

# Addendum

Published by the Alabama State Bar / [www.alabar.org](http://www.alabar.org)

## “THE JUDGE DIDN’T EVEN GIVE ME TIME TO CRY!”

How humor, style and an “inability to whisper” made one Huntsville trial lawyer a legend

Most folks know Jeff Smith as a grandfather, a father, a retired attorney, and a good man. What they need to know, for history’s sake, for the ages, is that he was one of the finest attorneys Huntsville, indeed the state of Alabama, ever had, and he was a great orator in the time when oration could win the case.

Smith, 92, lives in Huntsville near his daughter Cathy and her family. He attended Cumberland Law School when it was in Lebanon, Tennessee, finishing in 1933. In the 1940s, he was the county solicitor, today’s district attorney, and he did the job alone.

“He had four murder cases on the same day,” recalled Harvey Morris, who practiced with Smith from 1966 to 1976. “He didn’t ask for continuances or look around to see who else was handling them. He just took them one by one. The first one was tried and got life. The other three all pleaded guilty so they wouldn’t get the same thing.”

Smith was widely known as an outstanding trial lawyer, and because trials were held in courthouses that were not air-conditioned, during the days when windows were opened, his closing arguments were heard across the courthouse square.

People sat on benches and listened to closing arguments, says Huntsville defense attorney Fred Simpson, who later was district attorney and tried cases against Smith.

“When I came to Huntsville, I wanted to be Jeff Smith,” Simpson said. “He was the last of the Clarence Darrow-type orators. He was legendary. You could hear him a block away, and the courthouse would just about close down.

You would hear, ‘Jeff is going to make a closing argument,’ and everything would stop.”

Simpson recalled that Smith won over

jurors with his Southern gentlemanly style. “He’d say, ‘He’s from a good family. He had a good Mama, a good heart.’ Then he would say, ‘bless their heart,’ and people would feel for the defendant.”

Harvey Morris recalls Jeff this way. “One time, he got his handkerchief out, bent over, obviously getting ready to wipe his eyes and cry, and he got set down by a federal judge who gave him two minutes to wind up. They set time limits back then,” Morris recalled. “Jeff sat down next to me and said, ‘Dang, Harvey. That wasn’t enough time to cry.’”

Both Morris and Simpson remembered Smith having a terrible “inability to whisper.” He would lean over to his partner, Morris, while an opposing witness was on the stand and say, “You know he’s not telling the truth, Harvey,” loudly enough that everyone in the courtroom could hear it, particularly the jury. When the judge called him on it, Morris said, Smith said, “I’m sorry, judge, I was just talking to Harvey. I didn’t mean for anyone to hear.” But, Morris explained, you knew he did. And it was effective.

Simpson said of his idol, “I wish we had had video or audio recordings back then. Folks are missing a great part of history not having that to look back on and appreciate.”

—Reta A. McKannan, Huntsville



With open source software, all of the computer code for a program is freely available to developers to make modifications and fix bugs.

# An Office Suite Alternative

Pay Microsoft's fee or opt for software that's free

**M**icrosoft recently changed the way it licenses updates to its office application software. Now to get updates, users must sign multi-year con-

tracts and make annual payments. This volume licensing program has caused some consternation, especially among businesses because it can dramatically increase software costs. There is a free alternative, though—Open Office.

## Open Office

Open Office is a collection of four different software programs: word processor, spreadsheet, presentation manager and drawing program. These programs resemble the components in Microsoft Office such as Word, Excel and PowerPoint. Each Open Office program can handle files created in the Microsoft programs and save files in Microsoft formats as well. The programs may be downloaded at [www.openoffice.org](http://www.openoffice.org).

## How good is something free?

The word processing program, Writer, duplicates most features found in Microsoft Word and adds a few. For example, in its latest version it can save a document in the "pdf" format required for the Adobe Acrobat Reader, which may be useful if you want to create a document that cannot be easily modified by someone else.

I used the presentation program to modify a PowerPoint presentation and then exported the presentation to a format that could be posted on the Internet with much less trouble than when I tried to do so with PowerPoint.

## Will it be around for long?

Open Office is derived from the Star Office program that is now owned by Sun Microsystems. Sun donated a substan-

tial part of the computer code to Star Office to the Open Office organization to use in creating an "open source" office suite. With open source software, all of the computer code for a program is freely available to developers to make modifications and fix bugs.

Making open source software available is a growing movement among software developers and is represented by programs such as the Linux operating system ([www.linux.org](http://www.linux.org)) and the Mozilla browser ([www.mozilla.org](http://www.mozilla.org)),

among others. It is significant that Microsoft has labeled open source software as a threat to Mom, apple pie and the American way of life. Consequently, they must be doing something right. Because support for Open Office does not rest on one person, it is likely that these programs will be around and updated as long as there are computer geeks in the world.

## Alabama legal forms

You can find lots of legal forms on the Internet (see, e.g., [www.alabar.org/lomap](http://www.alabar.org/lomap)). Unfortunately, what you find may be too much or not enough. One Alabama lawyer has attempted to get it "just right" by creating a collection of Alabama-specific forms in over 15 different areas of the law at [www.legalforms-al.com](http://www.legalforms-al.com). The forms are in standard word processing formats and may be previewed online so you can see what you would be getting. You can download either a specific set of forms or the entire collection for a small fee.

—Paul E. Toppins ([paul@toppins.com](mailto:paul@toppins.com)), Tuscaloosa



# An Independent Judiciary and the War on Terror

The terrorist attacks of September 11, 2001 prompted unprecedented action by the American executive and legislative branches of government to prevent similar future acts. The Congress quickly enacted The Patriot Act, granting the executive branch expansive authority to conduct the “War on Terrorism.”

There are many questions concerning how far government can proceed, consistent with the United States Constitution, in today’s America, without infringing upon our liberties to “protect” us. Civil libertarians assert that government must be limited by the Constitution during emergencies or the liberties of Americans will be unduly infringed in the process. Conservative Americans contend that extreme measures are necessary in our current emergency to provide individual security and preserve the American culture.

The competing positions concerning an appropriate contemporary role for government serve to establish the scope of the question; however, the difficult practical problem is to determine how to accommodate the conflict.

Few Americans will contend that government does not require adequate authority to protect us from the type of terrorist activities to which we have been subjected. Thus, the question becomes how much government intervention into the lives of Americans can be justified and how that balance of liberty protection, as opposed to liberty destruction, can be established?

Both the executive and the legislative branches of government politically reflect the concerns of Americans. The judicial branch of government in America is the least political of the three branches and, therefore, should be our individual liberty protector through decisions in cases properly before the courts for decision.

Judges are appropriately reluctant to refuse to follow legal precedent. Hence, national security precedent can effectively limit the judicial role in cases involving national security matters. Even so, independent judges, with cases

before them presented by competent lawyers serving the American culture, can continue to be a check on government power, even in emergency circumstances.

When government infringes upon liberties in America, the judicial branch will use a standard of review which is called the “compelling governmental interest test.” Such requires that government prove it has an interest which is greater than the interest infringed upon, and the regulatory law is narrowly tailored to promote only the compelling interest which can be proven. One should note that both the “compelling interest test” and the “narrow tailoring” decisions are of a subjective nature, allowing the exercise of judicial discretion.

While it is true that legal precedent controls how the trial judge should decide compelling governmental interest cases, it will be an exceptional precedent that totally controls the discretion of the trial judge in determining “compelling interest” and “narrow tailoring.”

Governmental activity, to the extent required to assure that our Constitution is not a suicide pact, is necessary and proper. These are trying times and the many liberties Americans enjoy must be protected, to the extent possible. Only the independent judicial branch of government, supported by an independent and competent bar, can serve as the measured limitation on government activity necessary to minimize the loss of American liberties as the executive and legislative branches seek to “protect” us. The substantive liberties of the American culture can be greatly diminished if the independent judicial branch of government blindly defers to the executive branch.

—Professor Charles D. Cole, Birmingham





# The Art of Not

## A humorous lesson not learned How to give the appearance of communicating with other lawyers without actually doing so

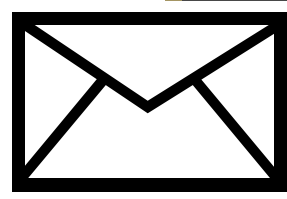
**W**e, the members of the noblest profession, who fancy ourselves as the great communicators of the nation, if not the world, who have counted among us the great orators history has known, such as Abraham Lincoln and Clarence Darrow, regretfully have invented and perfected “The Art of Not Communicating” among ourselves. Aided by the technological revolution, thought by some to increase ease of communication, but the use of which has been perverted by others, lawyers have become most adept at giving the appearance of communicating with other lawyers, without actually doing so. For those of you who are less adept at giving the appearance of communicating with other lawyers without actually doing so, or who believe it is your responsibility to actually communicate effectively with them, please read on for pointers on “The Art of Not Communicating.”

Ever have other lawyers call you about matters that just aren’t near the top of your priority list, or that may not even be on your priority list at all? In other words, you just don’t feel like you have the time or the interest to spend 15 minutes to discuss it with them. No problem! That’s what voice mail was invented for, wasn’t it? When the call comes in, either screen it through a receptionist who eventually puts the call through to your voice mail because you are in “deposition” or “court” or “away from your desk,” or use your voice mail as a screening device, taking no calls at the time they come in. The lawyer calling you will never think anything of it. After all, he or she will know that you sometimes have to be in deposition or in court, and will certainly understand that sometimes you have to be “away from your desk.”

But, that is only the first part of this scenario. You have to

give the appearance of returning the call. Again, voice mail to the rescue! Call back during lunch, very early in the morning or after hours and leave a voice mail message when the other lawyer isn’t there because of the odd hours. Now, if you should happen to get caught by the occasional lawyer who is in his or her office during these hours, just hang up, call back and ask the receptionist for the lawyer’s voice mail. The other lawyer will never know that he or she wasn’t actually on the phone or away from his or her desk when the call came in. Properly used, this clever use of voice mail can enable a busy lawyer to return all of the day’s calls in a few minutes, without actually having to communicate with the other lawyers.

Now that you have been taught the basic scenario, let’s go on to the more advanced techniques of using voice mail in



pursuit of “The Art of Not Communicating.” When the call comes in, have it answered initially by a recording that



# Communicating

## Learned in law school: The importance of communicating with Others is usually doing so



gives the lawyer calling a choice of extensions for all of the lawyers, paralegals and secretaries in your firm. If the calling lawyer lasts through the endless list of names, or can use the keys to spell your last name quickly enough to get connected, your system can then connect him or her to your voice mail. If you think this sounds a little cold, add to your voice mail message that if the calling lawyer needs to talk to someone immediately, he or she may call your secretary, #####, at extension number #####. Of course, when the lawyer calls your secretary's extension, he or she again will get a voice mail. At this point, the calling lawyer is even further removed from actually talking to you.

If you don't have voice mail capabilities or you think other lawyers may be catching on to your abilities for not communicating, there's always the U.S. mail. The mail has been used effectively for many, many years to avoid really communicating with other lawyers, even when there is a need to do so. For example, just think how often letters are written and sent through the mail to try to get an agreement on deposition dates, mediation dates, etc. One of the lawyers in a case will write four other lawyers in the case, suggesting deposition dates. The other lawyers will get the letter one to four days later, check their calendars, agree to a combination of dates that don't match with all four lawyers and let the first inquiring lawyer know by letters that arrive at the lawyer's office one to two weeks after the first inquiry was made. In the meantime, orders have come in from some court making the first lawyer unavailable on some of the dates he has suggested in his first letter. Even under the best of circumstances, it can take months to set a deposition at a convenient date using this method. But for pursuit of "The Art of

Not Communicating," such a deposition can usually be set within one day by the first lawyer having his secretary call the other lawyers' secretaries.

What happens if real communication with another lawyer starts nipping at your heels because there was a breakdown and the lawyer actually got you on the phone or you ran into the other lawyer at a bar function or on the street? It's time for the old bait and switch. Just tell the other lawyer that you have assigned whatever matter he or she is interested in to another lawyer in your firm. Some of the larger firms can effectively do this for months since they usually have three or four lawyers assigned to the case anyway. But, this will work for smaller firms also, who can always say that although both of the lawyers in the firm are working on the case, the particular item that is the subject of the inquiry is being handled by the other lawyer in the firm. Finally, if you are a partner in the firm, there is always the excuse that your associate was supposed to have taken care of the matter and obviously did not do so and that you will remind the associate about it.

Unfortunately, due to the lack of space only the basic principles of "The Art of Not Communicating" could be covered here. That is good, because this is one art form that should go the way of the dinosaurs. It is hoped that you will remember this article, not because it is the best written article you have read, or even within the top 10,000, but because the next time you are tempted to use one of these principles, this article may cause you to hesitate and attempt real communication. Just writing the article has already effected needed changes in my practice.

—Lloyd W. Gathings, Birmingham

## **Mandatory Continuing Legal Education Regulation Changes**

The following Regulation changes were approved by the Board of Bar Commissioners and became effective July 14, 2003.

### **REGULATION 4.2**

A list of organizations whose continuing legal education activities are presumptively approved for credit and the organization has paid the required annual sponsor fee of \$250 shall be compiled and published annually by the MCLE Commission. A list of approved sponsors is available upon request. Other organizations may be added to the list as their identities are confirmed by the commission by application and upon payment of an annual sponsor fee of \$250.

### **REGULATION 4.7**

Any organization that has not been designated an approved sponsor by the commission must pay an application fee of \$50 for each application submitted during a calendar year. This application fee must be attached to the application form for the application to be considered.

Attorneys who submit applications also must pay an application fee of \$25 for each application submitted during a calendar year. This application fee must be attached to the application form for the application to be considered. For more information, go to [www.alabar.org](http://www.alabar.org).

## **United States District Court, Northern District of Alabama, In Re: The Matter of the Reappointment of Paul W. Greene as a United States Magistrate Judge**

The current term of the office of United States Magistrate Judge Paul W. Greene at Birmingham, Alabama is due to expire January 20, 2004. The United States District Court is required by law to establish a panel of citizens to consider the reappointment of the magistrate judge to a new eight-year term.

The duties of a magistrate judge position include the following: (1) conducting most preliminary proceedings in criminal cases, such as initial appearances, bond and detention hearings, and arraignments; (2) the trial and disposition of misdemeanor cases; (3) conducting various pretrial matters and evidentiary proceedings on reference from the judges of the district court, including civil discovery and other non-dispositive motions; (4) conducting preliminary

reviews and making recommendations regarding the disposition of prisoner civil rights complaints and habeas corpus petitions; and (5) trial and disposition of civil cases upon consent of the litigants.

Comments from members of the bar and the public are invited as to whether the incumbent magistrate judge should be recommended by the panel for reappointment by the court and should be directed to: Perry D. Mathis, Clerk, U. S. District Court, Northern District of Alabama, Room 140, 1729 5th Avenue, N., Birmingham 35203. *Comments must be received by August 29, 2003.*

## **Appellate Mediation Skills and Techniques**

*(Sponsored by the Alabama Center for Dispute Resolution)*

The Alabama Supreme Court and the Alabama Court of Civil Appeals begin their confidential appellate mediation programs October 1, from 9 a.m. to 4 p.m., at the state bar. The cost is \$200 and six hours of CLE credit will be given. The courts will be supplying an approved list of trained appellate mediators to parties ordered to mediation.

A mediator must be currently registered on the Alabama State Court Mediator Roster to take this training; registration is limited to 60 mediators. Appellate mediators must agree to conduct up to two pro bono mediations per year.

Call the Alabama Center for Dispute Resolution at (334) 269-0409 to register.

## **Notice of and Opportunity for Comment On Amendments to the Rules of the U.S. Court of Appeals for the Eleventh Circuit**

Pursuant to 28 U.S.C. § 2071(b), notice and opportunity for comment is hereby given of proposed amendments to the Rules of the U.S. Court of Appeals for the Eleventh Circuit, and of proposed amendments to Addendum Three, Rules of the Judicial Council of the Eleventh Circuit Governing Complaints of Judicial Misconduct or Disability.

A copy of the proposed amendments may be obtained on and after August 4, 2003, from the Eleventh Circuit's Internet Web site at [www.ca11.uscourts.gov](http://www.ca11.uscourts.gov) or from the Office of the Clerk, U.S. Court of Appeals for the Eleventh Circuit, 56 Forsyth St., N.W., Atlanta, Georgia 30303 [phone: (404) 335-6100]. Comments on the proposed amendments may be submitted in writing to the Clerk at the above street address by September 5, 2003.

*Addendum* (USPS 013-915), the official newsletter of the Alabama State Bar, is published six times a year (December, February, April, June, August, October) by *The Alabama Lawyer* Board of Editors, P.O. Box 4156, Montgomery, AL 36101-4156. Contributions from members are welcomed and encouraged. Views expressed are those of the authors, not necessarily those of the board of editors, officers or board of commissioners of the Alabama State Bar.

Subscriptions: ASB members receive *Addendum* as part of their annual dues payment; \$15 of this goes to subscriptions for *The Alabama Lawyer* and *Addendum*. Copyright 2003. The Alabama State Bar. All rights reserved. Periodicals postage paid at Montgomery, AL.

Postmaster: Send address changes to *Addendum*, P.O. Box 4156, Montgomery, AL 36101-4156.

**2003 Editor:**

Susan S. DePaola, Montgomery

**2004 Editor:**

Gloria J. McPherson, Montgomery

**Associate Editor:**

Ashley Hamlett, Montgomery

**Technology Editor:**

Paul Toppins, Tuscaloosa

**Contributing Committee**

**Members:**

Gregory C. Buffalow, Mobile

Professor Charles D. Cole,  
Birmingham

Lloyd W. Gathings, Birmingham

Reta A. McKannan, Huntsville

# Secure Leave Rule— A Proposal

## Need some time off without losing your job? Read on

As a familiar request often goes, a deposition ought to be rescheduled or a trial postponed based on scheduling conflicts due to vacation or similar plans. No doubt many readers have experienced trial settings immediately after Thanksgiving, July 4th or New Year's. While this may have some benefit to the court to impose maximum pressure to get a case settled, and the tactic frequently works, it can interfere with an attorney's well-deserved time with family and related enjoyment of the holidays.

Usually, these requests for continuances due to vacation schedules or holidays are honored, based on an unwritten "lawyer vacation" rule. This custom, however, is likely to fall by the wayside, and suffer the same demise as many other informal practices of the bar have over the years.

A solution recently adopted in North Carolina and Florida permits an attorney to securely schedule time for family and vacation, without undue concern for the unpredictability of work schedules, court settings and the like. This concept is known as secure leave. The North Carolina Secure Leave Rule permits an attorney to designate up to three one-week periods for which he or she, in effect, is untouchable from the demands of courts and other attorneys. The North Carolina rule, entitled "Secure Leave Periods for



Attorneys," states that its purpose is in part: "to secure for the parties to actions and proceedings pending in the Superior and District Courts, and to the public at large, the heightened level of professionalism that an attorney is able to provide when the attorney enjoys periods of time that are free from the urgent demands of professional responsibility and to enhance the overall quality of the attorney's personal and family life, any attorney may from time to time designate and enjoy one or more secure leave periods each year as provided in this Rule."

It is suggested that this Rule, or a similar version, should be considered by the Rules Committee of the Alabama State Bar.

—Gregory C. Buffalow, Mobile

# The *Addendum* Experience

Do you have something to “Add” to the *Addendum*? We’re always looking for ASB members to write for us!

Interested? Here’s what you get:

- FAME** (You’ll actually have your name in print!)
- FORTUNE** (The *Addendum* staff has some jokers.

Sorry, there is no great fortune, but you do get to do a great service to your state bar!

- A FREE LUNCH** (There’s only one meeting a year to attend and we even feed you!)

Here’s what we get:

- ONE ARTICLE PER YEAR** (500 words, max, we promise!)

Name \_\_\_\_\_  
 Firm \_\_\_\_\_



Mailing Address \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 Fax \_\_\_\_\_  
 Phone \_\_\_\_\_  
 E-mail \_\_\_\_\_

Please help! Mail this form to Gloria J. McPherson,  
 2004 *Addendum* editor, Auburn University  
 Montgomery, P.O. Box 244023, Montgomery 36124-  
 4023 or fax it to (334) 244-3826.

Published by the  
 ALABAMA STATE BAR  
 P.O. Box 4156  
 Montgomery, Alabama



Periodicals Postage  
 Paid  
 Montgomery, AL