. See id.
9. See id. See also MAD – Alabama, We’re Not Just Mothers Anymore, Mothers Against Drunk Drivers figures are slightly higher for 1994. According to MAD, there were 9,400 alcohol-related accidents in Alabama in 1994. Id.
10. Archibald and Parks, supra note 9, at 1A.
11. These figures may be obtained from MAD – Alabama at 1-800-635-0722.
12. MAD, 1996 SUMMARY OF STATISTICS: GENERAL STATISTICS.
14. See id. at § 32-5A-191(d).
16. See id.
17. See id.
18. See id. See also MAD – Alabama at 1-800-635-0722.
20. Blalock and Archibald, supra note 6, at 1A.
21. Archibald and Parks, supra note 9, at 1A.
22. See id.
23. See id.
25. See id. at 6A.
27. See id.
28. See id.
29. Blalock and Archibald, supra note 6, at 1A.
32. See id.
33. See id.
34. See id.
35. See id.
36. See id.
37. See id.
38. See id.
39. Ala. Code § 32-5A-191(a), as amended by 1995 Ala. Act 764, states, in full, as follows:
(a) A person shall not drive or be in actual physical control of any vehicle while:
(1) there is 0.08 percent or more by weight of alcohol in his or her blood;
(2) under the influence of alcohol;
(3) under the influence of a controlled substance to a degree which renders him or her incapable of safely driving;
(4) Under the combined influence of alcohol and a controlled substance to a degree which renders him or her incapable of safely driving or
(5) under the influence of any substance which impairs the mental or physical faculties of such person to a degree which renders him or her incapable of safely driving.

42. Ex parte Young, 498 So. 2d 1106, 1109 (Ala. 1986).
44. See id.; United States v. Tapia, 912 F.2d 1367 (11th Cir. 1990).
46. 495 So. 2d 1144, 1145 (Ala. 1986).
50. 495 So. 2d 1144, 1145 (Ala. 1986).
52. Cogia, 435 So. 2d at 1145.
53. See id. at 1147.
65. Id.

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Continuing Legal Education
September - December 1998 Schedule

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Appointments
United States Bankruptcy Judges, Middle District of Alabama

The United States Court of Appeals for the Eleventh Circuit invites applications from highly qualified persons for a 14-year term of appointment as U.S. Bankruptcy Judge in the Middle District of Alabama succeeding Judge A. Pope Gordon. Judge Gordon has indicated his intention to retire upon expiration of his term April 14, 1999. The position will be available for appointment April 15, 1999.

The duty station for this position will be located at Montgomery, Alabama.

The basic jurisdiction of a Bankruptcy Judge is specified in Title 28, U.S. Code and explained in Title 11, U.S. Code, as well as in 98 Stat. 344 P.L. 98-353, Title I, Section 120. The duties of the position are demanding and comprehensive.

This selection process will be confidential and competitive. A subcommittee of the Judicial Council of the Eleventh Circuit will review all applicants and recommend the best qualified persons to the full Judicial Council, which in turn will recommend in confidence at least three nominees to the judges of the U.S. Court of Appeals for the Eleventh Circuit. The Court of Appeals will make the appointment subject to an FBI and IRS investigation of the appointee. The current annual salary is $125,764.

Persons shall be considered without regard to race, color, gender, religion, or national origin.

The Court also invites applications from highly qualified persons for a 14-year term of appointment as U.S. Bankruptcy Judge in the Middle District of Alabama succeeding Judge Rodney R. Steeles. Judge Steeles has indicated his intention to retire upon expiration of his term on October 17, 1999. The position will be available for appointment October 18, 1999.

The duty station for this position will be located at Montgomery, Alabama.

The basic jurisdiction of a Bankruptcy Judge is specified in Title 28, U.S. Code and explained in Title 11, U.S. Code, as well as in 98 Stat. 344 P.L. 98-353, Title I, Section 120. The duties of the position are demanding and comprehensive.

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Persons shall be considered without regard to race, color, gender, religion, or national origin.

Application forms and the full announcements may be obtained from any district court or bankruptcy court clerk of the Eleventh Circuit or from the circuit executive in Atlanta. Further information concerning the positions is available through Norman E. Zoller, circuit executive, U.S. Court of Appeals for the Eleventh Circuit, 56 Forsyth Street, NW, Atlanta, Georgia 30303; phone (404) 335-6535.

Applications must be received at the circuit executive’s office in Atlanta no later than October 14, 1999.
Punitive Damages  
In Alabama After  
BMW v. Gore:  
Are Outcomes Any  
More Predictable?  

By E. Berton Spence

Introduction  
In May 1996, the Supreme Court of the United States issued its opinion in BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589 (1996) ("Gore-U.S."), reversing a decision of the Supreme Court of Alabama and holding that a punitive damage award affirmed by the Alabama court violated the Due Process clause of Amendment XIV of the Constitution of the United States. By January 1998, the Supreme Court of Alabama had issued its first ten opinions reviewing, under the "guideposts" created by Justice Stevens in Gore-U.S., awards of punitive damages in cases not involving wrongful death. This paper examines those ten cases and analyzes whether Alabama's punitive damages laws are more concrete or predictable as a result.

The ten cases are listed, along with brief items of information concerning them, in Table 1. Five of the ten were the subject of orders of remand from the Supreme Court of the United States which required the Supreme Court of Alabama to review the cases a second time in light of the Gore-U.S. opinion (see Table 2).

Within the body of these opinions, the Alabama Supreme Court has concluded that the factors enumerated in Hammond v. City of Gadsden, 493 So. 2d 1374 (Ala. 1986) and Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989) (the so-called "Hammond/Green Oil factors"), that it was using prior to Gore-U.S. to determine whether punitive damage awards were excessive, pass constitutional muster under Gore-U.S. The Alabama court has also incorporated the three "guideposts" referenced by the U.S. Supreme Court in Gore-U.S. as a means of assessing whether a civil defendant has been given fair notice of the amount of punitive damages that might be awarded against it by a civil jury in Alabama. Even though the Alabama court has, to some extent, treated the Hammond/Green Oil factors and the "guideposts" as cumulative or additive doctrines, it has stated that the Hammond/Green Oil standards contain the guideposts and accommodate the due process concerns that led to their creation. This reasoning is most fully expounded in the Alabama Supreme Court's opinion in BMW of North America, Inc. v. Gore, 701 So. 2d 507, 509-10 (Ala. 1997) ("Gore-Ala."), which it issued in May 1997 after the case was remanded to it from the U.S. Supreme Court in May 1996. The Alabama court has not, however, directly confronted the sentiment expressed by Justice Breyer in his concurring opinion in Gore-U.S.; i.e., that "the [Hammond/Green Oil] standards, as the Alabama Supreme Court authoritatively interpreted them here, provided no significant constraints or protection against arbitrary results." 116 S.Ct. at 1605.

The guideposts created by Justice Stevens in Gore-U.S. are (1) the reprehensibility of the defendant's act; (2) the ratio of the punitive damages to the compensatory damages; and (3) a comparison of the punitive award to comparable sanctions that could have been awarded in other civil or criminal proceedings. This paper examines the Supreme Court of Alabama's treatment of these guideposts in its first ten post-Gore-U.S. opinions. The detailed analysis summarized in the text and presented more fully in tables 1 and 2 illustrate that the guideposts have not provided greater predictability of outcomes than existed prior to Gore-U.S.

Reprehensibility: A Lack of Meaningful Hierarchy  
In only four of the cases decided since
Gore-U.S. does the Alabama court apply a specific label (i.e., "high," "moderate," "low" "significant") to the degree of reprehensibility of the acts of the defendant. None of the four labels has been used more than once. In the other six opinions, the degree of reprehensibility is either left unspecified or is defined only in relative terms as "lesser" than some other situation or "higher" than that found in a different case. As can be seen from Table 2, the inherent lack of a definable hierarchy of degrees of reprehensibility runs counter to the goal of consistency and predictability. It does so by preventing any positive correlation between the punitive to compensatory damage ratios and the stated degree of reprehensibility of the defendants' acts.

For example, in Foremost Ins. Co. v. Parham, 693 So. 2d 409 (Ala. 1997), the degree of reprehensibility is unspecified. The court points out, however, that many of the actions found fraudulent in this case were not so defined at the time they were committed. The court's prospective ruling also indicates that most, if not all, of these acts will not be considered fraudulent from the date of the opinion forward. These are indications of low reprehensibility. Even so, the unspecified degree of reprehensibility is held sufficient to support ratios of punitive to compensatory damages ranging from 37:1 to 492:1 (this case involved four different causes of action from two plaintiffs and each count was analyzed separately). Even if one uses the overall ratio of punitive to compensatory damages arrived at for each plaintiff, one is left with the ratios of 94:1 and 121:1.

This poses a sharp contrast to Ford Motor Co. v. Spata, 708 So. 2d 111 (Ala. 1997), in which the reprehensibility was labeled "moderate," yet a 3.5:1 ratio of punitive damages was reduced to a ratio of 1.06:1 on the premise that a ratio as high as 3.5:1 would run afoul of the Gore-U.S. guideposts.

In another of the cases, Union Security Life Ins. Co. v. Crocker, So. 2d (Ala. August 15, 1997), the court upheld an award of punitive damages without knowing what the ratio was because the verdict form used by the jury did not specify which damages were compensatory and which were punitive but merely included a total. It did this in the context of a degree of reprehensibility labeled "high." In Life Ins. Co. of Georgia v. Johnson, 701 So. 2d 524, 530 (Ala. 1997), however, a case in which the court found the reprehensibility to be "far more reprehensible than that of Union Security," it reduced a 20:1 ratio to a 12:1 ratio.

A fourth label (in addition to "low," "moderate" and "high") for the degree of reprehensibility, "significant," was introduced in Patel v. Patel, 708 So. 2d 159, 163 (Ala. 1998) to describe an uncle's defrauding of his nephew in the purchase of a house and to provide a basis for the affirmation of a 2.6:1 ratio of punitive to compensatory damages.

The only empirical conclusion that can be drawn from these ten holdings is that when the Alabama Supreme Court puts no label on the degree of reprehensibility, as it has done in the majority of its post-Gore-U.S. decisions, the ratio of punitive damages to compensatory damages can range from 1:1 to 492:1 (see Table 2).

**The Ratio: There Are No Precise Measurements**

The necessity of analyzing the ratio of punitive damages to compensatory damages gives an initially logical or formulaic appearance to the measurement of punitive awards. The Alabama court has not developed, however, a predictable formula for arriving at a constitutionally appropriate ratio. It has refrained from doing so in furtherance of a stated policy goal. Specifically, the Alabama court has explained that it will not adopt a precise measurement by which a defendant could know in advance the total amount of punitive damages to which it might be subject for the doing of a particular act.

We reject the easy answer of adopting one ratio that would apply to all and would therefore give a wrongdoer precise notice of the penalty that his misconduct might incur. To do so would frustrate the purpose of punitive damages, which is to punish and deter a defendant's misconduct.

Gore-Ala., 701 So. 2d 507, 514 (Ala. 1997).

The apparent rationale for this avoidance of precise notice is one predicated on economics. In theory, a fixed, predictable fine for specific conduct may be treated as a cost of doing business. If the benefit of engaging in the prohibited activity exceeds its cost, even a cost enhanced by the fine, that fine will be ineffective to deter the conduct. For example, if one can sell enough cars by defrauding the buyers to generate profits that are in excess of the profits that would be incurred without the fraud, even after deducting the cost of the punitive damage awards, then the punitive award has not created an incentive to cease defrauding the buyers. If one has no idea, however, how high the fine may go, one cannot safely engage in this practice.

Whether this rationale accurately reflects behavior in the marketplace is subject to debate by economists. See A. Mitchell Polinsky & Steven Shavell, *PunitiveDamages: An Economic Analysis*, 111 Harv.L.Rev. 869 (1998). Whether or not such a policy of creating deterrence through uncertainty is ultimately beneficial, however, does not change that it is undeniably at odds with the stated goal of the U.S. Supreme Court in Gore-U.S., which was to further the fair notice component of due process by creating predictability with regard to punitive awards.

As was demonstrated in Section I and in Table 2, the ratio of punitives to com-
pensions cannot, in these ten opinions, be correlated with the degree of reprehensibility of the defendant's wrongful conduct. A further look at Table 2 suggests that there is, as yet, no limit to the punitive:compensatory ratio inherent in the post-Gore rulings of the Alabama Supreme Court. In this context, there are two competing ideas expressed in various of these ten opinions, but neither has been adopted in an actual holding endorsed by a clear majority.

One proposal, championed by Justice Gorman Houston in his concurrence in the result of Gore-Ala. (701 So.2d at 521-22), would use a 3:1 ratio as a benchmark, only to be exceeded in certain defined circumstances. This idea has been remarked on favorably by Justice See (in his concurrence in part and dissent in part in Johnson and his dissent in Spereau) and by Justice Maddox (by his joining in See's dissent in Spereau), as well as by Chief Justice Hooper (who

<table>
<thead>
<tr>
<th>CASE</th>
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<th>PUNITIVE AWARD</th>
<th>PARTICIPATION OF JUSTICES</th>
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<tbody>
<tr>
<td>FOREMOST2</td>
<td>Fraud claims against homeowner's insurer for misrepresentation about premiums and suppression of fact that coverage for adjacent structures was optional.</td>
<td>Plaintiff 1: $7,500,000 reduced to $175,000. Plaintiff 2: $7,500,000 reduced to $173,000.</td>
<td>Author: H Concurring: H, M, K, A, Sh, S Concurring in Result: C Dissenting: B</td>
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<tr>
<td>GORE3</td>
<td>Fraud claim against car maker for failing to disclose pre-sale repair of paint scratch.</td>
<td>$2,000,000 reduced to $50,000.</td>
<td>Per Curiam Concurring: Sh, K, B, A, C Concurring in Result: H, H, M Rejected: S</td>
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<tr>
<td>SPIVEY4</td>
<td>Bank defrauded borrower by disbursing proceeds from construction loan to creditors of borrower not involved in the construction project.</td>
<td>$500,000 affirmed.</td>
<td>Author: H Concurring: A, Sh, C, B Concurring in Result: M, S, H Not participating: K</td>
</tr>
<tr>
<td>HILLCREST5</td>
<td>Building lessor defrauded lessee by misrepresenting extent of parking spaces available to lessee in operation of hair salon.</td>
<td>$130,000 reduced to $90,000.</td>
<td>Author: C Concurring: A, Sh, K, H Concurring/Dissenting: B Dissenting: H, M, S</td>
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<tr>
<td>UNION SECURITY6</td>
<td>Sales agent represented that insured would be covered on credit life policy even though agent misrepresented to insurer health problems of insured and knew that discovery of health problems would void coverage.</td>
<td>$2,000,000 reduced to $1,900,000.</td>
<td>Author: B Concurring: A, Sh, H, K, C Dissenting: H, M, S</td>
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<tr>
<td>DAISEY JOHNSON7</td>
<td>Insurance agent defrauded insured by selling her unnecessary Medicare coverage.</td>
<td>$5,000,000 reduced to $3,000,000.</td>
<td>Author: Sh Concurring: A, K, C, B Concurring/Dissenting: H, H, S</td>
</tr>
<tr>
<td>SPEREAU8</td>
<td>Auto manufacturer defrauded purchasers of dealership by failing to disclose poor financial performance of other, similar dealers.</td>
<td>$6,000,000 reduced to $1,767,000.</td>
<td>Per Curiam Concurring: H, Sh, K, C, A Dissenting: M, H, B Rejected: B</td>
</tr>
<tr>
<td>WILLIAMSON9</td>
<td>Insurance company defrauded sales agent by refusing to pay commissions.</td>
<td>$2,000,000 reduced to $1,750,000.</td>
<td>Author: C Concurring: Sh, K, H, K, M, H, B, S Not Participating: A</td>
</tr>
<tr>
<td>TALENT TREE10</td>
<td>Employee of personnel service was defrauded by employer who manipulated her sales figures to reduce her commissions.</td>
<td>$2,000,000 reduced to $1,600,000.</td>
<td>Author: Sh Concurring: A, K, C, H Concurring in Result: M, B Concurring/Dissenting: H, M, B Not Participating: S</td>
</tr>
<tr>
<td>PATEL11</td>
<td>Purchaser was defrauded by seller regarding potential profitability of hotel.</td>
<td>$225,000 affirmed.</td>
<td>Author: C Concurring: H, A, Sh, H, K, B Concurring in Result: M, S</td>
</tr>
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FOOTNOTES
1. The nine justices of the Supreme Court of Alabama who participated in these decisions were Chief Justice Hooper (H) and Justices Houston (H), Maddox (M), See (S), Shores (Sh), Almon (A), Kennedy (K), Butts (B) and Cook (C).
5. Hillcrest Center, Inc. v. Rane, ___ So.2d ___ (Ala. August 1, 1997).
10. Talent Tree Personnel Serv., Inc. v. Flenor, 703 So.2d 517 (Ala. 1997).
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<td>Misrepresentation: Damages small and entirely economic in nature.</td>
<td>468:1</td>
<td>37:1</td>
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<td></td>
<td>(appears slight)</td>
<td>Suppression: Concealment of facts probably was not actionable at the time it occurred.</td>
<td>624:1</td>
<td>50:1</td>
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<td></td>
<td>Case involved only economic damage, making economic status of plaintiff relevant (economic injury to well-off plaintiff is not as reprehensible as economic injury to poor plaintiff). Case did not involve reckless disregard for health and safety. The Court says these facts show a “lesser degree” of reprehensibility, but does not specify what it is “lesser” than.</td>
<td>10,647:1</td>
<td>488:1</td>
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<td></td>
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<td>10,941:1</td>
<td>492:1</td>
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<td>GORE</td>
<td>“lesser”</td>
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<td>500:1</td>
<td>12.5:1</td>
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<td>(then what?)</td>
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<tr>
<td>SPIVEY</td>
<td>Unspecified</td>
<td></td>
<td>1:1</td>
<td>1:1</td>
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<tr>
<td>HILLCREST</td>
<td>Unspecified</td>
<td></td>
<td>2.8:1</td>
<td>2:1</td>
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<tr>
<td>UNION SECURITY</td>
<td>High</td>
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<td>?</td>
<td>?</td>
</tr>
<tr>
<td>DAISEY JOHNSON</td>
<td>Higher than</td>
<td></td>
<td>20:1</td>
<td>12:1</td>
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<tr>
<td></td>
<td>Union Security</td>
<td></td>
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<tr>
<td>SPEREAU</td>
<td>Moderate</td>
<td>Degree of reprehensibility, though ultimately labeled “moderate,” is discussed as “high,” but not high enough to warrant a $6,000,000 punitive award. It is deemed to be this high because even though it involved only economic injuries to sophisticated plaintiffs (buyers of an auto dealership), the amount of economic damage involved was great enough to potentially ruin the plaintiffs.</td>
<td>3.5:1</td>
<td>1.06:1</td>
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<tr>
<td>WILLIAMSON</td>
<td>Low</td>
<td></td>
<td>8:1</td>
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<tr>
<td>TALENT TREE</td>
<td>Unspecified</td>
<td></td>
<td>6.67:1</td>
<td>5:1</td>
</tr>
<tr>
<td>PATEL</td>
<td>Significant</td>
<td>Family member’s taking advantage of relatives in hotel transaction and misrepresenting profitability was “significantly reprehensible.”</td>
<td>2.6:1</td>
<td>2.6:1</td>
</tr>
</tbody>
</table>

FOOTNOTES
1. "Beginning ratio" indicates the status of the ratio of punitive damages to compensatory damages with which the Alabama Supreme Court was confronted at the outset of the current review of the case. In some cases, the Court is reviewing a jury verdict for the first time. The jury’s verdict may or may not have been reduced by the trial court before the appeal. In other cases, the Alabama Supreme Court may already have reduced the verdict once, but is now reviewing the case a second time on order from the U.S. Supreme Court (these cases are indicated with an asterisk).
2. "Ending ratio" means the ratio of punitive damages to compensatory damages included in the Alabama Supreme Court’s final ruling. In other words, if the ratio has been reduced on appeal, this figure is what it has been reduced to.
3. This case involves four different counts: one each of misrepresentation and suppression for two different plaintiffs.
4. The ratio for this case are presented in this order: (1) Plaintiff Parham’s misrepresentation claim; (2) Plaintiff Massev’s misrepresentation claim; (3) Plaintiff Parham’s suppression claim; (4) Plaintiff Massev’s suppression claim.
joined in See's dissent in Johnson).

The other plan, announced in the per curiam opinion in Gore-Ala., would generally cap punitive damages, regardless of their ratio to compensatory damages, at 10 percent of the "net worth" of the defendant. This idea was endorsed by Justices Shores, Almon, Kennedy and Butts (via their concur-
cences in the per curiam opinion of Gore-Ala.), and per-
haps also by Justice Cook, though his concurrence in the
Gore-Ala. opinion is not entirely clear on this point.

As with so much in this area of law, however, the proponents of each of these plans have not advanced them on a consistent basis. Justice Houston authored the majority opinion in Foremost in which a ratio of 492:1 was deemed appropriate.

Justice Houston has also concurred in a ratio of 3:1 (Talent Tree Personnel Services, Inc. v. Pleenor, 703 So. 2d 917 (Ala. 1997)) without specifying any circumstances that would justify a ratio higher than 3:1. The "10 percent" plan has fared no better. In Hillcrest Center, Inc. v. RonE, So. 2d (Ala. August 1, 1997), authored by Justice Cook and concurred in by justices Almon, Shores, Houston and Kennedy, an award of much greater than 10 percent of the defendant's net worth (43 percent) was upheld in a case in which the plaintiff's complaint was that the defendant misrepresented how many parking spaces would be available for the plaintiff's hair salon if it leased space in a particular commercial building (the reprehensibility of this act was unspecified). The ratio of punitive to compensatory damages deemed fair in this case was only 2:1, however, leaving it within Justice Houston's benchmark approach.

Rather than applying either the "10 percent" rule or the "3:1" benchmark, both of which have been expressly discussed in the opinions, the court appears to be merely reducing awards by arbitrary percentages once it has made a finding that the award is excessive. A fair number of these reductions are very roughly in the neighborhood of one-half, though a look at the change in ratios of the ten cases as illustrated in Table 2 (what the ratio was before the court heard the appeal and what the ratio became as a result of the court's ruling) shows three clear exceptions: (1) Gore-Ala., in which a 500:1 ratio was reduced to a 12.5:1 ratio (but remember that the first time the Alabama Supreme Court had this case, before it went to the U.S. Supreme Court, the Alabama court cut the punitive award from $4,000,000 to $2,000,000, exactly in half) (see BMW of North America, Inc. v. Gore, 646 So. 2d 619 (Ala. 1994)); (2) Foremost, in which a ratio as high as 10,941:1 was reduced to 492:1; and (3) Talent Tree, in which a 6.67:1 ratio was reduced to 5:1 (but, again, the original jury verdict was 10:1 before it was reduced by the trial court, so the ultimate effect of the appeal process was to cut the jury's punitive verdict in half). Patel is a particularly interesting opin-
ion in this regard, in that the Alabama Supreme Court
affirmed an award of $225,000 in punitive damages which itself was arrived at by the trial court's cutting in half the original jury verdict's award of $450,000. In other words, the Supreme Court of Alabama merely adopted the post-verdict review and remittitur of the trial court, which was a reduction of the verdict by half.

In the other cases, we see changes such as the reduction of a 20:1 ratio down to 12:1 (Johnson), and a reduction of 2:8:1 down to 2:1 (Hillcrest), both of which are reductions of not quite half, alongside reductions of 8:1 down to 3:1 (American Pioneer Life Ins. Co. v. Williamson, 704 So. 2d 1361 (Ala. 1997)) and 3:51 down to 1.06:1 (Spearu), both of which are cuts of more than half.

Once again, however, the results in these cases provide no real predictability of how future awards of punitive damages will be analyzed on appeal. Perhaps more importantly, these results have nothing to say about the initial stage of the process, the jury trial. Even if a defendant had a rough notion that an "excessive" verdict might be significantly reduced on appeal, there is nothing in the post-Gore decisions from which that defendant could reasonably predict what amount of punitive damages might result from the trial court's instructions to the jury. In other words, one-half of an indefinite number is still an indefinite number.

"Comparable Sanctions": The Least-Used Guidepost

In deciding if a defendant received fair notice of the amount of punitive damages that might be assessed against it, the U.S. Supreme Court emphasized in Gore-U.S. the role of "comparable sanctions." In other words, if there is a civil or criminal statute that applies to the same acts as those which form the basis of a common-law cause of action, the reviewing court is to compare the maximum statutory fine to the punitive damage award. The simplest example of this is Alabama's Deceptive Trade Practices Act, Ala. Code §§ 8-19-1 through 15 (1993), which creates a civil fine for certain types of dishonest behavior in a business context. The victim of such an act has a choice of suing under the common law for fraud, or for violation of the trade practices statute. The maximum civil fine for a single violation under the statute is $2,000. The act also authorizes a private action in which "up to three times any actual damages" (§ 8-19-10) may be recovered. Based on the language of § 8-19-10(a)(2), it seems clear that the amount over and above the actual damages, or an amount equal to twice those damages, is intended as a punitive award. The punitive damage awards at issue in the first ten cases decided since Gore-U.S., however, are all much higher than $2,000 and most are more than twice the amount of compensatory damage (see Table 2).
Many of them are in the millions of dollars.

The “comparable sanction” guidepost has had no discernible effect on the computation of the awards in the majority of the ten Alabama cases. Instead, in most instances, the Alabama court has held that if the statutory fine to which it would otherwise compare the award of punitive damages is lower than the award, it cannot be meaningfully employed in the post-verdict analysis. Only if the statutory fine is already large enough to justify either the jury’s award or the amount to which the court intends to remit that award will the court use it for comparison. This was made clear in the per curiam opinion in Gore-Ala., which states:

under the Alabama Deceptive Trade Practices Act, Ala. Code 1975, § 8-19-5, the maximum sanction for committing a fraudulent act against an Alabama consumer is a meager $2,000. Because the legislature has set the statutory penalty for deceitful conduct at such a low level, there is little basis for comparing it with any meaningful punitive damages award, particularly where the defendant is wealthy and the profit gained from the fraudulent act is substantial.

Gore-Ala., 701 So. 2d at 514. Thus, the court turned away from the question of whether anything in Alabama’s positive law would put a defendant on notice that it might be punished by an award in the millions of dollars, and addressed instead the unrelated (though potentially important) question of whether the legislature had set the civil fine for deceptive trade practices at an amount sufficient to deter a wealthy transgressor of that statute.

Justice Cook’s majority opinion in Sperau proceeds similarly:

As we recognized in BMW II, a $2,000 statutory penalty for deceitful conduct is so meager that there is little basis for comparing it with any meaningful punitive damages award.

Sperau, 708 So. 2d at 122.

Despite the treatment of this question in the above examples, in six of the ten post-Gore cases, the “comparable sanction” guidepost is not employed at all. Only in Foremost, Sperau, Talent Tree, and Patel is this guidepost actually included in the analysis of the case.

In Foremost, Justice Houston noted with respect to one of the four counts being analyzed that the jury’s award of punitive damages was 3,000 times greater than the maximum civil fine available for the defendant’s conduct. The amount of punitive damages to which the court reduced the award, however, was still 750 times greater than the civil fine.

In Sperau, authored by Justice Cook, has there been any meaningful use of this guidepost. In reducing a punitive damage award from a 3.5:1 ratio to an approximately 1:1 ratio, Justice Cook noted that a comparable statutory action would have allowed a total award roughly equal to the total amount of punitive and compensatory damages at which he arrived after analyzing the other guideposts. Because his total was similar to what would have been mandated by the statute, Justice Cook concluded that the defendant, under that guidepost, could not be said to have been denied fair notice of the potential amount of punitive damages that might be affirmed by an appellate court in Alabama.

In Talent Tree, however, Justice Shores noted that the defendants’ conduct was analogous to the crime of theft by deception, which carries potential imprisonment of two to 20 years. She further concluded that potential imprisonment of 20 years should put a defendant on notice that it might have to pay as much as $1,500,000 in punitive damages in a civil case. She did not, however, explain why the potential for prison time could not justify the original award of $3,000,000, or the award of $2,000,000 which followed the trial court’s remittitur.

In perhaps the most puzzling of these analyses, Justice Cook summarily concluded in Patel that “[t]here are no comparable civil or criminal penalties for similar conduct” (708 So. 2d at 163) even though the case dealt with common-law fraud, which he had already compared to the Deceptive Trade Practices Act in Sperau. Indeed, in Sperau Justice Cook specifically discussed the attributes of the Deceptive Trade Practices Act that would have made it a useful comparison to the facts present in Patel. In Sperau, Justice Cook quoted from Ala. Code § 8-19-5(20), which declares unlawful the following:

In connection with any seller-assisted marketing plan, either misrepresenting the amount or extent of earnings to result therefrom . . .

Sperau, 708 So. 2d at 121. The fraud in Patel, though not in the context of a “seller-assisted marketing plan,” concerned misrepresentations of the extent of earnings that would result from the operation of a hotel which the defendant sold to the plaintiff. In addition, the sanctions available under this statute would have come very close to justifying the total punitive award affirmed within Justice Cook’s opinion. The compensatory damages in Patel were $85,908. A treble damage award under the Deceptive Trade Practices Act would have yielded a total damage award of $257,724 plus attorney’s fees. The total award affirmed by Justice Cook was $310,908, $225,000 of which was punitive (a ratio of 2.6:1). A ratio of 2.6:1 is not so far from 2:1 that one could, with any predictable degree of success, claim a lack of fair notice that a jury might moderately exceed the statutorily-sanctioned punitive award. Regardless, Justice Cook chose not to compare the statutory remedy to the common-law action for fraud despite having done so in Sperau.

Sperau therefore remains the sole exception to a body of opinions in which the Alabama Court has simply not utilized the “comparable sanction” guidepost in any way that could provide predictability.

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Conclusion

Despite the U.S. Supreme Court's decision in Gore, and despite the Supreme Court of Alabama's first ten opportunities to create from Gore a predictable legal system regarding punitive awards in civil cases, one cannot yet reliably foresee the maximum punitive verdict that might be rendered in any given case. The only real lesson of the first ten cases is that it is better for a civil defendant to appeal an award of punitive damages than to accept it. The odds appear quite high that a large punitive award in a non-wrongful death case will be reduced significantly on appeal, though the reasons for this may not always be clear. This uncertainty appears to be a conscious choice of public policy—the favoring of deterrence over predictability. For better or worse, however, the Supreme Court of the United States has enshrined predictability in the temple of due process. It has not yet made a similar icon of deterrence. The potential conflict of these two goals suggests that Gore-U.S. may not be the last statement that our nation's highest court is called on to make in the arena of punitive damages.

Barbara C. Miller v. Alabama State Bar
ASB 93-393, 94-086, 95-192

ALABAMA SUPREME COURT ORDERS
S.C. #1950330, 1960912

January 9, 1998
"(W)e conclude that Miller should be unconditionally reinstated...immediately."

March 13, 1998
"(T)his Court became convinced that Miller had unduly been required to suspend her practice." "We cannot come to the conclusion that Miller deliberately defied an order of this Court."

June 10, 1998
Refund of Court costs denied.

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James Reeves, Trustee,
SOUTHTRUST ACCT. #57-493-080

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Alabama State Treasurer Lucy Baxley encourages parents of children from birth to ninth grade to consider enrolling them in Alabama's Prepaid Affordable College Tuition (PACT) program. This program is administered as a division of the State Treasurer's Office and presently has an enrollment of 45,000 children. Since its inception in 1989, assets of the trust fund have grown to over $470,000,000.

Laws establishing this program provide an opportunity for parents, grandparents or other sponsors to participate by purchasing a contract with PACT. Benefits of the contract provide full payment of tuition and mandatory fees for four years of undergraduate school at any public college or university in the state. If the student elects to attend a private or out-of-state school, PACT will pay the amount of the weighted average cost of tuition and fees charged by the public four-year institutions in Alabama.

Enrollment is open only one month each year. Enrollment for 1998 will be available for the month of September only. Cost for enrolling this year varies from $7,949 for an infant to $11,061 for a student entering ninth grade in the fall. Payment can be made in one lump sum or by an extended payment plan.

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Making Your Appeals More Appealing:
Appellate Judges Talk About Appellate Practice

by Susan S. Wagner

In a perhaps unprecedented gathering, 14 appellate judges met in May to talk about effective appellate advocacy at the 1998 Business Torts and Antitrust Institute, cosponsored by the Alabama State Bar Business Torts and Antitrust Section and ABICLE. The panel consisted of seven active justices and one former justice of the Alabama Supreme Court, the entire Alabama Court of Civil Appeals, and one representative of the Eleventh Circuit Court of Appeals. In a program packed with notable speakers and timely issues, the appellate panel was the highlight event.

Hot topics among the Alabama judges were “deflection” from the Alabama Supreme Court to the Court of Civil Appeals under Ala. Code § 12-2-7(6) and discretionary review of Alabama Court of Civil Appeals decisions by writ of certiorari to the Alabama Supreme Court. Other topics included effective writing and oral argument, interlocutory appeals, common mistakes, and miscellaneous procedural tips.

Supreme Court Relief Act. The “deflection” provision of Ala. Code § 12-2-7(6), which Presiding Judge William Robertson calls the “Supreme Court Relief Act,” was enacted in 1993. It permits the Alabama Supreme Court to transfer cases previously within its exclusive jurisdiction to the Alabama Court of Civil Appeals. In fact, with the exception of utility rate cases, bond valuation proceedings, and bar disciplinary proceedings, the supreme court may in its discretion transfer any case, unless the court determines that the case “presents a substantial question of federal or state constitutional law” or “involves a novel legal question, the resolution of which will have significant statewide impact.” Many practitioners who had never practiced before the court of civil appeals may now find a large portion of their appeals being decided in the first—and often last—instance by the court of civil appeals.

Missed Opportunity. The Alabama Supreme Court deflects roughly 29 percent of its cases, and the deflected cases make up about 30 percent of the caseload of the court of civil appeals. On the other hand, only about 10 percent of petitions for writ of certiorari to the court of civil appeals are granted. Thus, the best chance of assuring that a case is heard by the Alabama Supreme Court may be to resist deflection in the first place.

The time to oppose deflection is before it happens. Judge Sharon Yates noted that Form 24, the docketing statement for appeals to the Alabama Supreme Court, contains a question addressed to the appropriateness of deflection. It asks, “If you believe this case should not be transferred to the Court of Civil Appeals [pursuant to Ala. Code § 12-2-7], please state with specificity the reasons(s) why it should not be transferred . . . .” Unfortunately, appellants’ attorneys often delegate the task of completing Form 24 to secretaries and paralegals who do not know the significance of this question. Appellees’ counsel rarely take any stand on deflection, but may make their views known through a letter to the clerk of the Alabama Supreme Court.

Appellate Rule 39—the Silent Killer. Justice Mark Kennedy reports that an “overwhelming number” of applications for certiorari to the Alabama Supreme Court are procedurally defective because they fail to comply with Ala. R. App. R. 39. These applications are denied because the court cannot reach the merits. Justice Kennedy said that the order denying certiorari in these cases generally does not cite the procedural irregularity as the reason for the denial. Justice Gorman Houston reports counting 20 certiorari petitions in a single conference.
of the supreme court that were denied because the lawyers failed to comply with Rule 39 of the Alabama Rules of Appellate Procedure.

The critical requirements of Rule 39 are described in Ex parte Save Our Streams, Inc., 541 So. 2d 549 (Ala. 1989). Under Rule 39(a), an application for rehearing in the court of civil appeals must first be filed. According to Judge Sharon Yates, the most common mistake in applying for rehearing is the failure to comply with Rule 39(k) relating to motions to adopt additional or corrected factual. This failure effectively precludes review by the Alabama Supreme Court. A common mistake in seeking certiorari is in failing to satisfy the requirement of Rule 39(c)(4) for specificity in alleging that the court of civil appeals' decision conflicts with other controlling law.

Other Mistakes that Matter. Justice Harold See pointed out that because failure to file a notice of appeal within the time set forth in Ala. R. App. P. 4 is jurisdictional, such mistakes as filing in the wrong court or attempting to file by fax can result in the dismissal of an appeal. With respect to papers to be filed in the appellate courts, Justice See also noted that they are “deemed filed” under Ala. R. Civ. P. 25(a) on the day of mailing if “certified, registered, or express mail of the United States Postal Service” is used, but not if they are sent by Federal Express or any other overnight courier service. Thus, an application for rehearing sent by Federal Express on the due date will be dismissed as untimely.

Justice See noted that it is the litigants' responsibility to get the record filed and to make sure that it is complete. Counsel should personally review the appellate record, including exhibits, in the trial court to be sure nothing is omitted. Judge John Cramley suggested that counsel should make sure, in cases with a preliminary hearing, that all of the transcripts make it into the record.

Where no transcript of the proceedings is available, Ala. R. App. P. 10(d) permits the filing of a “statement of the evidence or proceedings from the best available means, including the appellant's recollection.” Judge Roger Monroe stated that without a transcript or Rule 10(d) statement, the appellate court cannot reverse on the basis that the decision is not supported by the evidence. If no evidentiary hearing has been held, Judge Cramley suggested being sure that the absence of a hearing appears of record.

Don't Make Me Cry. Chief Justice Perry Hooper's advice for oral argument:

Don't make a jury argument;
Stay at the podium;
Don't spread yourself too thin; and
Be prepared to answer questions from the court.

According to Justice Gorman Houston, the Alabama Supreme Court hears oral argument in only 10 percent of the cases. Counsel can expect that at least one justice—the one to whom the case is assigned—has thoroughly studied the case, briefs, and record and needs help in writing an opinion. This justice will have written and circulated to the other justices a bench memorandum in which the facts, issues, standard of review, and contentions of the parties are set forth. Justice Houston explained that the court is looking for:

A factual summary distilled into a few sentences;
A “dialogue with the court, not a monologue to the court”;
No jury speeches, lectures, personal attacks on opposing counsel, or overstatements;
A logical analysis;
Eye contact;
Courtesy and honesty; and
A complete understanding of the law pertinent to all the issues.

**How To Write the Opinion.** On the topic of brief writing, former Justice Terry Butts agreed that the court does not want a jury argument, saying, “Please don’t ‘wave the flag’ or ask the court to ‘send a message.’” Justice Butts also advised:

Avoid legalese;
Write in the active voice;
“If it can be said in ten words, don’t say it in 11,”
Don’t put an issue before the court and then fail to develop it so that the court has to do your research for you;
Don't make arguments in footnotes;
Don't “endlessly chronicle well-established points of law,” such as the standard of review in summary judgment cases;
Cite only recent cases unless an older case is more notable authority;  
Don't discuss cited cases without explaining how they apply 
to your case;  
Don't misquote or misrepresent the holdings of cases;  
Make the brief friendly and easy to read;  
Bind the brief so that it lies flat; and  
Break for paragraphs frequently.

Justice Houston said that in preparing briefs, he would first 
write "the best opinion that I think my client could possibly get" to "make sure that it will write that way" and then would 
brief from that opinion. He suggested that if the law is against 
you, cite Justice Shores' statement in Jackson v. City of 
Florence, 320 So. 2d 68, 73 (Ala. 1975), to try to get the court 
to change the law.

As strongly as we believe in the stability of the law, we 
also recognize that there is merit, if not honor, in 
admitting prior mistakes and correcting them.

Justice Kennedy suggested that it might not help your 
rehearing application to argue that the original opinion 
"shocks the conscience," is "the worst thing I've ever read," or 
"cannot be the law."

Justice Janie Shores said that the court is looking for help 
from the lawyers, explaining that the Alabama Supreme Court 
handles more than 1,700 cases per year, compared with 100 
cases decided by the United States Supreme Court. According 
to Justice Shores, "Some firms can complicate any case." She 
strongly suggested that in the statement of the case, only the 
critical events be outlined, not the date of each pleading, 
motion, and ruling.

A Really Bad Brief. Judge William Thompson reminded us 
that there are many fine books and articles written about how 
to write good briefs. He chose instead to provide "12 Steps for 
Writing a Really Bad Brief":

1. Totally disregard rules 28, 31 and 32 of the Alabama 
Rules of Civil Procedure. Following these rules will only 
lead you to file the requisite number of copies of a timely 
and technically correct brief.
2. Don't worry about time constraints. Wait until your 
opponent files a motion to dismiss for your failure to 
timely file a brief and then file your brief the next day.
3. Include numerous eye-catching typographical and 
grammatical errors interspersed with a multitude of 
misspelled and misused words.
4. Never miss the opportunity to confuse your reader 
with a few misplaced modifiers or poor pronoun 
placement. For example, one we saw recently was, 'My client 
could not see the judge because he was in jail charged 
with Driving Under the Influence.'
5. Confuse the facts by using 'Appellant' and 
'Appellee' instead of the parties' names. For example, 
"The Appellant told the Appellee that the Appellant's 
land, which previously was owned by the Appellee's 
mother would be sold to the Appellee when the 
Appellee paid the Appellant the purchase price agreed 
upon by the Appellee and Appellant."
6. Misquote, or better yet, don't even cite legal authority 
which supports your argument on a point of law. 
Simply use words like 'I conclude,' 'I believe' or 'the 
court must' to get around this technicality.
7. In your statement of facts, include only those facts 
favorable to your client. The judges will have no 
problem with your attempts to deceive the court and will 
likely not even notice the inconsistencies between your 
brief and that of your opponent.
8. Include every issue, fact and argument you can 
think of, even if they weren't raised at the trial court 
level and the chances of succeeding on these points is 
extremely unlikely. This will serve to beef up your brief 
and make for extremely tedious reading.
9. Do not cite to the record in your brief. However, if 
by chance you slip up and do so by accident, make sure 
you reference the incorrect page number and send the 
judge on a wild goose chase.
10. Excessive humor, sarcasm and cliches are definite­ 
ly to be included.
11. Don't miss an opportunity to cast aspersions on 
the intelligence, motives, or integrity of the opposing 
attorney.
12. Try to include something insulting about the 
court in your brief. For example, tell them that you've 
researched their opinions and have found that they 
consistently, unfairly rule against people like your

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New Commissioner Orientation

The annual commissioners' orientation for incoming new members of the Alabama State Bar Board of Bar Commissioners was held July 9 in Montgomery. Members of the ASB staff presented the one-day orientation which included a slide presentation highlighting functions and program operations of the bar. New ASB commissioners are:

William I. Grubb, II, 3rd Circuit, Eufaula; Ernestine S. Sapp, 5th Circuit, Tuskegee; W. Scott Donaldson, 6th Circuit, Place No. 1, Tuscaloosa; Calla J. Collins, 13th Circuit, Place No. 4, Mobile; Thomas J. Methvin, 15th Circuit, Place No. 4, Montgomery; Charles A. Langley, 24th Circuit, Fayette; Homer W. Cornett, Jr., 26th Circuit, Phenix City; and Roy W. Williams, Jr., 32nd Circuit, Cullman.

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client. Or you may want to take the lead from the Texas attorney you may have read about in the ABA Journal, who described the Texas Supreme Court as ‘one of the four horsemen of the apocalypse’ and its justices as ‘nine nutty professors.’ I feel sure he’ll prevail.”

**Extraordinary and Interlocutory.** Justice Hugh Maddox stated that extraordinary writs make up approximately 12 percent of the Alabama Supreme Court’s calendar and are often used by the court to review arbitration and class action rulings. Appeal by permission under Ala. R. App. P. 5 is rarely used. Justice Maddox suggested that summary judgments sometimes are used, with the trial court’s cooperation, as a method of interlocutory review on a dispositive issue of law.

While the rules prescribe no time limit for the filing of mandamus petitions, the court may not be impressed that a petition filed 42 days after an adverse ruling is the sort of emergency that merits extraordinary relief. Last-minute petitions to delay trial are not well received.

Judge Robertson recommended that if the Alabama Court of Civil Appeals denies a writ of mandamus, the losing party should file a new petition in the Alabama Supreme Court under Ala. R. App. P. Rule 21(e), rather than an application for rehearing in the court of civil appeals.

**What Else You Should Know About the Court of Civil Appeals.** Presiding Judge William Robertson explained that court of civil appeals’ cases are randomly assigned to individual judges by a “draw pool.” The court of civil appeals holds an internal “motion docket” each Tuesday to keep motions and extraordinary writs from “falling through the cracks.” If a motion or writ is an emergency, the court will respond immediately. Otherwise, motions usually are acted upon within 14 days. Extraordinary writs remain on the motion docket until ruled on or placed in the “draw pool” for preparation of an opinion.

Judge Monroe noted that the Alabama Court of Civil Appeals rarely grants oral arguments because of its heavy case load. Because the court will hold cases slated for oral argument until it gets a full calendar, their disposition may be delayed.

An **Extraordinary Epiphany.** The sole representative of the Eleventh Circuit Court of Appeals, Judge Ed Carnes, addressed effective speech and writing. He suggested that lawyers pay heed to the wisdom of Winston Churchill, who said, “Short words are best and the old words when short are best of all.”

Judge Carnes also told of John Newton, an 18th-century English slave ship captain turned abolitionist and preacher, who is remembered chiefly because “one of the songs he wrote is such a powerful statement about his own past and his deeply felt religious faith . . . that it has become the most popular Christian hymn ever written. It has endured for more than two centuries, having been translated into many languages, and is sung by millions of people every year.” The song is “Amazing Grace.”

Judge Carnes mused, “Why is that hymn so powerful and moving? Of course, John Newton had much to work with, because he had a real message to deliver about his past, his conversion, and his faith. Having something to say is essential to effective writing in briefs and in hymns. ‘Amazing Grace’ has six verses, but a total of only 148 words. The average word length is four letters. There are only two three-syllable words in the song — ‘amazing’ and ‘already’ — and more complicated than that. ‘The old slave trader turned preacher wrote with simple, direct, powerful words.’

‘How fortunate we are that John Newton was not an attorney,’” Judge Carnes said. “Think about it. If he had been, instead of writing ‘Amazing grace, how sweet the sound that saved a wretch like me,’ he might have written:

‘Oh, extraordinary religious epiphany, which was not unwelcome inasmuch as it induced a state of spiritual transcendence for an allegedly not unneeded party, such as the undersigned.’

“It is hard to imagine singing those words at a funeral, and there is little chance they would have lasted for more than 200 years.”

Judge Carnes then challenged the audience to translate the following legalese into a famous line from a “down-home, bayning-at-the-moon, done-me-wrong” country song:

“Your patent predisposition for indiscriminate carnality will invariably lead to self-inflicted mental anguish, as well as to self-incriminating gestures, words, and deeds.”

When Justice See guessed Hank Williams’ “Your Cheatin’ Heart” (“Your cheatin’ heart will tell on you . . . .”), Judge Carnes said that it worried him that Justice See was able to get it right.

Judge Carnes summarized his advice: “So, if you’re in trial or on appeal because your client has a cheating heart, just remember to write and speak with amazing grace.”

Questions?

Justice Janie Shores told us to call or come by the clerk’s office for answers to tricky procedural questions. The personnel are knowledgeable and anxious to help. Judge Crawley echoed this sentiment with respect to the court of civil appeals, but added: “If the phone is busy, go read the rules.”

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*The Alabama Lawyer*  **SEPTEMBER 1993 / 325**
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Reinstatements

- On May 26, 1998, Elberta lawyer Andrew Wilson Hayes was reinstated on the roll of the Alabama Supreme Court as an attorney authorized to practice law in the courts of Alabama. [Pet. No. 98-002]
- On January 9, 1998 Huntsville lawyer Barbara C. Miller was reinstated on the roll of the Alabama Supreme Court as an attorney authorized to practice law in the courts of Alabama. [Pet. No. 97-007]
- Huntsville attorney Joe N. Lampley was reinstated to the practice of law by order of the Disciplinary Board of the Alabama State Bar effective May 19, 1998. [Pet. No. 98-04]

Notices

- Notice is hereby given to Charles Timothy Koch of Mobile, Alabama that he must respond to the charges in disciplinary files ASB No. 97-090(A) and ASB No. 97-110(A) within 30 days from the date of this publication (September 15, 1998). Failure to respond shall result in further action by the Office of General Counsel. [ASB No. 97-090(A) and ASB No. 97-110(A)]
- Notice is hereby given to Theodore Richard Pearson of Birmingham, Alabama that he must respond to the charges in disciplinary file ASB No. 96-313(A) within 30 days from the date of this publication (September 15, 1998). Failure to respond shall result in further action by the Office of General Counsel. [ASB No. 96-313(A)]
- Notice is hereby given to Carey W. Spencer, Jr., who practiced law in Sturbridge, Massachusetts and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated June 23, 1998, he has 60 days from the date of this publication (September 15, 1998) to come into compliance with the Mandatory Continuing Legal Education requirements for 1997. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 98-19]
- Notice is hereby given to Kenneth H. Millican, who practiced law in Hamilton, Alabama and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated June 23, 1998, he has 60 days from the date of this publication (September 15, 1998) to come into compliance with the Mandatory Continuing Legal Education requirements for 1997. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 98-27]
- Notice is hereby given to Carlos Rae Allen, Jr., who practiced law in Homewood, Alabama and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated June 23, 1998, he has 60 days from the date of this publication (September 15, 1998) to come into compliance with the Mandatory Continuing Legal Education requirements for 1997. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 98-1]
- Notice is hereby given to Leland L. Price, who practiced law in Knoxville, Tennessee and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated June 23, 1998, he has 60 days from the date of this publication (September 15, 1998) to come into compliance with the Mandatory Continuing Legal Education requirements for 1997. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 98-9]
- Notice is hereby given to Kenneth H. Millican, who practiced law in Hamilton, Alabama and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated June 23, 1998, he has 60 days from the date of this publication (September 15, 1998) to come into compliance with the Mandatory Continuing Legal Education requirements for 1997. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 98-27]
**Suspensions**

- **Gadsden attorney John David Floyd** pled guilty before the Disciplinary Board of the Alabama State Bar to a violation of Rule 3.4(a), which provides that a lawyer shall not "unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value" and to a violation of Rule 4.1(a), which provides that a lawyer shall not knowingly "make a false statement of material fact or law to a third person." Floyd was ordered suspended from the practice of law in the State of Alabama for a period of 91 days with the imposition of said suspension to be held in abeyance pending successful completion of a one-year probationary period. As a condition of probation, Floyd was ordered to serve a 30-day suspension from the practice of law in the State of Alabama effective June 13, 1998. Other conditions of probation were ordered. In July 1996, the respondent attorney was retained to represent a criminal defendant who had been charged with two counts of criminal trespass in the third degree and one count of unlawful possession of a controlled substance. The defendant’s arrest for criminal trespass in the third degree was based on the fact that he had been banned from Gadsden Housing Authority property and that his name was published on a banned list maintained by the Gadsden Housing Authority for use by the Gadsden Police Department. The search incident to the defendant’s arrest for criminal trespass in the third degree led to the charge of possession of a controlled substance. Although a plea agreement in the matter had been negotiated between the respondent attorney and the deputy district attorney prior to the date of trial, on the morning of the trial, the respondent attorney requested to be heard on a motion to suppress. Prior to the hearing on the motion to suppress, the respondent attorney represented to the deputy district attorney that the defendant’s name was not on the Housing Authority notice of trespassing “banned list” and, therefore, his arrest and incident search were unlawful. The respondent attorney produced a copy of the “banned list” which did not contain the defendant’s name. When the police officers involved in the arrest produced their copy of the Housing Authority banned list, it was discovered that the Housing Authority banned list produced by the respondent attorney had been altered to delete his client’s name. In determining discipline in this case, the board considered the fact that the altered document was not submitted as evidence in any proceeding and that Floyd had no prior discipline. [ASB No. 97-201(A)]

- **Birmingham attorney Charles Leroy Howard, III** was suspended from the practice of law in the State of Alabama for a period of 91 days, effective July 16, 1998, by order of the Supreme Court of Alabama. This suspension is based upon Howard’s guilty pleas before the Disciplinary Board of the Alabama State Bar to violating rules 1.15(a) and (b) [safekeeping property], and 1.1 [competence], Alabama Rules of Professional Conduct. In ASB No. 95-214, Howard pled guilty to violating rules 1.15(a) and (b), A.R.P.C., based upon his participation with a client and other individuals in a series of improper and ill-advised investment schemes. Howard, acting as escrow agent for the group, solicited in excess of $200,000 from a single investor. The investment for which these funds were initially solicited never materialized. It was later discovered that Howard had co-mingled these funds with attorney and personal funds and that he failed to account for these funds when called upon to do so by the investor. The Disciplinary Board ordered that Howard make restitution to the investor in the amount of $201,000. In ASB No. 96-170, Howard provided legal advice and counsel to the White Hall Downtown Development Authority in connection with bond issues to be issued by the Authority. Howard, acting as bond counsel, gave certain advice and made certain recommendations to the City of Whitehall in connection with this bond issue. This advice was improper and resulted in violations of the Securities Act of 1933 and the Securities and Exchange Act of 1934. Howard admitted that he had no legal training or experience with such matters. Howard’s conduct resulted in the filing of a civil action by the Securities and Exchange Commission which was settled in February 1997 by entry of a consent order in favor of the Securities and Exchange Commission. [ASB Nos. 95-214 and 96-170]

- **Jackson attorney Larry Wayne Keel** was suspended from the practice of law in the State of Alabama for a period of 89 days, effective June 17, 1998. On June 16, 1998, Keel appeared before Panel I of the Disciplinary Board of the Alabama State Bar and admitted to violating rules 7.1(a) and (b) and 7.3, Alabama Rules of Professional Conduct. Keel obtained the name and telephone number of two individuals who were involved in an automobile accident in Evergreen, Alabama. On the day after the accident, Keel contacted one of the individuals by telephone for purposes of soliciting the prospective client to engage his services in the matter. Neither of the individuals who were contacted by Keel knew him or had ever used his services and neither had requested that he contact them. During his conversation with these prospective clients, Keel made several representations to these individuals concerning the results his firm could achieve on their behalf and benefits available to these clients through his firm, and compared his firm’s services as superior to those of other lawyers. In imposing the discipline in this case, the Disciplinary Board specifically noted that the severity of discipline imposed was substantially mitigated by Keel’s acknowledgment of his wrongdoing and acceptance of full responsibility for his misconduct in addition to the fact that Keel had been sued by the individuals for invasion of privacy which resulted in Keel’s
agreement to pay the individuals $10,000 to settle their claims and substantial adverse publicity regarding Keel's conduct in the local media. No prior discipline was considered. [ASB No. 97-54(A)]

- Birmingham attorney Charles Eugene Caldwell was suspended from the practice of law in the State of Alabama for a period of 45 days effective July 7, 1998. Caldwell was found guilty of violating Rule 1.5(f), which provides that "without prior notification to and prior approval of the appointing court, no lawyer appointed to represent an indigent criminal defendant shall accept any fee in the matter from the defendant or anyone on the defendant's behalf." Caldwell was also found guilty of violating Rule 8.4(c) which provides that it is professional misconduct for a lawyer to "violate or attempt to violate the

Rules of Professional Conduct" and found guilty of violating Rule 8.4(c) which provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The board's finding of guilt was based upon an incident where Caldwell was acting as appointed counsel for a defendant in the District Court of Jefferson County, Alabama, in connection with two pending felony drug cases. At the time of his appointment, Caldwell requested that the defendant pay him an additional $600 for his services. Subsequent to the appointment and their initial meeting, Caldwell advised this defendant that there was nothing he could do for him until he paid the $600. In a subsequent meeting between Caldwell and his client, his client expressed his displeasure with Caldwell's continued request for an additional $600. According to the defendant, Caldwell then advised him that the $600 was for bond and that he was negotiating with the district attorney regarding a plea. When Caldwell's demands were made known to the district court, the court relieved Caldwell of his appointment and ordered a hearing on the allegations. Immediately prior to the hearing, Caldwell advised the court that he had just been retained by the defendant and that he had recently accepted the defendant's income tax refund check of approximately $591 for his services. During the hearing the defendant initially indicated that the whole matter was a misunderstanding and that his earlier statements to the court regarding Caldwell's repeated requests for more money were untrue. However, upon further examination, the defendant admitted that the first statement that he gave was true and that he had changed his testimony because Caldwell had met with him prior to the hearing, coached him concerning their agreement, and advised him that his statement to the district judge had jeopardized his chance for probation and that he should advise the court that his initial statement was untrue. [ASB No. 95-57]
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United States Supreme Court

White defendant has standing to attack anti-black bias in Grand Jury selection
Campbell v. Louisiana, Case No. 96-1584, U.S., 66 U.S. L.W 4263 (1998). White defendants have the requisite legal standing to challenge indictments against them based on alleged discrimination against blacks in the selection of grand jury members. The United States Supreme Court ruled by a seven-to-two vote that any white defendant can "raise an equal protection challenge to discrimination against black persons in the selection of his grand jury." Justice Anthony M. Kennedy, writing for the Court, observed, "Regardless of his or her skin color, [a defendant] suffers a significant injury in fact when the composition of the grand jury is tainted by racial discrimination."

The Court's holding on the equal protection issue represented an extension of the doctrine of third party standing, which the Court applied in Powers v. Ohio, 499 U.S. 400 (1991), in the context of alleged discrimination in the exercise of peremptory challenges to petit jurors.

The defendant, who was convicted of murder, based his claim of discrimination on evidence that in the Louisiana parish where he was indicted, no black person had served as a grand jury foreperson from 1976 to 1993, even though blacks made up approximately 20 percent of the parish's registered voters. The Louisiana Supreme Court held that he had no standing to raise a Fourteenth Amendment challenge because he was not a member of the racial group who suffered the alleged discrimination.

Outside of the core holding in Campbell, the Court's extension of the three-part test set out in Powers v. Ohio for third-party standing, was expressly adopted, as follows:
1. A defendant must have suffered an injury in fact;
2. The defendant must have a close relationship to the excluded jurors; and
3. There must be some hindrance to the excluded juror's assertion of their rights on their own.

The Supreme Court left for another day the problem of defining a defendant's due process rights in the context of grand jury selection. The Court held only that, "a defendant has standing to litigate whether his conviction was procured by means or procedures which contravene due process." The Court again made the point that the defendant's claim did not concern the foreperson's "performance of his duty to preside," but rather his performance as a grand juror.

Attorney-Client privilege extends beyond the grave
Swidler and Berlin v. United States, Case No. 97-1192, U.S. (1998). The United States Supreme Court ruled that the attorney-client privilege extends beyond the grave. The Supreme Court, on June 25, 1998, held, in a six-to-three decision, that a grand jury subpoena does not trump the attorney-client privilege after a client's death. Independent counsel Kenneth Starr had sought to review the notes of a conversation that White House Deputy Counsel Vincent Foster had with a lawyer shortly before committing suicide in 1993.

Chief Justice Rehnquist, writing for the Court, observed, "...The attorney-client privilege is one of the oldest recognized privileges for confidential communications. Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel."

The case involved three pages of notes taken by James Hamilton, a Washington lawyer whom Foster visited at home nine days before his death. Starr contended that he needed the notes as part of his inquiry into whether Clinton administration officials lied to conceal Mrs. Clinton's alleged role in the 1993 firing of the White House travel office employees.

After noting that "there is no clear authority for the proposition that the privilege applies differently in criminal and civil cases," the Chief Justice added, "balancing ex post the importance of the information against client interest, even limited to criminal cases, introduces substantial uncertainty into the privilege's application. For just that reason, we have rejected the use of a balancing test in defining the contours of the privilege."

Habeas Corpus: Gun-Using suspects can rescind guilty pleas
Bousley v. Brooks, Case No. 96-6516, U.S. (1998). Defendants who pleaded guilty to "using" a gun during a crime, in violation of 18 U.S.C. 924(c)(1), before a judicial decision significantly narrowed the federal law's scope, can move to withdraw their previously entered pleas of guilty.

In the 1995 decision, Bailey v. U.S., 516 U.S. 137 (1995), the Supreme Court held that prosecutors must show someone actively "used" a gun during a drug crime, by displaying or firing it before a conviction under the anti-gun law could be obtained. A drug trafficker, who secretly had a gun nearby in case of a confrontation, did not violate the law.

In a seven-to-two decision, Chief Justice Rehnquist wrote that a defendant who takes back his previously entered plea of guilty must show in a new habeas proceeding that he is actually innocent of the crime.

"Although his claim was procedurally
defaulted, petitioner may be entitled to a hearing on the merits of it if he makes the necessary showing to relieve the default.”

Punitive forfeiture and the Eighth Amendment’s excessive fines clause


The defendant, a California businessman, failed to report $357,144 hidden in his luggage on an international flight. Although the money was lawfully obtained and intended for lawful use, the Customs Service seized all the funds because the defendant failed to report it and then lied about it when questioned by Customs’ agents.

Writing for the five—four majority, Justice Thomas declared that certain forfeitures constitute punishment, and thus, violate the excessive fines clause of the Eighth Amendment if they are “grossly disproportional to the gravity of the defendant’s offense.” The Court held that the forfeiture of the respondent’s entire $357,144 would be grossly disproportional to the gravity of his offense. His crime was solely a reporting offense. Thus, for the first time, the Supreme Court used the yardstick of proportionality to determine whether or not the forfeiture would be grossly disproportional to the gravity of the offense. The Court critically focused the issue as follows:

A punitive forfeiture violates the excessive fines clause if it is grossly disproportional to the gravity of the offense that it is designed to punish. Although the proportionality principle has always been the touchstone of the inquiry, see e.g., *Austin, supra* at 622-623, 113 S.Ct. at 2812-13, the clause’s text and history provide little guidance as to how disproportional a forfeiture must be to be excessive. Until today, the Court has not articulated a governing standard. In deriving this standard, the Court finds two considerations particularly relevant. The first previously emphasized in cases interpreting the cruel and unusual punishment clause is that judgments about the appropriate punishments belong in the first instance to the legislature... The second is that any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise. Because both considerations counsel against requiring strict proportionality, the Court adopts the gross disproportionality standard articulated in *Solem v. Helm*, 463 U.S. 277.

Recent Bankruptcy Cases and New Legislation

Bank in preference action loses $37.5 million on letter of credit seizure

*Matter of F.A. Bergner*, (7th Cir. April 9, 1998), 140 F.3d 1111, 32 B.C.D. 536. Bank One issued a standby letter of credit for two beneficiaries. The debtor, as the account party, committed to reimburse the issuer any sums drawn whether at the time the draft was presented by a beneficiary or thereafter, and in the event of a default, the debtor was to pay issuer the full amount of the drafts presented under the letters of credit. Thus, the issuer bank would hold the money, without interest, and be in a position to honor any drafts.

Additionally, the bank was granted a security interest and lien on any amount on deposit with it. The court described the arrangement as a tripod, one leg being the standby letter and agreement between the bank and debtor, the second being the letter of credit agreement between the issuer and the beneficiaries, and the third being the obligations (secured by the letters of credit) from the debtor to the beneficiaries. The debtor became in default to the beneficiaries and, within 90 days of bankruptcy, paid the bank $31.2 million in order to protect the bank in honoring drafts under the letters of credit. After filing chapter 11, the debtor claimed a voidable preference against the bank. The bankruptcy court ruled in debtor’s favor but did not allow interest. The case ultimately reached the Seventh Circuit on appeal.

The bank, in its defense, contended (1) there was no transfer; (2) if there were a transfer, it was not because of an antecedent debt; and (3) the debtor’s estate was undiminished by the transfer. All of these contentions were rejected by the appellate court, which held there was no new value given, as there was no subsequent credit granted. The court reasoned that the different obligations were independent of each other, as the bank was legally bound to pay the beneficiary according to the terms of the letter of credit regardless of what debtor did in satisfying the bank as the issuer. Because any alleged perfection of a common law security interest in the debtor’s bank account could not have occurred until Bank One assigned control of the bank account, such control occurred within the 90-day period, and thus was not within the exception. The court also ruled against the bank’s claim of a security interest in the bank account of the debtor. Finally, adding to the woes of Bank One, the Seventh Circuit held the debtor to be entitled to pre-judgment interest, and determined as an abuse of discretion the bankruptcy court’s reasoning that interest would be a windfall to the debtor.

Comment: The opinion of the court appears logical. However, because of the amount involved unless the case is settled, I assume it is on the way to the United States Supreme Court.

Bankruptcy Judge Jack Caddell held that proceeds of payment bond, as contrasted with performance bond, are property of estate

*Matter of Monarch Tile*, Bktcy N.D. Ala., Feb. 12, 1998, 319 B.R. 622. In May 1994, the Alabama Department of Transportation (ALDOT) issued a permit to Monarch Tile to construct a turnout lane along a public highway. The permit required a bond or certified check for $10,000 “to guarantee the faithful performance of this permit...” Upon satisfactory completion, the money or bond was to be returned to Monarch, but otherwise to be used to complete the project.

Monarch filed a cash bond, and subcontracted the job to David Michael for $8,500. Michael satisfactorily completed the job but, prior to receiving payment,
Monarch filed a chapter 11 bankruptcy. Michael filed an adversary complaint against debtor and ALDOT to obtain payment. Judge Caddell ruled in favor of debtor and ALDOT, stating that the “Little Miller Act” in §39-1-1 (1975) of the Alabama Code pertained only to payment, while the transaction in the instant case was a performance bond for the benefit of ALDOT to insulate construction of the turnpike lane, and not a payment bond for Michael’s benefit. He also held that although sympathetic, §105 of the Bankruptcy Code does not allow a bankruptcy judge to do equity without limits.

Comment: Although this appeared to be a close question, upon inquiry, I found there was no appeal.

New Legislation

The Donation Protection Act, signed June 19, 1998, immediately effective, amends §§ 544, 548, 707, and 1325 of the Bankruptcy Code by ameliorating the strict law on avoidable transfers with relation to charitable contributions. The limitations in the Act are that the transfer does not exceed 15 percent of gross annual income of the debtor for the year in question, or is consistent with prior practices of the debtor in making contributions, that it must qualify as a charitable contribution under the Internal Revenue Code, is made by a natural person to a “qualified religious or charitable entity” under the IRC, and is in cash or a financial instrument as defined in the IRC. The law is intended to prevent suits against charitable and religious organizations to set aside gifts, which includes tithing in the organizations. However, transfers intended to hinder, delay, or defraud remain vulnerable to attack.

Wilbur G. Silberman

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

David B. Byrne, Jr.

David B. Byrne, Jr., is a graduate of the University of Alabama, where he received both his undergraduate and law degrees. He is a member of the Montgomery firm of Robison & Beiser and covers the criminal decisions.

Technology Exchange Project

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Firms are asked to donate equipment that is in good working order and that is capable of using Windows 3.11. A firm that does not have equipment to donate can still help with the project by volunteering time of its information services staff to serve as technical support for legal services programs.
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The following listing is a random sampling of in-state programs approved for credit by the Alabama Mandatory CLE Commission on the printing deadline date for this issue of The Alabama Lawyer. Many other in-state programs, as well as programs nationwide, are continually being evaluated and approved. All are identified by sponsor, location, date and specialty area. For a complete listing, contact the MCLE Commission office at (334) 269-1515, ext. 156 or 158, or you may view a complete listing of current, approved programs at www.alabar.org.

### SEPTEMBER

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<td>Mediation and Conflict Management</td>
<td>Huntsville Community Mediation Center of the Better Business Bureau</td>
<td>Huntsville</td>
<td>20.0</td>
<td>$275</td>
<td>(205) 532-1425</td>
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<td>Domestic Violence Bench Manual Training Seminar</td>
<td>Montgomery Alabama Judicial College</td>
<td>Montgomery</td>
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<td>(334) 242-0300</td>
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<td>Elder Law</td>
<td>Birmingham Alabama Bar Institute for CLE</td>
<td>Birmingham</td>
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<td>(800) 627-6514</td>
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<td>Developments and Trends in Health Care Law</td>
<td>Birmingham Cumberland Institute for CLE</td>
<td>Birmingham</td>
<td>6.5</td>
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<td>(800) 888-7454</td>
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<td>11-12</td>
<td>How to Get and Keep Good Clients</td>
<td>Auburn Auburn University Hotel and Conference Center</td>
<td>Auburn</td>
<td>5.0</td>
<td>$225</td>
<td>(334) 321-5816</td>
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### OCTOBER

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<td>Divorce Mediation Training</td>
<td>Mobile Atlanta Divorce Mediators, Inc.</td>
<td>Mobile</td>
<td>40.0</td>
<td>$895</td>
<td>(404) 378-3238</td>
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<td>Ninth Annual Bankruptcy Law Seminar—Bankruptcy Fundamentals</td>
<td>Birmingham Cumberland Institute for CLE</td>
<td>Birmingham</td>
<td>6.0</td>
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<td>(800) 888-7454</td>
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(Elizabeth Manley)
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40 Hours

October 22-24
Birmingham
Mediation Process & the Skills of Conflict Resolution
Litigation Alternatives, Inc.
(Troy Smith)
(800) ADR-FIRM
(888) ADRCLE3
22 Hours

Note: To date, all courses except those noted have been approved by the Center. Please check the Interim Mediator Standards and Registration Procedures to make sure course hours listed will satisfy the registration requirements. For additional out-of-state training, including courses in Atlanta, Georgia, call the Alabama Center for Dispute Resolution at (334) 269-0408.

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- LEGAL RESEARCH, WRITING AND CONTRACT LEGAL SERVICES: Attorney (former federal law clerk). John R. Johnson, #205, 140 Robert Jamison Drive, Birmingham, 35209. Phone (205) 940-9953. No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.

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