

# The Alabama Lawyer

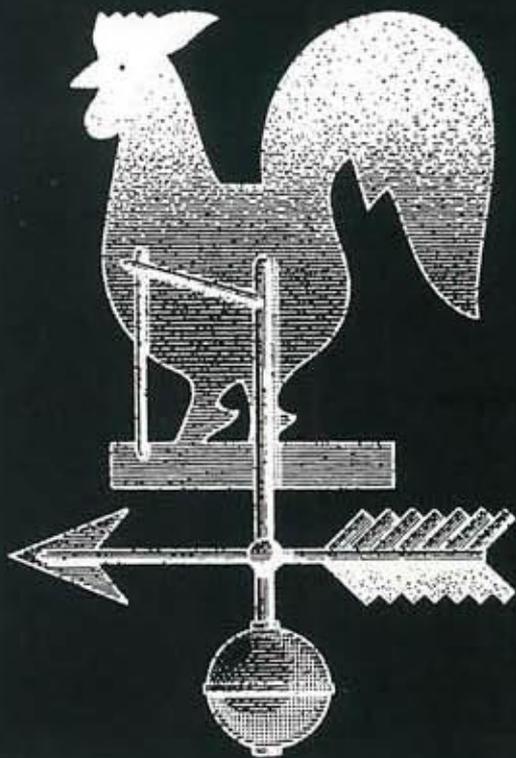
Vol. 58, No. 2

March 1997



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**The Tiger Turns 90—  
A Tribute To  
Martin Leigh Harrison**  
(page 103)



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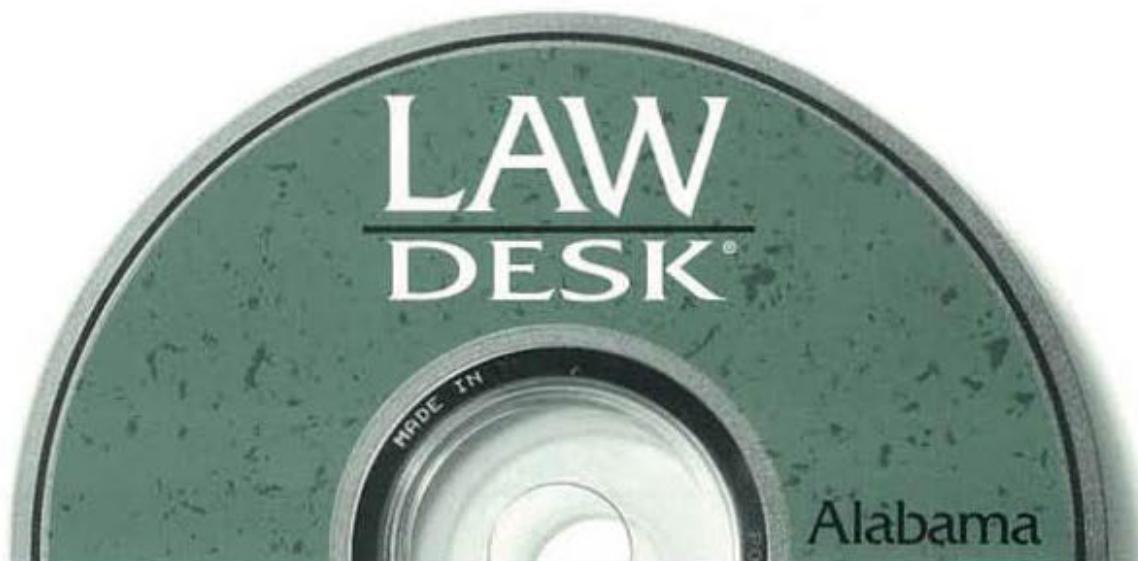
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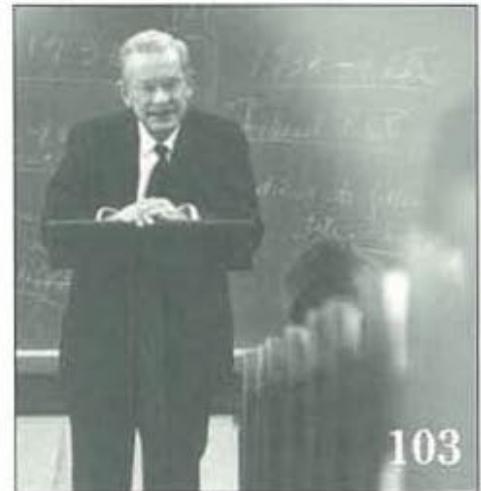
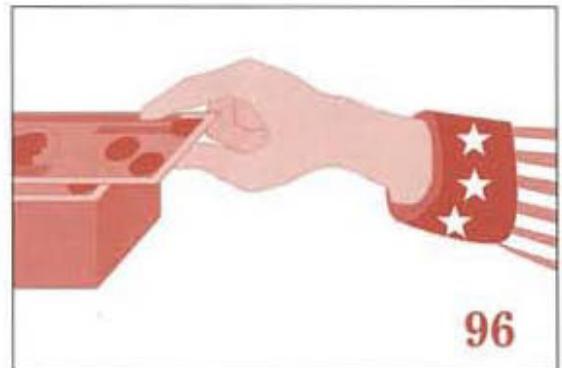
**On the Cover**

Jones School of Law, Montgomery, Alabama; see story on page 123.

—Photo by Paul Crawford, JD, CLU

## IN THIS ISSUE

TAXABILITY OF PUNITIVE DAMAGES By Glenda G. Cochran and John S. Campbell .....	96
THE TIGER TURNS 90— A TRIBUTE TO MARTIN LEIGH HARRISON By J. Rufus Bealle .....	103
CIVIL PROCEDURE UPDATE: A SURVEY OF RECENT CASE LAW INTERPRETING THE RULES By Sharon Donaldson Stuart and James R. Bussian .....	108
DEDICATION CEREMONY OF JONES SCHOOL OF LAW BUILDING By Gloria McPherson .....	123



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What's New . . .

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

(Continued on page 68)

# DEPARTMENTS

President's Page  
70

Executive Director's Report  
72

About Members, Among Firms  
74

Bar Briefs  
78

Building Alabama's Courthouses  
80

Legislative Wrap-Up  
86

Memorials  
88

Disciplinary Notice  
93

Recent Decisions  
101

Opinions of the General Counsel  
106

Young Lawyers' Section  
115

CLE Opportunities  
116

Classified Notices  
117

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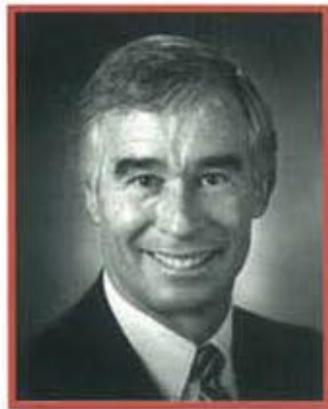
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## PRESIDENT'S PAGE

By Warren B. Lightfoot

# Non-Partisan Judicial Elections



Warren B. Lightfoot

**W**e are moving forward with the concept of merit selection-retention election of judges. On December 6 the board of bar commissioners unanimously reaffirmed the bar's position that election of judges should be nonpartisan. The board also, by majority vote, authorized me to appoint a committee of four plaintiff lawyers and four business/defense lawyers to study the merit selection-retention election concept and draft a proposed constitutional amendment.

I asked eight eminent lawyers to serve on this committee and to a person, they accepted. The lawyers were Joe Cassady of Enterprise; Fred Gray of Tuskegee; Larry Morris of Alex City; Tabor Novak of Montgomery; Jim Pratt, Stan Starnes and Marshall Timberlake of Birmingham; and Frank Wilson of Montgomery. I believe that our bar and our state is well represented by these distinguished practitioners and that if a solution to our election problems can be worked out, they will find a way to do it. I asked Frank Wilson to serve as chair, and this committee has been meeting and will continue to meet.

A number of lawyers support the idea of nonpartisan elections, but in my opinion that change does not go far enough. The Third Citizens' Conference on the Alabama State Courts, after exhaustively considering a number of proposals, reached two conclusions: first, that selection of judges for *vacancies* occurring during the term should be done by gubernatorial appointment. The Conference recommended a statewide judicial nominating commission for appellate vacancies, with individual circuits having the option to establish such commissions for trial court vacancies.

On the other hand, the Conference debated at length whether selection of

judges for *new terms* of office should be accomplished by merit selection-retention election or by nonpartisan election. They concluded that merit selection-retention elections should not be used for new terms of office and that both trial and appellate judges should be selected by nonpartisan election. This Conference was chaired by former Justice Oscar Adams and former Governor Albert Brewer, and their report was delivered to me on December 31, 1996, representing the culmination of over four years' work. Our state and our bar are indebted to the chairs and conferees for all their time and effort on our behalf.

The Conference made seven other specific recommendations for revisions to the Canons of Judicial Ethics:

1. No candidate for judicial office may personally solicit or receive directly any campaign contributions;
2. The solicitation and receipt of campaign funds may be handled only through a committee;
3. Such solicitation and receipt of campaign funds shall be limited to a specified time before and after the election date;
4. Limits should be placed on the amount of contributions from any one donor or from specified categories of donors;
5. The candidate's committee, or the candidate, shall maintain, for inspection and copying, a list of contributors of \$100.00 or more with respect to any primary, runoff and general election;
6. Candidates for judicial office shall be prohibited from announcing or advocating any specific judicial philosophy; and
7. There shall be established a system for prompt and expeditious consideration and resolution of complaints

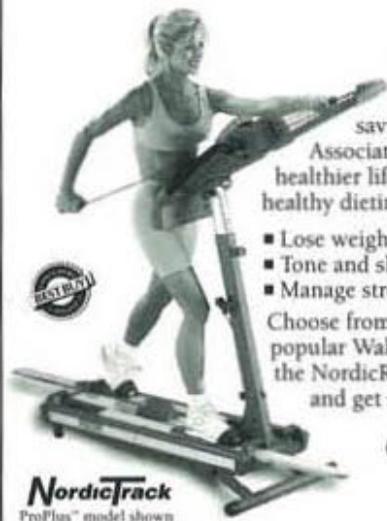
alleging violations of the provisions of the Canons applicable to the *conduct* and *financing* of campaigns for judicial office.

I expect more than one proposal to be introduced at the February Regular Session of the Legislature, including one or more relating to nonpartisan elections. The 26-member task force of judges appointed by Justice Hooper has also stated its preference for nonpartisan elections. I continue to believe, however, that even if such a change could be accomplished, it still would not go far enough to ensure that we never again allow judicial campaigning to degenerate into personal vilification. I have great confidence in the good will and ability of the eight lawyers who are presently working on the problem, and I still believe that our bar will provide leadership for the rest of Alabama as we move forward toward fundamental changes in our process. I ask for your support. ■

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## EXECUTIVE DIRECTOR'S REPORT

By Keith B. Norman

# The Client Security Fund Meeting Our Responsibility to the Public and the Bar



Keith B. Norman

The Alabama State Bar Client Security Fund was established by the Alabama Supreme Court in 1987. The purpose of the fund is to relieve or mitigate the monetary losses of clients caused by the dishonest conduct of active members of the bar in the practice of law. Like similar funds in 48 other states, the ASB Client Security Fund was established in recognition of the professional responsibility of lawyers to participate in the collective efforts of the bar to reimburse persons who have lost money or property as a result of the misappropriation or defalcation of another lawyer. The fund was patterned after model rules adopted by the ABA Standing Committee on Client Security Funds in the 1960s. This is a program in which all lawyers can take pride because it provides an important service to the public and helps improve the image of the profession.

The fund is primarily supported through a one-time assessment of \$100, paid by each lawyer holding an occupational license, and interest income. (Payment of the one-time assessment can be made in four annual installments of \$25.) In 1996, the CSF received \$110,800, of which \$49,825 came from assessments and \$39,852 from interest income. The remaining \$21,123 came from recoupments. As a condition of payment, CSF claimants are required to transfer to the bar any rights they may have against the lawyer and any third parties that may be liable for the loss. If a claim has been paid on behalf of a disbarred attorney, restitution is required before the attorney may be reinstated.

A client who wishes to file a claim with the fund must complete and submit an application for reimbursement with the Office of General Counsel.

Many times bar members assist claimants in preparing the application because of the actions of another lawyer. The Client Security Fund Committee is authorized to investigate each claim to determine whether it meets the requirements of a "reimbursable loss" and to recommend payment. The committee generally meets quarterly to review and act on claim reports. The dedicated members of the committee this year are: Chair **Dag Rowe**, Huntsville; Vice-chair **Michael Ballard**, Mobile; members **Lowell Womack**, Birmingham; **Lisa Hancock**, Guntersville; **Thomas Roundtree**, Auburn; **Woodford Dinning, Jr.**, Demopolis; and **Stewart O'Bannon, III**, Florence; Board of Bar Commissioners Liaison **Patrick Graves, Jr.**, Huntsville; and CSF Consultant **James Ward**, Birmingham. Staff Liaison are **Bonnie Mainor** and Assistant General Counsel **Robert Lusk**.

A claim may be filed by the "client" of an attorney for the loss of money or other property caused by a lawyer's dishonest conduct within an established lawyer-client relationship or while acting as a fiduciary in a matter related to the practice of law. "Dishonest conduct" includes wrongful acts committed by a lawyer against a client in the manner of a defalcation (i.e., theft), embezzlement or their wrongful taking of money or property. Such conduct may include the failure to return unearned fees where no work or minimal work has been done. It does not include acts that give rise to a fee dispute, or act of negligence or malpractice. To be reimbursable, a claim must be presented within three years and there must be no other source from which the client may recover. All reimbursement of losses by the fund are a matter of grace in the sole discretion of the CSF Committee

and not a matter of right.

The maximum amount which any *one* claimant may recover from the fund arising from an instance or course of dishonest conduct is \$10,000. The aggregate maximum amount which *all* claimants may recover arising from an instance or course of dishonest conduct of a single attorney is \$20,000.

The first claim was paid from the

fund in 1989. Since then, a total of \$214,475 has been paid from the fund. From 1989 to 1996, 320 claims have been received, alleging losses of approximately \$791,000. During this eight-year period, the committee investigated each claim and 136 were paid either in part or in full.

The dishonest acts of a few lawyers erode the public's confidence in lawyers in general and damage the

reputation of the legal profession. The Client Security Fund program, funded exclusively by lawyers in active practice without use of tax dollars, is the formal mechanism voluntarily chosen by the bar and the supreme court to address this problem. Through the diligent efforts of volunteer bar members, this special program operates to protect the public and to enhance the positive image of our profession. ■

## Notice of Election

**Notice is given herewith pursuant to the Alabama State Bar Rules Governing Election of President-Elect and Commissioner.**

### President-Elect

The Alabama State Bar will elect a president-elect in 1997 to assume the presidency of the bar in July 1998. Any candidate must be a member in good standing on March 1, 1997. Petitions nominating a candidate must bear the signature of 25 members in good standing of the Alabama State Bar and be received by the secretary of the state bar on or before March 1, 1997. Any candidate for this office must also submit with the nominating petition a black and white photograph and biographical data to be published in the May Alabama Lawyer.

Ballots will be mailed between May 15 and June 1 and must be received at state bar headquarters by 5 p.m. on **July 15, 1997**.

### Commissioners

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits: 2nd; 4th; 6th, place no. 2; 9th; 10th, places no. 1, 2, 5, 8, and 9; 12th; 13th, place no. 2; 15th, place no. 2; 16th; 20th; 23rd, place no. 2; 24th; 27th; 29th; 38th; and 39th. Additional commissioners will be elected in these circuits for each 300 members of the state bar with principal offices herein. The new commissioner positions will be determined by a census on March 1, 1997 and vacancies certified by the secretary on March 15, 1997.

The terms of any incumbent commissioners are retained.

All subsequent terms will be for three years.

Nominations may be made by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. Either must be received by the secretary no later than 5 p.m. on the last Friday in April (April 25, 1997).

Ballots will be prepared and mailed to members between May 15 and June 1, 1997. Ballots must be voted and returned by 5 p.m. on the second Tuesday in June (June 10, 1997) to state bar headquarters.



## ABOUT MEMBERS, AMONG FIRMS

### About Members

**Howard A. Mandell** is taking an extended sabbatical from the practice of law and will be closing his law office indefinitely effective December 15, 1996. He will be maintaining his P.O. Box 4248, Montgomery, 36103 and phone (334) 262-1666 through June of 1997.

**Lily Arnold Green**, formerly with Wallace, Jordan, Ratliff & Brandt, announces the opening of her office at 118 First Street Southwest, Hamilton, 35570. The mailing address is P.O. Box 2318. Phone (205) 921-5242.

**James Dorgan** announces the opening of his office at 314 Magnolia Avenue, Suite B, Fairhope, 36532. Phone (334) 928-0192.

**Paula W. Higginbotham**, formerly the associate director of the Alabama Bar Institute for Continuing Legal Education, announces the opening of her office at 1809 Skyland Boulevard East, Tuscaloosa,

35405. Phone (205) 556-4456.

**Brian Trammell** announces a change of address to 1104 Schaub Avenue, Mobile, 36609-5131. Phone (334) 633-9404.

**John A. Bales** announces a change of address to 970 Springfield Court, Northville, Michigan 48167-1030.

**Robert W. O'Neill** announces a change of address to 2540 Valleydale Road, Birmingham, 35244. Phone (205) 991-3239.

**Thomas E. Bazemore, III** announces a change of address to 800 Regions Bank Building, 417 N. 20th Street, Birmingham, 35203. Phone (205) 251-1193.

**Peggy K. Anderson** announces a change of address to 7207 Waterford Trace, Huntsville, 35802.

**Dorothy J. Collier** announces a change of address to P.O. Box 2097, Alexander City, 35011.

**David C. Livingston** announces the relocation of his office to 309 Broad Street, P.O.

Box 1621, Gadsden, 35902. Phone (205) 546-9300.

**R. Eric Summerford, Sr.** announces the continuation of his law practice under the firm name of **R. Eric Summerford, Sr. P.C.**, located at 118 E. Moulton Street, Suite B, Decatur, 35602-1149. Phone (205) 350-8885.

**Nelson Burnett** announces his retirement as chief of the Receivership Division, Alabama Department of Insurance, and the opening of his office at 6562 Huntcliff Court, Mobile 36608. Phone (334) 316-3173.

**Zondra Hutto Waters** announces the opening of her office at 605 Greensboro Avenue, Suite 100, Tuscaloosa, 35401. Phone (205) 343-0101.

**R. Jeneane Treace**, formerly with Nelson Mullins Riley & Scarborough in Atlanta, Georgia, announces the opening of her office in Decatur, Georgia. The mailing address is P.O. Box 1961, Decatur, 30031. Phone (404) 377-9385.

**T. Eric Ponder** announces the opening of his Georgia office at 12 W. Peachtree Place, Atlanta, Georgia 30308. Phone (404) 688-1005.

### Among Firms

**Jim R. Ippolito, Jr.**, former assistant attorney general, has been appointed chief counsel of the **Alabama Department of Transportation**. Offices are located at 1409 Coliseum Boulevard, Montgomery, 36130-3050. Phone (334) 242-6350.

**Rance M. Sanders** announces a change of address to **Healthcare Realty Management, Inc.**, 3310 West End Avenue, Suite 400, Nashville, Tennessee 37203. Phone (615) 269-8175.

**Jonathan Edward Ozmint**, formerly general counsel for the South Carolina Department of Labor, Licensing and Regulation, has assumed duties as chief, state grand jury, **Office of South Carolina Attorney General**. His address is P.O. Box 11549, Columbia, South Carolina 29211. Phone (803) 734-3693.

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**J. Thomas King, Jr.**, formerly corporate counsel for Collateral Mortgage and New South Federal Savings Bank, has joined the firm as a partner and **Annette Talley Phebus** has become an associate. Offices are located at 400 Shades Creek Parkway, Suite 100, Birmingham, 35209. The mailing address is P.O. Box 59807, 35259-0807. Phone (205) 879-5959.

**Brooks & Hamby** announces that **Daryl A. Atchison** has become an associate. Offices are located in Mobile and Citronelle.

**Cabaniss, Johnston, Gardner, Dumas & O'Neal** announces that **Melanie Merkle Bass** has become a partner. Offices are located in Birmingham and Mobile.

**Sadler, Sullivan, Sharp, Fishburne & Van Tassel** announces that **Kristin Bryance Metheny, Jeffrey Gerald Tickal** and **Charles Barton North** have become associates. Offices are located at 2500 SouthTrust Tower, 420 N. 20th Street, Birmingham, 35202. Phone (205) 326-4166.

**Pierce, Ledyard, Latta & Wasden** announces that **John Charles S. Pierce** and **W. Pemble DeLashmet** have become shareholders, and that **Roger E. Cole, Kathryn W. Peterson** and **Mark P. Eiland** have joined the firm. Offices are located at 1110 Montlimar Drive, Suite 900, Mobile, 36609. The mailing address is P.O. Box 16046, 36616. Phone (334) 344-5151.

**Hare, Wynn, Newell & Newton** announces that **Michael D. Ermert** has become a partner, and **Nolan E. Awbrey** has become an associate. Offices are located at The Massey Building, Suite 800, 290 21st Street, North, Birmingham, 35203-3713. Phone (205) 328-5330.

**Mark B. Craig** and **Brent M. Craig** announce the formation of **Craig & Craig**. Offices are located at 2708-1 Highway 31, South, Decatur, 35603. Phone (205) 355-8886.

**Sheffield, Sheffield & Sheffield** announces a change of address to 205 20th Street, N., Suite 323, Birmingham, 35203. Phone (205) 328-1365.

**Lloyd, Dinning, Boggs & Dinning** announces that **Gregory S. Griggers** has become an associate. Offices are located at 501 N. Walnut, Demopolis, 36732. Phone (334) 289-0556.

**Brantley & Wilkerson** announces that **Robert Winston Lee** has become an associate. Offices are located at 405 S. Hull Street, Montgomery, 36104. The mailing address is P.O. Box 830, Montgomery,

36101-0830. Phone (334) 265-1500.

**Robert F. Lewis** announces the association of **Jon E. Lewis**. Offices are located at 321 Frank Nelson Building, 205 N. 20th Street, Birmingham, 35203. Phone (205) 254-3927.

**Bradley, Arant, Rose & White** announces that **Matthew A. Aiken, Lynne R. Connery, Ronald H. Kent, Arlan D. Lewis, Caroline W. Lewis, Jeffrey P. Lisenby, Douglas C. Murdock, Rusha C. Smith, Mary Claire St. John, Rebecca B. Thai, and Mary Carol White** have become associates. Offices are located in Birmingham and Mobile.

**Jerome Tucker, III** and **Braxton Wagnon** announce the formation of **Tucker & Wagnon**. Offices are located at 701 37th Street, South, Suite 3, Birmingham. Phone (205) 252-1166.

**Ball, Ball, Matthews & Novak** announces that **Michael L. White** has become an associate. Offices are located at 60 Commerce Street, Suite 1100, P.O. Box 2148, Montgomery, 36102-2148. Phone (334) 834-7680.

**Walker, Hill, Adams, Umbach, Meadows & Walton** announces that

**Patrick C. Davidson**, formerly of Sasser & Littleton, has become an associate. Offices are located at 205 S. 9th Street, P.O. Drawer 2069, Opelika, 36803-2069. Phone (334) 745-6466.

**Adams & Reese** announces that **Timothy A. Clarke, J. Richard Moore** and **Kelly C. Woodford** have joined the firm as associates in the Mobile office.

**Bouloukos & Oglesby** announces a change of address for **George J. Bouloukos, David E. Oglesby, John Richard Shoemaker, Jason Ashton Stuckey, and Lee S. Lovoy** to 2017 Second Avenue, South, Birmingham, 35203. Phone (205) 322-1641.

**Baxter & Wilson** announces the relocation of their office to 2625 University Boulevard, Tuscaloosa, 35401. Phone (205) 349-1830.

**Horace G. Williams, Courtney R. Potthoff** and **Horace G. Williams, III** announce the formation of **Williams, Potthoff & Williams**. The mailing address is P.O. Box 880, Eufaula, 36072-0880. Phone (334) 687-5834.

**Vickers, Riis, Murray & Curran** announces that **Evan Austill, Jr.** has

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## About Members, Among Firms

(Continued from page 75)

become an associate. Offices are located in Mobile.

**Rothschild & Morgan** announces that **Jeffrey A. Brown** has become an associate. Offices are located at 1030 First Avenue, P.O. Box 2788, Columbus, Georgia 31902-2788. Phone (706) 324-4167.

**Charles M. Thompson** and **A. James Carson, III** announce that **Kearney Dee Hutsler** has joined the firm. The new firm name is **Thompson, Hutsler & Carson**. Offices are located at Suite 720, Independence Plaza Building, Homewood, 35209. Phone (205) 879-9393.

**Emond & Vines** announces that **Kathryn A. Lepper** and **Thomas M. Powell** have become associates. Offices are located at 2200 SouthTrust Tower, 420 N. 20th Street, P.O. Box 10008, Birmingham, 35202-0008. Phone (205) 324-4000.

**Young, Young & Parks** announces that **Raymond Charles Bryan**, formerly an associate of the firm, has become a partner and

the firm name has changed to **Young, Young, Parks & Bryan**. Offices are located at 1108 Wilmer Avenue, Anniston, 36201. Phone (205) 237-6645.

**H.M. Nowlin** and **Robert S. McAnnally** announce the formation of **Nowlin & McAnnally**. Offices are located at 118 East Moulton Street, Decatur, 35601. Phone (205) 353-8601.

**Olschner & Hart** announces that **Deborah S. Braden** has become a shareholder and **Kelli C. Cole**, **Catharine M. Smith** and **Michael C. Dodd** have become associates. Offices are located at 8 Office Park Circle, Suite 1, P.O. Box 531228, Birmingham, 35253. Phone (205) 879-9905.

**Cauthen & Cauthen** announces that **Robert Sidney McAnnally** has withdrawn from the firm. Offices are located at 217 East Moulton Street, Decatur, 35602. Phone (205) 353-1691.

**Maddox, Austill & Parmer** announces the relocation of its offices to Lakeshore Park Plaza, Suite 215, 2204 Lakeshore Drive, Birmingham 35209, and that **Conley**

**W. Knott** has joined the firm as an associate. Phone (205) 870-3767.

**Owens & Carver** announces that **M. Bradley Almond** has become a partner. The new firm name is **Owens, Carver & Almond**. Offices are located at 2720 6th Street, Tuscaloosa, 35401. The mailing address is P.O. Box 2487. Phone (205) 750-0750.

**Johnston, Barton, Proctor & Powell** announces that **R. Marcus Givhan**, **William K. Hancock** and **James P. Pewitt** have become partners. **Charles Morgan, Jr.**, formerly of Morgan Associates, Washington, D.C., has joined as *of counsel*, and **Debra L. Mackey**, **J. Trent Scofield**, **John A. Smyth, III** and **David T. Payne** have become associates. Offices are located at 2900 AmSouth/Harbert Plaza, 1901 6th Avenue, North, Birmingham, 35203-2618. Phone (205) 458-9400.

**Brown, Hudgens** announces that **Margaret S. Allison** has become an associate. Offices are located at 1495 University Boulevard, P.O. Box 18818, Mobile, 36616-0818. Phone (334) 344-7744. ■

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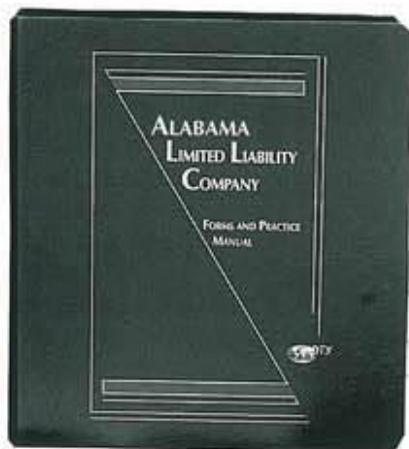
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## BAR BRIEFS

• **William Holcombe Pryor, Jr.** took office as Attorney General of Alabama on January 2, 1997, becoming the youngest attorney general in the United States.



He was appointed by Governor Fob James to complete the term of Jeff Sessions, who was elected to the U.S. Senate.

Pryor obtained a bachelor's degree in legal studies, *magna cum laude*, in 1984 from Northeast Louisiana University. At Tulane University School of Law, Pryor founded the school's chapter of the Federalist Society and was both president of that society and editor-in-chief of the *Tulane Law Review*. He graduated *magna cum laude* in the top two percent of his class in 1987.

Pryor began his legal career as a law clerk for Judge John Minor Wisdom of the U.S. Court of Appeals for the Fifth Circuit. From 1988 to 1991, Pryor worked with the Birmingham firm of Cabaniss, Johnston, Gardner, Dumas & O'Neal. He then joined several lawyers of that firm who founded Walston, Stabler, Wells, Anderson & Bains.

He is married to the former Kristan Wilson, a certified public accountant in Montgomery. They have two daughters.

• **E. Terry Brown** of Copeland, Franco, Screws & Gill and **Mark N. Chambless** of Chambless & Math, both of Montgomery, have been admitted to membership in the Commercial Law League of America. The CLLA, founded in 1895, is North America's premier organization of bankruptcy and commercial law professionals.

• The **Family Law Section** of the Alabama State Bar has set up a fax program to provide section members with proposed legislation, new laws, etc. Anyone interested in being added to this network should contact J. Timothy Smith at 1678 Highway 31 South, Suite

AA, Hoover, Alabama 35216. Phone (205) 823-1650.

• **George Fleming Maynard**, of Maynard, Cooper & Gale in Birmingham, was recently elected a Fellow of the American Bar Foundation. The Fellows is an honorary organization of attorneys, judges and law teachers whose professional, public and private careers have demonstrated outstanding dedication to the welfare of their communities and to the highest principles of the legal profession. Fellows are limited to one-third of one percent of lawyers licensed to practice in each jurisdiction.

• Tuscaloosa attorney **Sarah L. Thompson** was elected to serve on the board of the Alabama Humanities Foundation at its October board meeting. As the state affiliate of the National Endowment for the Humanities, the AHF provides public humanities programs throughout Alabama. Free to the public, these programs are designed to bring together communities to examine their

heritage and culture through humanities disciplines. In 1996, the AHF funded or conducted over 800 programs serving one million Alabamians.

• **James W. Gewin**, a partner in the Birmingham firm of Bradley, Arant, Rose & White, has become a Fellow of the American College of Trial Lawyers. Created in 1950 to recognize excellence in trial lawyers, the college includes members from every segment of the civil and criminal trial bar of the United States and Canada.

• **James L. North** of Birmingham recently was appointed by Governor Fob James to serve on the Court of the Judiciary.

• **Romaine S. Scott, III** has been appointed an associate editor of the *ABI Journal*, the official publication of the American Bankruptcy Institute. He also serves as a contributing editor and writes a bimonthly book review column for the publication. ■

### Local Bar News

The Lee County Bar Association recently honored attorney Jacob Walker, Jr. with the presentation of the Judge "Spud" Wright Jurisprudential Award.

This award is based on the years of service to Lee County and to the legal profession. Mr. Walker was presented with a plaque with a resolution and his portrait will be hung in the court-



room which was Judge Wright's at the Lee County Justice Center.

Pictured at right are: attorney Mary Lillian Walker (daughter); attorney Sean Smith (son-in-law); Mr. Walker; Mrs. Jane Walker (wife); attorney Jake Walker (son) and Edith Walker (daughter-in-law).

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# BUILDING ALABAMA'S COURTHOUSES

By Samuel A. Rumore, Jr.

## Washington County

Everyone knows that George Washington was the first president of the United States. A not so widely known fact is that Washington County, named for George, was Alabama's first county. As the first county, it is a county of firsts. It was the location of the first county government in Alabama, the first American courts in Alabama, the first incorporated city in Alabama, the first and only territorial capital of Alabama, and so on. The story of Washington County tells much of the state's significant early history.

The Gulf Coast region of today's Alabama was the scene of intense European rivalry for close to three centuries. The territory that would become Washington County was claimed by Spain from 1519 to 1700. France governed the region as part of Louisiana from 1700 to 1763. Following the Treaty of Paris of 1763, which ended the Seven Years' War, England controlled the area until the end of the American Revolution. Then the Treaty of Paris of 1783 returned the region to Spain.

In order to re-establish its presence in the territory, Spain took over the old French Fort Tombeche, located on the Tombigbee River near Epes in present-day Sumter County, and

renamed it Fort Confederation. The Spanish also built a new fort in the spring of 1789 on the lower Tombigbee at the head of navigation on a bluff where the Indians had a river crossing. As it was a common practice of that era to name a fort for a military commander or governor, the Spanish named this Fort San Esteban in honor of the Spanish governor, Esteban Miro. Fort



## Washington County

Established: 1800

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



*The exterior and interior of the courthouse at St. Stephens, built in 1854 and still standing*

"San Esteban" is Fort "St. Stephens" in English.

Fort St. Stephens had six commanders during its ten years of Spanish occupancy. These "commandantes" acted as judges in the territory and kept law and order based on Spanish rules. The fort also helped to maintain peace with the Indians by serving as a trading and supply post.

Spain and the United States disputed the boundary line between their respective territories. The United States claimed all territory between the Mississippi and Chattahoochee rivers north of the 31st degree of latitude. This parallel is the present boundary between Alabama and Florida. Spain claimed all territory up to 32 degrees 28 minutes of latitude, which would be represented by a line roughly extending from York in Sumter County to Montgomery to Phenix City. The dispute simmered between the two countries until 1795 when the Spanish acquiesced to the United States' position in an attempt to move the United States away from its trade friendship with England and toward closer ties with Spain.

In 1796, the United States government commissioned Major Andrew Ellicott, surveyor and astronomer, to find and fix the new boundary line, a three-year long project. From a hilltop beside the Mississippi River, he used astronomical sightings to find the 31st parallel and then his party began to hack its way through the wilder-

ness eastward to the Chattahoochee. When the surveying party reached the Mobile River, Ellicott erected a sandstone boulder to mark the boundary. On the southern side of the rock he carved in Spanish, "Dominion of his Catholic Majesty, Charles IV". On the northern side he carved in English "U.S. Lat. 31 1799".

The Ellicott Stone is the only known stone monument set by Ellicott during his famous survey. It is recognized as the oldest historic surveying monument in the southeast. In 1972 the marker was listed on the National Register of Historic Places and today is shown on state road maps. The stone still sits on its original site, but is in need of protection from the weather and vandals. Located in northern Mobile County, it is owned by the City of Mobile.

Since Fort St. Stephens was north of the settled boundary line, it became United States property. The small Spanish detachment waited for United States officials to take possession of the fort. Finally, on February 5, 1799,



*Earliest known picture of the Washington County Courthouse, possibly taken at the dedication in 1908 (Courtesy of Mrs. Sarah Odom, Chatom, Alabama)*

Lieutenant Fernando Lisoro, the commander, tired of waiting for an official change of command, delivered the keys to the fort to an American settler, Richard Brashears, with instructions to turn them over to the American authorities. Lisoro then left for Spanish territory. It was not until May 5, 1799, that Lieutenant John McClary arrived from Natchez with soldiers of the 2nd United States Infantry to make St. Stephens an American fort.

The United States Congress created the Mississippi Territory on April 7, 1798. At the time there were only two population centers in the territory—Natchez on the Mississippi River and the Tombigbee settlements near the junction of the Tombigbee and Alabama rivers. Therefore, the territory was divided into two districts—the Natchez District, which included the land west of the Pearl River, and the Tombigbee or Mobile District, which was east of the Pearl River.

Adams County and Pickering County, now called Jefferson County, in Mississippi, were the first two counties created in the Mississippi Territory on April 2, 1799. While both of these counties technically included parts of present-day Alabama, their focus was primarily in the western part of the territory.

On June 4, 1800, Mississippi Territorial Governor Winthrop Sargent established Washington County in the Tombigbee District. It included all of



*The old Washington County Courthouse, built in 1908 (Courtesy of C. A. Brown)*

Adams and Pickering counties east of the Pearl River to the Chattahoochee River. The county comprised more than 27,000 square miles. Subsequently, 18 counties in Mississippi and 29 counties in Alabama were carved in whole or in part from its boundaries.

The original Washington County was more than four times the size of either of the other two counties in the Mississippi Territory. Seeking a central location for the county seat, the governor chose McIntosh Bluff on the west bank of the Tombigbee River, approximately 40 miles north of Mobile, then a Spanish city. Thus, the distinction of being the first county seat in the first county of Alabama goes to McIntosh Bluff, named for a prominent early settler of the area. McIntosh Bluff would later hold the distinction of being the first county seat of Baldwin County when that county was created in 1809.

Captain John McIntosh, a British officer who had served in west Florida, came to the territory on the west bank of the lower Tombigbee River after it was opened for settlement following a treaty between the British and the Choctaw nation at Mobile in 1765. He received a land grant of 500 acres which included the bluff on the Tombigbee which thereafter bore his name. He built a plantation there, and in 1780, his grandson was born there. This grandson, George M. Troup, would one day become governor of Georgia and the first person born in Alabama to become governor of a state.

During the Revolutionary War, John McIntosh remained a loyal British subject. Because he did not support the Revolution, he was forced to abandon his property after the war. Despite the departure of the McIntosh clan from Washington County, the McIntosh name remains today.

The first American courts were held in Washington County in 1802 and 1803. Superior Court convened in September 1802, with the Honorable Seth Lewis, chief justice of the Mississippi Territory, presiding. The first county court was held at McIntosh Bluff in 1803.

In 1804 Harry Toulmin, an Englishman by birth, became Federal Territorial District Judge in the Tombigbee District of the Mississippi Territory. His district consisted mainly of the settlements along the Alabama, Tombigbee and Mobile rivers north of the 31st parallel. After becoming familiar with the territory, he decided that the county seat should be moved to a new location.

The reader might ask how one man, even though he was a federal judge, could single-handedly relocate the

speeches, and in general was the head of the Tombigbee settlements. So his decision to move the county seat of Washington County was accepted by the people.

In 1805, Toulmin established Washington's second county seat in the Sunflower Bend area, which was approximately eight miles north of McIntosh Bluff and 15 miles south of St. Stephens. He named the village Wakefield in honor of the English town in Oliver Goldsmith's novel, *The Vicar of Wakefield*.

The first court in Wakefield was held in September 1805. Although Wakefield was never a large place, it served as county seat of Washington County from 1805 to 1809. The log courthouse and jail sat opposite each other on the road from St. Stephens to Mobile. Wakefield has one prominent claim to distinction. It was incorporated on February 1, 1805. This act by the Mississippi Territorial Legislature marked the first time that a municipality in the area that would become Alabama was incorporated, almost 15 years before Alabama attained statehood. However, due to changes that took place in 1809, Wakefield lost the county seat, quickly declined and thereafter ceased to even exist. In 1809 the land area of Washington County was drastically reduced, from more than 27,000 square miles to a more manageable 1,640 square miles. A large portion was left without county government, awaiting the creation of new counties of reasonable size over the

next few years as settlement in the territory progressed. The western portion of Washington County, located in present-day Mississippi, was taken away to form Wayne County. And a large portion of southern Washington County west of the Alabama River became Baldwin County. The significance of this event was that Wakefield, the county seat of Washington County, ended up within the boundaries of Baldwin County. McIntosh Bluff became the first county seat of the new Baldwin County. The town of Wakefield died. It is interesting to note at this point that in the 40-year



Washington County marker in front of the courthouse

county seat? While Toulmin's official judicial duties consisted only of presiding over the federal court, because the county was mostly wilderness at that time, he was the primary federal officer in this large area. Due to the lack of other officials, he became the *de facto* diplomat to the Indian tribes, the responsible reporter to Washington and Natchez, the postmaster, the chief legal official, and the overall symbol of law and order. One of his biographers also stated that he preached, presided at funerals, performed marriages, practiced medicine, made Fourth of July

period between 1780 and 1820, McIntosh Bluff was under the control of three different nations—England, Spain and the United States; two territories—Mississippi and Alabama; one state—Alabama; and three different counties—Washington, Baldwin and, in 1820, Mobile. Finally, in 1829, the boundary lines changed once again and it returned to Washington County of which it remains a part today.

A side note is that when Baldwin County was created in 1809, it was totally west of the Alabama River, and it included parts of present-day Washington, Mobile and Clarke counties. In 1820 the county was literally lifted to a different location totally east of the Alabama River. Baldwin has the distinction of being the only county in Alabama that was totally removed from its original site. No portion of present-day Baldwin County was part of the original Baldwin County.

Following the boundary changes of 1809, a third county seat for Washington County had to be chosen. In 1807 three small towns had grown up around the former Spanish fort at St. Stephens: Franklin, Rodney and Carrollton. Franklin was named the new county seat and served the county until 1815. It should be noted that Clarke County was created in 1812 primarily from land in Washington County located east of the Alabama River. This action had left Washington County with only 770 square miles of area.

On December 23, 1815, the territorial legislature passed an act establishing the permanent seat of justice for Washington County at St. Stephens and levying a tax for the construction of a courthouse and jail. By this time, Franklin and the other small towns had merged with St. Stephens. St. Stephens grew as the fourth county seat, soon garnering both the Choctaw Trading House and the Federal Land Office. It was now the most prominent Tombigbee settlement.

St. Stephens had been incorporated by the Mississippi Territorial Legislature on December 18, 1811. By 1815 the community had 40 homes, several ware-



*The newest Washington County Courthouse, dedicated by Gov. George Wallace September 4, 1964*

houses, a steamboat company and the county seat. The next step up for St. Stephens came in 1817 when it was selected to be the Alabama Territorial capital following the division of the Mississippi Territory.

As the Alabama capital, St. Stephens was indeed an important place. The first state bank was chartered there. The town had a newspaper. It contained public buildings made of brick and limestone. The only two sessions of the territorial legislature met there.

The first session convened at the Douglas Hotel in St. Stephens on January 19, 1818. The members of the Mississippi Assembly who resided in Alabama became the first territorial legislature for the Alabama Territory, which consisted of seven counties at that time. The lower house had 12 representatives. The upper house, or Council, would have had three members. However, before the legislature met, one died and one resigned. That left James Titus of Madison County as the only member present. He had been president of the upper house in the Mississippi legislature so he was quite familiar with the protocol of that body. He called the Council to order, answered the roll call, elected himself president, voted on bills, moved for adjournment, voted on the same, and

declared the Council adjourned. This was probably the only time in American history when a single person composed the entire membership of a legislative body.

The second session of the territorial legislature convened at St. Stephens on November 2, 1818, in hotel rooms rented from Lemuel and William Alston. The primary concern for this session was the location of a state capital. A compromise was reached when Huntsville was selected as the temporary state capital until a town to be called Cahawba could be laid out at the junction of the Cahawba and Alabama rivers. This decision sealed the fate of St. Stephens. Once the capital moved away, most of the people likewise left. Any hope of a great metropolis on the Tombigbee was lost.

St. Stephens continued to serve as county seat of Washington County until 1825. However, the town of St. Stephens failed to prosper. By the late 1820s, the town had largely ceased to exist. By the 1860s it had become overgrown with vegetation.

Besides the removal of the state capital, there were several other reasons for the decline of St. Stephens. First of all, new shallow-draft river steamboats allowed navigation beyond St. Stephens to points upriver. It was no longer sig-

nificant as the port at the head of navigation on the river. Also, by this time, Mobile was no longer a Spanish city and goods could be traded freely there without foreign tariffs. The United States government moved the Indian trading post farther upriver. And, finally, a yellow fever epidemic caused many residents to seek homes elsewhere.

In 1899, a Spanish Evacuation Centennial Committee held a celebration marking the 100th anniversary of American occupation of the old fort. The event took place on May 6, 1899 at the site of Old St. Stephens. The participants and dignitaries arrived by water because of the inaccessibility of the place by land. Many speakers gave historical orations on that occasion. But the site where the fort had once stood was at that time only a grove of trees. The reports described St. Stephens as a wilderness.

Today the site of St. Stephens is a quarry from which rocks are carved out to make cement. The Alabama Historical Commission set aside funds for the preservation of the property in 1971. However, no agreement could be reached with the property owners. Today there is a largely inaccessible historic marker at the site of Alabama's first capital and little else. The site remains significant even today because the base meridian of all Alabama maps is called the St. Stephens Meridian and passes through the site of Old St. Stephens. Alabama should do more to memorialize its first capital.

The fifth county seat of Washington County was given the descriptive name of Washington Courthouse. It was located close to what was then the center of the county approximately

six miles northeast of the town of Millry. The courthouse was built in 1825 on land deeded by Robert Callier, Jr. The courthouse was constructed on a hill overlooking the town. In 1826, a jail, three stocks and a whipping post were built for the county.

In 1825, Washington County consisted of an estimated 820 square miles. This period was an era of shifting boundaries. By 1829 the southern boundary was extended to its approximate modern-day position. The county grew to 1,440 square miles. Then, in 1832, the county's territory increased again as its area covered almost three-fourths of present Choctaw County. Total area was now 1,740 square miles.

In 1842 the sixth county seat for Washington County was established because the Washington Courthouse building burned with the loss of many records. Barryton, whose name was changed in 1849 to Barrytown, became the county seat. Barryton is a shortened version of the combination "Barrel Town". This descriptive name referred to the large number of barrels of turpentine produced by the local industry. Barryton served as the county seat until 1847 when Choctaw County was created, and Barryton found itself located in the new county. Washington County now had 1,090 square miles of territory and it needed another new county seat.

The seventh county seat for Washington County, selected in 1848, was "New" St. Stephens. This town is located two miles south of the site of "Old" St. Stephens and approximately 12 miles northwest of Jackson in Clarke County. It was established to serve as the railroad station for the older town. The legislature in naming the new St. Stephens as the county seat specified that the courthouse would be located at a site that had been the residence and field of John B. Hazard.

The courthouse was constructed in 1854 by Levin Jefferson Wilson. It is still standing on County Road 34 in new St. Stephens today. This two-story frame structure has exterior stairways leading up to a porch topped by a pediment. The upper floor was used for meetings by the Masonic Lodge of new St. Stephens. When the county seat moved for the eighth and final time, the Masonic Lodge bought the building from the county.

The Masons have maintained the building and performed some restoration work on it. The original sheet metal roof lasted 100 years and was replaced by a tin roof in 1954 constructed by Rufus Beech and Coleman Moseley. At the same time, repair work on the sills was carried out under the supervision of George King. In 1985 the lodge had the front of the building restored to its original appearance. Today this former courthouse is in need of substantial repairs, but it is still used as a Masonic meeting place. The Alabama Historical Commission is seeking to have the structure named to the National Register of Historic Places.

On January 28, 1907, the voters of Washington County, by a two-to-one margin, chose to move their county seat an eighth time to the new and centrally located town of Chatom. The origin of this name is uncertain but it is believed to be a phonetic spelling of the English proper name "Chatham." One writer has linked this name to ancestral lands of George Washington. Another writer connects the name to William Pitt, the first Earl of Chatham. A third author claims the name



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was coined by an early resident, Fred Jordan, who petitioned the post office department in Washington, D.C. to establish a post office and name it Chatom. The authorities did establish a post office there on October 1, 1904. Whatever the origin of its name, Chatom, Alabama is unique because it is the only city name with that spelling in the entire United States.

A courthouse was built at Chatom in 1908. W. S. Hull of Jackson, Mississippi designed the structure. He received \$1,650 for his efforts. The earliest known photo of the building shows a two-story brick structure with classical styling. The facade included a triple arched entry on the lower level surmounted by a pedimented portico. The pediment was supported by four Corinthian columns.

By the 1960s, Washington County needed a new court building. The old cornerstone was removed in 1963 when the courthouse came down. Inside were coins dating back to 1868 and a copy of the *Washington County News* dated January 24, 1907, which referred to the

proposed moving of the courthouse to Chatom. This cornerstone is now located in the county museum in the basement of the new courthouse.

The newest Washington County Courthouse is a modern structure that was dedicated by Governor George Wallace on September 4, 1965. Honored guests at the ceremony included the governor's wife, Lurleen Wallace, Senator John Sparkman, Congressman Jack Edwards, and former Congressman Frank Boykin who lived in Washington County. The architect for this building was T. Cooper Van Antwerp of Mobile. The contractor was F. B. Bear, Jr. of Montgomery. The cost was approximately \$1 million.

Because of its long history as Alabama's first county, the citizens of Washington County have a long legacy of experiences with the American system of justice in their eight separate county seats. This legacy is reflected in two quotations found at the new courthouse. In the main courtroom is the quote: "The Life of a Nation Rests On the Quality of Its Justice." The exterior

facade sums up the true glory of the American judicial system with its quote: "Equal Justice Under the Law Is the Basis of Our Democracy." ■

**Sources:** *The History of Washington County, First County in Alabama*, Jacqueline Anderson Matte, 1982; article in the *Washington County News* on past and present courthouses, April 24, 1996; *Alabama Atlas of Historical County Boundaries*, John H. Long, editor, 1996.

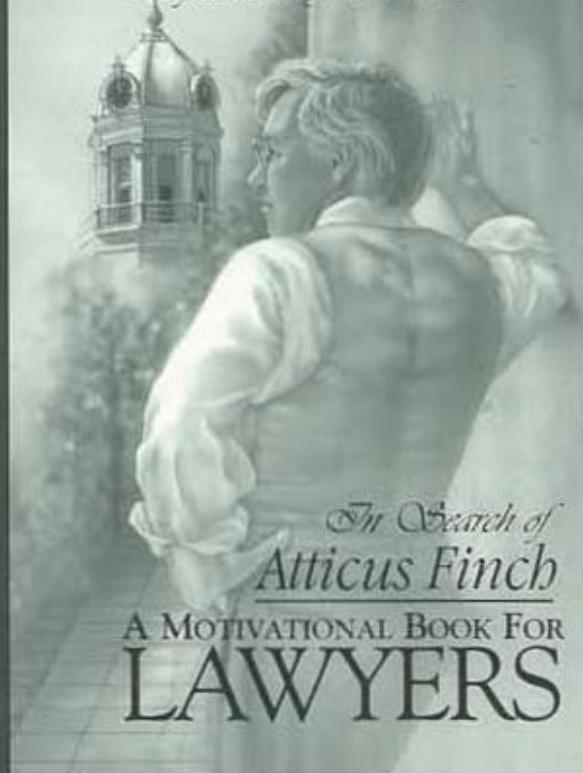


**Samuel A. Rumore, Jr.**

Samuel A. Rumore, Jr. is a graduate of the University of Notre Dame and the University of Alabama School of Law. He served as founding chairperson of the

Alabama State Bar's Family Law Section and is in practice in Birmingham with the firm of Miglionico & Rumore. Rumore serves as the bar commissioner for the 10th Circuit, place number four, and is a member of *The Alabama Lawyer* Editorial Board.

**Mike Papantonio**  
*with foreword by Morris Dees*



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## LEGISLATIVE WRAP-UP

### Regular Session

The 1997 Regular Session began February 4, 1997 and will continue until May 19, 1997. During these 105 calendar days the Legislature can meet for 30 legislative days; these are generally on Tuesdays and Thursdays, with committee days on Wednesdays. The Legislature has before it the following Institute-drafted bills:

### Multiple Persons Accounts

The Act addresses deposits in all types of financial organizations and corrects the problem of inconsistent treatment of joint accounts among different financial institutions in Alabama. The Act contains several sections which resolve ownership questions affecting parties and death beneficiaries of accounts. Separate sections are devoted to protecting financial institutions if they make payment in accordance with the account contract terms.

The Act includes sample statutory forms that provide clear and simple instructions to both financial institutions and depositors in setting up multiple-person accounts. Many of the account agreements being used in Alabama now do not allow the depositor to distinguish among the different functions of the

multiple-person account, with the result that the depositor's use of a joint account for one purpose may yield unwanted results after death.

### Uniform Family Support Act

The recently enacted Federal Welfare Reform Acts requires each state to pass the Uniform Interstate Family Support Act (UIFSA). UIFSA was initially passed in 1992 and was adopted by a majority of the jurisdictions in the United States. In 1996, the Commissioners adopted the 1996 draft that included amendments designed to improve the Act, as well as provide a smoother transition between those jurisdictions who had adopted UIFSA with those who had not. This new law, when enacted, will replace Alabama's current law (Ala. Code § 30-4-80 through 98).

One of the major drawbacks to the current interstate income withholding law in Alabama is that the orders, in general, are not affected by other support orders. This results in the potential of several states issuing conflicting support orders relating to the same parties and child. This leads to confusion on the part of a payer as to which amount he or she should pay and sometimes results in arrearage if the payer pays the lesser of the amounts specified in the orders.

Under UIFSA, the act will establish a priority scheme in which there will be a determination as to which jurisdiction may issue a child support order. Thus, even though there may be more than one state involved in enforcing a child support order at the same time, the order that is being enforced will be the same amount. This is accomplished through the process of having one state

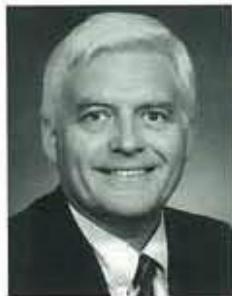
assume continuing exclusive jurisdiction, with modification of that order under very limited circumstances.

UISFA also contains a one-state enforcement mechanism that allows for direct withholding. Therefore, an order can be sent directly to an employer in a second state without the necessity of "domesticating" the order. The Act also provides immunity for an employer who complies with an income withholding order of another state in accordance with the provisions of the Act.

UISFA also substantially increases the methods in which courts and agencies may interact among each other concerning issues relating to child and spousal support. This allows the state to take advantage of the new technology available to speed up the enforcement process.

Another component of UISFA is a long-arm provision for asserting personal jurisdiction over a nonresident in an action to establish paternity or support. Also, a state that issues a support order and remains the residence of either the obligor, obligee or child has "continuing exclusive jurisdiction" unless the individual parties agree in writing for another state to exercise jurisdiction. Moreover, an *ex parte* temporary support order or a temporary support order pending a determination of a jurisdictional conflict does not affect the "continuing exclusive jurisdiction" of the issuing court.

It should be noted that USIFA does not affect the calculation of an arrearage under an existing order. Under the *Bradley* amendments, 42 U.S.C § 666(a)(9), arrearages are judgments that are entitled to full faith and credit.



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

The Act provides for uniformity in the procedure involved in the enforcement of spousal and child support orders from various states. The Department of Human Resources will be designated as the support enforcement agency for the State of Alabama.

### **UCC Article 5 Letters of Credit**

The revision of this Article is the first since the Uniform Commercial Code was passed in 1965.

A letter of credit is an instrument that participates in the payment system along with drafts, checks and electronic funds transferring money. A typical example would involve an American company buying goods from a European manufacturer. The European manufacturer is willing to do business provided it has assurances of payment for the goods which are purchased. The American company then applies to its bank with which it has accounts and receives a letter of credit from the bank. The bank issues the document that is in actual letter form. In the letter it guarantees the manufacturer in Europe that the bank will pay money up to a certain amount upon receipt of an appropriate document, usually a draft, from the European manufacturer. The letter of credit may also contain other documentary conditions on which the parties agree. The letter of credit provides the guarantee of payment to the European supplier that at an appropriate time in the transaction the manufacturer is paid upon presentation of the draft to the bank. Then the bank debits the appropriate account of the American company to receive its money. The letter of credit business is a \$200 billion industry in the United States. Half of all exports outside the United States are financed by letters of credit.

Alabama's UCC Article 5 is outdated and no longer reflects current commercial practice. New legal issues have developed which are resolved by the new law. This Act conforms our law with international law and practice which facilitates international trade.

### **Limited Liability Company Amendments**

Alabama adopted its Limited Liability Company law in 1993. When Alabama passed its law it was the 14th state to pass a LLC law. In the three and a half years since Alabama's enactment all other states have since passed LLC laws.

One of the major revisions in other states will allow for a one-person LLC organization, whereas Alabama requires two or more. There is also a need for a merger provision to enable other entities to be able to merge into LLCs. Filing provisions with the Secretary of State have been modified to remove the filing of an annual report. Further, there is a change in the buyout rule and adds fiduciary obligations to the members with each other.

### **Legal Separation**

Alabama has long had a divorce from bed and board which is found in Ala. Code §§ 30-2-30 and 31. It does not provide any guidelines as to what a legal separation would be. This new law will allow the court to enter into a legal separation if requested by one or both parties provided that the jurisdictional requirements for dissolution of marriage have been met. In a legal separation

the parties may agree on a property settlement, temporary alimony and child support. Further discussion of this bill can be found in the January 1997 *Alabama Lawyer*.

### **Revised Limited Partnership Act**

Alabama passed its current limited partnership in 1983 but followed the 1976 Uniform Limited Partnership Act. This Act is now over 20 years old and has been revised by the National Conference of Commissioners on Uniform State Laws.

The proposed revision of the Alabama Limited Partnership Act has two goals, one narrow and the other more broad. First, the proposed act amends the "default" rules that apply, in the absence of a provision in the partnership agreement, to the withdrawal of a limited partner from the partnership. Current estate tax laws make the Alabama law less advantageous than the laws of some other states, for example, Georgia and Delaware. As a result, a number of Alabama-based limited partnerships have been formed under the laws of other states. The statute removes that impediment to using the Alabama Limited Partnership Act. The second, broader goal is to bring the Alabama Act in line with the most current version of the Uniform Limited Partnership Act promulgated by the National Conference of Commissioners on Uniform State Laws by streamlining the information required to be set forth in the certificate of limited partnership and by clarifying the activities in which a limited partner may engage without loss of limited liability.

### **Institute Home Page—[www.law.ua.edu/all](http://www.law.ua.edu/all)**

The most recent information concerning any of the above bills can be obtained on the Internet by searching the Alabama Law Institute's home page. During the Session the status of the above bills will be brought up to date each Friday. The text of these bills is also available on-line along with bill numbers and sponsors.

Under the "Links to Law" related cites is a "click-on" to the home page for state government, which includes the Legislature, state agencies and constitutional officers such as the Governor's office and Secretary of State. There are also connections to the state bar, Alabama School of Law and Cumberland School of Law.

For more information, contact Bob McCurley, director, Alabama Law Institute, P.O. Box 861425, Tuscaloosa, Alabama 35486-0013; fax (205) 348-8411 or phone (205) 348-7411. ■

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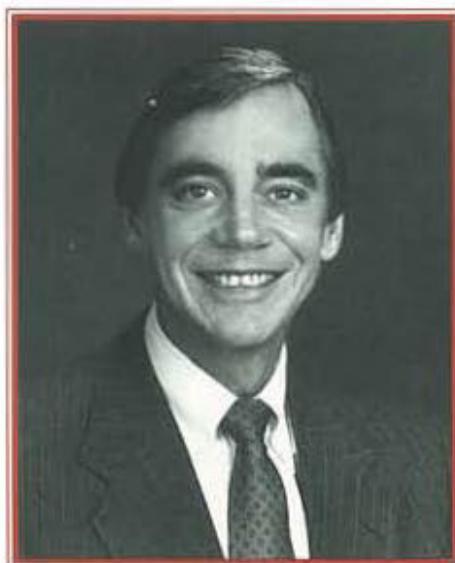


### Ray O. Noojin, Jr.

Whereas, the Birmingham Bar Association lost one of its dearest and cherished distinguished members on June 17, 1996. Ray O. Noojin, Jr., known affectionately and forever as "Ronnie", or "Nooj", or "the Nooj", died after a brief illness.

Whereas, Ronnie was born in Durham, North Carolina and he moved to Birmingham as a small child when his father, Dr. Ray O. Noojin, Sr., was called to found the Department of Dermatology at the University of Alabama in Birmingham in 1945. He attended Ramsay High School in Birmingham where he was an outstanding athlete and student. He attended Vanderbilt University where he lettered in baseball as a freshman and sophomore. He transferred to the University of Alabama graduating with a B.S. degree in English and chemistry and was a member of Kappa Alpha Order. He graduated from the University of Alabama School of Law with a J.D. degree in 1970. While in law school, he sat on the Campbell Moot Court Board of Directors and was editor of the *Alabama Law Reporter*.

Whereas, he was a partner with the law firm of Hare, Wynn, Newell & Newton since 1980. He was a member of the Birmingham Bar Association, Alabama State Bar, Alabama Trial Lawyers Association and American Bar Association. He served on the executive committee and as president of the Birmingham Bar Association in 1992. He served on the Board of Governors of the Alabama Trial Lawyers Association from 1979 to 1990 and was on its executive committee since 1991. He served



on the Jefferson County Judicial Commission from 1994 until his death and served as president of the Birmingham Bar Foundation from 1995 until his death. He had served on the editorial board of *The Alabama Lawyer* since 1992.

Whereas, Ronnie was active with and loved his alma mater, serving as a member of the executive committee of the Jefferson County University of Alabama Alumni Association since 1980 and was its president in 1986. He was a member of the board of directors of the University of Alabama Law School Foundation since 1993 and served on the University of Alabama President's Cabinet from 1995 until his death. He was Jefferson County Alumni Association Alumni of the Year in 1995.

Whereas, he was also active with the Monday Morning Quarterback Club serving as a member of its executive committee and as its captain in 1989. He served on the Crippled Children's Foundation as a member of the board of directors, was its treasurer and served

as chairman of the finance committee.

Whereas, he was a member of the Canterbury United Methodist Church, Birmingham Rotary Club, the Country Club of Birmingham, Shoal Creek, and Ducks Unlimited.

Whereas, Ronnie left behind a dedicated wife, two daughters, a son, his mother, and sisters, as well as other relatives and an endless number of friends.

Whereas, "Nooj" was a leader of his profession, who loved it and gave to it; he was a friend to all; he was the one person of his profession who pulled together the traditional polarized factions of the bar; he was the one person whose friendship transcended the traditional boundaries of trial lawyer, business community and medical community; he was forever with a smile, a calming voice of reason, a zest for life, the world's greatest practical joker, the fiercest of competitors. He loved to have fun and he loved a good joke; he was even a good cook.

Whereas, "Nooj" was the author, distributor and master of *The Factor*, known especially to his friends and family.

Whereas, Ray O. Noojin, Jr. was a very wonderful lawyer, a very wonderful person and the very best best friend ever to many people. He cannot be replaced and he will be sorely missed.

Whereas, this Resolution is offered as a record of our profound admiration, love and affection for Ray O. Noojin, Jr. and our condolences to his devoted wife, daughters, son, mother, sisters, and the other members of his family.

—M. Clay Alspaugh  
President, Birmingham Bar  
Association

## Thomas E. Skinner

The Birmingham Bar Association lost one of its distinguished members through the death of Thomas E. Skinner on October 19, 1996 at the age of 90.

Thomas E. Skinner was a native of Lucedale, Mississippi, but lived in Birmingham, Alabama most of his life. He was a graduate of the University of Alabama School of Law, and had been a member of the Birmingham Bar Association since 1931. During his long and distinguished career, Thomas E. Skinner served as a municipal judge for the City of Birmingham, and in 1939 he authored and published a widely-used annotation of Alabama Constitutional Law. During 1957, Thomas E. Skinner served as chairman of the Commission for Constitutional Reform which proposed a system of modern rules of civil procedure to the Alabama Legislature. It can be said that his work was part of that which prompted the adoption of the Alabama Rules of Civil Procedure in 1974.

Thomas Skinner leaves as survivors his wife, Margaret S. Skinner; two daughters, Jane Webb and Cathy Williams; one son, Thomas E. Skinner, Jr.; and an innumerable host of family, colleagues and friends who mourn his passing.

Whereas, this Resolution is offered as a record of our admiration and affection for Thomas E. Skinner and of our condolences to his wife, daughters and son, and the other members of his family.

—M. Clay Alspaugh  
President, Birmingham Bar Association

## John C. Payne

John C. Payne, Warner Professor of Law Emeritus at the University of Alabama Law School, died November 17, 1996 at DCH Regional Medical Center.

Payne's scholarly works include an estimated 50 major law review articles, some of which were reprinted in England, Scotland and Australia, five books, and eight reviews of legal publications. At the request of the British Legal Association, he gave a series of lectures in England in 1975.

He was born in Alexandria, Virginia, December 31, 1913, the son of Robert Lochbie Payne and Sarah Sills Payne. He lived his childhood in Norfolk and later in Columbia, South Carolina. A

## J. Louis Wilkinson

The Birmingham Bar Association lost one of its distinguished members through the death of J. Louis Wilkinson, who passed away on Saturday, November 16, 1996.

J. Louis Wilkinson was a graduate of the University of Alabama School of Law and served as an assistant city attorney in the legal department of the City of Birmingham, and also as an assistant district attorney for Jefferson County. For a number of years, he practiced as a criminal attorney in the private practice of law.

In 1978 he was appointed to the Alabama Board of Corrections by Governor George C. Wallace and taught as an adjunct professor at the Birmingham School of Law.

Whereas, this Resolution is offered as a record of our admiration and affection for J. Louis Wilkinson and of our condolences to his four children and other family members.

Now, therefore, be it resolved by the executive committee of the Birmingham Bar Association in its regular meeting assembled;

1. This Executive Committee greatly mourns the passing of J. Louis Wilkinson and is profoundly grateful for the example and his long and useful life has brought to the membership, both individually and collectively.

2. That the surviving members of the family of J. Louis Wilkinson are hereby assured of our deep and abiding sympathy.

3. That a copy of this resolution be spread upon the records of the Birmingham Bar Association as a permanent memorial to our departed brother.

4. That copies of this resolution be furnished to his four children as our expression to them of our deepest sympathy.

—M. Clay Alspaugh  
President, Birmingham Bar Association

graduate of the academic and law schools of the University of South Carolina, he held postgraduate appointments as a Morris Fellow, Columbia University Graduate Law School and a Sterling Fellow, Yale University Graduate Law School.

Payne served during World War II as a weather technical sergeant, seeing duty in the West Indies. Subsequently, he spent a year in private practice in Columbia, and then accepted a temporary position at the University of South Carolina Law School; there, he found that he loved teaching. It was then that he decided to come to the University of Alabama, where he served on the law faculty until his retirement in 1983.

**Felix Marshall Neilson**  
*Birmingham*  
Admitted: 1936  
Died: September 28, 1996

**Arthur D. Shores**  
*Birmingham*  
Admitted: 1937  
Died: December 16, 1996

**Richard B. Stone**  
*Montgomery*  
Admitted: 1951  
Died: August 30, 1996

**Roger Carlisle Suttle**  
*Gadsden*  
Admitted: 1930  
Died: October 11, 1996

Throughout his career, one of Payne's major interests was the law library. Because he served for many years as faculty adviser to the library, he could well be considered the architect of the current collection. The library now holds and continues to add to the Payne Collection.

Payne's expertise was the law of real property, and in this connection he testified before committees of both houses of the Congress on housing closing costs. He designed and the Alabama Legislature implemented in Tuscaloosa a method of clearing titles called the self-indexing system that has been judged a major contribution to property law. It has served as a model for many other counties and cities in the state.

In 1960, Payne was a member of the Alabama State Bar Committee of Jurisprudence and Law Reform, and he was

appointed to membership in the Commission on Uniform State Law, a position he held for four years.

Payne was a member of Phi Beta Kappa, Omicron Delta Kappa, Order of the Coif, the American Society of Legal History, the Selden Society, and Christ Episcopal Church, and was an honorary member of Jasons.

Survivors include his wife, Eunice Hinman Payne; a daughter, Tusten Payne Lanning, Destin, Florida; his brother, Robert L. Payne Jr., Oxford, Mississippi; and two nephews.

—**J. Sydney Cook, III**

**Rosen, Cook, Sledge, Davis, Carroll & Jones, P.A.**  
**Tuscaloosa, Alabama**

## Hardy Bolton Smith

Whereas, Hardy Bolton Smith, who served his community and this association with dignity and distinction, died on August 1, 1996, and the Mobile Bar Association wishes to remember his name and his service; and,

Whereas, Hardy was born in Mobile, Alabama on April 22, 1930. He attended elementary and grade schools in Mobile and in 1950 he graduated with a B.S. degree from the University of Alabama. He joined the United States Air Force during the Korean conflict and on July 18, 1953, while stationed in Madison, Wisconsin, he and Donna Jean Jenkins were married. In 1955 he entered the University of Wisconsin Law School, and in 1957 he was awarded his LL.B. degree; and,

Whereas, upon graduation from law school, Hardy returned with his family to Mobile and in 1958, after passing the Alabama State Bar examination, he became a partner in the firm of Gaillard, Gaillard, & Smith; from 1963 to 1976 he was a partner in the firm of Gaillard, Wilkins & Smith; and from 1976 to 1979, he was a partner in the firm of Gaillard, Smith & Little. In 1979 he became a sole practitioner. He chose his confidante and helpmate, his wife Donna, as his legal secretary, a position which she held for the remainder of his practice. Hardy was a member of the Alabama State Bar, the Wisconsin State Bar and the American Bar Association and was authorized to practice before the United States Supreme Court. He specialized in real estate, probate and personal income tax law and served on numerous committees of the Mobile Bar Association; and,

Whereas, throughout his adult life, Hardy continued his affiliation with the United States Air Force. He was a graduate



of the highly regarded Air War College and received degrees and certificates from other Air Force educational institutes made available to officers of company and field grade. After receiving the Air Force Commendation Medal, he retired from the military service with a rank of Lt. Colonel. He was a member of the Air Force Association and the Reserve Officers Association; and,

Whereas, in an effort to satisfy an insatiable curiosity, Hardy read extensively. Although many subjects engaged his attention, he developed a keen interest in military history, military weaponry and strategies and tactics of great military leaders. His consuming interest in these studies led him to join the prestigious "Order of World Wars"; and,

Whereas, Hardy is survived by his wife, Donna Jenkins Smith; two daughters, Diane Smith Conklin of Blue Springs, Missouri and Cynthia Smith Kirk of Mobile; two grandchildren, Courtney and Drew Conklin of Blue Springs, Missouri; and other relatives.

As a member of the Spring Hill Presbyterian Church, Hardy was active in its affairs and served as a member of its board of deacons. His pastor, Dr. Vernon Hunter, told of his generous contribution of time and professional expertise in the formulation and establishment of a non-profit foundation through which the church administers charitable activities. Hardy was a participant in the affairs of the Republican Party and had served on the Mobile County Executive Committee and the Alabama State Republican Executive Committee. He was a member of the Alpha Tau Omega social fraternity and Phi Delta Phi legal fraternity.

Now, therefore, be it resolved by the Mobile Bar Association on this 18th day of October, 1996 in its regular meeting assembled:

That the Association mourns the passing of our friend and fellow member, Hardy Bolton Smith, and that the surviving members of his family be assured of our deep and abiding sympathy.

—**William A. Kimbrough, Jr.**

**President, Mobile Bar Association**

## William Dewitt Reams

Whereas, the Mobile Bar Association wishes to honor the memory of William Dewitt Reams, a distinguished member of this association, who died on September 8, 1996, and the association desires to remember his name and recognize his contributions to our profession and to this community; Now, therefore, be it remembered:

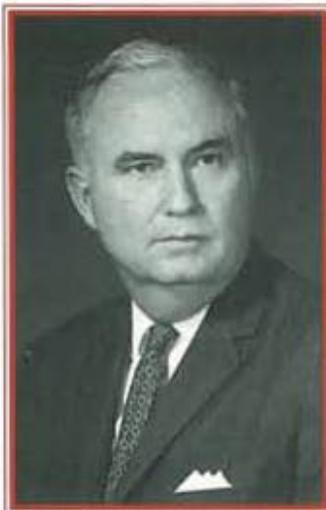
William D. Reams, known to all as Dewitt, was born in Tallassee, Alabama and attended elementary and high schools in Elmore County, Alabama.

Dewitt graduated in 1940 with honors from the University of Alabama receiving his LL.B., later converted to the Juris Doctor degree. He entered the practice of law in Mobile, Alabama with the firm of Pillans, Cowley & Gresham in 1940.

Dewitt served during World War II with Army Air Force Intelligence and in the United States Navy.

In 1945, Dewitt became a member of the Mobile law firm of Pillans, Cowley, Reams & Tappan, and continued as a senior partner in its successor firms. He was admitted to practice before the United States Supreme Court in 1971.

Early practice was in admiralty law and land matters. In early oil and gas exploration, he was a pioneer who became known for his expertise. In later years, he was instrumental in the establish-



ment of several large corporations in the Mobile area.

In 1970, Dewitt served as president of the Mobile Bar Association. Other offices he held included president of the Mobile Rotary Club, president of the Mobile Chamber of Commerce, and president of the Alabama National Law School Alumni Association.

Dewitt was on the Alcoholic Beverage Control Board of Alabama during the administrations of three governors.

Dewitt sought to serve his friends, clients and colleagues with integrity, thoughtfulness, courtesy and kindness.

Dewitt was a member of Springhill Baptist Church of Mobile where he was a Sunday School teacher, a member of its finance committee, and was elected life deacon.

Dewitt loved his family. He is survived by his wife, Betty Reams; son, John Harper Reams and wife, Peggy; grandson, John Walter Reams, and his wife, Christy, and a great-granddaughter, Isabel; his brother, Haywood I. Reams of Montgomery, Alabama; his sister, Doris R. Clute of Athens, Georgia; brother, Robert E. Reams of Mobile; and nieces and nephews.

Now, therefore, be it resolved, by the Mobile Bar Association on the 15th day of November 1996, that the association mourns the passing of William Dewitt Reams and does hereby honor the memory of our friend and fellow member who exemplified throughout his career the professional principles to which members of this association aspire; and requests that this resolution be spread upon the minutes of this association and of the Alabama State Bar and that a copy be presented to his family.

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

## Mollie Jordan

On this exciting journey I've met and traveled alongside many interesting people, but Miss Mollie Jordan was one of the most memorable of those many folks. She was so different, so enigmatic, so idiosyncratic; so fussy, so demanding, so cantankerous; and, in her unique and inexplicable way, so charming and lovable.

For my first ten years as reporter, I worked just down the hall from Miss Mollie. Quite frankly, for a while I thought she gave me a hard time. In my first year there, she would often step in my office, scold me severely for something I had done that had not suited her, and then leave as quickly as she had come—never giving me enough information to figure out what she was upset about. After each such occasion, I would stop by her office a few times until her exasperation with me eased and she would begin to explain what I had done wrong. She was a very demanding, very exact teacher, but I learned well. The staff attorneys and law



clerks who now deal with my own pickiness can blame much of it on Miss Mollie's teaching.

For those ten years, Miss Mollie and I were lunch partners at the old State Office Building basement cafeteria. I spent literally hundreds of hours eating lunch with her and trying to get to know her. I learned in those hundreds of hours that she was a very private person, probably the most private person I've ever been around. My wife, like Miss Mollie, grew up in Marshall County, so that gave us something to talk about. She loved to talk about North Alabama, politics (she was slightly opinionated in this regard), the office work, and occasionally poetry or other literature, but not much else. She was fond of Dorothy Parker. She was forcefully blunt about her literary tastes—and mine. Once I used a line from my favorite poet; unsmiling, she said simply, "Robert Service wrote doggerel. Pure doggerel."

Because she guarded her privacy so intently, few people ever knew her birthday, and it went unmentioned. She wanted it that way. My secretary during those years, Lois Gipson, was fond of Miss Mollie. Lois grew beautiful roses and Lois was one of the few who knew Miss Mollie's birthday; on her birthday a beautiful yellow rose always appeared on her desk. Lois always got a word of thanks—but she and Miss Mollie never mentioned the reason for the rose.

Miss Mollie, for all her bluff and bluster, had a tender and

compassionate side, but because she so guarded her privacy, few folks saw it. She spoke with passion when she talked of poverty, suffering children, and lack of educational and economic opportunity. Those things really bothered her. I suspect she was a generous soul in her private way.

Miss Mollie had a real sense of humor. She kept favorite cartoons in her desk and often commented on the world by simply handing you a cartoon (for example, an old man walking along with a lantern, apparently looking for an honest man, and another man behind him, pointing a pistol and saying, "I'll take the lantern.") I couldn't resist occasionally mentioning to her my high school friend, John Jordan—always careful to point out that his name Jordan was pronounced as most folks pronounce the name of the river or the country. That never failed to prompt her story of how her forebears' family

name came to be pronounced "Jurdun"—the English, she would say, could change the spelling of their name but couldn't make them pronounce it differently. My ploy always worked, but she had as much fun with it as I did.

Over the years, Miss Mollie and I came to be friends. I loved her and enjoyed her company, and in many ways we understood each other. At the same time, I always knew that, although we were friends, I really didn't know her beyond the fairly narrow bounds she has set for our friendship. But that was all right. That's the way she wanted it. She lived life as she charted it, and I respected her for that. I will always be thankful that for part of my own journey I could travel alongside her.

—George Earl Smith, Reporter of Decisions  
Supreme Court of Alabama

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## DISCIPLINARY NOTICE

### PLEASE NOTE:

• **James Lee Hoover** of Birmingham, who was disbarred on August 22, 1996, is not to be confused with **James Andrew Hoover** of Pittman & Associates of Birmingham. **James Andrew Hoover** has never been disbarred and continues to be a member in good standing of the Alabama State Bar.

### NOTICE

• **Wesley Thomas Neill**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of March 10, 1997, or thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB Nos. 95-128 and 95-226 before the Disciplinary Board of the Alabama State Bar. [ASB Nos. 95-128 and 95-226]

### Surrender of License

• Gadsden attorney **Joseph Gullatte Hunter, III** surrendered his license to practice law in the State of Alabama, effective May 18, 1995. Hunter had previously been interimly suspended by the bar. Hunter surrendered his license in lieu of disciplinary proceedings being pursued against him. [ASB Nos. 95-163, 95-225 and 96-68]

• Prattville attorney **Karla Ann Shivers** surrendered her license to practice law in the State of Alabama in response to numerous disciplinary complaints which were pending against her. The Supreme Court of Alabama entered an order striking Shivers' name from the roll of attorneys and canceling her license effective November 6, 1996. [ASB Nos. 96-084, 96-110, 96-182, 96-183, 96-193, 96-216, 96-217, 96-218, 96-237, 96-245, and 96-285]

### Suspensions

• On November 26, 1996, Mobile attorney **Paul M. Foerster, Jr.** entered guilty pleas in three disciplinary cases. He pleaded guilty to charges of failing to cooperate in the investigation of the underlying grievances. In circumstances with a plea agreement, Foerster was sentenced to a one-year suspension which will be abated during a two-year probationary period. Foerster had been interimly suspended since August 28, 1996. That was dissolved commensurate with the disposition of the disciplinary charges against him. [ASB Nos. 96-075, 96-125 and 96-126]

• Elba attorney **Gareth A. Lindsey** was suspended from the practice of law for a period of 60 days by order of the Alabama Supreme Court effective November 1, 1996. Lindsey was

found by the Disciplinary Board of the Alabama State Bar to have violated Rule 8.4(g) which prohibits an attorney from engaging in conduct that adversely reflects on his fitness to practice law. The evidence before the Disciplinary Board was that Lindsey had offered to provide legal services to a prospective client in exchange for sexual favors. Lindsey appealed the decision of the Disciplinary Board to the Alabama Supreme Court which affirmed without opinion on January 19, 1996. Thereafter, Lindsey petitioned for certiorari to the United States Supreme Court which denied his petition on October 7, 1996. [ASB No. 92-492]

• **Sanford W. Faulkner** has been suspended from the practice of law for a period of 91 days by order of the Alabama Supreme Court effective November 20, 1996. Faulkner presently resides in Shelby, North Carolina. Faulkner was charged with practicing law after having allowed his license to lapse. Faulkner failed to respond to the charges filed against him and a default judgment was entered. Faulkner also failed to appear at the hearing to determine discipline after having been given notice of the same by certified mail. [ASB No. 95-047]

• On January 15, 1997, the supreme court entered an order suspending Gadsden attorney **John Edward Cunningham** for a period of 91 days effective January 15, 1997. As conditions of future reinstatement, Cunningham was ordered to pay a settlement he had entered into with a former client who had sued him. He was also ordered to receive psychological counseling during his suspension. In the event Cunningham is reinstated, he will have a two-year probationary period to serve. Cunningham was paid \$3,000 to handle a will contest. Cunningham took no action on the case between October 1990 and June 1995. The client confronted him and Cunningham refunded the retainer. The client later sued and obtained a default judgment for \$100,000. Cunningham also allowed a default to be taken on the formal disciplinary charges brought by the bar. [ASB 95-276]

• By order of the Supreme Court of Alabama, Demopolis attorney **Yolanda Nevett-Johnson** was suspended from the practice of law in the State of Alabama for a period of 91 days, effective October 25, 1996. The suspension was ordered by the Disciplinary Commission of the Alabama State Bar which had previously ordered that Johnson receive a 91-day suspension, but abated the suspension with Johnson being placed on probation for a period of two years. Based upon Johnson's subsequent misconduct, the Commission revoked the probation of Johnson, and effectuated the 91-day suspension previously ordered. [Rule 22(a)(2); Pet. No. 96-01]

**Public Reprimands**

Montgomery attorney **Robert M. Alton, Jr.** received a public reprimand with general publication on December 6, 1996. Alton was involved in four separate real estate closings and certain irregularities occurred with regard to satisfaction of mortgages on parcels of real property which were the subject of these closings. In one case, funds to satisfy the mortgage were provided to either Alton or his nonlawyer assistant at a company known as Kwik Kloz. The monies, which were provided to satisfy the first mortgage, were not properly disbursed.

In another matter, settlement proceeds were tendered at the closing sufficient to satisfy a first mortgage which was the subject of the closing. This was acknowledged by Alton in a letter to counsel for the sellers of this property and eventually Kwik Kloz paid to the sellers of the property the sum of \$50,000 as damages.

In two remaining matters, real estate closings were conducted by Alton wherein settlement proceeds were tendered to Kwik Kloz to satisfy first mortgages. However, the first mortgages were not timely satisfied in accord with representations contained in the settlement statements issued at these closings. Alton's conduct was found to have violated Rule 5.3, Alabama Rules of Professional Conduct. [ASB Nos. 90-627 (A) & (B), 90-692 and 91-113]

• Mobile attorney **Paul M. Foerster, Jr.** was publicly reprimanded on December 6, 1996 for willfully neglecting a legal matter and failing to cooperate in the resulting grievance filed against him by his clients. Foerster collected fees from a client to handle a child support modification. After seven months, the clients learned that nothing had been done in the matter. Foerster admitted this to the clients when he was confronted by them. Foerster failed to respond to three letters sent to him by the Mobile Bar Association requesting a written response to the client's grievances. [ASB No. 96-012(A)]

• Anniston lawyer **G. Coke Williams** received a public reprimand without general publication on December 6, 1996.

On or about August 12, 1996, Williams was retained to handle a collection matter for an out-of-state client on a contingency fee basis. Thereafter, the client made repeated telephone calls to Williams in an effort to ascertain the status of the matter. Most of these telephone calls were not returned. At one point, Williams advised that he could not locate the defendant and, therefore, could not obtain service. However, the client was able to verify through other sources that the defendant was doing business in Anniston, Alabama at the address previously provided to Williams by the client. Williams delayed filing a complaint in the matter for approximately nine months after being retained. Eventually, Williams was able to obtain a judgment in his client's favor. The client then instructed Williams to proceed with garnishment and collection. Thereafter, the client made several attempts to contact Williams regarding the status of the matter. Again, Williams failed to respond to these inquiries, and failed to proceed with garnishment and collection as instructed. Williams' conduct violated

Rules 1.3, 1.4(a) and (b), and 8.4(a) and (g), Alabama Rules of Professional Conduct. [ASB No. 96-87]

• Mobile attorney **John William Parker** received a public reprimand, without general publication, on July 24, 1996. Parker was reprimanded for having failed to keep his client reasonably informed about the status of the client's case and promptly comply with reasonable requests for information. Parker was further reprimanded for failing to explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Parker undertook representation of an individual to pursue certain unpaid insurance claims. Eventually, Parker and/or an associate of his firm negotiated a settlement with the client's employer's insurance carrier. Thereafter, Parker wrote disbursement checks on these settlement proceeds to the client. When the client presented the check for payment, it was returned for insufficient funds. The check eventually cleared after the client processed the check a second time. Parker also sent a disbursement check from these settlement proceeds to a third-party provider, but failed to sign the check. Parker was notified of this fact in early March of 1992, but failed to submit a substitute check until mid-September of 1992. The check which Parker eventually sent to the third-party was a certified check, and was not drawn on a trust account of Parker's.

Parker tendered a conditional guilty plea which required, in addition to his receiving the public reprimand, that he receive an abated 91-day suspension from the practice of law and be placed on probation for a period of two years. During this two-year period, Parker is to participate in a mentoring program, is required to place \$25,000 in escrow to serve as security for reimbursement to any clients who may have sustained a loss as the result of any misconduct which Parker might have engaged in while serving as attorney for that individual, and submit to the Office of General Counsel a quarterly audit of his trust account for a period of two years, beginning June 30, 1996. [ASB No. 92-147]

• Birmingham attorney **Carol Ann Rasmussen** was ordered to receive a public reprimand without general publication for having violated the Rules of Professional Conduct in the representation of three separate clients. In ASB No. 94-027, Rasmussen was paid a fee to represent a labor union. Rasmussen's client was eventually sued but she failed to file any answer or take other action on behalf of the client resulting in a default judgment being granted against her client. Rasmussen pled guilty to having willfully neglected a legal matter entrusted to her and having failed to adequately communicate with her client about the status of the client's case.

In ASB No. 95-101, Rasmussen was hired to represent a client in a divorce case. At the hearing Rasmussen failed to introduce into evidence a document from the Department of Human Resources which was very favorable to her client. Subsequently, Rasmussen received an order adverse to her client and requiring her client to pay her former husband's attorney's fees. Rasmussen

failed to inform the client of the court's order. After the client filed a grievance Rasmussen failed to respond to requests for information from the bar. Rasmussen pled guilty to having willfully neglected a legal matter entrusted to her, to having failed to keep her client reasonably informed about the status of the client's case and by failing to respond to a lawful demand for information from a disciplinary authority.

In ASB No. 95-126, Rasmussen was hired to represent a client in an employment discrimination suit. The client had given Rasmussen some 40,000 pages of documents which had been previously obtained during discovery. After the client terminated Rasmussen, Rasmussen refused to return the documents and claimed a lien on them for unpaid attorney's fees. Eventually, the United States Magistrate ordered Rasmussen to return the documents to the client but Rasmussen did so less than three weeks before the scheduled trial date of the client's case. Rasmussen pled guilty to having failed to surrender papers and property to which the client was entitled and for having engaged in conduct prejudicial to the administration of justice. [ASB Nos. 94-027, 95-101 and 95-126]

•Decatur attorney **Claud W. Lavender** received a public reprimand without general publication on December 6, 1996. Lavender agreed to represent a client in an employment discrimination/sexual harassment matter. Lavender failed to file a timely claim with the Equal Employment Opportunity Commission, although he advised his client that he had done so. Upon discovery that a timely claim had not been filed with the Equal Employment Opportunity Commission, the client confronted Lavender. At that time, he explained that he was in settlement negotiations with the employer and that he intended to file an action to pursue remedies in state court. Thereafter, Lavender failed to file an action in state court despite repeated assurances to his client that he would do so. Lavender's services were terminated by the client who was forced to hire new counsel to pursue her remaining state law claims. Lavender's conduct violated Rule 1.3, Alabama Rules of Professional Conduct, which provides that a lawyer shall not willfully neglect a legal matter entrusted to him, and Rule 1.4, Alabama Rules of Professional Conduct, which provides that a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with requests for information. [ASB No. 95-180]

•Goodwater attorney **William Taylor Denson** was ordered to receive a public reprimand without general publication for failing to provide competent representation to a client, for willfully neglecting a legal matter entrusted to him, and for failing to adequately communicate with a client about the status of the client's case. Denson pled guilty to formal charges which were filed against him. Denson had been hired to represent a client in connection with a worker's compensation claim. On the date the client's case was scheduled for a docket call on the circuit court, Denson failed to appear on the client's behalf resulting in the case being dismissed for want of prosecution. Denson then failed

to communicate to the client the fact that the case had been dismissed, but rather, falsely represented to the client that the case was still pending. Thereafter, Denson misrepresented to the client that he had settled the case for \$5,000 and gave her a personal check for that amount. [ASB No. 95-122]

•Birmingham attorney **Keith William Veigas, Jr.** was ordered to receive a public reprimand with general publication upon his plea of guilty in two separate disciplinary matters. In ASB No. 94-197, the complainant was Bar-Bri, a company which markets a bar examination preparation course. The complaint alleged that Veigas, as representative of Bar-Bri, had misappropriated funds which should have rightfully gone to Bar-Bri. Veigas pled guilty to having violated Rule 1.15(b) which requires that a lawyer promptly deliver to a client or third person any funds or property the client or third person is entitled to receive.

In ASB No. 95-235, Veigas was charged with having settled a case with an insurance company on behalf of a client when Veigas knew or should have known that the client had been deceased for almost two months at the time the settlement was finalized. Veigas failed to disclose the death of his client to the insurance company. Veigas pled guilty to having violated Rule 8.4(c), admitting that he engaged in conduct involving dishonesty, fraud, deceit or misrepresentation. [ASB Nos. 94-197 and 95-235] ■

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# Taxability of Punitive Damages

By Glenda G. Cochran and John S. Campbell

## Introduction

For approximately 80 years, the federal government has provided a taxability exclusion in one form or another for "damages received...on account of personal injuries." 26 U.S.C. §104 (a)(2)<sup>1</sup>. There have increasingly been questions raised regarding whether this provision excludes punitive damages from taxability. The circuits have split on this issue. Recently, both Congress and the Supreme Court have acted to clarify this issue.

The current statute was amended in 1989, and again amended in 1996. Originally, that statute simply exempted from the definition of "gross income" for purposes of taxability the "amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries." The 1989 amendments added a provision, subpart (a)(3), which states that this exclusionary section "shall not apply to any punitive damages in connection with a case not involving physical injury or physical sickness."

The 1996 amendment,<sup>2</sup> effective as of August 20, 1996, specifically excludes punitive damages from the prior exemption of subpart (a)(2).<sup>3</sup> This provision is modified by a later part, 104 (c), which states:

(C) Application of prior law in certain cases.

The phrase "(other than punitive damages)" shall not apply to punitive damages awarded in a civil action—

- (1) which is a wrongful death action, and
- (2) with respect to which applicable State law (as in effect on September 13, 1995 and without regard to any modification after such date) provides, or has been construed to provide by a court of competent jurisdiction pursuant to a decision issued on or before September 13, 1995, that only punitive damages may be awarded in such action.

This subsection shall cease to apply to any civil action filed on or after the first date on which the applicable State law ceases to pro-

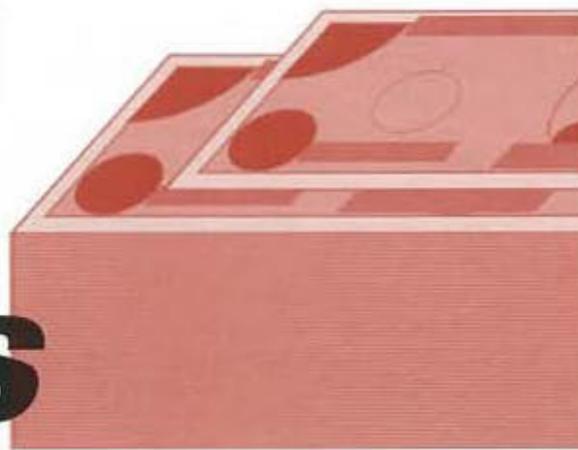
vide (or is no longer construed to provide) the treatment described in paragraph (2).

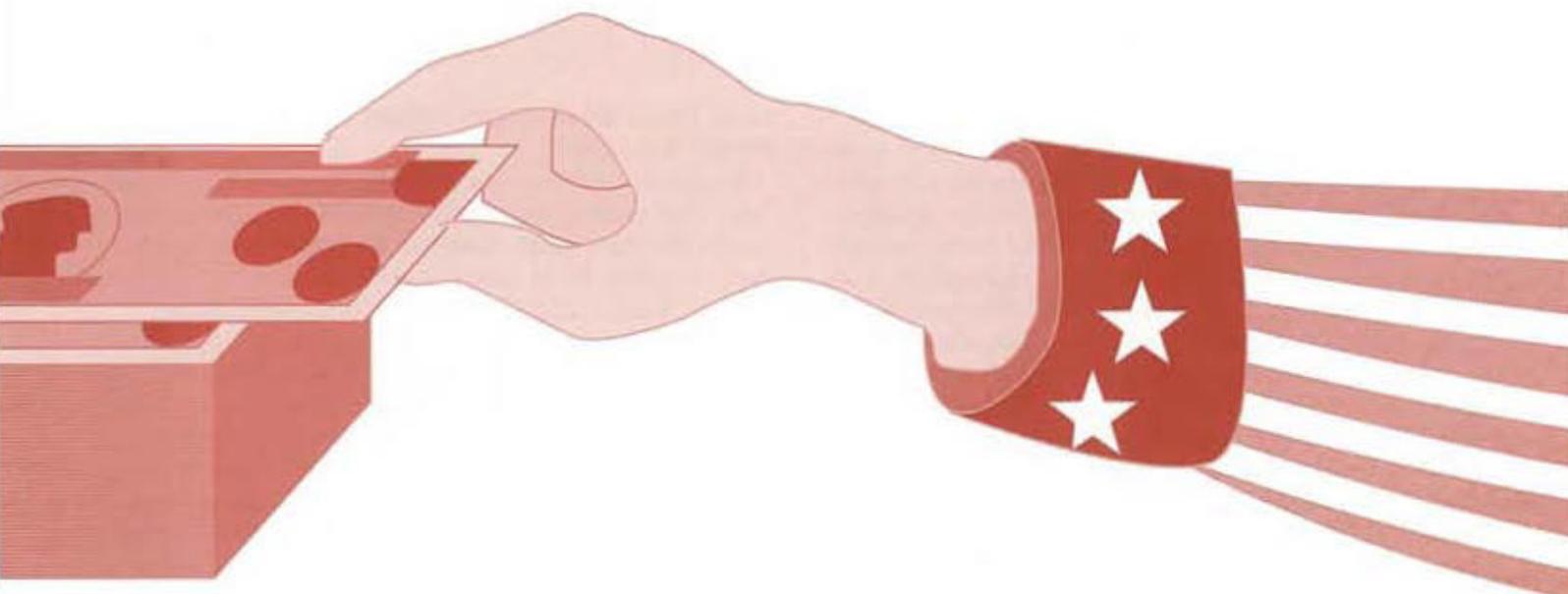
This amendment makes clear that most punitive damages are now taxable. It also provides that damages for emotional distress (other than damages for treatment of emotional distress) are also taxable.<sup>4</sup> There is an exception in the amendment for punitive damages awarded for wrongful death, where state law regarding wrongful death under which the case is decided provides for no remedy other than punitive damages.<sup>5</sup> The amendment, of course, is prospective only, as pointed out by the Supreme Court in *O'Gilvie v. United States*.<sup>6</sup> The 1996 amendment does not expressly state whether the exception for punitive damages for wrongful death where state law provides no other remedy is intended to mean that such damages are not to be considered as part of "gross income" or whether it is intended merely to leave in place the pre-existing law on that issue, whatever that law is determined to be.

Last December, the Supreme Court construed §104(a)(2) as it existed prior to the 1989 amendments, and held that punitive damages were taxable.<sup>7</sup> Prior to that decision, the circuit courts had been split on this issue.

Five circuits, including the 10th Circuit in *O'Gilvie*, had determined that "non-compensatory" punitive damages are not received "on account of" personal injuries, and are not excludable from gross income. *E.g. Wesson v. United States*, 48 F.3d 894 (5th Cir. 1995); *Hawkins v. United States*, 30 F.3d 1077 (9th Cir. 1994), *cert. denied* \_\_\_ U.S. \_\_\_, 115 S.Ct. 2576, 132 L.Ed.2d 827 (1995); *Reese v. United States*, 24 F.3d 228 (Fed Cir. 1994); *Commissioner v. Miller*, 914 F.2d 586 (4th Cir. 1990). Each of these decisions held that the phrase "any damages" is ambiguous as to the treatment of punitive damages in a personal injury action, and then went on to construe that phrase.

The Sixth Circuit<sup>8</sup> held instead that §104(a)(2) unambiguously exempted punitive damages from "gross income". The Eleventh Circuit had not made a determination on this issue.





### **O'Gilvie**

*O'Gilvie* arose from a wrongful death action brought under Kansas law. The decedent had died of toxic shock syndrome, and her estate filed suit. The plaintiff's estate was ultimately awarded \$1,525,000 in actual damages, as well as an award of \$10,000,000 in punitive damages. In 1988, prior to the amendment of §104 (a)(2), the estate disbursed the net proceeds to the beneficiaries. The beneficiaries reported the amount attributable to punitive damages as income on their 1988 tax returns, paid the taxes, and then sued in district court for a refund.<sup>9</sup>

The Supreme Court noted that §104 (a)(2), closely construed, contained two requirements for exemption: (1) that the underlying action be one for personal injury<sup>10</sup>; and (2) that the funds be received "on account of" personal injuries. The Court held that, as to this second issue, the text of §104 (a)(2) was ambiguous. The Court accordingly considered sources other than the statute for insight into the purposes of the statute and the intent of the legislature in drafting the statute.

It is not fully clear what effect *O'Gilvie* will have on the construction of §104 (a)(2) after the 1989 amendments; clearly it is not controlling as to recoveries had since the 1996 amendment came into effect. *O'Gilvie* does not explicitly apply to any version of the statute other than the pre-1988 version. The case decided by the Court clearly arose under the pre-1989 statutory language. The Court did discuss whether that amendment should be read as a legislative determination of the pre-existing construction of that section; the Court declined to so read it, and further stated that it would not view as binding a current legislative determination of the intent of a past legislature in enacting a statute.<sup>11</sup>

In deciding not to take the 1989 amendment as a determination of the pre-existing state of the law, the Court raised the possibility that, in enacting the 1989 amendments, Congress had felt that the law was unclear as to the treatment of punitive damages for physical and nonphysical injuries and wanted

to clarify the law as to nonphysical injuries, but leave it unclear as to physical injuries. In addition to the obvious common-sense criticisms of this artificially myopic approach, that supposition ignores the rules of construction, including the common law maxim of *ejusdem generis*. However, as criticisms of Supreme Court decisions rarely do any good in practice, it should be noted that the Court did not so hold, but merely raised the possibility in deciding not to be bound by any conclusions to be drawn from the enactment of the amendment. Should the issue arise squarely, the parties are free to construe the post-1989 statute according to more generally accepted guidelines.

### **Practical Effect**

The decision in *O'Gilvie* leaves open several questions for practitioners, particularly in light of the amendments made to the statute by Congress. For Alabama practitioners, the principal question must be "Are Wrongful Death Recoveries Taxable?" Other serious questions include:

- Is *O'Gilvie* retroactive?
- How does the 1996 amendment to Section 104 affect wrongful death damages?
- How can I craft settlements to best benefit my clients?
- How should I advise past and present clients?

In discussing all of these issues, it is important to recall that there are three relevant time periods: pre-1989 amendment; post-1996 amendment, and the time in between.

### **Are Alabama Wrongful Death Recoveries Taxable?**

The Alabama Wrongful Death statute, Ala. Code §6-5-410, is one of the few such provisions in the country. The statute provides that the sole recovery for a wrongful death shall be in the nature of punitive damages; the provisions are not identical to those for punitive damages for fraudulent, intentional, willful or reckless conduct.

*O'Gilvie* was a wrongful death case; as noted by the Tenth

Circuit, there was no claim made by plaintiffs that the wrongful death benefits were compensatory in nature.<sup>12</sup> Kansas law does not provide that punitive damages are the sole remedy for a wrongful death; the plaintiff received compensatory and punitive damages.

It does not appear that *O'Gilvie* has affected, except perhaps by its reasoning, the state of the law regarding taxability of so-called "compensatory" punitive damages, such as those awarded in an Alabama wrongful death case. In a very real sense, such "compensatory" punitive damages fall within the plain language of §104 (a)(2)—damages received "on account of personal injury." The analysis of the majority in *O'Gilvie* centers on a construction of "on account of personal injury" as applied to non-compensatory punitive damages; the argument was based in large part on the holding in *Commissioner v. Schleier*,<sup>13</sup> that generally punitive damages are not "designed to compensate...victims." The Court ruled in favor of the government's argument that section (2) "was inapplicable to punitive damages where those damages 'are not compensation for injury [but] [i]nstead ... are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.'"<sup>14</sup> This stated basis for the decision certainly implies that any damages, including punitive damages, which are intended as compensation are non-taxable.

### Is *O'Gilvie* Retroactive?

The Supreme Court's decision will almost certainly be treated in practice as a mere determination of existing law, with full retroactive effect. Obviously, given the passage of the 1996 amendments to §104 (a)(2), the Court did not anticipate prospective application of its decision. The opinion itself distinguishes its effect from the merely prospective effect of the 1996 amendments.<sup>15</sup> None of the recent decisions on this issue were written prior to the 1989 amendments, and the Eleventh Circuit never decided the issue. Alabama litigants will not be able to claim that they relied on any firmly settled prior state of the law.

*O'Gilvie* therefore raises several issues of the effect on any litigants who received punitive damage awards prior to the 1989 amendments; if they failed to pay taxes on that award, they remain liable for that amount, plus interest and penalties imposed by the IRS. There are also, of course, the possible criminal repercussions to this failure.

### How Does §104 (a)(2) Affect Wrongful Death Awards?

As amended, §104 (a)(2) and §104 (c) provides for the taxability of all punitive damages awards except for wrongful death awards like those under Alabama's Wrongful Death Statute. Part (c), quoted above, attempts at length to restrict the ability of the states to gain the benefits of this exception by amending their law of wrongful death. That section, however, does *not* clearly state what treatment is to be afforded to qualifying wrongful death awards. The amendment *excepts* "compensatory" punitive damages for wrongful death from the *exception* of all punitive damages to the *exception* for damages received as a result of personal injury. One commentator<sup>16</sup> has questioned whether the amendment intends to leave such wrongful death benefits to pre-existing law (whatever that is later determined to be), or whether the amendment provides for the non-taxability of such wrongful death benefits. That commentator erroneously states that *O'Gilvie* held such punitive damages taxable under pre-existing law. As discussed above, *O'Gilvie* neither determined post-1989 law, nor the status of "compensatory" punitive damages.

The House Report on the 1996 amendments<sup>17</sup> state that the intent of the House in drafting the original bill was that such qualifying punitive damages continue to be controlled by "present law." As noted, *O'Gilvie* did not involve state law on wrongful death allowing punitive damages as the sole recovery; the plaintiff received actual as well as punitive damages. The very specificity with which this section is drafted, particularly the provisions to avoid states rewriting their wrongful death laws in order to apply what is obviously viewed as a beneficial tax status for any awards, indicates the understanding and intent of the legislature regarding what "present law" is in this regard.

### Crafting a Settlement: Will the IRS Look Beyond the Pleadings?

In any case involving punitive damages, other than a wrongful death case, the parties can both benefit by crafting a settlement in terms of compensatory damages (other than emotional distress, of course). Undoubtedly, a plaintiff will be willing to settle for a somewhat smaller amount if that amount is for compensatory damages, than the same plaintiff would require as taxable punitive damages. The recent decision of the Alabama Supreme Court in *Life Ins. of Georgia v. Johnson*,<sup>18</sup> provides further impetus for such a settlement, to avoid the payment of one-half of the punitive damage award to the State general fund.

The parties must be careful, of course, in crafting such a settlement; the Internal Revenue Service has the authority to assign a portion of a lump sum settlement to punitive damages, despite the lack of any indication in the settlement of the breakdown of the proceeds. Presumably, the Service can also question the statements of the parties in the settlement document regarding the breakdown of damages, and find a portion of those damages taxable.<sup>19</sup> You should consult your accountant or tax specialist before drafting or finalizing such an agreement.

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There are some common-sense considerations you should use in reaching a settlement; plaintiff should be able to prove compensatory damages sufficient to support the full amount of any settlement for compensatory damages. The parties can, in the settlement, specifically withdraw all allegations of fraudulent, intentional or willful actions, in return for a substantially full settlement of claimed compensatory damages. If you can reach a settlement figure in good faith based upon claimed compensatory damages, that should go a long way toward satisfying an audit.

Similarly, the parties may apportion the settlement themselves. If done in good faith, the Service should have no grounds to challenge a reasonable determination; bear in mind, in reaching these figures, such factors as that the value of a claim for punitive damages is always considerably less precise and assured than one for provable compensatory damages. Obviously a jury may or may not award punitive damages, they may choose any amount, and the award is subject to challenge and reversal or remittitur. Of course, many defendants may not be willing to pay any amount identified as punitive damages; such a settlement would tend to admit wrong-doing.

Undoubtedly, the IRS and the courts eventually will reach a definition or a test for determining whether any such settlement proceeds, though identified as compensatory damages, should be taxable; it is hoped that timely advice from a tax expert may help to keep your client from becoming the test case.

### Advising Your Clients

The first advice to give any client who has received a sizable award of punitive damages is: hire an accountant or attorney who is expert in tax law. That is good advice as well for the practitioner with serious questions in this area.

In *O'Gilvie*, punitive damages were awarded to the estate of a woman who had died of toxic shock syndrome. In 1988, the estate distributed the net proceeds of the suit to the beneficiaries, who reported the amount as income on their 1988 returns and paid their taxes based on that amount. The beneficiaries thereafter sought both a declaration that the punitive damage award was not taxable and a refund of the amounts paid in income taxes on those funds. This approach may appear to be unnecessarily complex, but it serves two purposes: it protects your client from later being held liable for interest and penalties by the IRS, and it allows your case to be heard in district court rather than in the much more pro-tax forum of the tax courts. It also has the added benefit of avoiding temptation for a spendthrift client to dip into the funds that should be set aside for payment of taxes. ■

### Endnotes

1. Internal Revenue Code §104 (a)(2).
2. § 1605 of the Small Business Job Protection Act of 1996, Pub.L. 104-188, 110 Stat. 1838.
3. "...[G]ross income does not include—... (2) the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness."
4. § 104 (a)(5) (as amended 1996).

5. 26 U.S.C. § 104.
6. *O'Gilvie v. United States*, — U.S. —, 1996 WL 705261 (December 10, 1996).
7. *O'Gilvie v. United States*, — U.S. —, 1996 WL 705261 (December 10, 1996).
8. *Horton v. Commissioner*, 33 F.3d 625 (6th Cir. 1994).
9. *O'Gilvie v. United States*, 66 F.3d 1550, (10th Cir. 1995).
10. The Court had previously determined that this phrase was unambiguous, and referred to actions based on tort or tort-type rights. *United States v. Burke*, 504 U.S. 229, 112 S.Ct. 1867, 119 L.Ed.2d 34 (1992).
11. *O'Gilvie v. United States*, — U.S. —, 1996 WL 705261, at 4 (December 10, 1996).
12. *O'Gilvie*, 66 F.3d at 1556 note 10.
13. 515 U.S. —, — n. 5, 115 S.Ct. 2159 (1995).
14. *O'Gilvie*, 1996 WL 705261, at 3, quoting *Electrical Workers v. Foust*, 442 U.S. 42, 99 S.Ct. 2121, 60 L.Ed.2d 698 (1979).
15. *O'Gilvie v. United States*, — U.S. —, 1996 WL 705261, at 5-6 (December 10, 1996).
16. *United States Tax Reporter* (12/19/96), page 15,528.
17. Reprinted in *United States Tax Reporter*, 15,523 through 15,524 (9/26/96).
18. — So.2d —, No. 1940357 (Ala. April 26, 1996), cert. granted, — U.S. —, No. 96-184 (October 15, 1996).
19. Cf. *Eleanor L. Stocks* (1992) 98 TC 1 (the motivation of the payer is the proper basis of allocation of settlement on account of two claims, contract and racial discrimination).



#### Glenda G. Cochran

Glenda G. Cochran was born in Mobile, Alabama. She holds a B.A. degree from the University of South Alabama; an M.P.A. from the University of Alabama; and the J.D. degree from Cumberland School of Law. She is a member of the Alabama Trial Lawyers Association Board of Governors, the American Bar Association and the Birmingham Bar Association.

#### John S. Campbell

John S. Campbell is a 1988 graduate of the University of Mississippi. He is licensed in Mississippi and is currently working for Cochran & Associates in Birmingham. After clerking for Judge Glen H. Davidson of the United States District Court for the Northern District of Alabama, he was in private practice for six years. He is scheduled to sit for the February 1997 Alabama bar exam.

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## RECENT DECISIONS

By Wilbur G. Silberman

### Bankruptcy Decisions

#### Power of court to change previously authorized fee arrangements explained

*In re Westbrook*, 202 B.R. 520, (Bkrcty N.D. Ala. Oct. 8, 1996). Judge James S. Sledge, in a well-reasoned opinion, discussed Code sections 327, 328, 329, 330, and 1106, with respect to the latitude of the trial court in allowing compensation different from that approved under the terms of the employment. The thrust of the opinion was that the court does not have unlimited power to enhance or decrease the original terms and conditions under the theory of "reasonableness"—that "reasonableness" is the basis of the original undertaking pre-approval, as provided in §328, but that the standard of review as set forth in §330 is that of *improvidence*; §330 is subject to §326, 328 and 329. Because of the importance of this opinion, the following is quoted from pages 522-523 of the West citation:

If the bankruptcy court pre-approves the terms of the appointment, it does not have the power to make a "reasonableness" review. Instead of the reasonableness standard, in §328 pre-

approval cases, the standard of review to be used in the §330 hearing is one of improvidence. The court is *required* to allow the agreed upon fees, pursuant to Section 330, unless the agreed upon terms and conditions are improvident. In fact, where the bankruptcy court previously approved compensation terms, it *cannot* subsequently alter those terms unless the original terms were improvident in light of unanticipated developments. (cases which have considered this aspect of §328(a) have not allowed bankruptcy courts to later reduce previously approved contingency fees based upon the usual tests for reasonable compensation). (citations omitted)

**Comment:** In light of the changes made by the 1994 amendments, it will be interesting to observe whether Judge Sledge is followed. We call particular attention to the 1994 amendment to §330(a) providing for reduction by the court on its own motion. Probably a reduction could always be justified by a ruling that the original approval was improvident, but is this only a discussion of semantics?

#### Seventh Circuit rules that Tampa law firm should pay \$125,000 to trustee

*Bayer v. Carlton, Fields, Emanuel, Smith & Cutler, P.A.*, 100 F.3d 53 (7th Cir. November 8, 1996). In September 1992, the law firm (Carlton) was retained by Paul Davis, the president of U.S.A. Diversified Products, Inc., to defend the corporation in a fraud suit. In December, Davis wired \$125,000 from the debtor's money market

account to the attorneys to fund a possible settlement. The following day, Diversified filed bankruptcy and four days later Davis informed Carlton of the bankruptcy, but told the attorneys that the money was his personally. In February 1993, Davis demanded return of the funds and Carlton returned \$113,000, after deducting a fee of \$12,000. The trustee sued for the entire \$125,000. Carlton argued that under §542, it had no knowledge that the \$125,000 was property of the debtor, that it no longer had the property, that it had no knowledge of the money being property of the estate, and it should not have to pay the trustee. The Seventh Circuit made short shrift of Carlton's arguments that it did not have control of the money, stating that whether the law firm was a transferee, §542 controlled as to the obligations of persons who have custody of property, and that §550(a) was not applicable as the law firm did have control of the money. It then held that §542 overruled the equitable defense theory to protect an innocent transferor who does not know of the bankruptcy, which theory was enunciated in the U.S. Supreme Court case of *May v. Henderson*, 268 U.S. 111 (1925), but regardless, in the *Bayer* case there were sufficient facts to put the law firm on notice that the funds may be property of the debtor.

**Comment:** This case is discussed to alert attorneys that when there is any question as to a debtor in bankruptcy having a claim to funds in possession of the attorney, great care should be exercised before releasing funds to a third party claimant. In an abundance of caution, in the absence of obtaining releases, pay the money into court.



**Wilbur G. Silberman**

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

**Eleventh Circuit holds trustee personally liable to IRS for \$20,000 commission paid to duly employed broker because it was from "property or rights to property subject to levy"**

*U.S. v. Ruff*, CA 11, November 21, 1996, 99 F.3d 1559. In this opinion of some five pages, the Eleventh Circuit has held a trustee personally liable for failure to heed a tax levy against compensation due a broker employed under a bankruptcy court order to broker a sale of assets of the estate. The employment order was entered March 2, 1989, but the commission compensation was subject to final court approval. On July 27, 1989, the IRS served the trustee with notice of a levy against the broker in excess of \$230,000. The trustee replied that at the time, she had no funds due the broker. On August 10, 1989, the bankruptcy court approved payment to the broker of a \$20,000 fee, which the trustee paid on August 11. The IRS was successful in a suit in the District Court against the trustee personally.

The Eleventh Circuit stated that the issue on appeal was whether the trustee was in possession of or obligated with respect to property subject to levy. It determined that under Florida law, the broker was entitled to the commission if his prospect became the successful buyer. *Payment* was conditioned on further court approval, but not *entitlement*. (emphasis supplied.) Thus, the broker had a property interest in the commission. The court stated that once the property interest is determined under state law, federal law determines the tax consequences. It held that here, as the sale had been closed, the commission was fixed and determined when the levy was served. It further stated that the power of the court under Code §328 to alter the fee arrangement did not diminish the fixed and determinable nature, as no evidence was addressed to show any reason why the commission could be altered.

**Comment:** I can visualize cases where §328 could be used to alter events. In this instance, I am of the opinion that §328 could have been discussed in a way to justify an opposite conclusion.

**Eleventh Circuit allows bar orders against future litigation to facilitate settlement**

*Matter of Munford*, 97 F.3d 456, 29 B.C.D 1087 (11th Cir. Oct. 10, 1996). The liquidating debtor in a Chapter 11 filed an adversary proceeding against several parties based upon an LBO buyout. One defendant offered to settle for \$350,000 of its \$400,000 liability insurance policy but with a condition that it would be final and complete liability on such defendant, and that no contribution could be obtained by other defendants. The bankruptcy court approved the settlement and issued an order restraining the other defendants from seeking contribution or indemnity. After affirmance by the District Court, the Eleventh Circuit also affirmed under provisions of §105 and Fed.R.Civ.P. 16(c)(9). Appellants had contended (1) lack of jurisdiction of the bankruptcy court over unasserted state law claims, and (2) lack of legal authority of the bankruptcy court to enter such a bar order. Chief Judge Hatchett wrote the opinion, stating that for the bankruptcy court to have jurisdiction, there must be nexus between the civil case and title 11. The test was whether the outcome would affect the administration of the bankruptcy estate. He held that because a claim for contribution or indemnity would have such an effect, there was a nexus, principally because there could be no settlement without such a bar order. He explained that this was not jurisdiction by consent, but rather the "nexus" of the claims to the settlement agreement, and subject to approval under bankruptcy rule 9019(a). Next, as to there being no subject matter jurisdiction because claims had not been asserted by other defendants, he said a claim is ripe for adjudication when it is at a stage to permit effective decision-making by the court. Judge Hatchett reasoned that there was ample authority to enter the bar order under a combination of bankruptcy section 105(a) and Fed.R.Civ.P. 16(9) which provides that the court may take appropriate action with respect to:

(9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule.

He then justified bar orders on public policy and economy of minimizing litigation.

**Comment:** If you have such a situation develop, it is suggested that authority of the court be sought, and cite this case for your authority. ■

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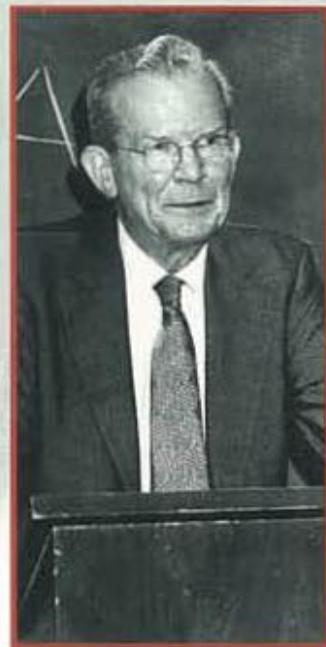
BETTY JOWERS, RN, LNC

RUTH LYNCH, BSN, CRNP, LNC

# The Tiger Turns 90—

## A Tribute To Martin Leigh Harrison

By J. Rufus Bealle



Dean Martin Leigh Harrison, approaching his 90<sup>th</sup> birthday on April 4, looks back with satisfaction on his 39 years of service on the faculty of the University of Alabama School of Law from 1938 to 1977, and with much fondness for the 3,451 who graduated during this period, most of whom he taught. He served as dean for 16 years, from 1950 to 1966, having the second longest tenure of the 11 who have so served. He was then appointed to the Herbert D. Warner Professorship which he filled until his retirement in 1977, at which time the University of Alabama Board of Trustees conferred on him the honorary LL.D. degree. He taught for an additional four years after retirement without compensation because of his love for teaching and loyalty to the law school.

His characteristic modesty is relaxed when reminded that he has taught three United States Senators; 11 other congressmen; five governors; innumerable judges of state and federal courts; CEOs of the Southern Company, CSX Railroad and Torchmark; many members of the Alabama Legislature; and a large percentage of the members of the Alabama State Bar and many others throughout the country. While at the law school, he taught many courses, including common law and Alabama pleading, contracts, agency, and conflicts of law, his favorites.

His students and colleagues hold him in the utmost esteem, not only for his total commitment to teaching and legal scholarship, but for his integrity, intellect and his perfect sense of balance between firmness in insisting on high standards and a warm sense of caring.

Leigh Harrison was born in Opelika on April 4, 1907, the son of William Robert Harrison and Eva Trawick Harrison. William H. Mitchell, Jr., a prominent attorney and retired banker in Florence, University of Alabama Trustee Emeritus and one of Dean Harrison's former students, said this about

his family: "Dean Harrison's grandfather came to Lauderdale County from North Carolina in the early 1800s as one of our early settlers. His father was a graduate and later a respected professor at Florence State Normal School (now the University of North Alabama). From this position, he became the second Montgomery City/County Superintendent of Education where he remained for 20 years. As a pioneer in legal education Dean Harrison continued a great family tradition as an outstanding teacher. He is a credit to his fine heritage and I count it as a privilege to have been among his students."

Leigh was in the fifth grade when the family moved to Montgomery where his father received much distinction for having one of the model school systems in the South. It is interesting to note that both Leigh and his father were awarded honorary degrees from the University and, on retirement, each received an automobile (and Leigh a check for \$4,000) from faculty and former students.

However, Leigh's parents' greatest achievement was raising three outstanding children. The oldest, Charles Trawick Harrison, was a member of Phi Beta Kappa at Alabama with master's and Ph.D. degrees from Harvard and a long and distinguished teaching career at Boston University, William & Mary and, for 26 years, at Sewanee as professor of English, department head and dean of the College of Arts and Sciences. He studied under George Lyman Kittredge at Harvard and, in the opinion of some knowledgeable observers, was "...the finest teacher of Shakespeare in America since Kittredge's death."

Leigh was four years younger, also a member of Phi Beta Kappa at Alabama, with a law school record of all A's and one B, and with an LL.M. degree in law from Harvard. He was married in December 1935 to Barbara Sinclair of Washington,

D.C. Barbara Harrison was just as dedicated and loyal to the law school as was Leigh. As "first lady," she was a gracious hostess at law school social events, a counselor to students' wives and female students, and a caring wife and mother. Barbara died in June 1994. The Harrison's daughter, Barbara Ann, was a four-year honor student of the College of Education at the University of Alabama and holds the MS in Library Science degree from Drexel Institute, Philadelphia, Pennsylvania. She is married to the Rev. Harwood T. Smith, Jr., a Lutheran minister in Boone, North Carolina. Their son, W. Robert Harrison, is a Sewanee graduate who teaches English in the Danville, Virginia Community College. Leigh has five grandchildren, the youngest being his 14-year-old namesake, Martin Leigh Harrison, who plans to study law.

Caroline, four years younger than Leigh, graduated from Randolph-Macon with honors, and earned the MA in English from Radcliffe. While at Radcliffe, she studied under a number of Harvard professors, including Kittredge who also taught at Radcliffe. She later taught English in the Montgomery school system and was married to Dr. R. Edward Moore, dean of the College of Education at Millsaps College. She served there as a Librarian, is now retired and, following the death of her husband, lives alone in Jackson, Mississippi.

No one in Dean Harrison's family had ever studied law when he was deciding on a career. He has said that he knew no lawyers. He knew that he did not want to be a physician or an engineer or a minister. In a conversation with his mother, she said, "What about law?" He agreed to try to see whether he liked it or not. He enrolled at the University of Alabama School of Law and said that, at first, he was mystified as most law students are when they first begin "but I was completely fascinated, I was hooked from almost the first week of law study...I have enjoyed the study of law all of my life since then".

Judge Thomas S. Lawson, longtime justice of the Alabama Supreme Court, now retired, 1929 classmate of Dean Harrison, trustee emeritus of the University and first president of the University of Alabama Law School Foundation, recalled the early love which Leigh Harrison had for the law, his ability to quickly analyze a legal problem and his clear and convincing briefs and recitations. He remembered the respect and recognition given Leigh by students and faculty, and that, on graduation in the hardest year of the depression, Leigh was one of the few who found ideal employment as a practicing attorney. He noted with much pride his support of

Leigh Harrison's selection as dean and of his satisfaction as the law school became stronger under his long and distinguished leadership.

After his graduation in 1929, Leigh joined the firm of McClellan & Stone of Birmingham in private practice. Judge Thomas C. McClellan had retired from the supreme court in 1923 and went into private practice in Birmingham with John S. Stone, who left a partnership in the firm of Tillman, Bradley & Baldwin. In 1929, Judge McClellan had become incapacitated with a stroke and Leigh began practice with John S. Stone. They had a very busy practice with a great deal of appellate work, which Leigh inherited because Mr. Stone preferred trial practice over the writing of briefs and trips to appellate courts. Leigh enjoyed and was more proficient in the study of the law, preparation of briefs and the more technical appellate arguments. He loved his association with Mr. Stone, with whom he practiced until Mr. Stone's death in 1932. He was next associated with White Gibson which also gave him opportunity to handle appellate work.

Although he enjoyed practice, he nurtured a feeling that he was best suited to teach law. Finally, in 1934, he left Mr. Gibson to attend Harvard Law School. He received his LL.M. degree from Harvard in 1935 and began a law-teaching career at Southern Methodist University. An opening on the faculty brought him back to the University of Alabama in 1938 at the age of 31.

After a few demanding semesters in his classes with grades to match, the law students dubbed him "Tiger" Harrison "because he was so rough on them" which was recognized in the *Tuscaloosa News* headlines and editorial on his becoming dean.

He was fortunate to serve on the faculty with Albert J. Farrah, who served as dean from 1912 to 1944 and whose strength and leadership shaped the legal profession in Alabama, and with William M. Hepburn, who served as dean from 1944 to 1950. Both were great teachers, and Leigh exhibited traits in his teaching which reflected on his association with them. Leigh was particularly close to Bill Hepburn, both building neighboring homes in the Beech Hills subdivision and their families developing warm friendships. Dean Hepburn reorganized the former *Alabama Law Journal*, dormant for a number of years, into the *Alabama Law Review* and prevailed on Leonard M. Trawick, Leigh's first cousin, to join the faculty with a primary assignment as the *Law Review's* faculty advisor. Trawick served with distinction until his untimely death in 1964.

Leigh's scholarly works as a faculty member include *Cases on Alabama and Common Law Pleading*, (incl. a 2nd Rev. Ed.), *Alabama Cases on Equity Pleading*, (each by the University of Alabama Press), *Alabama Pleading Before 1973*, (Alabama Law Institute), and numerous journal articles. In addition, he served as reporter for a number of law revision committees for the State of Alabama, the most important of which was the Alabama Constitutional Revision Commission, of which he was reporter and research director. The work of this commission was largely used in the adoption of the revised Judicial Article, a milestone in the development of the court system in Alabama.





Leigh Harrison receives the Farrah Law Society Service Award from Tom Christopher (left) and Richard Thigpen (right).

The law school faculty was strengthened during Dean Harrison's deanship, including the appointments of Dr. Jeff Bennett, Harry Cohen, Talbert B. Fowler, Henry A. Leslie, Dwight Morgan, Judge Sam Beatty, Dr. Cecil Mackey, Philip Mahan, Thomas L. Jones, and Guy T. Huthnance.

Senior Law Professor Tom Jones, appointed by Leigh in 1962, recalls the period of Leigh's tenure:

"During the uneasy period in educational institutions occasioned by racial integration and later student unrest, the Law School enjoyed relative calm through the steady disciplined but fair administration of Dean Harrison. Collegiality of the faculty with all important decisions affecting the law school receiving open faculty discussion and participation was the norm and led to understanding and support. Dean Harrison was not an overly excitable person and he worked hard to maintain support and loyalty so that students and faculty members were comfortable with his leadership. He constantly worked hard to increase educational standards by seeking the best qualified students and slowly increasing the minimum requirements for admission.

"Admission and retention questions were made impartially and fairly without any yielding to political or other pressures. On the other hand, he was considerate of the personal problems of the students and always tried to be helpful when such help was deserved.

"Dean Harrison was a strong advocate for library enhancement, strongly supporting the faculty library committee and its chair, Professor John C. Payne. Dean Harrison appointed the Law School's first attorney-librarian, Professor Talbert B. Fowler, and was able to obtain two expansions of Farrah Hall to provide, among other things, additional library facilities and a new moot courtroom."

One of the most important accomplishments of the Law School during Harrison's deanship was the organization of the University of Alabama Law School Alumni Association and the University of Alabama Law School Foundation. Dean Harrison modestly gives credit for these developments to the

large number of dedicated alumni who gave of their time and money, singling out retired Senator Howell Heflin for his outstanding leadership in these endeavors. He was elected as the first president of the Law School Alumni Association, which provided the nucleus for the organization of the Foundation and, later, for the Farrah Law Society.

Senator Heflin remembers his role: "Prior to my going on the supreme court, I had long felt that Alabama needed a stronger and better coordinated judicial system and improved legal training as a means of upgrading our legal system. I did not think that public funding could provide adequate support to bring the state law school to its needed strength and that private supplemental funding was essential to its mission as had been demonstrated at the state universities of Virginia, North Carolina, Michigan and California.

"I will never regret the time from my practice given to the law school in the organization of the law school

Foundation and the initial fund raising efforts to get it started. I and several others worked with Dean Harrison to identify potential leaders and urge them to take a leadership role. After the Foundation was organized, we all worked throughout the state to obtain initial endowed gifts. Later, the Farrah Law Society was organized with members limited to those willing to commit at least \$100 (now \$150) per year. Success of this program resulted from the loyalty of each alumni to the Law School plus their love and affection for Dean Harrison and their confidence in the wise allocation of their gifts under his leadership. I am honored to participate in this tribute to the man who inspired my love and devotion to the study of law."

Last year, law school alumni Robert McDavid Smith of Birmingham and retired Judge Conrad M. Fowler of Lanett approached Dean Ken Randall with the idea of establishing a fund and seeking gifts in honor of Dean Harrison as he approaches his 90th birthday. Dean Randall enthusiastically accepted their suggestion. The two then went to work and, to date, close to \$60,000 in gifts and pledges has been raised. At the time, Dean Harrison was living in his Beech Hills home, that he had lived in for 56 years. Last August, he fell and broke his hip. He is now living in a nursing home near his daughter Barbara's home in North Carolina. Her address and Dean Harrison's mailing address is 1060 Big Hill Road, Boone, North Carolina 28607. Contributions to or questions about the Harrison Fund should be directed to the University of Alabama School of Law, Office of Development, Box 870382, Tuscaloosa, Alabama 35487. ■



#### J. Rufus Bealle

J. Rufus Bealle currently is the coordinator of special gifts for the University of Alabama School of Law. For 30 years, he served as general counsel for the University of Alabama and secretary of the University of Alabama Board of Trustees. He was elected president of the National Association of College and University Attorneys. Prior to coming to the University of Alabama, Bealle was in private practice in Tuscaloosa. He received his bachelor's and law degrees from the University of Alabama.



## OPINIONS OF THE GENERAL COUNSEL

By J. Anthony McLain, general counsel

# Employment of Disbarred or Suspended Attorneys

### Question:

May an attorney who has been suspended, disbarred, is on disability inactive status, or who has surrendered his or her law license in the State of Alabama work as a paralegal, law clerk or legal assistant in the office of another duly licensed attorney?

### Answer:

A disbarred or suspended attorney may be employed as a paralegal, law clerk or legal assistant by another attorney subject to the following conditions and restrictions:

- (1) The disbarred or suspended attorney shall have no contact with the clients of the firm. Any contact with a client is prohibited. Although not an inclusive list, the following restrictions apply: a suspended or disbarred lawyer may not be present during conferences with clients, talk to clients either directly or on the telephone, sign correspondence to them, or contact them either directly or indirectly.
- (2) The disbarred or suspended attorney shall function only under the close supervision of the employing attorney. Such supervision must be continuous and regular.
- (3) The employing attorney must file a written report with the Disciplinary Commission outlining the type of work being performed by the disbarred or suspended attorney as well as the supervising mechanism utilized by the employing attorney to supervise the actions of the disbarred or suspended attorney.
- (4) The supervising attorney must be

physically located within the same office or premises as the disbarred or suspended attorney.

(5) Disbarred or suspended attorneys are prohibited from attending any court proceedings with the employing or supervising attorney.

(6) The disbarred or suspended attorney is prohibited from having any access whatsoever to funds of a client.

(7) The employing or supervising attorney shall confirm the parameters of the employment on a quarterly basis to the Disciplinary Commission.

### Discussion:

Research into this issue indicates that some states specifically prohibit suspended or disbarred attorneys from being employed as law clerks or paralegals. See e.g. *In re Kuta*, 86 Ill.2d 154, 427 N.E.2d 136 (1981); *Disciplinary Proceedings Against Wright*, 132 Wis. 2nd 223, 291 N.W.2d 696 (Wis.1986). The majority of states, however, do allow suspended or disbarred attorneys to work as paralegals, law clerks or legal assistants subject to certain conditions. One of the conditions almost uniformly applied is that the suspended or disbarred attorney have no contact with clients. Research has not disclosed any jurisdiction which permits such employment and expressly allows client contact, although some are silent on the subject. Representative of those jurisdictions which have allowed employment subject to certain restrictions is the decision of the Supreme Court of Kansas in the *Matter of Wilkinson*,



J. Anthony McLain

834 P.2d 1356 (Kan. 1992) which addressed this issue as follows:

"The consensus is that an attorney suspended from the practice of law may obtain employment as a law clerk, providing there are certain limitations upon the suspended attorney's activities. Regarding limitations, we are persuaded the better rule is that an attorney who has been disbarred or suspended from the practice of law is permitted to work as a law clerk investigator, paralegal, or in any capacity as a lay person for a licensed attorney-employer if the suspended lawyer's functions are limited exclusively to work of a preparatory nature under the supervision of a licensed attorney-employer and does not involve client contact. Any contact with a client is prohibited. Although not an inclusive list, the following restrictions apply: a suspended or disbarred lawyer may not be present during conferences with clients, talk to clients either directly or on the telephone, sign correspondence to them, or contact them either directly or indirectly.

Obviously, we do not accept that a disbarred or suspended lawyer may engage in all activities that a non-lawyer may perform. By barring contact with the licensed attorney-employer's clients, we prohibit a disbarred or suspended attorney from being present in the courtroom or present during any court proceedings involving clients." 834 P.2d at 1362.

It is, therefore, the opinion of the Disciplinary Commission of the Alabama State Bar that suspended or disbarred attorneys may be employed as paralegals by duly licensed attorneys or law firms subject to the conditions as set out above. The application of this opinion will be retroactive to the extent that it shall apply to the employing attorney who currently has in his employ as a paralegal, law clerk or legal assistant a lawyer who has been suspended, disbarred, is on disability inactive status, or who has surrendered his or her law license. ■

[RO-96-08]

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# Civil Procedure Update: A Survey of Recent Case Law Interpreting the Rules

By Sharon Donaldson Stuart and James R. Bussian

Over the past year, several significant court decisions had an impact on the Alabama Rules of Civil Procedure. This article does not attempt to address every recent opinion concerning the rules. Instead, the authors have selected five areas that apply to a broad spectrum of practitioners and that have had a substantial impact on the law. Part I of this article discusses the discovery of liability insurance contracts under the Alabama amendment to the Rules of Civil Procedure. Part II addresses the propriety of permissive joinder and interventions of subrogees since *American Legion Post Number 57 v. Leahey*. Part III analyzes a recent case on the principles of relation back of amendments, used to correct a misnamed defendant in the complaint. Part IV discusses *Ex parte Alfa Mut. Gen. Ins. Co.*, a January 1996 case addressing the application of time limitations to motions to reconsider. Part V reviews several recent decisions affecting the scope of discovery in civil cases.

## Insurance Agreements

In October 1995, the Alabama Rules of Civil Procedure were amended to provide for the discovery of insurance agreements. Ala. R. Civ. P. 26(b)(2). Research has not revealed any Alabama Supreme Court decision interpreting the application of the amendment. However, federal courts have been wrestling with the discovery of insurance agreements since 1970 and have delineated a number of boundaries on the rule's use in pretrial litigation. The federal cases give the Alabama practitioner some guidance on how to approach requests for insurance agreements. The following are a sample of cases that have addressed the discoverability of insurance agreements.

1. **Excess Policies**—The United States District Court for the Northern District of Illinois, Eastern Division, granted attorney's fees to plaintiff for having to compel defendant to produce an excess policy in a post-consent decree hearing where

defendant had failed to produce the excess policy prior to settlement. *Porter v. Creative Nail Design, Inc.*, 1990 U.S. Dist. LEXIS 4018 (E.D. Ill. April 10, 1990).

2. **Amount of Coverage Still Available**—In *Wegner v. Viessman, Inc.*, the United States District Court for the Northern District of Iowa denied the production of information relating to the amount of coverage still available to defendant following previous settlements with other persons in the same collision and following legal expenses in that all insurance policies had already been produced. 153 F.R.D. 154 (W.D. Iowa 1994).

3. **Reinsurance Agreements**—The United States District Court for the Eastern District of Pennsylvania denied the production of the insurer's reinsurance agreement (agreements that spread an insurer's risk of loss to other insurers) in a first party action in that the relief being sought was for declaratory judgment, not for money damages, and Rule 26(b)(2) specifies that insurance agreements are to be produced only if they may cause the insurer to be liable to satisfy part or all of a judgment. 139 F.R.D. 609 (E.D. Pa. 1991).

4. **"Risk Management" Documents**—In *Simon v. G. D. Searle & Co.*, the United States Court of Appeals for the Eighth Circuit granted production of defendant's risk management documents as being relevant to notice, defect and punitive damages in a products liability case. The court noted *in dicta* that such risk management documents, including reserve information, would not necessarily be termed insurance documents and, therefore, would not be discoverable under the provision mandating the disclosure of insurance agreements. The court ordered the production of the documents under the general rule providing for the discovery of any and all relevant documents, Rule 26(b)(1). The court went on to hold that they could not agree with the defendant's position that the rule mandating the disclosure of insurance agreements under the federal Rules

of Civil Procedure foreclosed discovery of any insurance document beyond the agreement. 816 F.2d 397 (8th Cir. 1987), cert. denied, 484 U.S. 917 (1987).

**5. Overbreadth Objection**—In *Roy v. The Austin Company*, defendants objected to a request for “all relevant insurance policies...” on the grounds that the request was vague, overly broad, not calculated to lead to admissible evidence, and sought confidential and proprietary information. The United States District Court for the Northern District of Illinois ordered the defendant to produce copies of insurance policies under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the case or to indemnify or reimburse defendants for payments made to satisfy any judgment which may be entered. The overbreadth objection was overruled. 1995 U.S. Dist. LEXIS 10559 (E.D. Ill. July 10, 1995).

**6. Health Care Provider Liability Insurance**—The limits of liability insurance coverage available to a health care provider shall not be discoverable in any action for injury or damages or wrongful death, whether in contract or tort, against a health care provider for an alleged breach of the standard of care. Ala. Code §6-5-548(e) (1975). This change to the Medical Liability Act of 1987 providing for the confidentiality of liability insurance limits was made effective May 17, 1996, presumably in response to the 1995 amendment to the Alabama Rules of Civil Procedure calling for the disclosure of insurance limits.

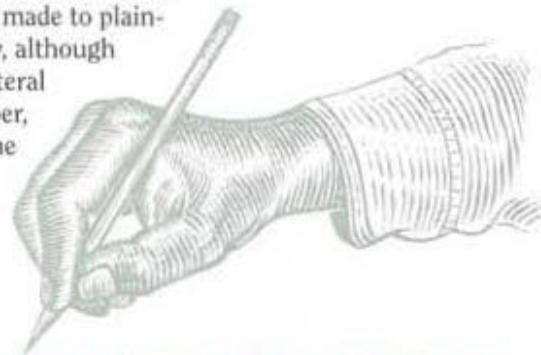
### **Joinder and Intervention Following American Legion Post Number 57 v. Leahey**

In *American Legion Post Number 57 v. Leahey*, the Supreme Court of Alabama held that the defendant in a personal injury action cannot introduce evidence that the plaintiff received from a collateral source payments for her medical or hospital expenses. 1996 Ala. LEXIS 182 (July 12, 1996). This ruling raises the issue whether interventions and joinder of insurance subrogees who have paid medical benefits to a plaintiff are still proper. Under Ala. R. Civ. P. 24, a person may move to intervene in an action. Ala. R. Civ. P. 24. Intervention is used where an insurer, for example, moves to have itself named as a real party in interest in the case. On the other hand, joinder is used where a party moves to have another entity or person joined into a case. *Abbott v. Allstate Ins. Co.*, 507 So. 2d 905, 906 (Ala. 1987); see Ala. R. Civ. P. 19(a). The Alabama Supreme Court in *Abbott v. Allstate Ins. Co.* in 1987 was faced with the issue of whether the collateral source rule is violated by the addition of plaintiff's medical insurance carrier as a party plaintiff where the plaintiff stipulated all subrogation claims of the insurer will be satisfied from the proceeds of any judgment rendered in favor of the plaintiff. *Abbott*, 507 So. 2d at 906. The court held that under Ala. R. Civ. P. 17(a), the subrogee, as real party in interest, is the proper plaintiff regardless of the form of the transaction between the insurer and the insured. *Id.* If the subrogee is not named as a plaintiff, according to the court, the defendant may compel joinder of the insurer pursuant to the joinder provision contained in Ala. R. Civ. P. 19(a). *Id.* (citing *Roberts v. Hughes*, 432 So. 2d 1232, 33 [Ala. 1983]).

The recently-decided case, *American Legion Post Number*

*57 v. Leahey*, does not affect this rule that joinder of a subrogee insurance carrier is proper. 1996 Ala. LEXIS 182. The express language of the statute ruled unconstitutional by *American Legion Post Number 57* states, “[t]his section shall not apply to any civil action pending on June 11, 1987”. Ala. Code §12-21-45 (Ala. 1975), overruled by *American Legion Post Number 57 v. Leahey*, 1996 Ala. LEXIS 182. The *Abbott* case, wherein the court allowed the joinder of the subrogee insurance carrier, was decided on April 24, 1987. *Abbott v. Allstate Ins. Co.*, 507 So. 2d at 905. Section 12-21-45 was not even in effect and did not control the *Abbott* decision. Therefore, the fact that it has been ruled unconstitutional would not have an impact on the *Abbott* case.

The *American Legion Post Number 57* decision prohibits the introduction into evidence of testimony concerning payments by the collateral source. However, it is interesting to note that in *Abbott*, the Supreme Court of Alabama stated, “[t]he only testimony before the jury concerning Blue Cross that this court can find in the record was *Abbott's* testimony by which he apparently sought to claim the premiums he had paid to Blue Cross as an element of his damages”. *Id.* at 906. As a result, according to the court, the collateral source rule was not violated by defendant adding the insurance subrogee as a party plaintiff where no testimony was introduced by defendant that interjected collateral payments having been made to plaintiff. *Id.* In summary, although the joinder of collateral sources is still proper, the usefulness to the defendant of doing so has been restricted by the *American Legion* decision.



### **Misnamed Parties and Principles of Relation Back**

On October 4, 1996, the court of civil appeals followed the Alabama Supreme Court's holdings in *Hughes v. Kox* and *Ex parte Nicrosi*, re-affirming the liberal construction that is to be applied to the principles of relation back of amendments. See *Parks v. Moore*, 1996 Ala. Civ. App. LEXIS 690 (October 4, 1996).

The general rule as to misnaming a defendant by a plaintiff is that a default judgment may be entered against a trade name and that judgment constitutes a judgment against the individual doing business under that trade name, as long as the individual was personally served with the complaint. *Hughes v. Kox*, 601 So. 2d 465 (Ala. 1992). In *Hughes*, the original summons and complaint had named “Hughes Realty of Clanton” as defendant. *Id.* The plaintiffs moved for a default judgment. *Id.* On June 27, 1990 the plaintiffs amended their complaint and substituted “Gearlene Hughes, d/b/a Hughes Realty or Hughes Realty of Clanton” for “Hughes Realty of Clanton, Alabama” as a defendant. *Id.*

The original summons did not indicate whether Hughes Realty was a sole proprietorship, a partnership or a corporation. Hughes contends that because the action was not filed against a suable entity, but only against a trade name under

which she did business, the complaint did not name her as a defendant. *Id.* Moreover, she argued that the Kox's amendment to the complaint was not sufficient to give her notice that she was a defendant in the action because she was never served a copy of the amended complaint. *Id.* The court reasoned that the rules are designed to prevent preclusion of a viable claim or defense because of technical inaccuracy in the pleading. *Id.* Because Hughes personally received service of the complaint naming her sole proprietorship as a defendant, the complaint gave her fair notice that a claim was being filed against her individually.

In short, the rule is that a name change is merely a matter of description if it does not affect the identity of the party sought to be described, but only gives accuracy and certainty the party's identity. *Id.* When an error is made in the naming of a party, the error may be corrected by an amendment and

whether the amendment introduces a new party to the action or merely refers to the same party by a different name is a question of fact to be determined by the court. *Id.*

In the recently-decided *Parks* decision, Bobby Parks brought a wrongful death action against "James Moore d/b/a James Moore Paving Company" on July 16, 1993 when his two-year old son had wandered over to and drowned in a pond on property owned by Mr. Moore. *Id.* at \*2. Moore filed an affidavit in support of a motion to dismiss the complaint on November 17, 1993, stating that his residence contained the pond and that his business, located across the road from the pond, was unconnected to his residence. *Id.* Parks then filed an amended complaint on November 18, 1994, substituting James Moore, an individual, in place of fictitious party defendant No. 1. *Id.* On November 18, 1994 the motion to dismiss James Moore d/b/a James Moore Paving Company was granted. *Id.* at \*3.

Over one year later, Moore filed a motion to dismiss the amended complaint on the grounds that plaintiff had not satisfied the fictitious party requirements of Rule 9(h) of the Alabama Rules of Civil Procedure, allowing for relation back of the amendment to the original complaint. *Id.* The trial court agreed and dismissed the plaintiff's amended complaint. *Id.* The court of civil appeals relied on *Ex parte Nicrosi*, which was relied upon in *Hughes*, that plaintiff's use of fictitious party practice did not change the nature of the amendment, which was to accurately describe the capacity in which James Moore had been sued. *Id.* at \*7-8 (citing *Ex parte Nicrosi*, 15 So. 507 [1894]). In *Nicrosi*, the Supreme Court of Alabama held that an amendment renaming The Roswald Grocery Company, a corporation, to Esther Roswald doing business under the name The Roswald Grocery Company was merely a matter of a description and that the amendment did not change the party against whom suit had been brought. *Ex parte Nicrosi*, 15 So. 507, 508 (1894).

Based upon the *Parks* decision it is clear that regardless whether plaintiff erroneously attempts to utilize fictitious party practice or merely invokes a Rule 15

amendment a defendant cannot utilize the statute of limitations as a defense to an amended complaint where the amendment is used merely to correct a misnomer. However, the case does not address the effect that a complete change in parties would have on the principles of relation back. For instance, where a plaintiff has sued an individual and later learns that the correct entity was a corporation of which the individual was merely a stockholder, then such an amendment would not merely be one to correct a misnomer, but would work a complete change of parties. In short, the principles of relation back of amendments in accordance with the modern construction of the rules of civil procedure are given a liberal interpretation as seen in *Parks v. Moore*.

### Motion to Reconsider

The motion to reconsider is a curious animal in Alabama jurisprudence. In a January 1996 opinion from the Supreme Court of Alabama, authored by Justice Ingram, the court made clear that although the Rules of Civil Procedure do not provide for a motion to reconsider, such motions are subject to the time limitations set forth in the rules where the motion has been filed seeking relief from the entry of a final judgment. *Ex parte Alfa Mut. Gen. Ins. Co.*, 1996 Ala. LEXIS 1, \*4-5 (January 5, 1996). In *Ex parte Alfa Mut. Gen. Ins. Co.*, Alfa sought a writ of mandamus directing the Montgomery Circuit Court to vacate an order purporting to set aside a summary judgment entered in favor of Alfa in action filed against it by John B. Ledbetter. *Id.* at \*1. Ledbetter had filed a fraud action against Alfa, claiming that one of Alfa's agents made misrepresentations to him concerning the cancellation of an automobile insurance policy. *Id.* at \*1-2. When the plaintiff admitted in his deposition that he had talked to no one at Alfa other than his agent and that the agent did not lie to him but, in fact, had been helpful and honest, Alfa filed and was granted a motion for summary judgment. *Id.* at \*2.

Plaintiff filed a motion to reconsider requesting that the trial court "reconsider its decision granting [summary judgment]" and contending that "this is a fraud case involving genuine issues of

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material fact and [that] the Defendant is not entitled to a judgment as a matter of law." *Id.* at \*2. The trial court based upon plaintiff's motion and a hearing set aside its granting of summary judgment. *Id.* The Supreme Court of Alabama set aside the trial court's order vacating summary judgment, reasoning that the essence of a motion, rather than its title, is what must be considered in determining how a motion is to be treated under the rules. *Id.* at \*4. Because a judgment had been entered against the plaintiff, the court held that the motion to reconsider was a Rule 59(e) motion to alter, amend or vacate the judgment. *Id.* at \*6. The court also recognized that the motion was not a Rule 60 motion, which seeks relief from a judgment upon the grounds of mistake, inadvertence or other such reasons. *Id.* Because a Rule 59 motion is subject to the provisions of Rule 59.1, plaintiff's motion was deemed denied by operation of law when it was not ruled on for 90 days after it was filed. *Id.* The order vacating summary judgment was deemed a nullity. *Id.*

Again, nothing in the Alabama Rules of Civil Procedure discusses the propriety of a motion to reconsider. However, there is ample support for a trial court's ability to reconsider its own rulings even where there has been no entry of judgment; for example, when a defendant's motion for summary judgment is denied. This support can be found in the language of Rule 54(b), which states:

[A]ny order or other form of decision, however, designated, which adjudicates fewer than all the claims or their rights and liabilities or fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Ala. R. Civ. P. 54(b). More significantly, perhaps, is not what Rule 54 says in terms of support for a motion to reconsider where no final judgment has been entered, but what Rule 59 does not say. Rule 59 applies only to cases where there has been an "entry of judgment."

See Ala. R. Civ. P. 59(e) (stating that the motion shall not be filed later than 30 days "after entry of judgment"). A judgment is an order from which an appeal lies. Ala. R. Civ. P. 54(a). Therefore, neither Rule 59 or 59.1 contain time limitations confining a trial court's power to reconsider a motion where there has been no entry of judgment, in that those rules do not apply to situations where a judgment has not been entered. In summary, although not directly addressed by the rules of civil procedure, motions to reconsider are subject to the same time limitations as any post-judgment motion where a final judgment has been entered by the court.

### Discovery

During the past year the Alabama Supreme Court has issued several opinions affecting the breadth of discovery in civil litigation. The cases primarily have an impact on the plaintiff's ability to discover evidence of other similar incidents or acts to show notice to the defendant or to establish a pattern and practice of wrongful conduct.

#### A. Premises Liability

Two recent Alabama Supreme Court decisions have expanded the scope of discovery of similar accidents in premises liability cases. *Ex parte Wal-Mart Stores, Inc.*, [Ms. 1951128, July 26, 1996], \_\_ So. 2d \_\_ (Ala. 1996), 1996 Ala. LEXIS 216; *Ex parte Heilig-Meyers Furniture Co.*, [Ms. 1951150, October 25, 1996], \_\_ So. 2d \_\_ (Ala. 1996), 1996 Ala. LEXIS 520.

In *Ex parte Heilig-Meyers*, the plaintiff claimed that he was injured when he tripped over a piece of furniture protruding into the aisle at a Heilig-Meyers store in Florence, Alabama. The plaintiff sought discovery of all complaints or reports against any Heilig-Meyers store during the preceding three-year period wherein a slip and fall was claimed to have occurred due to an object protruding into an aisle or passageway. Plaintiff sought a copy of all such complaints or reports, as well as an explanation of the disposition of each complaint or report.

Heilig-Meyers objected on various grounds, including an objection that the request was unduly burdensome. In support of its objection, Heilig-Meyers pro-

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duced evidence that it had over 700 stores in the U.S. and Puerto Rico, and that no particular person, file, database or document could identify similar incidents in its stores. The trial court overruled the objection and ordered Heilig-Meyers to produce the requested information within five days. Heilig-Meyers petitioned the Alabama Supreme Court for a writ of mandamus directing the trial court to prohibit the requested discovery.

Noting that the discovery request was fashioned to seek only claims relating to similar incidents, the supreme court rejected Heilig-Meyers' assertion that the requested information was not relevant. Specifically, the court stated that the requested information could be relevant to show knowledge of Heilig-Meyers that its merchandise was being displayed in an unsafe manner, and thus it might provide an evidentiary basis for the plaintiff to amend his complaint to assert wantonness.

However, the court agreed with Heilig-Meyers that the request was

unduly burdensome. The court was influenced by the evidence presented by Heilig-Meyers that it would be required to contact the managers of each of Heilig-Meyers' 700 stores to inquire whether similar incidents had occurred during the specified time period. The court limited Heilig-Meyers' response to complaints or reports made or forwarded to the company's home office during the three-year period, noting that this limitation should eliminate the burdensome nature of the request.

Although not discussed at length in the opinion, this limitation accomplished another important purpose. By restricting production to claims reported to the home office, the court helped to ensure that the information produced was relevant to Heilig-Meyers' knowledge that its merchandise was being displayed in an unsafe manner. As a practical matter, the company would not have notice of claims that were not reported to its home office.

While the court provided Heilig-Meyers with some relief, the case is significant in that it allowed discovery of other similar incidents on a nationwide basis, rather than limiting such discovery to incidents within the State of Alabama.

The court reached a contrary result in *Ex parte Wal-Mart Stores, Inc.*, [Ms. 1951128, July 26, 1996], \_\_ So. 2d \_\_ (Ala. 1996), 1996 Ala. LEXIS 216. The plaintiff in *Ex parte Wal-Mart* was injured when a footlocker fell from a shelf in a Wal-Mart store and hit her on the head. She sued Wal-Mart on negligence and wantonness theories, and sought through discovery accident and incident reports from all 86 Alabama Wal-Mart stores for the preceding five-year period. Wal-Mart objected on grounds that the request was unduly burdensome and not reasonably calculated to lead to discovery of admissible evidence. The trial court initially ordered Wal-Mart to produce all Alabama accident and incident reports for the five-year period, subject to a showing that the production would be unduly burdensome. On three separate occasions during the following seven and one-half months, the trial court ruled that Wal-Mart had not sufficiently proven that compliance with its order would be unduly burdensome and again

ordered production of the accident and incident reports.

The Alabama Supreme Court denied Wal-Mart's petition for writ of mandamus, noting only that the trial court did not abuse its discretion in requiring production of the requested discovery, in light of Wal-Mart's failure to prove that compliance with the order was in fact unduly burdensome.

Although the discovery request in *Ex parte Wal-Mart* was limited to the state of Alabama and was therefore less broad than the request in *Ex parte Heilig-Meyers*, it was still arguably unduly burdensome in that the request sought accident and incident reports from 86 stores. The factor that appears to have made the difference in the result in the two cases is that Heilig-Meyers produced evidence to support its claim that the request was unduly burdensome, while Wal-Mart apparently did not.

#### B. Fraud

The importance of establishing undue burden has proven equally important in fraud cases, as illustrated by the Alabama Supreme Court decisions in *Ex parte Compass Bank*, [Ms. 1951249, September 6, 1996], \_\_ So. 2d \_\_ (Ala. 1996), 1996 Ala. LEXIS 487, and *Ex parte Pate*, 678 So. 2d 762 (Ala. 1996).

The plaintiff in *Ex parte Compass Bank* asserted claims on behalf of a putative class, and alleged fraud and suppression arising from his purchase of two variable annuities through the bank. The trial court entered partial summary judgment with regard to a portion of the fraud claim, but left intact plaintiff's claims alleging Compass' failure to disclose costs, fees and expenses associated with the annuities. The plaintiff then filed a broad discovery request seeking documents relating to customer complaints and correspondence relating to variable annuities, mutual funds and other such products, and a list of customers who had purchased annuities and mutual funds from Compass since 1990. In response to these requests, Compass presented affidavit testimony of two employees explaining the burden and expense which would be involved in gathering the requested information. The trial judge ordered Compass to produce the requested documents.

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The supreme court granted Compass' petition for writ of mandamus, noting that "even in a fraud case, justice requires the trial court to protect a party from oppression or undue burden or expense." *Ex parte Compass Bank*, 1996 Ala. LEXIS at \*7. The court held that Compass made a clear showing that the trial court's order was overly broad and would result in undue burden and expense in that it failed to limit discovery to the putative class members and to the type of annuity purchased by the plaintiff, and would require production of over 21,000 customer files and would involve review of files on 35,000 transactions, and thus was unduly broad, burdensome and expensive.<sup>1</sup>

The court reached a contrary conclusion in *Ex parte Pate*, 678 So. 2d 762 (Ala. 1996). In *Ex parte Pate*, the plaintiffs alleged that the defendant car dealership was guilty of fraud in the sale of an allegedly new car which had, in fact, been used as a promotional vehicle for a radio station. The plaintiffs sought production of the names and addresses of all persons who had purchased a vehicle from the dealership since 1984 that had previously been placed with the radio station. The dealership produced the names of five customers who had purchased such vehicles since 1992, and sought a protective order preventing the plaintiffs from contacting the customers, on the grounds that contact would damage its relationship with these customers and would likely be of no value to the plaintiffs. The trial court entered the protective order.

On petition for writ of mandamus, the supreme court directed the trial court to vacate its order, reaffirming the oft-cited proposition that the plaintiff in a fraud case is afforded more latitude in discovery, and stating that, "in order to obtain a protective order that would limit this broad discovery, the movant must either show good cause why the objected-to discovery would be unduly burdensome, expensive, oppressive, embarrassing, or annoying, or show that the subject matter sought to be discovered is privileged." 678 So. 2d at 764. The court rejected the dealership's argument that the potential damage to its reputation outweighed the plaintiffs' right to contact the customers. More

importantly, the court disagreed with the dealership's contention that the sales to other customers were substantially dissimilar and would be of no value to the plaintiffs' case. Specifically, the court found that the dealership had not shown good cause to circumvent the plaintiffs' "clear legal right" to discover not only whether the dealership had made the same misrepresentation to other customers, but were also entitled to learn whether it had "made other kinds of misrepresentation to other persons in order to sell the cars that had been used as promotional vehicles for WKSJ." *Id.* at 765.

### C. Bad Faith

The Alabama Supreme Court addressed the scope of discovery in insurance bad faith cases in *Ex parte Finkbohner*, [Ms. 1951363, September 6, 1996], \_\_ So. 2d \_\_ (Ala. 1996), 1996 Ala. LEXIS 488. In that case, plaintiff sued Principal Mutual Life Insurance Company for breach of contract and bad faith refusal to pay for plaintiff's "tummy tuck" under a medical insurance policy. Plaintiff sought discovery of other Alabama claims and lawsuits since 1992 alleging bad faith denial of a claim, as well as the name, address and telephone number of each insured whose claim was denied based on the same policy language within the preceding five year period.

The trial judge refused to require production of the requested information, and the plaintiff filed a petition for writ of mandamus. In an opinion authored by Justice Houston, the Alabama Supreme Court held that plaintiff was entitled to discover previous bad faith suits filed against Principal Mutual, but was not entitled to discover evidence of other claims.

In reaching the decision that previous bad faith suits were discoverable, the court relied heavily on the rationale of *Ex parte Rowland*, 669 So. 2d 125 (Ala. 1995).<sup>2</sup> Although *Ex parte Rowland* was a fraud case, the court noted that "intent is an element of the Finkbohner's bad faith claim". *Finkbohner*, 1996 Ala. LEXIS 488, at \*11. Finding that "bad faith, like fraud, is particularly difficult to prove", the court held that plaintiff was entitled to discover any bad faith actions filed

against Principal Mutual since 1992.

However, the court upheld the trial court's refusal to allow discovery of other claims. Noting that, "in the absence of fraud, the existence of an otherwise valid coverage exclusion in a policy would arguably provide the insurer with a legitimate or debatable reason for denying a claim," the court held that, under the facts presented, other claims did not appear relevant to the bad faith claim.<sup>3</sup> *Id.* at \*9. In light of the summary fashion in which the court addressed the discoverability of other lawsuits, its refusal to allow discovery of other claims is puzzling. It is difficult to reconcile the court's contrary holdings on these two seemingly related issues, since, as a practical matter, if other claims are not relevant on the issue of bad faith, other lawsuits should not be either.

A close analysis raises additional questions concerning the rationale utilized by the court to determine that other lawsuits are discoverable. First, while it is true that bad faith was originally difficult to prove, such was the intent of the Alabama Supreme Court at

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the time the tort was created. See *National Savings Life Ins. Co. v. Dutton*, 419 So. 2d 1357, 1362 (Ala. 1982). Indeed, the court envisioned that only "extreme" or "unusual" cases would present a jury question on bad faith claim. See *Thomas v. Principal Financial Corp.*, 565 So. 2d 735, 743 (Ala. 1990)(citing Justice Jones' concurrence in *Dutton*, 419 So. 2d at 1362).

Moreover, the court's application of fraud principles to bad faith cases is particularly disturbing due to the differences in the elements and proof of the two torts. For example, the "intent" aspect of a bad faith claim is quite different from the "intent" aspect of a fraud claim. A misrepresentation does not have to be intentional to be actionable. Indeed, a misrepresentation made recklessly or negligently will support a fraud claim. The rationale for allowing discovery and proof of other frauds in fraud cases is to allow the plaintiff an opportunity to show a fraudulent scheme, motive, or plan and thereby establish intent in a particular case.

The same rationale does not apply as neatly in the bad faith context. Although "intentional refusal to pay the insured's claim" is one of the elements of a bad faith claim, there is usually no dispute that the insurance company intended to deny the claim.<sup>4</sup> The dispute in a bad faith case typically centers not around whether the denial was intentional, but around whether a lawful, debatable, or arguable basis exists to support the denial. Thus, each denial of a claim should normally stand or fall on its own merit, without regard to whether other lawsuits have been filed or claims denied. Not only is proof of the denial of other similar claims unnecessary to establish intent to deny a particular claim, such proof is not probative of the insurer's intent. If the plaintiff can establish that the insurer denied the claim with knowledge that it lacked a debatable reason for doing so, the fact that the insurer has previously been sued for bad faith by other insureds or has denied other similar claims does not strengthen the plaintiff's prima facie case, although such

evidence could prejudice the insurer.

It is difficult to understand how different rationales would apply to discovery of other bad faith lawsuits versus other claims. One would expect that if the court had applied the same analysis to other lawsuits as with claims it would have reached identical conclusions on both issues.

#### D. Medical Malpractice

In *Ex parte Northport Health Service, Inc.*, [Ms. 1950849, July 19, 1996], \_\_ So. 2d \_\_ (Ala. 1996), 1996 Ala. LEXIS 204, the plaintiff sued a nursing home alleging breach of contract, negligence and wrongful death of a patient. The plaintiff sought to discover "pattern and practice" evidence relating to other acts of abuse, neglect, or mistreatment of nursing home residents, and the trial court ordered production of the requested information.<sup>5</sup> The Alabama Supreme Court held that a nursing home is a "hospital" under Ala. Code § 6-5-481, and thus is covered by the provisions of the Medical Services Liability Act.<sup>6</sup> The court also reaffirmed its holding in *Ex parte Golden*, 628 So. 2d 496 (Ala. 1993), that plaintiffs are not entitled to discover similar acts or omissions, or "pattern and practice" evidence in cases falling within the ambit of the Medical Services Liability Act, and directed the trial judge to limit his order compelling the requested discovery.

#### Conclusion

Because the rules of civil procedure are the bread and butter of any litigation practice, trial lawyers must stay abreast of current judicial interpretation of the rules. This article highlights several important recent developments. However, each practitioner should continuously monitor the rules and cases to ensure compliance with this ever-changing area of the law. ■

1. Interestingly, the court did not hold that the discovery requests were irrelevant insofar as they sought information regarding different products, although the language of the opinion indicates that the court found the requests to be irrelevant for the same reasons that it found them overly broad.

2. *Ex parte Rowland* was a fraud and breach of contract action arising out of the purchase of an automobile. The Alabama Supreme Court refused to limit the plaintiff's discovery of other frauds to those which were similar, and held that the plaintiff was entitled to discover all fraud actions that had been filed in Alabama against the defendant car dealer within the previous 10 years. 669 So. 2d at 127. See also *Ex parte Pate*, supra (refusing to limit discovery to similar misrepresentations).

3. The court noted the plaintiff's apparent intention to buttress their bad faith claim by presenting testimony of other insureds whose claims were denied based on the policy language at issue.

4. The inadvertent or mistaken failure to pay a claim does not constitute bad faith. See *Harrington v. Guaranty Nat'l Ins. Co.*, 628 So. 2d 323 (Ala. 1993).

5. In his order compelling discovery, the trial judge indicated that Section 6-5-551 was unconstitutional. The Supreme Court assumed, without deciding, that the trial judge so ruled, and held that his order was void for failure to serve the attorney general pursuant to ALA. CODE § 6-6-227.

6. ALA. CODE § 6-5-551.



#### James R. Bussian

James R. Bussian was born in Stamford, Connecticut. He is a graduate of Vanderbilt University and South Texas College of Law, cum laude, where he was note and comment editor of the *South Texas Law Review*. He was admitted to the Alabama State Bar in 1995. He is

a member of the Birmingham Bar Association, the Alabama State Bar, the American Bar Association, the Alabama Defense Lawyers Association, and the Defense Research Institute. Bussian practices with the Birmingham firm of Rives & Peterson.



#### Sharon Donaldson Stuart

Sharon Donaldson Stuart received her undergraduate degree from Samford University and her law degree from Cumberland School of Law. She served as law clerk to United States District Judge Sharon Lovelace Blackburn. Stuart also practices with Rives & Peterson.



## YOUNG LAWYERS' SECTION

By Andy D. Birchfield, Jr.

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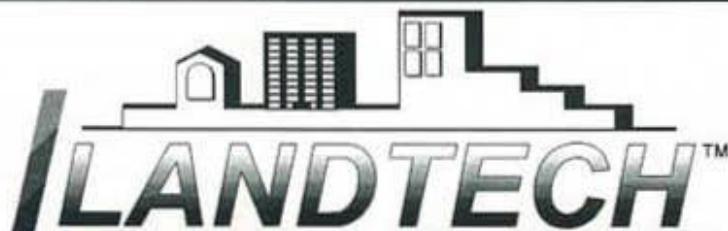
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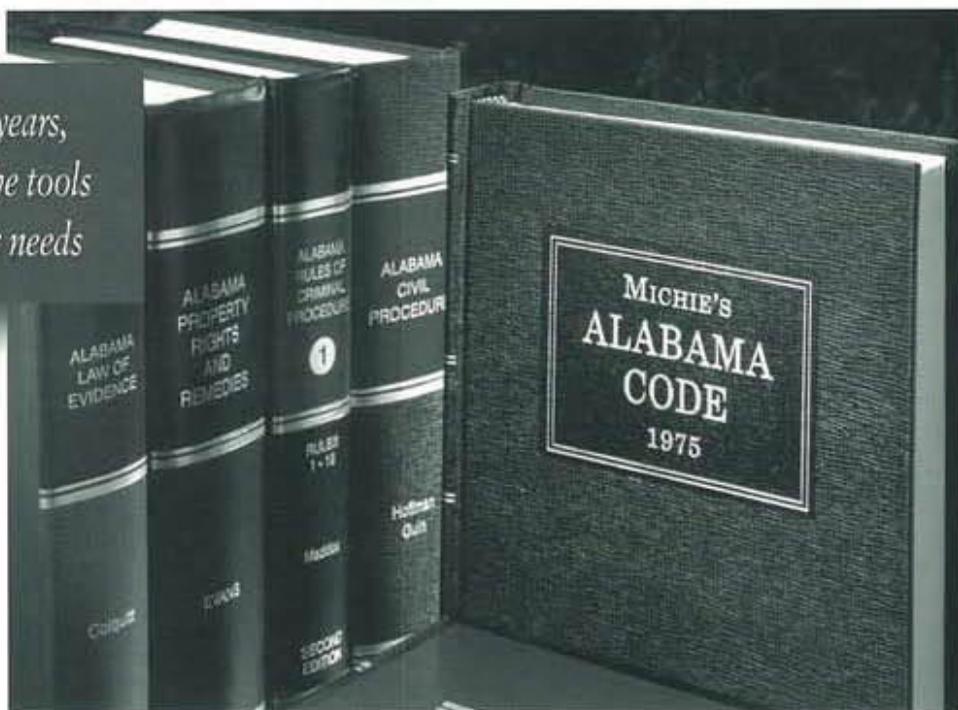
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Alabama Law Foundation president Harry Gamble, Jr. of Selma presided at the dinner. The speaker for the evening was Dr. David G. Bronner, chief executive officer of the Retirement Systems of Alabama. Seventy-two guests attended the dinner. Fifteen Fellows have fulfilled their monetary commitment to the foundation and were recognized as Life Fellows. Fellows' contributions will help fund projects of the foundation that benefit the legal community and the public.



Life Fellows in attendance at the dinner are pictured above. Standing l-r: Thomas S. Lawson, Jr., James A. Main, William L. Utsey and William D. Melton. Seated l-r: Frank M. Bainbridge, Gorman R. Jones, Jr., Frank O. Burge, Jr., William S. Pritchard, Jr. and John B. Scott, Jr.



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**ETHICS OPINIONS:** ASB members may obtain copies of formal ethics opinions. Informal opinions, which are given over the phone, can be obtained from the General Counsel's office.

**PROFESSIONAL JOURNAL, NEWSLETTER AND BAR DIRECTORY:** The *Alabama Lawyer* is mailed to ASB members bimonthly and features informative and substantive articles to enhance the practice of law. The *ADDENDUM* is the ASB newsletter focusing on timely information and mails during alternate months. All ASB members receive the annual edition of *The Alabama Lawyer Bar Directory* listing members, firms, the Alabama Rules of Professional Conduct, MCLE Rules and Regulations, and other Alabama Supreme Court rules relating to the profession.

**LAWYER REFERRAL SERVICE:** The ASB operates this statewide public service program that receives over 16,000 calls a year. Lawyers outside Jefferson, Madison and Mobile counties may participate for an annual fee and may select up to 15 areas of practice in which to receive referrals. LRS members agree to provide the first 30 minutes of consultation to the referred client for \$25.

**GROUP HOSPITAL, DISABILITY AND LIFE INSURANCE:** The ASB endorses five insurance programs through its administrator, Insurance Specialists, Inc. Coverage areas include major medical, disability income, hospital indemnity, business overhead, and life. These are available to ASB members, their spouses, children and employees. Contact Insurance Specialists, Inc. for details at 1-800-241-7753.

**LEXIS-NEXIS GROUP MEMBERSHIP DISCOUNT:** MVP (Maximum Value Products) is the LEXIS Group Membership Program that allows unlimited access to Alabama case law, statutes and more at a flat monthly rate starting at \$135 for a firm with up to three members, plus a monthly subscription fee of \$25. No "on-line" time limits are imposed. Specialty subscriptions are also available in selective law areas. For details on this program call LEXIS at 1-800-356-6548.

**PROFESSIONAL LIABILITY INSURANCE:** Attorneys Insurance Mutual of Alabama, Inc. (AIM) was established by the ASB to provide a more stable professional liability market for its members than had commercially been provided. For more information about AIM call 1-800-526-1246.

**AIRBORNE EXPRESS DISCOUNTS:** ASB members receive group discount benefits. Example: Next-day delivery on a one-ounce letter is \$9.25 versus a \$15 competitive price. There is no charge to enroll. To enroll call 1-800-443-5228 and give the ASB code: N68.

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# Dedication Ceremony of Jones School of Law Building

By Gloria McPherson

(This article, which originally appeared in the *Montgomery County Bar Association Docket*, is reprinted in part with permission.)

On December 12, 1996, alumni and friends gathered for the dedication ceremony of the new \$4 million Thomas Goode Jones School of Law building in Montgomery. Designed in the neo-federal architectural style, the new building has a feeling of openness and is best described as affording an elegant appearance without extravagance. The new building is an essential step in seeking American Bar Association accreditation for the law school.

At the request of a few young men, almost 70 years ago Walter B. Jones began teaching law at night. At that time, he was the judge of the 15th Judicial Circuit. Judge Jones founded Jones School of Law in 1928 and named the school in honor of his father, Thomas Goode Jones, a Confederate Officer, Governor of Alabama and an author.

During the dedication program for the new building, Attorney General Jeff Sessions, Lt. Governor Don Siegelman, Chief Justice Perry Hooper, Justice John Patterson, attorney Fred Gray, Mayor Emory Folmar, and others commented on the academic excellence and high ethical standards exemplified by the graduates and students of Jones School of Law.

Alabama State Senator Wendell

#### Gloria McPherson

Gloria McPherson is a 1994 graduate of Jones School of Law. She is with the United States Attorney's Office in Montgomery.

Mitchell, dean of Jones School of Law, presided at the dedication ceremony. Under Dean Mitchell's leadership, the law school has experienced phenomenal growth. When he became the dean in 1987, there were 98 students and one full-time professor. Today, as part of Faulkner University, Jones has achieved a current enrollment of 448 students and nine full-time faculty and administrative staff.

Justice Patterson is confident that Judge Jones would be pleased

with the progress of Jones School of Law and with the new building. Describing the dedication of the new building as "a giant step; indeed, a leap for the legal community," Justice Patterson believes that Judge Jones would have said, "Well done—well



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## Judicial Award of Merit Nominations Due

The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the state bar's Judicial Award of Merit through May 15, 1997. Nominations should be prepared and mailed to:

**Keith B. Norman, Secretary**  
**Board of Bar Commissioners**  
**Alabama State Bar**  
**P.O. Box 671**  
**Montgomery, Alabama 36101**

The Judicial Award of Merit was established in 1987. The 1996 recipient was the Honorable Ralph Cook, associate justice, Supreme Court of Alabama.

The award is not necessarily an annual award. It may be presented to a judge who is not retired, whether state or federal court, trial or appellate, who is determined to have contributed significantly to the administration of justice in Alabama. The recipient is presented with a crystal gavel bearing the state bar seal and the year of presentation.

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

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

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