



The Alabama Lawyer

Vol. 52, No. 6

NOVEMBER 1991

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IN BRIEF

NOVEMBER 1991

Volume 52, Number 6

ON THE COVER: After 36 years on the federal bench, and a notable and distinguished career, Judge Frank M. Johnson, Jr. of Montgomery takes senior status at age 73.

Photo courtesy of The Birmingham News

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

Published seven times a year (the seventh issue is a bar directory edition) by The Alabama State Bar, P.O. Box 4156, Montgomery, Alabama 36101. Phone (205) 269-1515. FAX (205) 269-1501.

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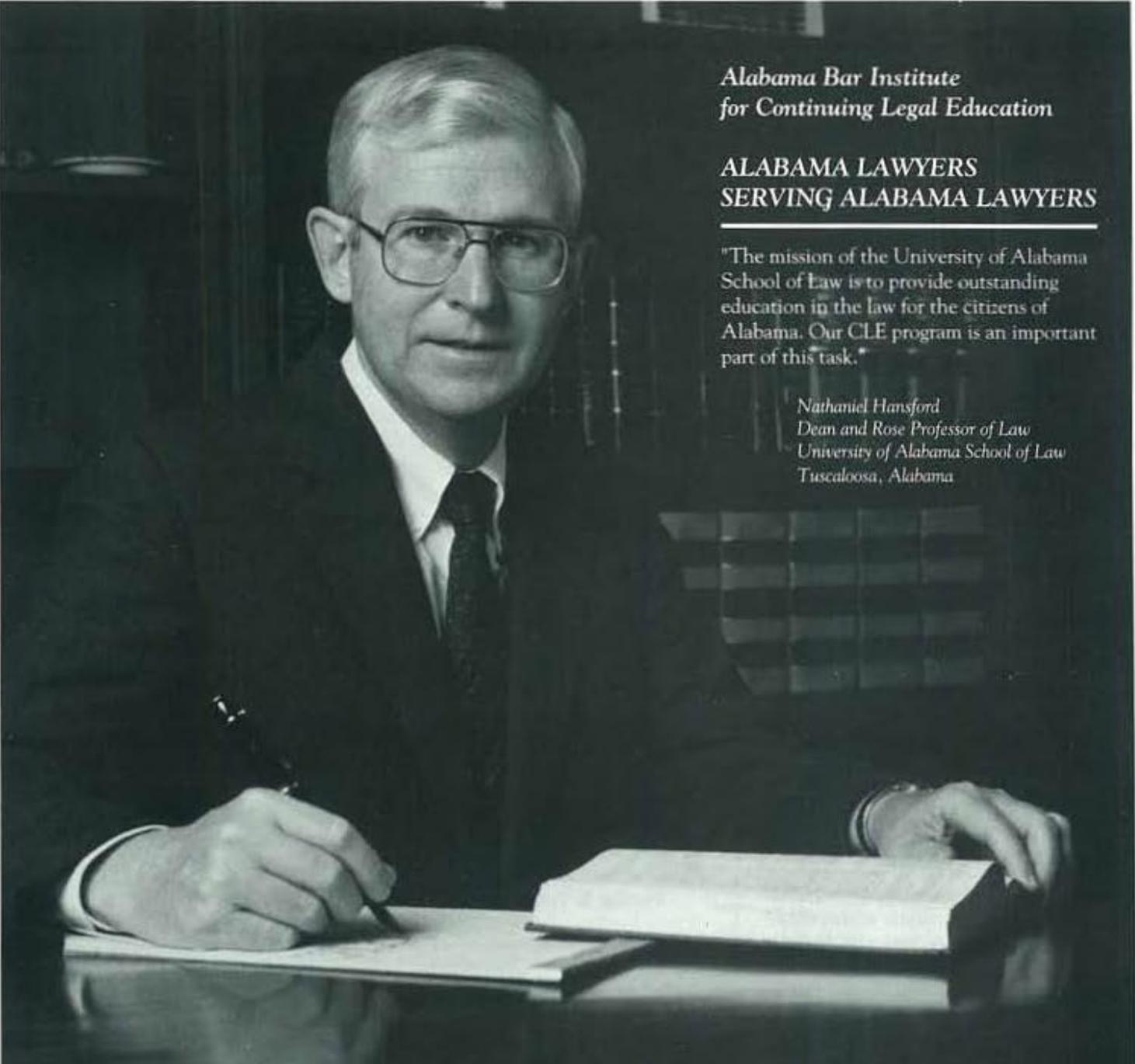
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PRESIDENT'S PAGE

At the beginning of the bar year, I think it is important to outline some of the projects that you will be hearing more about as the year progresses. While time and space will not permit me to review all of our committee and task force activities, I want to mention several important areas.

Lawyer discipline

In my first article to you, I quoted a line from Robert Frost's poem that mentioned the value of seeing yourself as other people see you.

One area that I am afraid our profession is not seen in a very favorable light is the area of lawyer discipline. Some background information in this area might be appropriate.

About 20 years ago, an American Bar Association committee (Clark Committee), formed to evaluate disciplinary enforcement in the legal profession, published a report. The Clark Committee report and recommendations led to many changes in the process of lawyer discipline over the last 20 years.

In 1989, the ABA appointed a second commission to evaluate disciplinary enforcement (McKay Commission). The purposes of the McKay Commission were to study the progress made since the Clark Committee had made its report, to conduct some original research to evaluate the state of disciplinary enforcement in this country and to make its findings and recommendations known.

In May of this year, the McKay Commission published its draft report. This report was discussed at length at the National Conference of Bar Presidents meeting in Atlanta this past August. I understand that some revisions to the report are being made at this time and it will be presented to the ABA House of Delegates for action at the ABA mid-winter meeting in Dallas. I won't attempt in this report to outline all of the findings and recommendations to the McKay Commission or give you an in-depth analysis of any of the recommendations and findings. However, some of the findings and recommendations are as follows:

1. Changes in the legal profession over the past years have produced a growing mistrust of secret, self-regulated systems of lawyer discipline in the eyes of the public.

2. If judicial regulation of the legal profession is to be preserved, the system of regulation must withstand the charge of inherent conflict of interest and appearance of impropriety. While lawyers have a legitimate role to play in an appropriately structured disciplinary system, the management and control of the system must rest with the Courts.

3. Central intake and statewide jurisdiction are essential to avoid charges of cronyism and the familiar criticism that the "fox is guarding the henhouse".

4. Non-lawyers must be given a significant role in the administration of the system.

5. Secret proceedings are the greatest cause of distrust, and disciplinary systems can no longer operate secretly. Absolute immunity from suit should be given to persons who file complaints against lawyers.

6. Expediting processing of minor complaints, and summary procedures and consent procedures should be allowed to insure prompt disposition of complaints.

7. Mandatory reporting of trust account overdrafts and random audits of trust accounts should be required of all lawyers.

Some of the findings and recommendations of the McKay Commission are very controversial. Other recommendations of the Commission report are less controversial and should be seriously considered.

I believe the purpose of lawyer discipline is to protect the public. It is important that our disciplinary process not only accomplish this purpose, but also be perceived by the public as being fair and responsive. As professionals, we must insure that our system avoids the criticisms of being too slow, too secret, too soft and too self-regulating. The system must be fair to lawyers and to the public and be perceived as such.

I have appointed a task force chaired by former President Bill Scruggs to study the process of lawyer discipline in Alabama and make such recommendations as the task force deems appropriate regarding our process. It is my hope that this task force will review all available data and materials and make recommendations to improve our procedure.

I receive at least two calls per week from disgruntled clients complaining about lawyer conduct, legal ethics or the disciplinary process. While I believe our system is a good one, I am also convinced that it can be significantly improved.

Pro Bono

Over the years, lawyers donating their time to provide free legal services to the disadvantaged has been one of our profession's finest accomplishments. Many state bar associations have been required by their supreme courts to adopt mandatory pro bono programs. Our board of commissioners recommended a voluntary pro bono program for lawyers in this state because the commission believed that such a program would allow the bar to expand legal services to the poor in an organized manner without mandating that lawyers do so.



Phillip E. Adams, Jr.

During the administration of President Harold Albritton, the volunteer lawyer program was established. Melinda Waters of Montgomery, a member of our bar, was hired as the coordinator of the program and has performed admirably in her first year to get the program organized on a statewide basis. This year, local bar associations and individual lawyers will be contacted and asked to adopt programs and voluntarily donate professional time to make our pro bono project work.

If each of us donated a small fraction of our work week to the less fortunate, we will have taken a giant leap toward fulfilling one of the highest responsibilities of our profession. I have confidence in the members of our state bar in meeting this most important challenge.

State bar headquarters expansion

In 1964, the existing bar headquarters building was constructed. This building was designed and built to serve a state bar comprised of approximately 2,000 lawyers. At this writing, our bar has approximately 9,600 members, a staff of 21 people and an annual budget in excess of a million and a half dollars. The lawyers of this state, through the bar commission, made a decision to expand bar headquarters. This

building expansion will be completed in early 1992.

Quite frankly, support from our membership has been disappointing. While some members have given generously of their time and their money to support this effort, many members have not responded at all. Our goal is to raise \$3,500,000. At this writing, we are approximately \$2,000,000 short of reaching our goal. I believe that the lawyers of this state care enough about our profession and the proper administration of the programs of the Alabama State Bar to support the construction of a facility to house our bar. Every lawyer should contribute at least \$300 to insure that adequate funds are available to complete this project. It is most definitely an investment in the future of our profession.

When you are in Montgomery, please go by bar headquarters. I can't help but believe that every lawyer in this state will be proud of this facility and would want to make the modest contribution we are requesting so that he or she might feel a part of this building.

Please contact me about your thoughts regarding anything mentioned in this article or anything else you think we might do to improve our profession. I look forward to hearing from you. ■

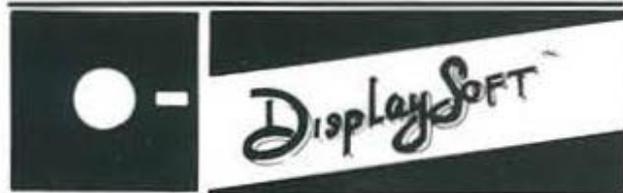
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EXECUTIVE DIRECTOR'S REPORT

Did you know this?

Members of the Alabama State Bar serve in numerous representative capacities. Appointments are made, usually by the board of commissioners, pursuant to an appropriate statute or bylaw governing the entity involved.

I thought I would share with you the names and positions which our members currently hold after learning recently introduced legislation would call upon the bar to name members to another such group, the Legislative Compensation Commission. I was impressed with how often our members are asked to serve in various representative roles.

Nationally, the Alabama State Bar has three elected members of the American Bar Association House of Delegates. These persons serve at their own expense and serve two-year terms and may be re-elected. The board of commissioners elects these persons. Currently serving are Wade H. Baxley of Dothan, J. Jerry Wood of Montgomery and Ben H. Harris, Jr. of Mobile. These are not, however, the only Alabamians in the House. N. Lee Cooper serves as chairman of the ABA House of Delegates while Gary C. Huckaby of Huntsville sits as a member of the ABA Board of Governors. William C. Knight represents the Birmingham Bar Association. Due to Gary Huckaby's recent election to the board of governors, his position as a state delegate was vacated and Wade Baxley, as the most senior Alabama State Bar delegate, moved, under ABA bylaws, into this state delegate position on an interim basis through August 1992. Alabama State Bar President Phil Adams was elected to fill Baxley's former position. Baxley has indicated he will seek election as state delegate in his own right for that three-year term in an election among ABA members in Alabama in the spring of 1992. The terms of Harris and Wood end in August 1992, while Baxley's elected term, currently filled by Adams, expires in 1993.

The passage of the Judicial Article resulted in the establishment of a **Judicial Inquiry Commission**, the **Court of the Judiciary** and the **Judicial Compensation Commission**. The bar, by statute, must elect two persons to serve on each of these bodies. Those currently holding these positions and the years in which their current terms expire (noted in parentheses) are as follows:

Judicial Inquiry Commission:

William B. Hairston, Jr., Birmingham (95)
J. Don Foster, Foley (93)

Judicial Compensation Commission:

Charles R. Adair, Jr., Dadeville (95)
Broox G. Garrett, Jr., Brewton (95)

Court of the Judiciary:

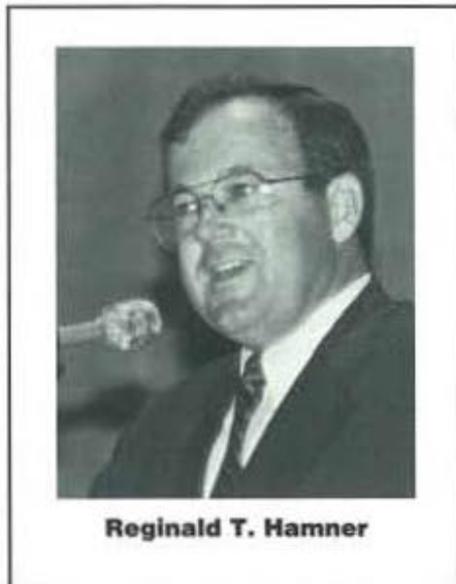
Hugh A. Nash, Oneonta (93)
William D. Scruggs, Jr., Fort Payne (97)

In addition to Bill Scruggs and Hugh Nash, the bar elected as alternates judges on the Court of the Judiciary J. Edward Thornton of Mobile and Norman Harris of Decatur.

The bar elects eight of the 15 persons who comprise the Board of Directors of the **Legal Services Corporation of Alabama**. Currently serving after their election by the board of commissioners are:

Cecilia J. Collins, Mobile (92)
Robert D. Segall, Montgomery (92)
Walter E. McGowan, Tuskegee (92)
Bryant T. Whitmire, Birmingham (92)
Oliver Frederick Wood, Hamilton (93)
Scott K. Hedeem, Dothan (94)
Al Vreeland, Tuscaloosa (94)
J. McGowin Williamson, Greenville (94)

One member of the **Alabama Securities Commission** is elected by the board of commissioners. Actually, the bar submits three names to the Governor pursuant to Section 8-6-51(A), *Code*, 1975, and he names the member. Currently serving as the bar's representative is E.B. Peebles, III of Mobile whose appointment extends to October 31, 1993.



Reginald T. Hamner

The bar commission also elects members to the board of trustees of the **Alabama Law Foundation, Inc.** Those serving by election are:

Ben H. Harris, Jr., Mobile (94)
Lynn R. Jackson, Clayton (92)
Roy J. Crawford, Birmingham (93)
Harry W. Gamble, Jr., Selma (94)
John Earle Chason, Bay Minette (92)
John B. Scott, Jr., Montgomery (93)

In addition, the president, president-elect and immediate past president of the Alabama State Bar serve by virtue of their office.

The **Capital Representation Resource Center** is the most recent entity to which its board members are to be elected by the board of commissioners. Currently serving are:

J.L. Chestnut, Jr., Selma (92)
Anne W. Mitchell, Birmingham (92)
Frank S. James, III, Birmingham (92)
Albert P. Brewer, Birmingham (92)
Jesse R. Brooks, Jr., Huntsville (93)
Vanzetta Penn McPherson, Montgomery (93)
William Posey Cobb, II, Montgomery (93)
Dennis Balske, Montgomery (94)

Frank H. McFadden, Montgomery (94)
Richard S. Manley, Demopolis (94)

Each state bar in the U.S. Eleventh Judicial Circuit has three named delegates to its **Judicial Conference**. These persons are appointed for a three-year term with each incumbent president of the state bar naming one delegate and an alternate. The current delegates and alternates are:

Delegates:

Wanda D. Devereaux, Montgomery (92)
John A. Owens, Tuscaloosa (93)

Alternates:

William D. Melton, Evergreen (92)
Broox G. Holmes, Mobile (93)

ASB President Adams will name a delegate and alternate in December with terms to expire in 1994. Service to the bar and the profession, as well as practice before the U.S. District and U.S. Circuit courts, are factors considered in selecting these delegates. These persons receive an invitation to the Eleventh Circuit Judicial Conference as ASB delegates and serve at no expense to the bar.

Pursuant to supreme court rules, the bar commission elects the **bar examiners**, the members of the **Disciplinary Commission**, the **Disciplinary Boards** and the **Mandatory Continuing Legal Education Commission**. With the exception of the bar examiners, the membership of these bodies is restricted to members of the board of bar commissioners. Current members of these groups are:

Disciplinary Commission:

Victor H. Lott, Jr., chairperson
James R. Seale, Montgomery
James E. Hart, Jr., Brewton
Drayton N. James, Birmingham

Disciplinary Boards:

Panel I:

William B. Matthews, Sr., Ozark
A.J. Coleman, Decatur
Lynn R. Jackson, Clayton
J. Mason Davis, Birmingham
Jerry C. Porch, Russellville

Panel II:

Richard H. Gill, Montgomery
John W. Kelly, III, Selma
Wanda D. Devereaux, Montgomery
J. Robert Faulk, Prattville
Jerry K. Selman, Jasper

Panel III:

Robert M. Hill, Jr., Florence
James S. Lloyd, Birmingham
Cathy S. Wright, Birmingham
George W. Royer, Jr., Huntsville
Wayman G. Sherrer, Oneonta

Panel IV:

Bowen H. Brassell, Phenix City
George Higginbotham, Bessemer
R. Blake Lazenby, Talladega
George P. Ford, Gadsden
Conrad M. Fowler, Jr., Columbiana

Mandatory Continuing Legal Education Commission:

Lynn R. Jackson, Clayton, chairperson
John David Knight, Cullman
J. Mason Davis, Birmingham
George W. Royer, Jr., Huntsville
Arthur F. Fite, III, Anniston
John A. Russell, III, Aliceville
Conrad M. Fowler, Jr., Columbiana
Benjamin T. Rowe, Mobile
Samuel A. Rumore, Jr., Birmingham

Board of Bar Examiners:

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Marcus W. Reid, Anniston
Kenneth O. Simon, Birmingham
Ronald L. Davis, Tuscaloosa
Randall M. Woodrow, Anniston
David P. Broome, Mobile
T. Thomas Cottingham, Birmingham
John C. Calame, Selma
Robert H. Rouse, Mobile
Andrew P. Campbell, Birmingham
C. Michael Stilson, Tuscaloosa
Laura L. Crum, Montgomery
Anne W. Mitchell, Birmingham

If you are interested in serving in any of these capacities, write to me or your bar commissioner. These are all time-consuming positions, but professionally rewarding.

You can see there are numerous areas outside bar committees, task forces and sections for service where your talents can be utilized in furtherance of our public responsibility. The persons noted herein represent you and your interest. Your input is encouraged and welcomed.

Have I told you more than you really wanted to know? I hope not. ■

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JUDGE FRANK M. JOHNSON, JR.

When The Goin' Got Tough . . .

On October 30, 1991—his 73rd birthday—Judge Frank M. Johnson, Jr. took senior status on the Eleventh Circuit Court of Appeals after 36 years on the federal bench. This issue of *The Alabama Lawyer* commemorates Judge Johnson's distinguished and courageous tenure as a jurist in Alabama during one of the state's most difficult eras.

Frank Minis Johnson, Jr. was born in 1918 in Winston County, a north Alabama county whose citizens are known for their fierce independence and strong respect for individual rights. He married Ruth Jenkins of Haleyville in 1938. After attending public schools in Winston County, the Gulf Coast Military Academy in Mississippi and Massey Business College in Birmingham, he took an LL.B. at the University of Alabama in 1943.

Thereafter, Johnson saw combat in the infantry in France and Germany during World War II. He was wounded twice and decorated with the Purple Heart with oak leaf cluster, Bronze Star and combat infantryman's medal.

Upon his return to Alabama, Johnson began his legal career in general practice with the firm of Curtis, Maddox & Johnson in Jasper in 1946. He was appointed United States Attorney in the Northern District of Alabama in 1953, and came to Montgomery when he was named United States District Judge for the Middle District of Alabama in 1955. Johnson served as chief judge for the Middle District from 1966 to 1979.

In 1979, Judge Johnson was elevated to the United States Court of Appeals for the Fifth Circuit. When that circuit split in 1981, Judge Johnson was assigned to the new Eleventh Circuit Court of Appeals, where he has served until the present. Judge Johnson is the recipient of honorary degrees from the University of Alabama, Yale Law School, Princeton University, the University of Notre Dame, St. Michael's College, and Boston University. He is the subject of several biographies, including books by Dr.

Tinsley Yarborough and Robert F. Kennedy, Jr., as well as forthcoming works by Jack Bass and Frank Sikora.

Judge Johnson is best known for a series of courageous—and, in their time, highly controversial—decisions involving human rights. Television interviewer Bill Moyers, in a 1980 interview with Judge Johnson, summarized those decisions in this way:



Judge Frank M. Johnson, Jr.

"Fate placed Frank Minis Johnson, Jr. in the nerve center of confrontation and change. To give you an idea of his impact on the South and the nation during his 24 years on the district bench, this is how he responded to the challenge. He declared segregated public transportation unconstitutional (*Browder v. Gayle* 1956). He ordered the integration of public parks (*Gilmore v. City of Montgomery*, [176 F.Supp. 210 (M.D. Ala. 1961)]), interstate bus terminals (*Lewis v. Greyhound Corporation*, [199 F.Supp. 210 (M.D. Ala. 1961)]), restaurants and restrooms (*U.S. v. City of Montgomery* 1962) and libraries and museums (*Cobb v. Montgomery Library Board* 1962). He required that blacks be registered to vote (*U.S. v. Alabama* 1961), creating a standard that was later written into the 1965 Voting Rights Act. He was the first judge to apply the one man-one vote principle to state legislative apportionment

(*Reynolds v. Sims* 1964). He abolished the poll tax. He ordered Governor George Wallace to allow the civil rights march from Selma to Montgomery (*Williams v. Wallace*, [240 F.Supp. 100 (M.D. Ala. 1965)]). He ordered the first comprehensive statewide school desegregation (*Lee v. Macon County Board of Education*, [267 F.Supp. 458 (M.D. Ala. 1967) (three-judge court)]), and was the first to apply the equal protection clause of the Constitution to state laws discriminating against women (*White v. Crook*, 1966). He established the precedent that people in mental institutions have a constitutional right to treatment (*Wyatt v. Stickney*, [344 F.Supp. 373 (M.D. Ala. 1972)]), a sweeping breakthrough in mental health law. His order to eliminate jungle conditions in Alabama prisons is the landmark in prison reform (*Pugh v. Locke*, [406 F.Supp. 318 (M.D. Ala. 1976)]."

This issue of the *Lawyer* does not revisit those landmark district court decisions, which are well-known and frequently discussed, except briefly in the interview with Judge Johnson conducted by Stephen Rowe. Instead, focus is on other sides of his life and career that are less explored.

Judge Gerald B. Tjoflat, chief judge of the Eleventh Circuit Court of Appeals, writes on the subject of Johnson's 12-year tenure on the federal circuit bench. Bryan Stevenson's article on Judge Johnson's opinions in the area of criminal justice explores a segment of Johnsonian jurisprudence that is often overlooked. Portions from a recent interview with Ruth Johnson, Frank Johnson's wife of 53 years—a thoughtful and spirited individual in her own right—add a new perspective to events in Judge Johnson's career. Finally, a selection of stories about Judge Johnson excerpted from a book of anecdotes put together by his law clerks in 1985 show the judge known best to his colleagues and friends: a man not only of integrity and strength, but also of prodigious good humor. ■

Tales of Judge Johnson

Following are some excerpts from "Antics and Anecdotes", a collection of humorous tales about Judge Johnson. It was published by some of Judge Johnson's law clerks and presented in 1985 at a celebration marking the 30th anniversary of his service as a federal judge.

Many years ago, shortly after he had come to Montgomery, Judge Johnson asked, in a pre-trial conference, what the plaintiff and defendant lawyers thought to be the settlement range of their respective cases. It began with the plaintiff's lawyer saying very forcefully that he "had a nice little plaintiff", and he believed the jury would assess damages in the range of \$75,000, which was very excessive in light of the damages. Judge Johnson's reply was, "You also have a nice little judge, and if the jury gave you that, he would set it aside."

—Maury Smith, Montgomery

One of my more memorable encounters with Judge Johnson came after my tenure as law clerk, while serving as an appointed counsel. The defendant, a young man, had pleaded guilty to a rather serious charge. The young man asked if he could speak with the judge about his sentence.

When we appeared before Judge Johnson, in chambers, a young girl carrying a small baby also came in. As usual, from the pre-sentence report, Judge Johnson knew more about the defendant than the defendant knew himself. After some discussion, the defendant asked Judge Johnson for probation so he could get a job and support his baby. The judge then asked, "Is that your baby the young lady has with her?" The defendant responded that it was, and Judge Johnson then asked the defendant if he was married to the young lady. The defendant replied that he was not, and Judge Johnson said, "Well, tell you what. I am going to continue your sentencing for two weeks, and you can

come back and bring your girlfriend to watch me send you to the penitentiary or can bring your wife to watch me give you probation."

A very important marriage ceremony was performed within two weeks, and, true to his word, Judge Johnson gave the defendant probation.

—George B. Azar, Montgomery

From 1965-69, I was an assistant United States Attorney in the Southern District of Alabama trying cases before Honorable Dan Thomas, United States district judge. In Mobile, attorneys could question witness and make objections while seated at counsel table. In February 1969, I transferred to the Middle District of Alabama. In March, I tried my first criminal case before Judge Johnson. The case hadn't proceeded very long before I objected (while I was seated) to defense counsel's question on cross-examination. Judge Johnson said, "I can't hear you, Mr. Segrest." Still seated, I objected louder, and he said, "I still can't hear you, Mr. Segrest." Frustrated, I stood up and repeated my objection. His response: "Now, I can hear you. Sustained." I tried the rest of the case on my feet.

—Broward Segrest, Montgomery

A probation officer, well-known for his frequent bouts of indigestion, was observed at the Houston County Courthouse one afternoon as he popped into his mouth his usual five or six after-dinner antacid tablets. A young deputy clerk asked with concern why he needed so many tablets. The probation officer explained that he had a nervous stomach, as did everyone else in the Federal

Court. About that time, the clerk of the court entered the office and inquired, "Does Judge Johnson have a nervous stomach, too?" "No," the probation officer replied, "but he's a carrier."

—Helen Harris

Judge Johnson has long been known as a "no-nonsense" judge. I was an Assistant United States Attorney from 1954 to 1958 and am the only present employee of the Court who was here when Judge Johnson ascended the trial bench about 30 years ago. I tried a number of cases as Assistant United States Attorney and as a private practitioner before Judge Johnson, and I have had only one experience in which it could be said that Judge Johnson lost his composure on the bench.

A moonshiner had taken the stand in his own defense in a case wherein several Internal Revenue Agents had testified that they had approached an active still and observed the defendant and an unknown person fire the still, stir the mash and go about the usual processes of making moonshine. When the agents attempted to arrest the two subjects, both tried to flee, the defendant unsuccessfully.

At trial, the defendant insisted that he was perfectly innocent of any intent to contribute in any way his services to the making of moonshine, that he had been hunting with his companion on a cold and rainy day and that needing the support of some liquid sustenance, his friend suggested that they stop by a still and partake of the by-products. The defendant denied having stirred the mash or fired the cooker and insisted that his only participation was to take a small drink in an effort to ward off the

possible ravages of pneumonia.

On cross-examination, the prosecutor, being a hunter himself and possibly sympathetic to the need for liquid sustenance after a long day of hunting in inclement weather, conducted more or less a friendly conversation with the defendant in which it was acknowledged by all that it could be very nice to hunt with an old friend and stop for a much-needed toddy after hours of exposure to wet and cold. It was conceded that the joys of partaking of such sustenance could be enhanced considerably by sharing it with an old friend with whom the defendant had hunted many times, and the warmth of the occasion was exceeded only by the chill of the prosecutor's next question concerning the identity of the old friend with whom the defendant had so often hunted and enjoyed the fruits of Bacchus.

At this point, the defendant assured all that he did not know the name of his old friend with whom he had often hunted and drunk. The prosecutor, with some logic, reminded the defendant that the jury was not likely to believe such a statement and insisted upon disclosure of the name of the old friend and joint perpetrator of the crime. By this time, it was obvious that the defendant was departing from the truth and that he would, in all likelihood, be convicted. An older and wiser prosecutor would have abandoned his quest and dismissed the witness in complete dishonor. However, the kill was in sight, and the prosecutor insisted upon disclosure of the name of the more agile moonshiner. The defendant then turned to the judge and explained that while he really knew the name, it was a dirty word, and he could not disclose it in the presence of all of the ladies in the courtroom.

This being the first term of court at which ladies had ever served on a jury in the Middle District of Alabama, the court dutifully explained that there would be vile language used and that all ladies in the courtroom except those on the jury would have one minute to abandon the courtroom so that such language would not offend them. Following a short scuffle, at which all in attendance simply moved three inches forward in their seats, the judge instructed the defendant that, in spite

of the offensive nature of the name of the other moonshiner, he must reveal the name to the prosecutor. Thereupon, the defendant, with a helpless shrug, answered, "His name was Peter."

Whether or not his last name was ever disclosed is lost on record because of the uniform indication of mirth, and I can well remember the high chair occupied by the judge, and referred to as the bench, turn so that only the back of the chair, rocking in rhythmic beat, was visible to the courtroom.

It often has been said by experienced defense counsel that if one can instill in his trial some humor to make the jurors feel good, they are far less likely to convict. Such was the case here. In spite of all of the evidence against the defendant, the jury returned a verdict of "not guilty", and the defendant, with the everlasting reluctance to offend a female juror by use of the name "Peter", was acquitted.

—*Judge Robert Varner, Montgomery*

Judge Johnson's first secretary, Miss Helen Cospers, saw to it that he was never disturbed during a conference. Once, Mrs. Johnson called the office, asked to speak with her husband, and was refused permission. So, she calmly told Miss Cospers to send in a note, when the next opportunity arose, to inform the judge that his house was on fire.

The judge now has a separate, unlisted telephone line into his private office so Mrs. Johnson can call direct in the event of an emergency. One morning, not long ago, that phone rang. Before lifting the receiver, the judge pronounced that it must be someone dialing the wrong number, because he had just spoken with Mrs. Johnson and she was fine.

I witnessed the following one-sided conversation:

"Hello."
"Who?"
"Betty . . . Betty who?"
"She's not here."
"She ran off with the cook."
"That's right, the cook."
"I don't know where."
"OK."
Click.

—*Glen Darbyshire*

The most memorable one-liner which I recollect occurred in New Orleans in the courthouse while several judges were waiting for an elevator and complaining about the heavy workload, Judge Johnson entered the elevator, turned around and commented, "Well, it sure beats plowing."

—*Judge R. Lanier Anderson, III*

After becoming United States Attorney, the judge was cross-examining a witness and was intent on showing her to be a woman of ill repute. To his preliminary question as to her place of residence, however, she answered, "Aw, Mr. Johnson, you know very well where I live."

—*Anonymous*

I play golf with a regular group. One of the members of a foursome—a fair golfer—usually takes up considerable time on the first tee attempting to get strokes. If the others agree on two, he will insist on three, and so on.

Not long ago, and the day before one of our scheduled games, I sent my secretary to the probation office to get a King James version of the Bible. I wanted to copy, to present my "stroke-seeking" friend, verse six, chapter 18, Book of Proverbs:

"A fool's lips enter into contention and his mouth calleth for strokes . . ."

. . . earlier in the day, I had, as is my occasional practice, asked my court bailiff to drop by Jim Folsom's whiskey emporium and get me a bottle of Jack Daniels.

As it would and did happen, my secretary arrived with the Bible at the same time the bailiff arrived with the whiskey. I heard one of them remark as they left my chambers, "I don't know what opinion the judge is working on, but I'll bet it'll be a doozie."

—*Frank M. Johnson, Jr.*

Note to a law clerk:
Glen, Go to People's Drugs (across street from courthouse on Forsyth) and get:

1. Neosinephrine (12-hour type),
2. Sucrets — for irritated throat, and
3. Levi Chewing Tobacco (4 pkgs.) to irritate throat.

—*FMJ*

Excerpts from Opinions

[Federal Rules Decision, *Grau v. Procter & Gamble Co.*, United States District Court, M.D. Alabama]

On January 8, 1963, the official court reporter for this district filed with the clerk of this court a certified transcript of the proceedings in this case. Subsequent to the filing of the original certified transcript by the court reporter, the defendants, now the appellees, asked this court to strike and eliminate certain portions thereof. The exact portions of the record which this court is asked to strike are as follows:

Page 24: "MR. GARRETT: Ha, ha, ha, ha."

"MR. GARRETT: Ha, ha, ha, ha."

Page 42: "Q [MR. GARRETT]: Ha, ha, ha, ha."

"Q [MR. GARRETT]: Ha, ha, ha."

Page 74: "Q [MR. GARRETT]: Ha, ha."

Page 82: "MR. GARRETT: Ha, ha, ha."

Page 105: "MR. GARRETT: Ha, ha, ha, ha."

JUROR: "Ha, ha, ha."

In asking this Court to edit the record and strike the above portions, the appellees state "that although Mr. Garrett and the juror may have made some sound at such times, that it was an inadvertent mannerism, such as a person coughing, clearing his throat or otherwise inadvertently making a sound." The appellees contend that the inclusion of the above portions of the proceeding merely serve to clutter unduly the record on appeal in this case. The plaintiff, now the appellant, formally objects to altering or changing the official transcript.

Those who know the Honorable James Garrett, Attorney at Law, who was, according to the record, doing all of the "ha, haing," would hesitate long and deliberate seriously before suggesting that he is not a highly competent practitioner of the law. This Court has long recognized and appreciated this exceptional and outstanding ability as a trial lawyer. He wears his success graciously—both in and out of the courtroom; he demonstrates his proficiency in the art of trial work in a manner pleasing both to the Court and, most of the time, to the jurors. As is generally true in the case of successful trial lawyers, Mr. Garrett is a past master in the art of suggestive psychology. His long and active experience in trial work enables him to practice with proficiency his art of suggesting through the use of auditory stimulation. He undeniably demonstrated this art of using the hypnotoxin of laughter in the trial of this civil action. When this art is practiced as Mr. Garrett practices it, it is with finesse and without reflecting a lack of respect for the witness, for the opposing counsel, or for the Court. The proficiency of Mr. Garrett in the use of this is vividly demonstrated by at least one juror (page 105) joining him in his "ha, ha, has." As to how effective with the jury this approach to plaintiff's case (for damages growing out of her hypersensitivity to Crest Toothpaste) was to be, we will never know since the verdict was directed by the Court.

32 F.R.D. 199 (1963), as reprinted in *The New Yorker*, July 6, 1963, at 53.

Carl M. Miles, et al., v. City Council of Augusta, Georgia, United States Court of Appeals, Eleventh Circuit, August 4, 1983.

PER CURIAM:

Plaintiffs Carl and Elaine Miles, owners and promoters of "Blackie the Talking Cat," brought this suit in the United States District Court for the Southern District of Georgia, challenging the constitutionality of the Augusta, Georgia, Business License Ordinance . . .

The partnership between Blackie and the Mileses began somewhat auspiciously in a South Carolina rooming house. According to the deposition of Carl Miles:

Well, a girl come around with a box of kittens, and she asked us did we want one. I said no, that we did not want one. As I was walking away from the box of kittens, a voice spoke to me and said, "Take the black kitten." I took the black kitten, knowing nothing else unusual or nothing else strange about the black kitten. When Blackie was about five months old, I had him on my lap playing with him, talking to him, saying "I love you". The voice spoke to me saying,



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"The cat is trying to talk to you." To me, the voice was the voice of God.

Mr. Miles set out to fulfill his divination by developing a rigorous course of speech therapy.

I would take the sounds the cat would make, the voice sounds he would make when he was trying to talk to me, and I would play those sounds back to him three or four hours a day, and I would let him watch my lips, and he just got to where he could do it.

Blackie's catechism soon began to pay off. According to Mr. Miles:

He was talking when he six months old, but I could not prove it then. It was where I could understand him, but you can't understand him. It took me altogether a year and a half before I had him talking real plain where you could understand him.

Ineluctably, Blackie's talents were taken to the marketplace, and the rest is history. Blackie catapulted into public prominence when he spoke, for a fee, on radio and on television shows such as "That's Incredible." Appellants capitalized on Blackie's linguistic skills through agreements with agents in South Carolina, North Carolina, and Georgia. The public's affection for Blackie was the catalyst for his success, and Blackie loved his fans. As the District Judge observed in his published opinion, Blackie even purred "I love you" to him when he encountered Blackie one day on the street.

Sadly, Blackie's cataclysmic rise to fame crested and began to subside. The Miles family moved temporarily to Augusta, Georgia, receiving "contributions" that Augusta passersby

paid to hear Blackie talk. After receiving complaints from several of Augusta's ailurophobes, the Augusta police—obviously no ailurophiles themselves—doggedly insisted that appellants would have to purchase a business license. Eventually, on threat of incarceration, Mr. and Mrs. Miles acceded to the demands of the police and paid \$50 for a business license . . .

Upon review of appellants' claims, we agree with the district court's detailed analysis of the Augusta ordinance. The assertion that Blackie's speaking engagements do not constitute an "occupation" or "business" within the meaning of the catchall provision of the Augusta ordinance is wholly without merit. Although the Miles family called what they received for Blackie's performances "contributions", these elocutionary endeavors were entirely intended for pecuniary enrichment and were indubitably commercial. Moreover, we refuse to require that Augusta define "business" in order to avoid problems or vagueness. The word has a common sense meaning that Mr. Miles undoubtedly understood . . .

This Court will not hear a claim that Blackie's right to free speech has been infringed. First, although Blackie arguably possesses a very unusual ability, he cannot be considered a "person" and is therefore not protected by the Bill of Rights. Second, even if Blackie had such a right, we see no need for appellants to assert his right *jus tertii*. Blackie can clearly speak for himself . . .

AFFIRMED.

710 F. 2d 1542 (11th Cir. 1983). ■

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NOTE: If we do not know of a change in address, we cannot make the necessary changes on our records, so please notify us when your address changes. ■

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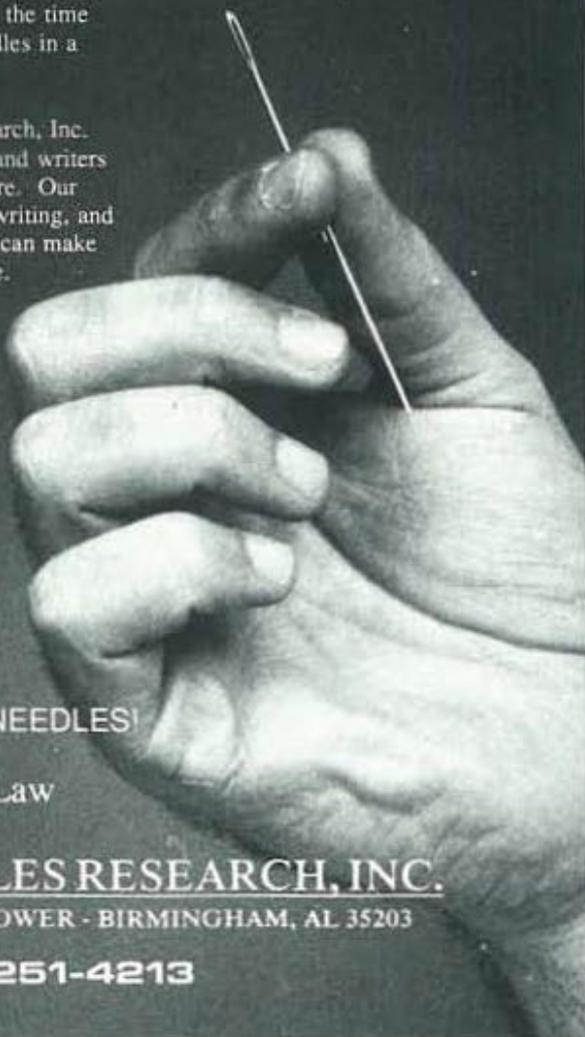
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BAR BRIEFS

Lasseter installed as chairperson of ABA section; Harris elected to Executive Council

The American Bar Association Section of General Practice installed Earle F. Lasseter as chairperson at its annual meeting in Atlanta. Lasseter was also elected to the House of Delegates of the ABA for three years.

Lasseter is a graduate of Auburn University and the University of Alabama School of Law. He is a partner in the firm of Pope, McGlamry, Kilpatrick & Morrison of Atlanta and Columbus, Georgia and Phenix City, Alabama. He is a native of Gadsden, Alabama and is a member of the American Bar Association, Alabama State Bar, Alabama Trial Lawyers Association, Georgia State Bar, Georgia Trial Lawyers, District of Columbia Bar and the Association of Trial Lawyers of America.

Also, former Alabama State Bar President Ben H. Harris, Jr. of Mobile has been elected to a three-year term on the Executive Council of the National Conference of Bar Presidents.

The election took place at the NCBP's annual meeting in August in Atlanta in conjunction with the annual meeting of the ABA.

The NCBP is a voluntary, independent organization of past, present and future presidents of state and local bar associations. It is managed by a 20-member executive council and supported by dues of individuals and member bar associations and meeting registration fees.

The NCBP's major activity is presenting—in conjunction with each ABA annual and midyear meeting—a two-day educational program on the issues affecting the organized bar's public service and member service activities.

Harris is a graduate of Davidson College and the University of Alabama School of Law. He is a partner with the Mobile firm of Johnstone, Adams, Bailey, Gordon & Harris.

College soliciting nominations for award

The American College of Trial Lawyers periodically grants an award for the instances of courageous advocacy by members of the bar, whether or not Fellows of the College. The definition of the conditions of the award is as follows:

The award of the College for "Courageous Advocacy" shall be given for outstanding efforts by a lawyer, whether or not a member of the College, on behalf

of a controversial cause or client where the representative occurs in the face of actual or possible disfavor or public unpopularity or adverse treatment by the media of the lawyer, client or cause.

The most recent recipient of the award was Judge Robert J. Lewis, Jr. of the Kansas Court of Appeals for his courageous defense, on a pro bono basis, of a defendant in a criminal case in which there was great public outrage about the alleged crime and Judge Lewis' representation of the defendant.

Matters handled which resulted in the awards ranged from civil and administrative matters to criminal cases.

Nominations should include a resume of the nominee, copies of any newspaper accounts of the matter handled by the nominee, and letters of support from members of bench and bar who are knowledgeable of the matter. They should be sent to:

Sylvia H. Walbolt
Carlton, Fields, Ward, Emmanuel,
Smith & Cutler
One Harbour Place
P.O. Box 3239
Tampa, Florida 33601

Nominations open for Devitt award

Nominations are also being solicited for the 1991 Devitt Distinguished Service to Justice Award. The award was established to recognize the dedicated public service by members of the federal judiciary. All federal judges appointed under Article III of the Constitution are eligible recipients.

Among the previous winners is United States Circuit Judge Frank M. Johnson, Jr. of Alabama.

The honor includes an award of an inscribed crystal obelisk and \$15,000 made available in the name of Judge Edward J. Devitt, longtime Chief United States District Judge for the District of Minnesota, by West Publishing Company, St. Paul, Minnesota.

A committee comprised of Judge Devitt, Justice John Paul Stevens of the

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U.S. Supreme Court, and Chief Judge William J. Holloway, Jr. of the Tenth Circuit Court of Appeals will select the 1991 recipient.

Nominations for the 1991 award must be submitted by December 31, 1991 to: Devitt Distinguished Service to Justice Award, P.O. Box 64810, St. Paul, Minnesota 55164-0810.

Secretary of State's new address

The new mailing address for the Office of the Secretary of State is P.O. Box 5616, Montgomery, Alabama 36103-5616, with offices located at the Sterling Centre on Carmichael Road, just off the Perry Hill Road exit of I-85 in east Montgomery.

Legal Desk Reference released

West Publishing Company announces the release of *Legal Desk Reference*, which provides approximately 9,000 definitions of legal words and phrases. Also included are dictionary listings of 893 ways to rid writing of clichés, redundancies, colloquialisms, vague phrases, and overly formal language.

For additional information, contact West at 1-800-328-9352.

Section's reference guide available

A reference guide for attorneys involved in antitrust and other litigation, *The Antitrust Evidence Handbook*, is available from the American Bar Association's Section of Antitrust Law.

Six major topics are addressed in the handbook: Hearsay Issues Most Relevant in Antitrust Cases, covering issues such as co-conspirator statements and prior statements and testimony of a witness; Relevance Issues in the Antitrust Context, where conduct protected by the First Amendment is discussed; Privileges, which includes a discussion of physician-patient privilege in the antitrust context; the Privilege Against Self-Incrimination, covering limitations and adverse inferences of privileges; Experts, which cites liability and market power as issues on which experts often testify in antitrust cases; and a summary of Collateral Estoppel.

The handbook is available from the ABA Order Fulfillment, 750 North Lake

Shore Drive, Chicago, Illinois 60611. Phone (312) 988-5555.

Book out on workers' comp claims

A new 258-page monograph is now available to guide lawyers representing employees, employers or insurers who deal with workers' comp claims. The publisher is the Tort and Insurance Practice Section of the ABA.

The articles are drawn from a recent TIPS annual meeting and were written by some of the country's most prominent authorities in the areas of labor law, occupational medicine and insurance.

The book is available from TIPS for \$54.95 or for \$49.95 for TIPS members, plus \$3.95 for handling. Mail orders to ABA Order Fulfillment 519, 750 North Lake Shore Drive, Chicago, Illinois 60611.

Directory published for people with AIDS or HIV

A comprehensive listing of programs and organizations providing free legal services to people with AIDS or the HIV virus is available. The 368-page publication was compiled by the ABA's AIDS Coordination Project.

The directory is organized by state, and each listing includes name, address, telephone number and a brief description of the project. It also has information on national and state organizations.

The AIDS Coordination Project is a project of the ABA's AIDS Coordinating Committee and the Section of Individual Rights and Responsibilities. It coordinates the ABA's AIDS-related activities and acts as a clearinghouse for existing AIDS programs by publishing a quarterly newsletter and by providing descriptions of existing programs, sample training materials, intake forms, funding proposals, eligibility guidelines and articles about the AIDS crisis.

For more information contact Michele Zavos, ABA AIDS Coordination Project, 1800 M Street, NW, Washington, D.C. 20036, or phone (202) 331-2248.

Freese appointed chair of subcommittee

Richard A. Freese, a partner with the Birmingham firm of Burr & Forman, was recently appointed chairperson of the ABA

Subcommittee on Franchise Litigation. The appointment was made by the Litigation Section of the ABA's Business Torts Committee during the ABA Annual Meeting in Atlanta in August.

Freese is a graduate of Cumberland School of Law.

Pointer elected, Ogle re-elected to board of AJS

Sam C. Pointer, Jr., chief judge of the U.S. District Court for the Northern District of Alabama, recently was elected to the American Judicature Society Board of Directors at the Society's annual meeting in Atlanta, and Birmingham attorney Richard F. Ogle, of the firm of Schoel, Ogle, Benton, Gentle & Centeno, was re-elected to the board.

Pointer is a graduate of the University of Alabama School of Law and New York University Graduate School of Law. He is a member of the American Bar Association, Alabama State Bar and the Birmingham Bar Association. He is a 1990 recipient of the Samuel Gates American College of Trial Lawyers Award and a 1988 recipient of the Francis Rawle American Law Institute-American Bar Association Award.



Ogle

Ogle is a graduate of the University of Alabama School of Law, and is a member of the Alabama State Bar, the Birmingham Bar Association, the Alabama Law Institute and the

American Trial Lawyers Association. Ogle served as president of the Birmingham Bar Association.

Founded in 1913, the AJS is a national independent organization of more than 20,000 citizens working to improve the nation's justice system.

Alabama attorneys attend centennial meeting

Members of the Alabama Commission on Uniform State Laws were among the 260 law professors, judges and lawyers who participated in the 100th annual meeting of the National Conference of Commissioners on Uniform State Laws held recently in Florida.

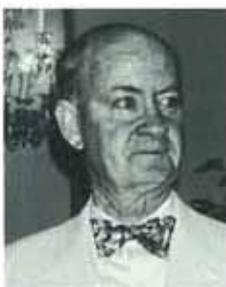


Crook

Founded in 1892, the ULC is the group of commissioners appointed by each state to draft proposals for uniform laws that are designed to solve problems common to all states. Over the years, ULC efforts have resulted in the Uniform Commercial Code, Uniform Partnership Act, Uniform Controlled Substances Act, Uniform Anatomical Gift Act and uniform child custody and support codes.

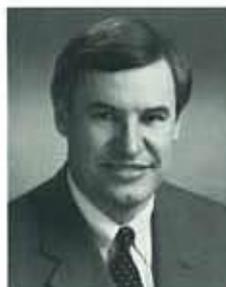
Past commissioners have included Woodrow Wilson, U.S. Supreme Court Justices Louis D. Brandeis and William F. Rehnquist, and professor Roscoe Pound of Harvard.

Current members of the Alabama commission are Charles M. Crook, Montgomery; Thomas L. Jones, Tuscaloosa; and George F. Maynard, Birmingham.



Jones

Huckaby joins board of governors of ABA



Huckaby

Gary C. Huckaby, a partner in the Huntsville firm of Bradley, Arant, Rose & White, recently became a member of the Board of Governors of the American Bar Association.

Huckaby will serve a three-year term representing District 5 on the 33-member board. The district encompasses Alabama, Mississippi, North Carolina and South Carolina. The board meets five times yearly to oversee administration and management of the 360,000-member ABA, believed to be the largest voluntary membership professional association in the world.

Huckaby has been active in the ABA, starting with his membership on the

Standing Committee on Lawyers in the Armed Forces in 1971-73. He also served on the Task Force on Public Education, the Consortium on Legal Services and the Public, and the Standing Committee on Lawyers Public Service Responsibility. Huckaby has been a member of the House of Delegates, the policy-making body of the ABA, since 1982, and is a Fellow of the American Bar Foundation. He is a past chair of the ABA Standing Committee on Lawyer Referral and Information Services and of the Special Committee on Delivery of Legal Services. He is a member of the Board of Directors of the American Judicature Society and a Fellow of the American College of Trial Lawyers. He has also been active in state-level activities, including serving as president of the Alabama State Bar.

He is a graduate of the University of Alabama and the University's School of Law.

Williams receives scholarship



Williams

Lisa D. Williams of Montgomery has been awarded the Cabaniss, Johnston Scholarship for 1991. Williams is the daughter of Mr. and Mrs. Curtis Williams and a 1986 graduate of Jefferson

Davis High School. She graduated summa cum laude from the University of Alabama in 1990. Williams attends Yale Law School.

The scholarship was established by the Birmingham firm of Cabaniss, Johnston, Gardner, Dumas & O'Neal in 1987 to reward academic excellence. The \$5,000 scholarship is awarded annually for the second year of law school to an Alabama resident attending an ABA-accredited law school. The Alabama Law Foundation administers the scholarship.

The four previous recipients of the scholarship were academically outstanding students. Henry F. Sherrod, III, son of Florence attorney Floyd Sherrod, served as a law clerk to the Honorable Patrick E. Higginbotham, U.S. Fifth Circuit Court of Appeals, upon his graduation from Vanderbilt School of Law. He

is currently an associate with a Dallas, Texas firm.

Sheryll D. Cashin, a Huntsville native, served as a law clerk to the Honorable Thurgood Marshall, associate justice, United States Supreme Court, after her graduation from Harvard Law School. She will be joining the Alabama firm of Sirote, Permutt when she completes her clerkship.

Matthew H. Lembke recently graduated from the University of Virginia Law School and will serve as law clerk to the Honorable J. Harvie Wilkins, III, U.S. Fourth Circuit Court of Appeals.

Sarah H. Cleveland, winner of the 1990 scholarship, is in her third year at Yale Law School.

West donates building

West Publishing Company recently announced its intention to donate to Ramsey County (Minnesota) its present headquarters building located in downtown St. Paul. This donation will be the third major donation of property that West has made in recent years for charitable and governmental purposes. In addition to the present donation, West donated much of the property the Ordway Theater is on, and, more recently, West donated its former High Bridge plant to the City of St. Paul to be used as an incubation site for new businesses.

The present donation, valued in excess of \$12 million, consists of West's headquarters building and the land it sits on, including 60 parking spaces.

Student bar association named best in nation

The Student Bar Association at Cumberland School of Law, Samford University, has been named best in the nation by the American Bar Association.

The national award is presented annually to the association deemed tops among those at 175 ABA-accredited law schools. Cumberland representatives accepted the award during a meeting of the ABA in Atlanta.

Judges looked at each organization's contributions to the law student body, communication with school administration and community service.

Cumberland's community activities include work with the Alabama Center for Law and Civic Education and sponsorship of a Law Explorers post of the

Boy Scouts of America and a Volunteer Income Tax Assistance chapter.

An SBA-sponsored lecture series during 1990-91 included such speakers as former U.S. Supreme Court nominee Robert Bork and former Circuit Court of Appeals Judge John C. Godbold.

Law Day USA 1992 commemorates struggle

The 1992 theme of Law Day USA commemorates the continuing importance the rule of law plays in America and honors those around the world currently engaged in the democratic struggle for justice.

The purpose of Law Day USA, celebrated annually on May 1, is to reserve a "special day of celebration by the American people in appreciation of their liberties and to provide an occasion for rededication to the ideals of equality and justice under laws." Law Day USA was established by United States Presidential Proclamation in 1958 and reaffirmed by a Joint Resolution of Congress in 1961.

The American Bar Association, as the national sponsor of Law Day USA, prepares a detailed planning guide to assist individuals and organizations conducting Law Day programs. In addition, the ABA makes available many promotional and educational/informational materials, ranging from buttons and balloons to leaflets, brochures, booklets, speech texts and mock trial scripts.

For more information, write Law Day USA, American Bar Association, 8th Floor, 750 North Lake Shore Drive, Chicago, Illinois 60611, or phone (312) 988-6134. The 1992 planning guide will be available in late January.



ACLCE awarded grant for film

Alabama celebrates the Bicentennial of the Bill of Rights in a new documentary video series. The Alabama Center

for Law and Civic Education and Birmingham filmmaker L. Wade Black have been awarded an \$82,588 grant by the United States Commission on the Bicentennial of the Constitution. The grant will fund five videotapes on Alabamians who have played major roles in defining rights protected by the U.S. Constitution. Grant funds will also be used to prepare teaching materials for the Bicentennial of the Bill of Rights in December of this year.

The Alabama Center for Law and Civic Education is a non-profit resource and training center for law-related education in Alabama, funded primarily by the Alabama State Department of Education, the Alabama Law Foundation and the U.S. Department of Justice. Its programs include statewide teacher training in such areas as constitutional law, drug education and juvenile delinquency prevention, and the coordination of special projects, including the recent visit to Alabama by U.S. Attorney General Richard Thornburgh.

Black is the former director of the Alabama Filmmakers Co-op, a 1982 Alabama Governor's Arts Award recipient, and a recipient of three NEA regional fellowships.

ACLCE advisors for the Bill of Rights videotapes include history professors Wayne Flynt, Forrest MacDonald and Jeff Norrell; journalism professor Jack Bass; educators Linda Felton, Linda Jones and Jim Kilgore; law professors Charles Cole and Martha Morgan; Alabama Public Television producer Sandra Polizos; Bill Ferris, director, Center for the Study of Southern Culture; and Alice Knierem, of the Alabama Department of Archives and History. UAB professor David Sink is directing teacher training workshops related to the Bill of Rights Bicentennial with support from the Alabama Humanities Foundation.

Subjects selected for use in the series include the *Wallace v. Jaffree* school prayer case, Virginia Durr's involvement in the movement to repeal the poll tax, the desegregation of the Birmingham schools, and the *Wyatt v. Stickney* cases dealing with care for the mentally ill. A fifth videotape will provide an overview relating these cases to the Bill of Rights and other constitutional amendments. ■



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A COLLEAGUE'S PERSPECTIVE OF FRANK JOHNSON

By JUDGE GERALD TJOFLAT

Summing up Frank Johnson's judicial career and his contribution to the cause of justice in our circuit — in fact, throughout the nation — is a formidable task, a formidable task indeed. Much has already been written about his quarter of a century of service on the district court. I would, therefore, be guilty of rank plagiarism if I were even to comment on that service.

For, I was not there in Montgomery while he was confronting a docket of some of the most difficult, emotion-laden cases a trial judge has ever had to face. It was, to use the sports announcers' favorite expression when the game is on the line and the going gets tough, "gut-check time"; it was gut-check time 24 hours a day, seven days a week, year in and year out. Those who were there — his staff, the lawyers and litigants, the press, and, of course, Ruth Johnson — experienced it all firsthand, and so I leave the telling to them. I focus, instead, on Frank Johnson, the circuit judge, the man my colleagues and I have come to know over the past dozen years.

Frank Minis Johnson, Jr. joined our court July 12, 1979, when it was the old Fifth Circuit. The court numbered 15 judges then, but we were soon to become a court of 26, Congress having added 11 new judgeships in a bill passed earlier in the year. Going from the trial bench, where he functioned alone — ruled the roost, if you will — to the appellate bench, where he would be functioning in three-judge panels or with the whole court *en banc*, was, understandably, quite a transition for Frank Johnson. As all of us who have gone from the district court to the court of appeals have learned it's a new world there. The transition didn't last long, though; as soon as he got settled down and became familiar with "the territory",

he began to take charge. Rather, his personality — that is, the sheer force of it — quietly took over. And the court, and the people of the six states of our circuit, were the beneficiaries.

of the Fifth Circuit, we needed a spokesman of impeccable credentials, whose motive, in presenting our case, could not be questioned. Frank Johnson was the obvious choice, so we formed a



Judge and Mrs. Johnson with Judge and Mrs. Tjoflat

His leadership first manifested itself in the spring of 1980, when it became apparent to us that a court of 26 judges, the one Congress had given us, simply could not function efficiently the way a court should. The solution? The circuit had to be split into two circuits; we would petition the Congress to do so, without delay.

Splitting the Fifth Circuit, however, would not be an easy task. Many in the civil rights community felt that, if the circuit were split, the clock would be turned back and the advancements they had made would be lost. Consequently, they would oppose, with every resource available, any attempt to divide the circuit. We had to allay their fears if we were to succeed in the Congress. To do this, to convince the civil rights community and the Congress that splitting the circuit was necessary if we were to continue to administer justice in the states

committee and made him the chair. Within two months, he had steered a bill through the Senate. The groundwork for this was laid in the proceedings before the Senate Judiciary Committee. Judge Johnson obtained the committee's unanimous endorsement. (It is pure myth that he obtained the endorsement by intimidating the committee members by glaring at them over his half glasses, as if they were trial lawyers appearing before him in the district court.)

It took Frank a little longer to work his magic in the House; the bill didn't reach the House floor until September 1980. Once there, however, it passed with flying colors. The President promptly signed the measure into law, and, effective October 1, 1981, the Eleventh Circuit and the new Fifth Circuit were born.

The efficiency the division of the old Fifth Circuit has wrought has been

astonishing. This efficiency is demonstrable in a number of ways. I only cite here the "bottom line". During the last court year, the 12 judges of the Eleventh Circuit Court of Appeals have decided more cases — 150 percent more — than the 26 judges of the old Fifth Circuit decided when the circuit was divided. And, what is more important, our docket is current.

Frank Johnson's value to our court, as an institution, cannot possibly be overstated. The constitutional scholars and others in the academic community, who daily monitor, digest and criticize our work, which, in the main, consists of our written opinions, have, in commenting on Judge Johnson's opinions, made this quite clear. What has produced these opinions, and, thus, such acclaim, is a question I will address in the space that remains.

Frank Johnson brings many skills to the task of decision-making; they are well-known. He has a quick, analytical mind and, as has been widely noted, is very inquisitive: he is constantly searching for the truth. Added to this is a wide-ranging knowledge of the substantive law — constitutional law, in particular — and, given 25 years on the trial bench, a profound knowledge of procedural rules. In short, he has all of the tools one needs to break down a case to its essential elements, to separate the wheat from the chaff, which he does as quickly as anyone I have encountered.

Frank also has an uncanny knack of discerning the real motivations behind a dispute, the parties', or their lawyers', hidden agendas. This should not be surprising. For years he has made it a virtual hobby to study human nature, why people behave as they do, in all sorts of

situations. This is reflected in his storytelling, which, of course, is legendary, and in the many difficult remedies he had to fashion as a district judge, in, for example, the school desegregation cases and the controversies involving the conditions of the prisons and mental institutions in Alabama. To fashion remedies in these cases, moreover, to have the remedies obeyed, which they were, he had to know the people of Alabama who, he had long sensed, were intuitively law abiding.

All of these skills and insights do not, however, in my mind, account for the landmark decisions Frank Johnson has made, as a district judge and as a member of this court. In other words, while his skills and insights have given him the ability to fashion these decisions, they have not mandated them. It took something in addition: the man's character.

Frank Johnson has frequently been described as steel-willed and uncompromising (or, in some quarters, just plain stubborn). To be sure, he is that, but there is far more. He has, as a matter of

his upbringing, an innate sense of right and wrong, of fundamental values, of what the Framers had in mind when they enshrined the words "due process of law", and the courage to adhere to his beliefs, regardless of the public outcry or the adverse personal consequences such adherence may bring. These traits have been, and will continue to be, the *sine qua non* of his decision-making.

The decision the court reaches in a case is a group decision; thus, to carry the day, the opinion-writer must persuade a colleague to join him. Judge Johnson is a past master in the art of persuasion — in particular, because of his humanity, his sensitivity and his marvelous sense of humor. He is the perfect gentleman, the perfect colleague.

And, now he leaves the court, to assume "senior status". Though he will be sitting with us on assignment from time to time, he will finally get the chance to do some of his favorite things, which he has had to put aside for far too long. We wish him Godspeed. ■



Gerald Bard Tjoflat

Gerald Bard Tjoflat was born in Pittsburgh, Pennsylvania and now lives with his family in Jacksonville, Florida. He is chief judge, United States Court of Appeals for the Eleventh Judicial Circuit. He attended the University of Virginia and graduated from the University of Cincinnati. He received his law degree

from Duke University School of Law. He was appointed to the U.S. Court of Appeals for the Fifth Circuit in December 1975 and served there until his appointment to the Eleventh Circuit in October 1981 (when the Fifth Circuit was divided into two separate circuits). He has served as chief judge since October 1, 1989.

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LEGISLATIVE WRAP-UP

By ROBERT L. McCURLEY, JR.

Alabama Law Institute Annual Meeting

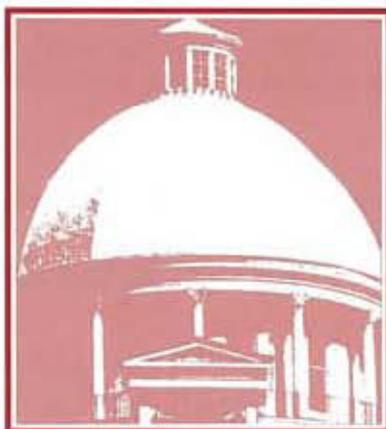
The Law Institute held its annual meeting in conjunction with the Alabama State Bar Meeting in Orange Beach. The following persons were elected as officers for the 1991-92 year:

President: Jim Campbell, Anniston
Vice-president: Yetta Samford, Opelika
Executive Committee:
George Maynard, Birmingham
Rick Manley, Demopolis
Oakley Melton, Jr., Montgomery
Ryan deGraffenried, Jr., Tuscaloosa
E.C. Hornsby, Montgomery
Frank Ellis, Columbiana

Oakley Melton, Jr. retired as president of the Law Institute having served from 1984 to 1991 and was only the third president since the Law Institute was founded. The other presidents were Hugh D. Merrill of Anniston (1969-78) and Finis E. St. John, III of Cullman (1978-84). During Melton's eight years as president, 16 major revisions were completed and passed by the Legislature, including: Non-profit Corporation Act, Eminent Domain Code, Uniform Guardianship and Protective Proceedings Act, Alabama Securities Act, Adoption Code, and Uniform Condominium Act. The Alabama Supreme Court also adopted new Rules of Criminal Procedure.

President Jim Campbell, who is also speaker pro tem of the Alabama House of Representatives, assumed the presidency after having served eight years as vice-president. Campbell can look forward to the completion of the following revisions that are in various stages of completion:

Probate Procedure
Rules of Evidence
Business Corporation Act
Article 2A of the UCC-Leases
Article 4A of the UCC-Funds Transfers
Article 8 of the UCC-Securities
Limited Liability Companies



Reapportionment

With the official count of the 1990 census being received by the State on February 6, 1991, the Legislature must reapportion both itself and the Congressional districts prior to the next election for the respective offices.

It is expected that Governor Guy Hunt will call the Alabama Legislature back into session during late October or early November to redistrict Alabama's seven Congressional districts. The Permanent Legislative Committee on Reapportionment has held 16 public hearings across the state taking testimony as to Congressional reapportionment. The Reapportionment Committee has held six meetings and received 24 plans.

Once the Legislature and the governor have agreed on a reapportionment plan, this plan must be reviewed by the Justice Department, who has 60 days to act. If additional questions are asked by the Justice Department, the State has an additional 60 days to respond. At any time, the plan may be challenged in a federal court.

Since legislators do not run for office again until 1994, the Legislature has until then to reapportion itself.

The Reapportionment Committee is co-chaired by Representative Jim Campbell of Anniston and Senator Ryan deGraffenried of Tuscaloosa. The Legislative Reapportionment Committee is composed of 22 legislators. They have employed David Boyd of Montgomery as counsel to the committee. He was the attorney representing the State in the 1980 reapportionment plan.

Legislative Reference Service Director

Jerry L. Bassett has been appointed director of the Legislative Reference Service, effective October 1991. Bassett comes to Alabama from California, having served the last 25 years in the Legislative Council Bureau, and was currently principal deputy legislative counsel for the California Legislature. Bassett has a law degree from the University of California, Berkeley and a bachelor's degree from the University of Wisconsin, Madison. He has been a member of the State Bar of California since 1966. He and his wife, Andrea, have two children. ■



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.

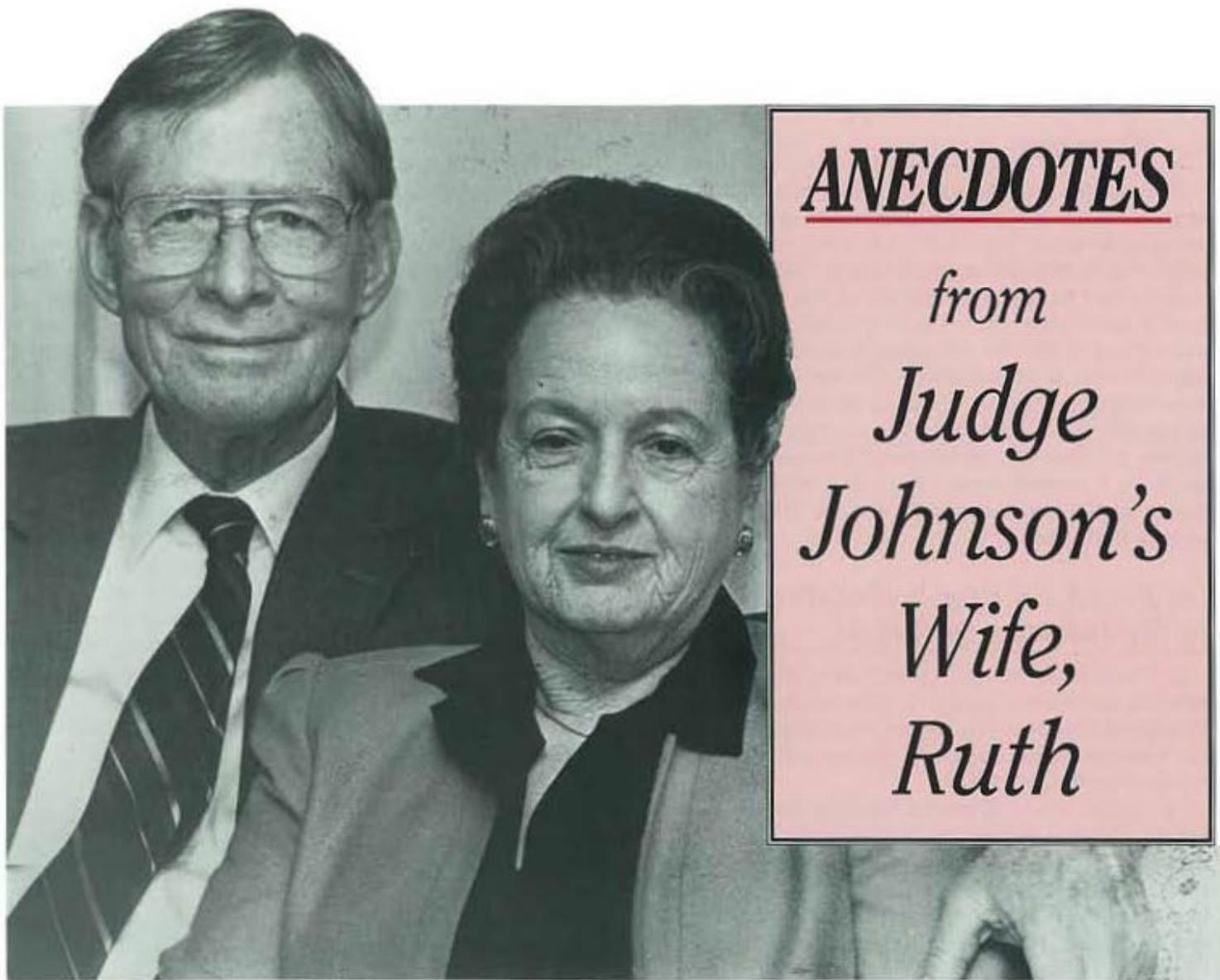


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ANECDOTES

from
*Judge
Johnson's
Wife,
Ruth*

Frank and Ruth Johnson

On Their First Date

I must have been — let's see, I hope I was 15, I might have still been 14 — he asked me to go to the movies and, of course, I had to ask my mama — no telephones — so I asked my mama, and she says is there anybody else [going]?

But Mama agreed, I guess reluctantly. He had his daddy's car, but it was still daylight [and] we were on the way to the Princess Theatre, and we had no intention of going to the Princess Theatre. At that tender age I already had learned subterfuge. All the teenagers hung out at a place called the Overhead Bridge. It was a bridge that was arched over the railroad tracks at a certain place, and that's just where you went to park. Now this is where we were; it was getting dark about this time.

Frank's father had second thoughts about his car, and he got in touch with Frank's cousin, his mother's sister's son, Elbert Williams, and told him that he had to have his car and to go to the Princess Theatre and find FM and tell him that he needed his car.

Elbert, knowing what everybody does, didn't even go to the

Princess Theatre — he came straight to the Overhead Bridge. You just sat and talked, but no parents would have given permission for their kids to meet like that at that age without having some adult with them. Elbert drove up out there. [He] didn't even pause going by the Princess Theatre. So, that ended my date, my first date.

On Attendance at Trials

... I have never been in a courtroom ...

I have never heard a case ...

I did, at one time, want to go and I casually told Frank Johnson I was going to the courthouse, that I wanted to hear that case. He said, "Ruth, the courtroom is not for spectators. It's a very serious business between two contending factions, and if you were sitting in the courtroom, you would be distracting my attention and other's attention from what's going on and they deserve everything that they have coming to them, either side." So, when I got that lecture, I never went.

On Marriage

[W]e told our parents, and my sisters were very unhappy about it. But, my mother always loved Frank, and Mrs. Johnson was crazy about me. So, we didn't have any [problems]. Frank's father said he thought we ought to wait, you know, but, his mother didn't seem to think that was all that important, so we lived in Birmingham from January, probably five months. He was working at the time and going to school at Massey. But, when he went in and asked his — he was keeping books for some insurance company — and he asked for a raise because he was married . . . and they said . . . [that] [h]e couldn't be married and have this job because the responsibility was too much for a married person. He wasn't making that much money, [but] [t]hey fired him. So, not only did he not get the raise, he lost his job.

On Frank Johnson's Enlistment in the Infantry in WW II

He chose the infantry. No, I didn't worry about him at all; I definitely didn't worry about it. It never occurred me that anything could happen to him. He was the strongest person I had ever known in my life and still is. [I]t was such a shock [when Frank Johnson got wounded].

I got a telegram. . . [f]rom the War Department. "We deeply regret to inform you that your husband was wounded at such and such a place." Well, I just went all to pieces, you know. I followed him through military information I got my hands on through my office. After about an hour, I called his family and told them. And, by that time, he was already out of the hospital, I guess.

He [was wounded the first time] out on night patrol and, a sniper shot [him] in the rear and in his legs. He was crawling. [H]e still has scrap metal in him that they didn't get out. You know, you recover from that. It wasn't all that serious compared to other wounds. They sent him back to the front after he had three or four weeks off.

It was a bomb explosion and it was a concussion that shattered one of his kidneys. And they sent me stuff — it was a watch that just was all to pieces — just messy stuff like that. He was too serious then to patch up at a camp hospital. He was in France, in northern France, and they sent him back to England and he was in the hospital there for several months.

On the District Court Judgeship

This was always in his mind [to seek a judgeship]. He was a Republican, and got involved with the politics of the Republican Party of Alabama, which wasn't a big organization, as you know. It was very small. And, his father having been a real worker in the Republican Party, and I guess influential — anyway his friends were . . . [S]ee, he was in a good position to get some kind of an appointment there, and he wanted the first judgeship, but he was just too doggone young and inexperienced, and so they told him to take this one. Then, when the next one was open they'd work toward it, the organization. And

they did, they came back to him. I think it was about 95 percent of the Republicans in Alabama supported his nomination . . . [t]o be a federal judge. I don't think he had any opposition then.

The vacancy occurred in Montgomery. That is where Judge Kenamer died. And this caused a little problem because some of the newer Republicans, the ones that had come into the party, the disenchanting Democrats of the time, thought it should go to a Montgomery person and not a north Alabama unknown. T.B. Hill here was a contender, and Red Blount supported him, and it just didn't carry as much weight as the backing that Frank got from the Republicans.

[W]e had no idea [about the civil rights cases that would come up immediately]. He thought that he would have ordinary cases, and he had been in Birmingham and had gotten valuable experience from Judge [Seybourn] Lynne, who is an outstanding trial judge. He learned right there how to judge. He and I always say that Judge Lynne is his mentor.

For two years, he had this experience in Judge Lynne's court and when he came here there was no organization. Judge Kenamer was old, and there had been no litigation going on. The lawyers just didn't . . . some of them told me that there was just no point in trying to get a case in court. So, it all had to be done from the bottom up.

On the Montgomery Bus Boycott

[A]ll of my neighbors carried their maids back and forth and picked up the extras. Did you see [the movie] "The Long Walk Home"? That happened right across the street from me. Oh, everybody carried everybody's maid. Even though, the whole community seemed to be against the bus boycott, they weren't, they were not. There were a lot of people. And, it was not just limited to the Maxwell [AFB] people, either. Maxwell wives. That's what they'd say — oh, those old Maxwell wives.

But, it was not so. People were not going to do without their space for their children, and people to clean up the house and cook the food. They just wanted everything they had always had. They wanted to play golf and bridge and do all those things. And, I guess, at that time they were giving it a lot of thought that there was a lot of injustice, too, to having to go and sit at the back of the bus. But, their immediate needs were not being met and this is what they objected to, more than the right of the blacks.

On the Civil Rights Movement

You just don't realize those things [that the Johnsons would find themselves in the middle of the civil rights movement]. For the past few years, I had been giving this a lot of thought about the blacks, and it was something somewhere that was just basically wrong with the system. Not enough for me to get out and protest and carry a sign around — just to think about. It was in my mind.

I was not a member of any civil rights organization nor did I participate in any of it. I was just kind of a bystander. Well, you know, even if I had wanted to, I wasn't in the position with Frank sitting on those cases.

On Leaving the Baptist Church

Let me tell you what Frank told the Baptist deacon who came. It was Visitation Day. He is still a member of the Baptist Church. First Baptist Church [in Montgomery]. And, he said, "The reason I left the Baptist Church [w]as that during all this time that my family and I were going through this, I looked around and I did not find one supporter in that church. Not one person supported my position." And, the deacon agreed with him, that that was true.

Frank told him, "I don't think that I belong in a group that was so opposed to what I stood for." I am quoting him now. But, my view of being there in the first place — I wanted Johnny [the Johnson's son] to have a religious background. I just thought it was important for him to be subjected to Sunday school, and all that goes along with it and church. And, then he could reject it later if he wanted to. But, if he hadn't experienced it he wouldn't have anything to base it on.

My reason for not attending is this: When the freedom riders came to Montgomery, the Baptist deacons and leaders linked arms and stood in front of the church on Sunday morning to keep them out. My young son asked why they were doing this. I told him and he was very upset. He said, "Jesus loves everybody, Mama. In 'Sunbeams' we sing the song—'red and yellow, black and white, they are precious in his sight, Jesus loves the little children of the world.' So, why do they want to keep anyone out?" I said, "Son, I don't have an answer to that. I don't know." And, that was that.

On Martin Luther King

I thought he was a marvelous speaker. Oh yes, I heard his sermons; I never went to the church. I told you I never associated — I didn't meet any of these people personally. I saw him on the television. I have a copy of his "Dream" sermon that I read over the intercom at my school [Houston Hills Junior High School, then a predominantly black school in Montgomery where Mrs. Johnson taught in the 1960s]. I think that he was a tremendous influence on the black people. He was a leader. After his death, they said everything is going to go back the way it was because we don't have a leader. And, frankly, I don't think they have come up with a real leader since then. He was that strong and that good.

[At] Houston Hills, I asked on Martin Luther King Day, if they had any program planned for the students? They looked at each other and looked at me — no. Someone, one of the black teachers, said, "We couldn't afford to do that, we would lose our jobs." And, I asked the principal if she minded if I read that speech over the intercom. I don't know whether anyone knew that it was me or not. I knew if the authorities came by that they would find out that it was me who did it. Those children needed to hear that. It is a wonderful speech.

On Robert and Helen Vance

I remember how he enjoyed everything. He enjoyed being with people, talking. He and Frank Johnson were such good

friends. And, they would write notes to each other when they were hearing cases — nothing to do with the case. And, they talked on the telephone a lot. He was so enthusiastic about so many different things, not just his work. He was a good person, too, and his wife was a close friend of mine.

She was very much like I was. She didn't go to court and she stayed away from it — the actual workings. You know, some wives think that their husbands need them on the front row of the courtroom. They really feel that way and they think that they are doing their duty. I never felt that way, and Helen Vance never felt that way. So, we had a lot in common.

[Bob Vance] and Frank were close friends and, oh, he liked to cook. Make the biggest mess in the kitchen. And he liked to eat. He knew every restaurant in this state, I guess, or probably in the circuit. He liked to go to Miami. Nearly all the judges did not like to go to Miami, but Bob Vance did. He would go all the way to Key West, or almost all the way, to a restaurant that he knew about.

(Continued on Page 325)

NOTICE

FALL PROMOTION BEGINS FOR ALABAMA STATE BAR LEXIS® MEMBERSHIP GROUP PROGRAM

Have a library on your desk as easy as . . . 1 2 3. The Alabama State Bar's LEXIS® Membership Group is offering special incentives to new subscribers this fall. The bar's program gives sole practitioners and small firms affordable access to the LEXIS® computerized legal research service from their own homes and offices. New members of the program will receive free training, free LEXIS® software and LEXIS®/NEXIS Legal Research Assistant Software, and two months unlimited use of the services at a reduced price. For those attorneys who do not have PCs with modems, dedicated LEXIS® equipment is available at no charge. New members must sign on to the LEXIS® service before December 31, 1991. For more information, including pricing, contact Danielle Domico at 1-800-356-6548.

DISCIPLINARY REPORT

Disbarment

Sylacauga lawyer **Michael Wayne Landers** has been disbarred from the practice of law effective immediately for misappropriating the funds of a client in violation of the Rules of Disciplinary Procedure. (ASB No. 89-827)

Suspensions

- Tuscaloosa lawyer **Hugh Don Waldrop** was temporarily suspended from the practice of law effective April 20, 1990. Thereafter, Waldrop was found guilty by the Disciplinary Board of the Alabama State Bar of a number of charges of accepting fees from clients and thereafter, not providing the agreed-to legal services, in violation of DR 6-101(A) of the *Code of Professional Responsibility*, willfully neglecting a legal matter entrusted to him, DR 7-101(A)(1) and (2); failing to seek the lawful objectives of his client and failing to carry out a contract of employment entered into with a client for professional services; and DR 1-102(A)(6), engaging in conduct that adversely reflects on his fitness to practice law. Waldrop was thereupon ordered suspended from the practice of law for a period of three years, said suspension to run up to and through April 20, 1993. (ASB Nos. 89-22, 89-304, 89-527, 89-639, 89-654, 89-655, 90-67, 90-244, 90-245, 90-255, 90-256, 90-263, and 90-327)
- Birmingham attorney **Robert McKim Norris, Jr.** was suspended by the Supreme Court of Alabama from the practice of

law for a period of two years, effective August 22, 1991. Norris' suspension was based upon findings of the Disciplinary Board of the Alabama State Bar that Norris had failed to deliver to the Office of General Counsel of the Alabama State Bar a copy or recording of an advertisement in a timely fashion, engaged in conduct that adversely reflected on his fitness to practice law, and solicited or caused to be solicited on his behalf professional employment from a prospective client, when a significant motive for his doing so was his pecuniary gain. (ASB No. 87-424)

- In an order dated August 27, 1991, the Supreme Court of Alabama suspended Mobile attorney **John A. Courtney** for a period of six (6) months, said suspension to become effective on August 27, 1991. The suspension was based upon the Disciplinary Board's finding that Courtney had engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, and willful misconduct, and, further, that he had engaged in conduct that adversely reflected on his fitness to practice law. These violations were based upon Courtney's having made sexual advances toward a female client, and the fact that Courtney had previously been disciplined by the bar for similar misconduct. (ASB No. 90-382) *The above referenced attorney should not be confused with Mobile attorney John P. Courtney, III, who is not being disciplined.*
- On August 13, 1991, Selma lawyer **James Patrick Cheshire** was publicly censured for willfully neglecting a

NOTICE

DISCIPLINARY PROCEEDINGS

Jim Clay Fincher, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of November 15, 1991, or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB Nos. 89-166, 89-177 and 89-235 before the Disciplinary Board of the Alabama State Bar.

Done this the 25th day of November, 1991.

NOTICE

TO: **Millard Lynn Jones**
FROM: **Alabama State Bar**
RE: **Order to Show Cause, CSF 91-22**

Notice is hereby given to **Millard Lynn Jones**, attorney, whose last known address is 620 Creekview Drive, Pelham, Alabama 35126-1160, that his name has been certified to the Disciplinary Commission for noncompliance with the Client Security Fund Rule requirements of the Alabama State Bar and that as a result thereof, an ORDER TO SHOW CAUSE has been entered against him ordering him to show, within sixty (60) days from the date of entry of the order, why he should not be suspended from the practice of law. Said order having been entered August 9, 1991, the attorney has until December 15, 1991 to show cause.

*Disciplinary Commission
Alabama State Bar
1019 South Perry Street
Montgomery, Alabama 36104*

legal matter entrusted to him, a violation of DR 6-101(A); of failing to seek the lawful objectives of his client through reasonably available means permitted by law and the disciplinary rules, a violation of DR 7-101(A)(1); and of prejudicing or damaging his client during the course of the professional relationship, a violation of Disciplinary Rule 7-101(A)(3). Cheshire, on December 22, 1988, filed in the United States District Court for the Southern District of Alabama an employment discrimination suit on behalf of his client against Goodyear Tire & Rubber Company. On July 31, 1989, this lawsuit was dismissed without prejudice for failure to obtain service of process against Goodyear. Thereafter, the client paid to Cheshire an additional sum for filing fees and expenses to refile the suit. Cheshire failed to file suit and the statutory period for filing expired. (ASB No. 91-48).

• On June 7, 1991, Mobile lawyer **Vader Al Pennington**

was publicly reprimanded for having failed to deposit the funds of his client in an identifiable insured depository trust account, of failing to safekeep the monies of the client entrusted to him for payment to the client's creditors, of failing to maintain complete records of all funds of his client which came into his possession, of failing to render an appropriate account to his client regarding her monies, and by misappropriating the funds of his client, by failing promptly to pay over money collected by him for his client or appropriating to his own use client funds entrusted to his keeping. (ASB No. 88-402)

Transfer to Disability Status

• Dothan lawyer **Fred Menefee Tatum, Jr.** has voluntarily transferred to disability status pursuant to Rule 27, Rules of Disciplinary Procedure (Interim), effective August 6, 1991. (Rule 27(c) 91-04)

Anecdotes from Ruth Johnson

(Continued from page 323)

On Going to School at Alabama State University

My [teaching] certificate had lapsed and I had to renew it. The closest place I could do that was Auburn. It was before AUM was here, so, I went to Alabama State. I went in and asked to enter the graduate school to get enough hours to get my certificate.

I always enjoyed going to school. I always enjoyed classes. I was taking the library intermediate courses and a lot of other stuff. I went down and took some black history courses, "Search for Identity" and electives. After I had to fulfill my requirements for my certificate I just went ahead and got my master's degree.

The students, mainly the ones in my classes, the older school teachers, were very friendly. The younger people resented me. One young girl [in] one of the black study courses [said], "You don't belong here. This is a black studies course." I said, "Young lady, I paid my tuition and I'll come if [I want to]." They didn't understand it. It was a good experience.

On Judge Johnson's Characteristics as a Judge

I'd have to tell you as a person, too, because [his best char-

acteristics as a judge and a person] overlap. It is his strength. He is the strongest man I've ever known, and I think you would agree with me. I'm not talking about muscles, I'm talking about determination and willpower and stubbornness and everything that goes together to make up strength. And attention to purpose. He has to have that determination to be a good judge. He has to have the self-confidence to do the best he can come up with to make the right decision. And, he does it. And, I and no one else have ever or ever could influence that.

I know that he feels strongly about a lot of the things that . . . he is proud of a lot of the things he's done that help people, and I know that he has hurt for people, too. I don't think it would ever get in the way of a decision.

On Judge Johnson's Most Important Accomplishments

[Y]ou know we lived together through all of this. I don't know that I could say any one thing [was his greatest accomplishment]. I just hope that all the struggle he went through with the mental health case, that it has benefitted the mentally ill as much as I think it has. That has given me a lot of satisfaction. And, I'm sure that the prisons were in terrible condition when those cases came up. These are things that you can see. I think the most important thing is that each case that was presented to him, he took it individually, and didn't look right nor left nor forward nor backward, but decided that particular case according to what he thought was constitutionally a very good decision. I don't think there was any question that this is what he's done. ■

ABOUT MEMBERS, AMONG FIRMS

ABOUT MEMBERS

J. Michael Williams, Sr. announces the moving of his office to 2400 Frederick Road, Opelika, Alabama 36801 (near the Lee County Justice Center). The mailing address remains P.O. Box 1068, Auburn, Alabama 36831. Phone (205) 705-0200.

Rodger M. Smitherman announces the relocation of his office to Bank for Savings Building, 1919 Morris Avenue, Suite 1550, Birmingham, Alabama 35203. Phone (205) 322-0012, 322-0017.

Patricia Cobb Stewart, formerly with the firm of Scruggs & Jordan, announces the relocation of her office to The World Arcade, Market Street, Scottsboro, Alabama 35768. Phone (205) 259-3582.

Lester L. McIntyre announces the relocation of his office to 1110-B Shelton Beach Road, Saraland, Alabama 36571. Phone (205) 679-8199.

Marvin Neil Smith, Jr., formerly an assistant United States Attorney for the Northern District of Alabama, has been appointed as an assistant **United States Attorney for the Eastern District of Tennessee**, 103 West Summer Street, Greeneville, Tennessee 37743. Phone (615) 639-6759.

F. Mitch McNab announces the opening of his office at 300 North Bell Street, Suite 1, Dothan, Alabama. The mailing address is P.O. Box 5612, Dothan, Alabama 36302. Phone (205) 793-2629.

AMONG FIRMS

Emond & Vines announces that **Robert H. Ford** and **Leigh Ann King** have become associates of the firm, with offices at 1900 Daniel Building, P.O. Box 10008, Birmingham, Alabama 35202-0008. Phone (205) 324-4000.

Dillard & Ferguson announces the relocation of its offices to The Massey Building, 290 21st Street North, Suite 600, Birmingham, Alabama 35203. Phone (205) 251-2823.

Miller, Hamilton, Snider & Odom announces that **Christopher G. Hume**,

III has become a member of the firm, **Todd H. Katz** has become associated with the firm and **Bill J. Braswell** has become director of administration with the firm. Offices are located in Mobile and Montgomery, Alabama and Washington, D.C.

Robert H. Walston, Frank C. Galoway, Jr., L. Vastine Stabler, Jr., Charles Hayes, Lawrence Dumas, III, C. Henry Marston, Vernon L. Wells, II, James L. Birchall, Michael C. Quillen, David B. Anderson, Larry B. Childs, Kay K. Bains, Heyward C. Hosch, III, and Helen Currie Foster announce the formation of **Walston, Stabler, Wells, Anderson & Bains. Elizabeth Champlin Bishop, C. Ellis Brazeal, III, David B. Walston, Samuel M. Hill, William H. Pryor, Jr., Anne B. Stone, Vincent R. Ledlow, Russell W. Adams, and Emily Sides Bonds** have joined as associates, and **Lawrence Dumas, Jr.** will be of *counsel* to the firm. Offices are located at Financial Center, 505 20th Street North, Suite 500, Birmingham, Alabama 35203. Phone (205) 251-9600.

Beasley, Wilson, Allen, Mendelsohn, Jemison & James announces that **J. Cole Portis**, former law clerk to Montgomery County Circuit Judge Joseph D. Phelps, and **W. Daniel Miles, III**, former law clerk to Alabama Supreme Court Justice Henry B. Stegall, II, have become associated with the firm. Offices are located at 207 Montgomery Street, 10th Floor, Bell Building, P.O. Box 4160, Montgomery, Alabama 36103-4160. Phone (205) 269-2343.

Thomas R. Elliott, Jr. and J. Thomas Burgess announce the merger of their practices and the formation of **London, Yancey, Elliott & Burgess. Thomas S. Hale**, formerly with Central Bancshares of the South, Inc., has become associated with the firm. Other associates are **I. Ripon Britton, Jr. and Richard W. Lewis**. Offices are located at 1230 Park Place Tower, 2001 Park Place, Birmingham, Alabama 35203. Phone (205) 251-2531.

Richard J. Stockham, III and

Howard M. Miles announce the formation of **Stockham & Miles**, with offices located at 1125 Financial Center, 505 North 20th Street, Birmingham, Alabama 35203. Phone (205) 252-2889.

Bouloukos & Oglesby announces the relocation of its offices to The Financial Center, 505 North 20th Street, Suite 1675, Birmingham, Alabama 35203. Phone (205) 322-1641.

Cherry, Givens, Tarver, Peters, Lockett & Diaz announces that **Don Siegelman**, former Secretary of State and Attorney General for the State of Alabama, has become a member of the firm. Also, **J. Barry Abston** has become an associate. Both will practice in the firm's Mobile office located at 401 Church Street, P.O. Drawer 1129, 36633. Phone (205) 432-3700. The firm also has offices in Birmingham and Dothan, Alabama and Jackson, Mississippi.

Pierce, Carr & Alford announces **Andrew C. Clausen** has joined the firm. Offices are located at 1110 Montlimar Drive, Mobile, Alabama 36609. Phone (205) 344-5151.

Miller, Hamilton, Snider & Odom announces the opening of a Birmingham office, located at Colonial Bank Building, 1928 First Avenue North, Suite 1501, Birmingham, Alabama 35205. Phone (205) 325-1530. The firm also announces that **Edgar C. Gentle, III** will be the Birmingham partner in residence and **Jill Ganus** has become associated with the firm's Mobile office.

Wallace K. Brown, Jr. and Richard M. Kemmer, Jr. announce the formation of **Brown & Kemmer**. Offices are located at 1323 Broad Street, P.O. Box 3556, Phenix City, Alabama 36868-3556. Phone (205) 298-2222.

Kaufman, Rothfeder & Blitz announces a change of the firm name to **Kaufman & Rothfeder**, that **Robert M. Ritchey** became a stockholder effective January 1, 1991, and that **Mark N. Chambliss** has become associated with the firm. Offices are located at 2740 Zelda Road, Third Floor, Montgomery, Alabama 36106. Phone (205) 244-1111.

Elliott & Elliott announces that **Edward L. McRight, Jr.** has become a member of the firm, and the name of the firm has been changed to **Elliott, Elliott & McRight**. Offices will remain at Third Avenue, Blanton Building, 2nd Floor, Jasper, Alabama 35502-0830. Phone (205) 221-9333.

Eason Mitchell announces that **T. Eric Ponder**, former law clerk to Judge H. Randall Thomas, has become associated with the firm. Offices are located at Shelby Medical Building, 644 Second Street NE, Suite 104, P.O. Box 989, Alabaster, Alabama 35007. Phone (205) 663-9696.

Brannan & Guy announces the removal of its offices to 602 South Hull Street, Montgomery, Alabama 36104. Phone (205) 264-8118.

Cada M. Carter has withdrawn from the firm of **Carter, Hall & Sherrer**. **Banks T. Smith** has become a partner, and the firm will now be known as **Hall, Sherrer & Smith**, including members **R. Bruce Hall** and **Gary C. Sherrer**. Offices are located at 316 N. Oates Street, P.O. Box 1748, Dothan, Alabama 36302. Phone (205) 793-3610.

William G. Werdehoff and **Stephanie Winning Werdehoff** announce the opening of their offices under the name of **Werdehoff & Werdehoff**. Offices are located at 303 Williams Avenue, Suite 512, Huntsville, Alabama 35801.

Harris, Evans, Berg & Morris announces the change of the firm name to **Harris, Evans, Berg, Morris & Rogers**, with offices to remain at Historic 2007 Building, 2007 Third Avenue North, Birmingham, Alabama 35203. Phone (205) 328-2366. The firm also announces that **Susan Rogers** has become a partner in the firm, and that **Lawrence T. King**, former clerk to former Chief Justice C.C. Torbert, Jr. and to Chief Justice **E.C. Hornsby, Jr.**, has become associated with the firm.

Gary K. Grace announces that **Steven J. Shaw** has become a member of the firm, and the firm's name has been changed to **Grace & Shaw**. Offices are located at 100 Jefferson Street South, Suite 300, Huntsville, Alabama 35801. Phone (205) 534-0491.

Edward M. Rogers, Jr., former deputy assistant to President Bush and executive assistant to White House Chief of Staff

John Sununu, has joined the Washington, D.C. office of **Balch & Bingham**. Rogers is a graduate of the University of Alabama School of Law and a 1985 admittee to the Alabama State Bar. Balch & Bingham also has offices in Montgomery and Huntsville, Alabama.

The Prudential Bank and Trust Company announces that **Richard J. Volentine, Jr.**, formerly vice-president and associate counsel with Chase Home Mortgage Corporation, has become associated with the Prudential Bank as vice-president and assistant general counsel. His mailing address is The Prudential Bank and Trust Company, Two Concourse Parkway, Suite 500, Atlanta, Georgia 30328-6107. Phone (404) 551-6879.

Blankenship & Robinson announces that **Dinah P. Rhodes** has become a member of the firm and the firm name has been changed to **Blankenship, Robinson & Rhodes**, with offices to remain at 229 East Side Square, Huntsville, Alabama 35801. Phone (205) 536-7474.

Wallace, Brook & Byers announces

that **Michael J. Brandt** has joined the firm as partner, and **William W. Brooke**, vice-president and general counsel of Harbert Corporation, has become of counsel to the firm. The firm has changed its name to **Wallace, Jordan, Ratliff, Byers & Brandt**. Offices are located at 2000 SouthBridge Parkway, Suite 525, Birmingham, Alabama 35209. Phone (205) 870-0555.

Woodall & Maddox announces that **Virginia F. Holliday** has become associated with the firm. The firm's address is 3821 Lorna Road, Suite 101 Chase Commerce Park, Birmingham, Alabama 35244. Phone (205) 733-9455.

Najjar Denaburg announces that **Terry M. Cromer** has joined the firm as an associate. Offices are located at 2125 Morris Avenue, Birmingham, Alabama 35203. Phone (205) 250-8400.

Adams & Reese announces that **Oby T. Rogers** has become an associate of the firm. Offices are located in Mobile, Alabama and New Orleans and Baton Rouge, Louisiana. ■

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QUESTIONS & ANSWERS

WITH JUDGE FRANK JOHNSON

By STEPHEN J. ROWE

The following interview with Judge Johnson was conducted on August 2, 1990.

Q: *A lot has been made of the importance of Winston County as a major influence on your character and judicial independence. How important would you say Winston County actually was to your development?*

A: I wouldn't think that Winston County, just because it's Winston County, had anything to do with my development or anything that I've done or anything I think. I think the fact that it was a small, lightly populated rural-type area may have. In any rural area, like Winston County is, you get to know people personally, and you learn early to judge people on the basis of their individual characteristics and not judge people as members of a class or on the basis of their economic status or their social status. In that regard, I think growing up in Winston County had a lot to do with my development.

Q: *Do you have any particular fond memories of growing up there?*

A: Of course, many, many. Most of them have to do with working, plowing, cleaning up barns, cutting and piling hay. A lot of them have to do with the geography, the rivers and the waterfalls.

Q: *In the 1961 freedom riders case, you enjoined the riders from demonstrating because of the possibility of further violence. Also, in the 1969 case of *Scott v. Alabama State Board of Education*, you refused to overturn the suspension of 39 students for civil disobedience. In both cases, you, in effect, ruled against protesters in civil disobedience cases.*

A: That isn't true. That's a wrong assumption.

Q: *My question is, what are your views on the limits of civil disobedience and when, if ever, is it justified under the law?*

A: Well, let me tell you the basis for the temporary injunctions that were entered in the cases that you just made reference to. There was violence. There was disruption in the communities, disruption in the state because of the freedom riders. Because of the attempted Selma march, a lawsuit was filed. I didn't just step in [in] these cases. You had a complaint filed asking for relief. If the disruption was continuing at that time, I felt that it wasn't fair to the court or fair to the parties on either side to allow them to file a complaint asking for relief and continue to disrupt to obtain it on their own. If they wanted relief from the court, they could sit back and give the court a reasonable opportunity to take the evidence and

determine what their rights were, and if they had rights, to declare them and enforce them. So I felt like, and it was my basic philosophy, and still is, that you cannot continue your disruption and come to court and ask for relief. You're going to have to stop it and give the court a reasonable opportunity to take the evidence, find out what the legal questions are, and make a declaration as to the rights of the various parties. Now, civil disobedience can range from making speeches on the corner outside a courthouse to disrupting Highway 80 from Selma to Montgomery or disrupting riding a Greyhound bus from Birmingham to Montgomery or from Montgomery to Mobile. I do not believe—and never have—that parties have a right to engage in civil disobedience that will have the effect of disrupting other people's right to live without being disrupted when the courts are reasonably available. Now, you can apply that concept to what went on in China and find it might not be applicable. But, in Alabama it was. The courts were here, the federal courts were here, they were available, and if you were entitled to relief, they'd give it to you. You don't have any right to engage in civil disobedience that's disruptive of other people's lives under those circumstances.

Q: *One of your biographers wrote that one of your goals was to maintain Alabama's heritage and uniqueness through your judicial deci-*

sions. How much of a consideration was that and how successful do you feel you were?

A: [There] wasn't any consideration in my action as a judge. You decide lawsuits on the basis of the facts in a case, you decide the legal issues that are properly presented, and as the controlling and binding authority requires. You don't do it just to make Alabama look better or keep it from looking worse. So, it was no consideration. None. If you took that into consideration in an attempt to make Alabama look better or keep it from looking worse, then, if you didn't like Alabama, you could take action that would be designed to make it look worse. One's not any worse than the other insofar as deviating from your judicial authority and obligation. The premise in that question implies that I was involved in politics, which is not true. Now, that doesn't mean that decisions didn't have some political ramifications. They always do. But, that wasn't the purpose that I entered the findings or the injunction or whatever it was that was appropriate in a given case. The image of Alabama had nothing to do with it, and it shouldn't have.

Q: Looking back, do you consider yourself in the '50s, '60s and '70s to have been judicially liberal or conservative or something else?

A: I figure myself to be judicially independent. Not liberal. Not conservative. Not radical. I decided cases on the basis of what I thought binding authority was, and if there wasn't any binding authority, on the basis of my interpretation of the law and the history of the statute without regard to whether it was going to be socially acceptable or socially unacceptable. And, that's the

way judges have to be. You cannot be a judge if you're going to decide cases with the consideration in your mind "is this going to be acceptable by the people or is it not?" That cannot be a consideration. That's the reason I never have agreed that electing state judges was a good concept. And, nearly all your state judges would agree that it's not a good concept. I've talked to several of them . . .

Q: In the *Montgomery bus case*, the majority opinion by Judge Rives and you extended the Supreme Court's *Brown* decision. In a sense, new law was created. What is the proper role of lower courts in taking this type of action?

A: The use of the word "extended" and your phrase "new law was created" are both wrong. Lower court judges in the federal system have a duty and an obligation to follow the law . . . Supreme Court decisions in the federal system are binding on all lower court judges. The court of appeals judges, district courts, magistrates, everyone in the federal judiciary system. Judge Lynne—I have a lot of respect for Judge Lynne—in that case dissented because he said the Supreme Court hadn't specifically overruled *Plessy v. Ferguson*. Well, the Supreme Court had in concept overruled *Plessy v. Ferguson*. They had overruled any public institution that discriminated on the basis of race. Why should we have sat back and let the Montgomery bus system and the Alabama bus system continue to discriminate on the basis of race when that concept had been very definitively decided by the Supreme Court of the United States? I think you're abandoning your duty if you say, well, I think you're right, but I'm going to deny relief and let you file a petition for certiorari to the Supreme Court of the United States and let them decide this specific issue as to whether the concept applied in *Brown* is applicable to public transportation. Judges shouldn't do that. So, we didn't make new law. Some judges have a different concept. Judge Lynne, for example. I tried cases before him when I was a lawyer. I prosecuted when I was a U.S.

Attorney, and he's a great judge, but that's a position that I don't think judges should take. I never have. Of course, Judge Rives obviously felt the same way. The Supreme Court is not set up to decide every case, every issue. They're set up to give some guiding principles to the lower courts to apply specifically. That's what they did in *Brown* and that's what we did in the bus desegregation case.

Q: What kind of stress did the reaction to these decisions impose on you and your family? What kind of danger do you think you were in?

A: You don't ever know that. You just speculate on it. It was a little harder here in Montgomery because we had the *Montgomery Advertiser* and the *Alabama Journal* that were owned by a family referred to as the "Hudson family". They were very reactionary as far as the civil rights movement was concerned. They editorialized on me at least once a week, very adversely and very critical of me. That makes it harder for your family. It stirs up adverse feelings in people who don't think for themselves, but just believe what they read in the paper. You don't ever know what the danger is. The United States Marshal service provided some protection at my home at night, particularly when I was off in court. My mother's house was bombed. She lived about six blocks from where my wife and son and I lived. I don't think there's any question but that her house was chosen for that bombing either by error, thinking it was mine, because they were listed in the telephone book, or because they found that there were marshals at my house, and they just did that for intimidating purposes. But you can't tell what the dangers were. We're in the same situation now as far as this Judge Vance murder is concerned. All you can do is speculate. All the judges on this court, the active judges, received death threat letters mailed the same day that bomb was mailed, written on the same typewriter as the bomb was addressed with. So, you don't know. . . . It's worse on some judges than it is on others. You



Stephen J. Rowe
Stephen J. Rowe, a Mobile native, is a student at the University of Virginia. Rowe is the son of Mobile attorney Benjamin T. Rowe.

don't ever get accustomed or acclimated to it. But, you can't let it slow you down or stop you from working or carrying out your regular schedule because they've accomplished a substantial part of their mission if you allow them to do that.

Q: *I know that you and Judge Rives sat on several three-judge panels together, and in one book I've read, you're quoted as referring to him as the "real hero of the South". If that is an accurate quote, why do you say that and what are some of your memories of Judge Rives?*

A: Judge Rives was a great person. We were personal friends. Our wives were friends. I had a tremendous respect for him. He's the only judge who ever came to this building who beat me to work in the morning. I got here about 7:00 and he'd already be here most of the mornings. He was much older than I was. Twenty-seven or 28 years. But, he studied. He didn't shoot from the hip. He was subjected to more criticism and personal discrimination than I was because he thought a lot about his church and the social clubs and men's clubs that he belonged to. He was ostracized from those. They even changed their weekly luncheon meeting without telling him where they'd changed it to. People would not sit on the same row in his Presbyterian church here in Montgomery. And, he had to leave the church. So, that hurt him, hurt his wife, because they were socially active. I wasn't. My wife wasn't. I'd rather be out in a fishing boat than down here at one of these white glove annual dances. I don't like that sort of stuff. And, it's pretty hard to discriminate against someone who does his own discriminating. So, he was subjected to more discrimination than I was. It hurt him more because he was very sensitive to it. And, he still decided cases like he saw them in most instances. I dissented against him and Judge Varner in a couple of cases. They were both taken to the Supreme Court of the United States. The Supreme Court adopted my dissent and that got his attention. He wouldn't

speak to me for three or four months when we'd meet at our cars after he was reversed in one those cases. But, we were good friends. And, he was a hero because nothing deterred him from doing what he thought his job required him to do. When I say job, I'm including his oath of office.

Q: *There is an old picture of you and Governor Wallace standing with your wives in your law school days. What was your relationship with him then, and do you ever see him now?*

A: Oh, I haven't seen George Wallace since I was inducted into the Alabama Academy of Honor and we had the ceremony up here in the capitol. He came in after the ceremony had just started. That's the last time I've seen him and the first time I'd seen him since he came to my house one night and wanted me to give him a short sentence.

Q: *In the Bullock County case?*

A: That's right. Bullock and Barbour. It [the induction] was ten or 12 years ago at least. That's the last time I've seen him. We were friends in law school. But, there weren't but 25 or 30 of us in law school. So everyone was friends. We had some philosophical differences then. In undergraduate school, we were both in a debating course. Speech. We debated Franklin Roosevelt's philosophy as far as putting the Alabama Power Company out of business up in the Tennessee Valley and putting the subsidized-by-the-federal-government TVA in there. And, I took a strong position against it. I thought it was a bad concept. Public enterprise was what this nation was founded on. He was for it. But, I guess, we kind of switched after we got out of that.

Q: *You had extensive experience as a trial lawyer and as a trial judge, and you have the reputation of having been a great trial judge. What qualities do you think make a good trial judge and also a good trial lawyer?*

A: Would you consider the recognition of the necessity to study and work hard a trait? That's the most important one. You have a lot judges who crawl on the bench without studying their cases. A lot of lawyers who go in the courtroom without knowing what the controlling principles of the law are or, even in trial, interviewing their witnesses and making an application of the testimony to the controlling principles of the law. You can't decide a case, you can't try a case, unless you know all that. You can't do it in an intelligent and effective manner. So, the bottom line is hard work. I don't know any job that you can do and do it well and do it effectively without hard work. Whether you're a surgeon or an internist or a trial lawyer or a trial judge or an appellate lawyer or appellate judge. All of it's still work.

Q: *Who's the best trial lawyer you ever saw?*

A: You'd have to go to a category before making a decision. You've got an outstanding group of civil defense lawyers. Civil plaintiffs lawyers. Criminal defense. Criminal prosecutors. Appellate lawyers. So, you have to go to a category to determine that. Rarely ever will you find a lawyer who's an expert in civil work and criminal work and trial work and appellate work. Sometimes, but not often. Roderick Beddow in Birmingham was one of the finest criminal defense lawyers I ever tried cases with. I prosecuted these Dial boys over here for slavery; it was the last slavery case that was ever prosecuted in the State of Alabama . . . He came down for my investiture and made a talk when I was sworn in, in 1955, and he mentioned that case. Said, "I can tell you he was a good prosecutor because anybody who beats me in a courtroom is a damned good prosecutor." So, you have to go to categories. Your father's [Ben Rowe] a great, great civil lawyer. I doubt he'd be a very good criminal lawyer. He could be if he specialized in it but he hasn't.

Q: *What about in the civil rights cases, the lawyers you saw when you were on the bench in the civil rights cases?*

A: You have a lawyer who was with the Department of Justice. He went in as an assistant attorney general in the civil rights division during the latter part of the Eisenhower administration. He became the head of the civil rights division. His name is John Doar. He's one of the finest civil rights lawyers I've ever seen. Now, maybe it's not fair to private lawyers to compare them to lawyers who have the power and the authority and the resources that the federal government has. So, with private lawyers, well, there's several of them. I appointed two lawyers to represent some prisoners in the state prison case. One of them was an ex-law clerk of mine named Robert Segall. He still practices here. The other one that I appointed was a professor named Taylor at the University of Alabama Law School. They did a great job in that case. Truman Hobbs, he's on the district bench, he was a good lawyer, but he didn't handle any civil rights cases. Chuck Morgan was a good civil rights lawyer. He began doing that in Birmingham and then he was ostracized to the point he felt like he had to leave when he took a public position and made some speeches to some of those social clubs in Birmingham against the leaders, political and community leaders in Birmingham, who let an atmosphere get created that would allow people to come in and bomb that church and kill those black children. He moved to Atlanta . . . he's in private practice now making a

lot of money in Washington at a law firm that represents corporations like Sears, Roebuck. He was a great civil rights lawyer.

Q: *What advice do you have for law students and young lawyers as to what their ambitions and goals should be?*

A: Well, it's always good to have ambitions and goals, but ambitions and goals won't get it. You have to have the determination and the persistence to get qualified and get in a position where you're eligible and qualified to perform the position that your ambition tells you you want. That's the route you have to take. You can't just say I want to be a United States Federal Judge and goof off in law school and goof off in your law practice. You can't do it. That won't get it. I don't care what your political power is. It still won't get it.

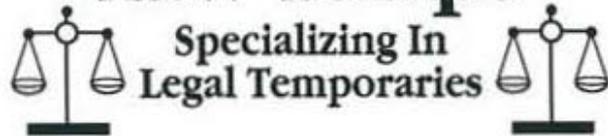
Q: *My last question is: Is it true that one of your dogs bit one of your brothers on the bench, and if so, was it a comment on his judicial views?*

A: Judge Tjoflat is chief judge now. He was just a circuit judge like I am now. At that time, he came up to Montgomery to go fishing with me one Saturday afternoon. He had been at our home before. My wife and I were sitting in the den with Neb, our Doberman — he thinks he owns that house and has a right to protect it, a duty. That's bred in him. So, Judge Tjoflat came to the back

door, and it wasn't locked. He just opened it and stuck his leg in and yelled for me. He calls me "old codger" and I call him "old cooter". We're very close friends. And, when he yelled like that, there was no way I could beat that Doberman to him, and he got back there and got him by the leg. So, I put the dog out and gave Judge Tjoflat some antibiotics I had and doctored him, and we talked a few minutes. He said, "Why don't you let old Neb back in here; I want to get acquainted with him." So, I brought him back in on the leash and sat him on the couch with me. Neb sat there and looked at him for ten or 15 minutes and then he relaxed. I let him get up, and he went over and smelled around Judge Tjoflat's feet and legs and laid down by him. I said, "Well, Jay, what do you think?" And he said, "Take the leash off?" I took the leash off, and he laid by him because we had let him in and he saw that he wasn't any danger. In a few minutes I said, "You've just driven from Jacksonville, so why don't we go to the kitchen and fix a drink?" He said, "I'd like to have one," and we started to the breakfast room. Judge Tjoflat has a habit, when he wants to tell you something, of putting his hand on your head, and he said, "Hey, old codger, let me tell you," and, when he did, Neb got him in the rear end. He had to go back to the antibiotic salve again. So, that's a true version of what happened. That's kind of ridiculous about the speculation that it had something to do with judicial philosophy. That Doberman's smart, but he's not that smart, and he's not interested in judicial philosophy. ■

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BUILDING ALABAMA'S COURTHOUSES

ST. CLAIR COUNTY COURTHOUSES

By SAMUEL A. RUMORE, JR.

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

St. Clair County

St. Clair County was created by the Alabama Territorial Legislature on November 20, 1818 with land taken from the northern part of Shelby County. The county was named for General Arthur St. Clair, although it is not clear why since St. Clair's career was checkered at best.

Arthur St. Clair was born in Scotland in 1736. He served as an officer in the British Army and saw duty in Canada during the French and Indian War. He married a woman from Boston in 1760, a niece of the governor of Massachusetts, and decided to stay in America. With an inherited fortune from his wife's family and his own military service claims, he purchased over 4,000 acres in western Pennsylvania, becoming the largest resident landowner in that part of the state.

With the outbreak of the Revolutionary War, St. Clair supported his new country. He served under Washington as a brigadier general in the battles of Trenton and Princeton. In 1777, he was promoted to major general and ordered to defend Fort Ticonderoga.



St. Clair County Courthouse

When the fort was approached by British forces, St. Clair evacuated the position without a fight, in apparent disregard of orders. Even though he was exonerated by a court martial in 1778, he was not restored to command in the Colonial Army.

After the war, St. Clair entered politics and served as a delegate to the Continental Congress. In 1787, he was named president of that body. Later in 1787, he was appointed governor of the newly created Northwest Territory. He also served as military commander of the region. St. Clair led an expedition that was surprised and defeated by an Indian force on November 4, 1791. Although he was again exonerated, this time by a congressional committee, St. Clair resigned from the army. He continued to serve as governor of the territory.

St. Clair objected to legislation that would change the government in the Northwest Territory. His political oppo-

nents sought to create the state of Ohio from the territory. He declared that the congressional enabling act concerning Ohio was a nullity. President Jefferson disagreed and removed him from office in 1802.

St. Clair retired to his estate in western Pennsylvania. However, because he had lost money through loans to friends, had co-signed notes that were not paid, and was not reimbursed by Congress for expenses that he incurred as governor, St. Clair lost his entire fortune. He lived in poverty until his death on August 31, 1818. Shortly after he died, the Alabama Legislature created St. Clair County, possibly because some of his former soldiers lived in that area.

The first court in St. Clair County was held at the home and trading post of Alexander Brown, which was located approximately four and one-half miles south of present-day Ashville. The first case, in which Brown himself was the

named defendant, was heard on December 7, 1818. Joel Chandler had sued Alexander Brown for \$10,000 due to a trespass, but the case was quickly dismissed upon payment of \$13.56 in court costs by defendant Brown. Brown's home was located in a place called "Old Town", sometimes called "Cataula" because it was near to Indian Chief Cataula's village.

In November 1822, Philip Coleman acquired 30 acres of land in St. Clair County from the United States Government. He had the land platted into lots and set aside a central square for a courthouse. The town was first called St. Clairsville. On October 8, 1823, Coleman sold the 30 acres for \$10,000 to five commissioners who were appointed to erect a courthouse and jail in the county. A log courthouse was constructed there in 1824. The name of St. Clairsville was soon changed to Ashville in honor of John Ash, one of the pioneer settlers of the area.

Ash and his family had arrived in St. Clair County in 1818. They were traveling through on their way west when one of the children fell from their wagon, fractured her skull and died. Ash decided to stay in the area and homestead the land. He was active in local and state politics over the years until his death in 1873.

The log courthouse at Ashville was intended to be only a temporary seat of justice and was constructed south of the town square. This log building and a possible successor log structure served the county for close to 20 years. During that period of time, the court square remained vacant and was used as a village green and meeting place.

By 1840, it became apparent that a



Pell City Courthouse

larger courthouse was needed. The legislature passed an act on December 26, 1843 which authorized a special tax for a new courthouse. In 1844, the construction on the present courthouse at Ashville began. Littleton Yarbrough constructed the building. His family ledger reveals that bricks for the construction were handmade on the site, and the laying of brick commenced on October 23, 1844. The courthouse contained 155,640 bricks which cost \$2.50 per thousand. By June 4, 1845, the courthouse was completed and payments settled in full.

This original brick courthouse was a two-story square building. It had a bell tower and two large chimneys. It consisted of four offices downstairs and a large courtroom upstairs. In 1886, a two-story wing was added to each end of the building. Further additions and renovations have taken place over the years.

Also, the boundary lines of St. Clair County have changed over the years. In 1836, a portion of the county was assigned to the new Cherokee County, and a portion went to the new DeKalb County. In 1866, another section was used to create Baine County, later called Etowah County.

On December 17, 1868, another change was made by a specific act which read:

"Be it enacted by the General Assembly of Alabama that the boundary line between the counties of Etowah and St. Clair be changed so as to include Thomas

M. Springfield as a citizen of St. Clair."

It appears from the record that a legislator, H.J. Springfield, resided on his brother's farm. Springfield was elected from St. Clair County but the farm was later discovered to be over the county line in Etowah County. So, instead of denying Springfield his seat because he did not reside in the county from which he was elected, the Legislature officially placed the Springfield farm in St. Clair County. Apparently, annexation law was not overly restrictive during the Reconstruction Era in Alabama.

Pell City

Pell City in southern St. Clair County was originally established in 1887, and named for George H. Pell of New York, the original promoter of the Pell City Iron and Land Company. The area saw hard times following the Panic of 1893, but soon the town prospered with new industries. The population grew, and, thus, a problem was created.

St. Clair County is roughly divided into two sections by Backbone Mountain. When the county was originally established, very few residents lived in the area that would become Pell City. As the population grew, it became increasingly apparent to the residents on the southern side of Backbone Mountain that they needed more convenient access to their courthouse. If a trip was required to the county seat from Pell City, a resident had to travel by rail to Birmingham, switch trains to venture north to Whitney, and then go by foot or



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ride to Ashville. A person called for jury duty had to start two or three days ahead in order to assure timely arrival.

To solve this problem, the Constitutional Convention of 1901 passed an ordinance, Number 390, which established a branch courthouse in St. Clair County, and divided the county into two judicial districts. Four towns vied for the designation of branch county seat. They were Pell City, Eden, Coal City, and Riverside. A heated campaign was waged by each town, but in the election of January 6, 1902, Pell City won by about a 600-vote majority.

On January 22, 1902, the county purchased a site for a courthouse in Pell City. Probate Judge W.S. Forman borrowed funds for the construction of the building. The total cost of the courthouse and jail was \$9,038.12. The architects for this building were W. Chamberlain and Company, who were paid \$321.84 for their services. The contractor was Robert P. Manley. The county accepted this building on March 13, 1903.

Two years after the construction of the courthouse in Pell City and the commencement of court sessions there, a group in the northern part of the county took action to overturn the two-court system. In 1905, the Pell City Circuit Court was abolished. However, in the next election for the Legislature, two local candidates for the House and Senate campaigned on a platform to reinstate the Southern Judicial Division at Pell City. These candidates won their offices, and in 1907, a new local act re-established the two divisions and put the Pell City court back in business.

The old courthouse served Pell City for over 50 years, but with continued growth, a new building became necessary. Martin J. Lide of Birmingham was architect for the new Pell City courthouse. R.P. Henderson and his son, Howell P. Henderson of Pell City, were contractors. The structure was built of reinforced concrete and has an exterior veneer of limestone and granite. The building cost approximately \$625,000 and was dedicated March 3, 1956.

The courthouse in Ashville was expanded or remodeled in 1911, 1934,

1964, and 1982. In 1964, the courthouse was enlarged and repaired. Horace M. Weaver was architect and Dawson Construction Company was builder. In 1982, further additions and alterations were completed. Poole, Pardue, Morrison and Associates were architects, and Ralph Williams Construction Company was contractor.

The courthouse at Ashville is an example of the Greek Revival style. The front and rear entrances have a classic portico with four fluted Doric columns. The front pediment contains a town clock. Above the doorway is a governor's balcony.

In 1978, a car crashed into the courthouse at Ashville and demolished the front steps. The granite for these steps had been quarried in Lithonia, Georgia over 100 years before. Coincidentally, the U.S. Customs House in Gulfport, Mississippi had recently undergone a renovation. Its original steps were quarried from the same stone at approximately the same time. These old steps had been removed in the renovation. Garner Stone Company of Birmingham was commissioned to repair the Ashville courthouse steps. The company was able to obtain the Gulfport stone, and, thus, replace the historic steps at Ashville with compatible steps having a history of their own.

Many attempts have been made over the years to do away with the dual courthouses in St. Clair County. A highway now crosses Backbone Mountain, and the courthouses are less than 20 minutes apart. Ashville remains the historic county seat while Pell City has more businesses and population. Certainly one courthouse would be more economical than two, but neither area wishes to lose its courthouse. Unless the voters of St. Clair County demand a change, two courthouses will probably remain in the county well into the future. ■

The author thanks Circuit Judge H. Edwin Holladay, retired presiding judge of the 30th Judicial Circuit at Pell City, for his help in obtaining information for this article.

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EMPHASIS AND INTEGRITY:

FRANK JOHNSON

and the Administration of Criminal Justice

By *BRYAN A. STEVENSON*

W

hen Frank M. Johnson, Jr., at the age of 37, became the nation's youngest federal

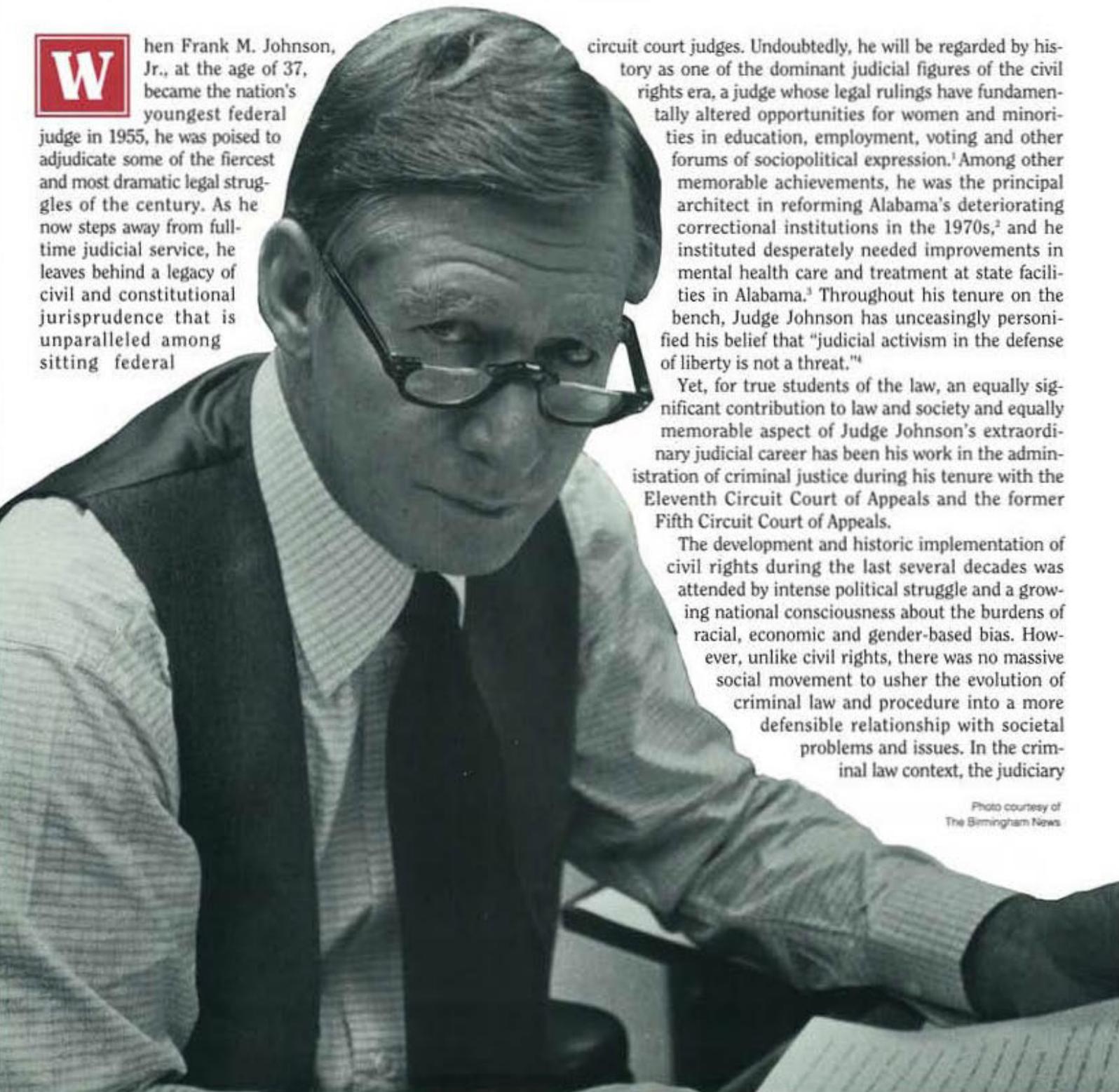
judge in 1955, he was poised to adjudicate some of the fiercest and most dramatic legal struggles of the century. As he now steps away from full-time judicial service, he leaves behind a legacy of civil and constitutional jurisprudence that is unparalleled among sitting federal

circuit court judges. Undoubtedly, he will be regarded by history as one of the dominant judicial figures of the civil rights era, a judge whose legal rulings have fundamentally altered opportunities for women and minorities in education, employment, voting and other forums of sociopolitical expression.¹ Among other memorable achievements, he was the principal architect in reforming Alabama's deteriorating correctional institutions in the 1970s,² and he instituted desperately needed improvements in mental health care and treatment at state facilities in Alabama.³ Throughout his tenure on the bench, Judge Johnson has unceasingly personified his belief that "judicial activism in the defense of liberty is not a threat."⁴

Yet, for true students of the law, an equally significant contribution to law and society and equally memorable aspect of Judge Johnson's extraordinary judicial career has been his work in the administration of criminal justice during his tenure with the Eleventh Circuit Court of Appeals and the former Fifth Circuit Court of Appeals.

The development and historic implementation of civil rights during the last several decades was attended by intense political struggle and a growing national consciousness about the burdens of racial, economic and gender-based bias. However, unlike civil rights, there was no massive social movement to usher the evolution of criminal law and procedure into a more defensible relationship with societal problems and issues. In the criminal law context, the judiciary

Photo courtesy of
The Birmingham News



has been, in many instances, the only institution with the authority and perspective to balance society's legitimate need for order and safety with basic constitutional principles and human rights. Judge Johnson's rulings in the criminal area reveal not only a recognition of that role but also a pioneering vision of the judiciary's unique obligations to achieve equality, fairness and a heightened duty of care in the criminal justice realm. That vision has had a significant impact on constitutional adjudication of criminal matters in this region.

With scores of criminal opinions to his credit, it is impossible to completely survey even a subset of Judge Johnson's contributions to the criminal law area in this short article. However, in both large and small ways, it is easy to see that Judge Johnson's work has had a defining influence on the evolution and interpretation of criminal law and procedure.

Frank Johnson's written criminal case opinions reveal a jurist who rarely philosophized while making judicial pronouncements. He rather preferred to rigorously apply constitutional law with precision and detail to the facts of a particular case. Yet, Judge Johnson was extremely attentive to the constitutional idea that an adversarial system of criminal justice serves the truth-finding function only when the institutional components of the system perform their tasks carefully and conscientiously. Some of Judge Johnson's opinions on the right to counsel and the prosecutorial function provide a brief glimpse of his contributions in the development of this consciousness.

RIGHT TO COUNSEL

Perhaps the single most significant development in criminal procedure during the last 30 years was the United States Supreme Court's decision in *Gideon v. Wainwright*,⁵ which required that states provide lawyers to poor people unable to afford legal representation in criminal matters. On the foundation created by the Supreme Court's earlier decision in *Powell v. Alabama*,⁶ *Gideon* offered all of the transformative possibilities that the Court's major civil rights decisions heralded. Yet, like *Brown v. Board of Education*⁷ and other renowned constitutional decisions, it was left to lower courts to give meaning and shape to the right to counsel.

Judge Johnson played a significant role in sculpting the precise meaning of the right to counsel in criminal cases. He has stated that "[l]ike good moral philosophy, good legal thinking is not discovery; it is emphasis."⁸ As a circuit court judge he has applied this legal philosophy by "emphasizing" that the

right to counsel must be meaningful. As he stated in *Tucker v. Kemp*, "[a] vital corollary to the Sixth Amendment's guarantee to criminal defendants of the right to assistance of counsel is the requirement of *effective* assistance of counsel." *Tucker*, 724 F.2d at 892. In addressing the right to counsel in criminal cases, Judge Johnson hammered out the parameters of effective advocacy in the criminal area with the kind of specificity that generated meaningful standards for practitioners.

For example, in *Mylar v. Alabama*,⁹ the jurist held that a lawyer's "failure to file a brief in a nonfrivolous appeal falls below the standard of competency expected and required of counsel in criminal cases and therefore constitutes ineffective assistance."¹⁰ Alabama appellate courts subsequently followed Judge Johnson's lead and now require that every lawyer representing an indigent criminal defendant on direct appeal in this state must file an appellate brief. *Ex parte Dunn*.¹² By recognizing that a constitutional right that is not protected or enforced is of no value, Judge Johnson sought to ensure that the right to counsel for indigent defendants meaningfully aided in an adversarial system of criminal justice.

Judge Johnson has noted that, "[o]ne of the most important, if not the most important, duties of the courts is to secure the integrity of the relationship of private citizens to the government."¹³ In fulfilling this duty, he has always recognized that a judge's constitutional pronouncements must effect meaningful solutions. In the civil rights context, it was Judge Johnson's belief that "[a]fter deciding that under the facts of a case the Constitution mandates that the litigants are entitled to relief, a judge cannot discharge his oath of office without seeing to it that relief is provided."¹⁴

In reviewing the implementation of the right to counsel, Judge Johnson has been equally mindful of enforcing meaningful legal assistance to poor people accused of criminal offenses. Judge Johnson's opinions have challenged the criminal defense bar for the indigent to recognize the importance of learning substantive criminal law, *see e.g., Harrison v. Jones*,¹⁵ the need to conduct a thorough defense investigation in the preparation of a criminal trial, *see e.g., Futch v. Dugger*¹⁶ and prompted lower courts and the bar to recognize that the right to defense counsel must mean the right to a true advocate and aid, *see e.g., Cunningham v. Zant*.¹⁷

PROSECUTORIAL FUNCTION

Before taking the bench in 1955, Frank Johnson served as the U.S. Attorney for the Northern District of Alabama. He came to the judiciary with an appreciation for the burdens and benefits of representing the government in criminal prosecutions. He nonetheless insisted that anyone serving as the representative of the state or federal government strictly adhere to their constitutional obligation to be fair, and to be mindful of the special role and interest of the prosecutor that is not necessarily "that it shall win a case, but that justice shall be done . . ."¹⁸

Judge Johnson's written opinions demonstrate great respect

Bryan A. Stevenson

Bryan A. Stevenson is the executive director of the Alabama Capital Representation Resource Center. He formerly was with the Southern Center for Human Rights. He earned his law degree at Harvard Law School and a master's in public policy from the Kennedy School of Government at Harvard University. He is a member of the Alabama State Bar and the State Bar of Georgia. He has authored *Defending a Capital Case in Alabama* and *The Alabama Postconviction Manual*.

for the importance of the role prosecutors play in the criminal justice system. His legal opinions were particularly attentive to the expectation that the integrity of the prosecutorial function not be compromised by improper conduct. In reviewing prosecutorial misconduct claims, Judge Johnson would often identify improper prosecutorial conduct even where it did not amount to reversible error.¹⁹ He clearly recognized the corrective role judges can play in improving the administration of criminal justice.

He was particularly vigilant in regulating the emotional excesses that so often compromised constitutional authority in the implementation of civil rights. "A prosecutor may not make an appeal to the jury that is directed to passion or prejudice rather than to reason and an understanding of the law." *Cunningham v. Zant*.²⁰ "Reason and an understanding of the law" clearly have been the only means by which Judge Johnson believes that the administration of criminal justice can be constitutionally managed. His well-known remarks to an all-white jury summoned to try the case of Klansmen charged with violating the civil rights of Viola Liuzzo by murdering her, are just one example of his belief that the "concrete embodiment of the Constitution" depends on judges, juries and prosecutors to "make a proper and an unbiased application of [the law] in any given instance."²¹

Judge Johnson's efforts on the appellate bench to frame the prosecutorial function reflect his dominant concern that criminal trials be conducted in a manner "in which the jury reaches its verdict based only on the evidence subjected to the crucible of the adversarial process." *Woods v. Dugger*.²²

ANTIDISCRIMINATION LAW IN THE CRIMINAL JUSTICE CONTEXT

Something must be said in even a partial review of Judge Johnson's work in the criminal justice area about his persistent efforts to limit the effects of race, gender and class bias in the administration of criminal justice. The evolution of antidiscrimination law has come much more slowly in the criminal justice context than in other areas of public administration. It is only in the last five years that the United States Supreme Court has addressed in a meaningful way racially discriminatory use of peremptory challenges in criminal proceedings.²³ Less than 12 years ago, the Court was still grappling with the constitutionality of systematic schemes of underrepresenting women from juries.²⁴ Judge Johnson's perspective on the enforcement of antidiscrimination law clearly influenced these changes as well as the general development of equal protection analysis in the criminal context.

Judge Johnson began addressing systematic race and gender discrimination in jury selection as a district court judge in the Middle District of Alabama early in his career on the bench. *Mitchell v. Johnson*,²⁵ *Penn v. Eubanks*²⁶ and *White v. Crook*²⁷ demonstrated his resolve to implement the demands of the equal protection clause to achieve a representative jury system in Alabama that was representative of the entire community and that possessed the "integrity" that constitutional norms require. He continued, moreover, to recognize discriminatory practices in the administration of criminal justice as an appellate judge by condemning grand jury foreperson exclusion on the basis of race or gender,²⁸ overturning convictions obtained through discriminatory use of peremptory strikes in jury selection,²⁹ and by addressing evidence of racially discriminatory sentencing schemes.³⁰

In the civil rights context, Judge Johnson's commitment to relief and remedy was well understood, as he explained:

Judges are trained in the law. They are not penologists, psychiatrists, public administrators, or educators, and in most cases, do not wish to assume such roles. Faced with defaults by government officials, however, a judge does not have the option of declaring that litigants have rights without remedies. The judge has no alternative but to take a more active role in formulating appropriate relief.³¹

At the Eleventh Circuit, Judge Johnson was sometimes unable to convince his colleagues to recognize the applicability of antidiscrimination demands in the criminal justice context. New rhetorical visions emerged during his tenure at the Eleventh Circuit that not only challenged his idea about formulating appropriate relief but even questioned the very identification of antidiscrimination rights in the criminal justice system.

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For example, in *McCleskey v. Kemp*, the Eleventh Circuit was asked to review the denial of habeas relief to a Georgia death row prisoner who argued that imposition of the death penalty in Georgia was racially biased in violation of the Eighth and Fourteenth amendments. The petitioner presented statistical evidence that defendants convicted of homicide in Georgia are four and a third times more likely to receive a death sentence if the victim is white than if the victim is black. The *en banc* court rejected McCleskey's claim which was also rejected by a narrowly divided Supreme Court.³²

In dissent, Judge Johnson challenged the majority's restrictive view of the Eighth Amendment's applicability to discrimination claims in sentencing.

The central concerns of the Eighth Amendment deal more with decisionmaking processes and groups of cases than with individual decisions or cases. . . . Without this systemic perspective, review of sentencing would be extremely limited, for the very idea of arbitrary and capricious sentencing takes on its fullest meaning in a comparative context. . . . This emphasis on the outcomes produced by the entire system springs from the State's special duty to insure fairness with regard to something as serious as a death sentence. . . .

In sum, the Supreme Court's systemic and objective perspective in the review and control of death sentencing indicates that a pattern of death sentencing skewed by race alone will support a claim of arbitrary and capricious sentencing in violation of the Eighth Amendment. [citations omitted] The majority's holding on this issue conflicts with every other constitutional limit on the death penalty. After today, in this Circuit arbitrariness based on race will be more difficult to eradicate than any other sort of arbitrariness in the sentencing system.

McCleskey, 753 at 910-911.

The continuing debate over the relationship of antidiscrimination rights and concerns to criminal justice topics, e.g., use of peremptory strikes, sentencing disparities based on race, discriminatory exercise of prosecutorial discretion, may be where Judge Johnson's perspective, shaped by his unparalleled experience in civil rights enforcement, may be most notably missed. Nonetheless, his legacy will undoubtedly shape these and other issues in the continuing efforts to make the dispensation of criminal justice equitable and fair. ■

Endnotes

1. For an introduction to the storied career of Judge Johnson in the area of civil rights and constitutional law see R. Kennedy, *Judge Frank Johnson, Jr., A Biography* (1978); T. Yarbrough, *Judge Frank Johnson and Human Rights in Alabama* (1981); J. Bass, *Unlikely Heroes* 78-82 (1981); W. Douglas, *The Court Years* 128-32 (1980); Bill Moyers' Journal, "Judge: The Law and Frank Johnson" (1980); *Time*, "The Real Governor," January 26, 1976.
2. See *Plugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1972), consolidated and *aff'd in part sub nom. Newman v. Alabama*, 559 F. 2d 283 (5th Cir. 1977), cert. denied, 438 U.S. 915 (1978); *Newman v. Alabama*, 349 F. Supp. 275 (M.D. Ala. 1972), consolidated and *aff'd in part*, 559 F. 2d 283 (5th Cir. 1977), cert. denied, 438 U.S. 915 (1978). See also *Reform and Regret, The Story of Federal Judicial Involvement in the Alabama Prison System* (1989), Larry Yack-

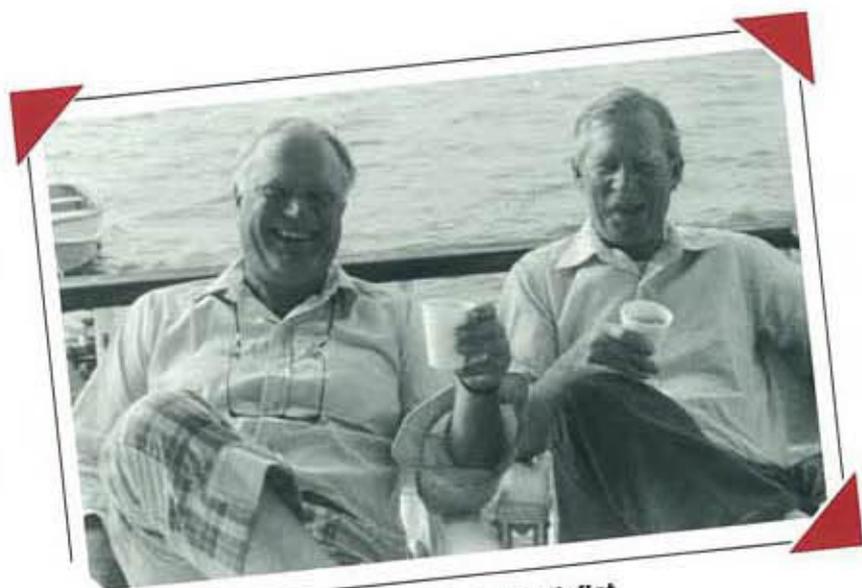
- le's excellent history of Judge Johnson's involvement in the campaign to achieve prison reform in Alabama through federal constitutional litigation.
3. See *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), enforced, 344 F. Supp. 387 (M.D. Ala. 1972), modified sub nom. *Wyatt v. Aderholt*, 503 F. 2d 1305 (5th Cir. 1974).
 4. Johnson, "In Defense of Judicial Activism," 28 *Emory L.J.* 901 (1979).
 5. 372 U.S. 355 (1963).
 6. 287 U.S. 45 (1932). In *Powell*, the Court recognized that defendants "stood in deadly peril of their lives" and held that "in a capital case, where the defendant is unable to employ counsel . . . it is the duty of the court, whether requested or not, to assign counsel . . . and that duty is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." *Powell*, 287 U.S. at 71.
 8. Johnson, "Judicial Activism," 28 *Emory L.J.* at 901.
 9. 724 F. 2d 882, 892 (11th Cir. 1984), vacated in part and reinstated in part, 762 F. 2d 1480 (1984), vacated and remanded, 474 U.S. 1001 (1985).
 10. 671 F. 2d 1299 (11th Cir. 1982), cert. den., 463 U.S. 1229 (1982).
 11. *Myer*, 671 at 1302.
 12. 514 So. 2d 1300 (Ala. 1987); see also *Carroll v. State*, 468 So. 2d 186, (Ala. Cr. App. 84).
 13. Johnson, *The Role of the Federal Courts in Institutional Litigation*, 32 *Ala. L. Rev.* 271, 272 (1981).
 14. *Id.*, at 273.
 15. 880 F. 2d 1279 (11th Cir. 1989) (defense counsel ineffective where he did not challenge trial court's illegal use of a prior *nolo contendere* pleas in enhancing defendant's sentence).
 16. 874 F. 2d 1483 (11th Cir. 1989) (counsel's failure to locate, interview and call defense witnesses and investigate defendant's competency necessitates further review of counsel's effectiveness).
 17. 928 F. 2d 1006 (11th Cir. 1991) (trial counsel's failure to present important mitigating evidence denied defendant effective assistance of counsel and an individualized sentencing decision).
 18. *Berger v. United States*, 295 U.S. 76, 88 (1935).
 19. See e.g., *Hance v. Zant*, 669 F. 2d 940, 951 (11th Cir. 1983) ("Certainly the prosecutor's conduct during the guilt phase of this trial was improper, but it was not unconstitutional. Considering the overwhelming strength of the state's case we cannot find that the prosecutor's conduct rendered the determination of Hance's guilt fundamentally unfair").
 20. 928 F. 2d 1006, ____ (11th Cir. 1991)
 21. Yackel, *Reform and Regret*, at 16.
 22. 923 F. 2d 1454, 1456 (11th Cir. 1991) (Judge Johnson reversing the conviction of a Florida defendant who had been sentenced to death for the murder of a correctional guard where the defendant's trial was unconstitutionally influenced by pretrial publicity and the presence of uniformed correctional guards in the courtroom).
 23. See *Batson v. Kentucky*, 476 U.S. 79 (1986); *Powers v. Ohio*, ____ U.S. ____ (1991).
 24. See *Duren v. Missouri*, 439 U.S. 357 (1979).
 25. 250 F. Supp. 117 (1966) (injunction against the systematic exclusion of African Americans in Macon County from jury rolls).
 26. 360 F. Supp. 699 (1973) (injunction against systematic exclusion of African Americans and women from jury rolls in Montgomery County).
 27. 251 F. Supp. 401 (M.D. Ala. 1966).
 28. See e.g., *Bryant v. Wainwright*, 696 F. 2d 1373 (1982) (In dissent Judge Johnson argues that total exclusion of women as grand jury forepersons over three-and-one-half year period establishes prima facie case that entitled black female prisoner to habeas relief).
 29. See e.g., *Horton v. Zant*, ____ F. 2d ____, No. 90-8522 (11th Cir. 1991) (Georgia death row prisoner's conviction unconstitutionally obtained where prosecutor has used peremptory strikes to systematically exclude African Americans in violation of *Swain v. Alabama*, 380 U.S. 202 (1965)).
 30. See e.g., *McCleskey v. Kemp*, 753 F. 2d 677 (11th Cir. 1985), see *infra*.
 31. Johnson, *Role of the Federal courts*, *supra*, at 274.

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THE CRAFTY SIDE OF JUDGE FRANK JOHNSON



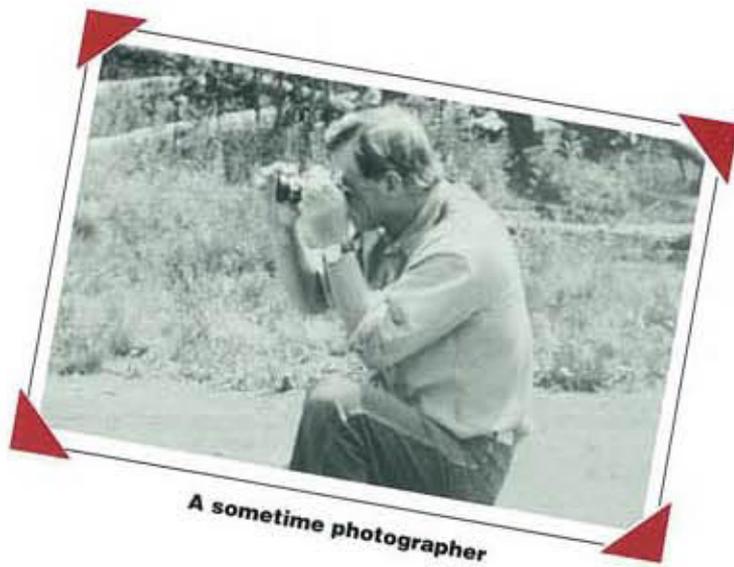
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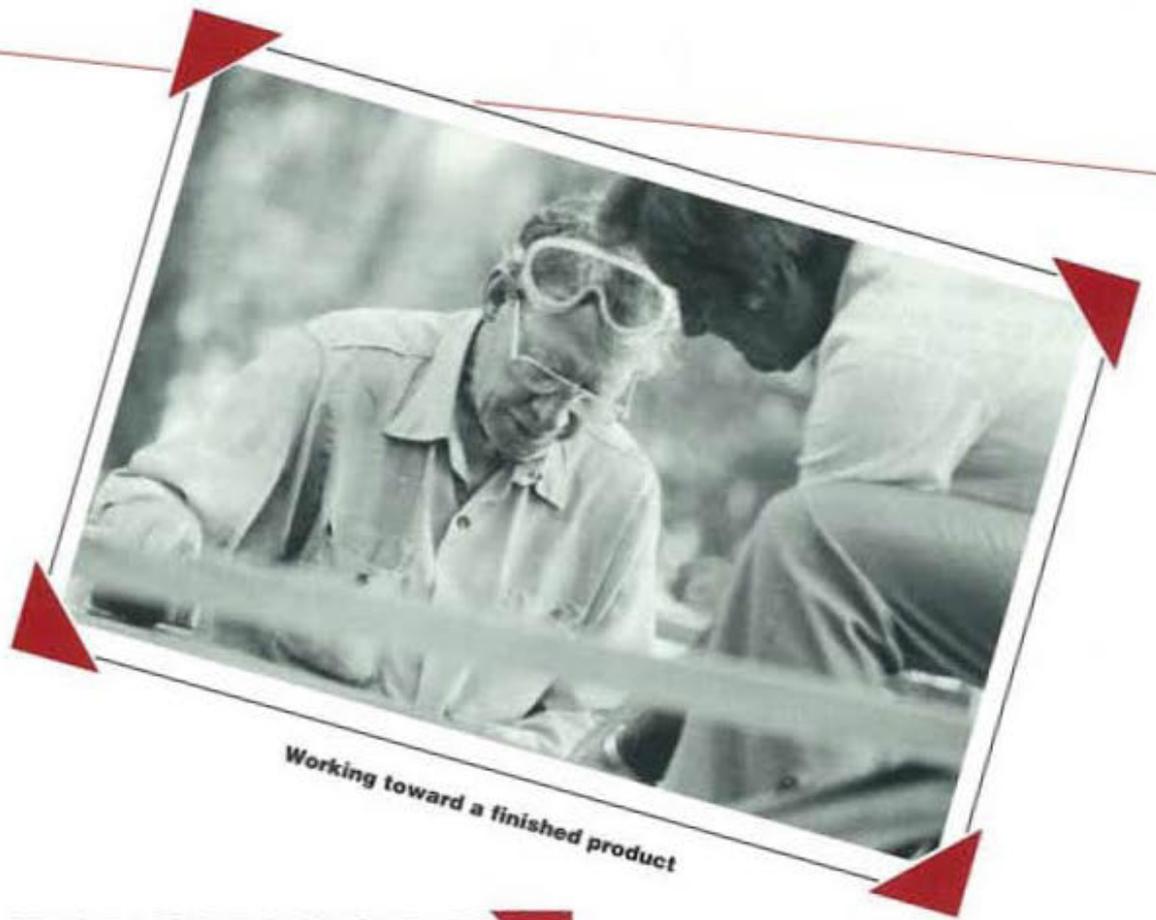
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Constructive criticism from a colleague

YOUNG LAWYERS' SECTION

By KEITH B. NORMAN, *president*

Professionalism now — why we can't wait

In the public's eye, our profession is not the shining and noble calling that we would like to envision. Perhaps you have experienced a legal jibe, dig or other insult which has been expressed verbally or in some written text about our profession. Indeed, lawyer jokes and other insults are legion and have been around for a long time. Before you say that perhaps I am a little too sensitive, let me state that in spite of my concern, I do appreciate a good anecdote or witty episode about our profession.

However, the disrepute which the legal profession has endured has been far more scathing than any other. In many instances, it goes past the point of gentle ribbing — it is destructive. In fact, I feel that it has become deleterious to our judicial process by diminishing respect for our judicial institutions.

Why does the image of lawyers suffer? One reason is our role in the judicial process. The second reason is that we have lost a measure of civility and collegiality in our profession and failed to transmit ethical and professional values from one generation of professionals to the next.

As an advocate, the lawyer argues one side of a dispute in a system built on the proposition that if all propositions are presented aggressively and arguably, the truth and correct answer will eventually emerge.

As uncomplicated as the concept may be, some often fail to grasp its profundity and refuse to acknowledge its importance to the judicial process. Indeed, those who quote Shakespeare's lines spoken by Dick the Butcher in the second part of the play, *Henry VI* (act four, scene two), "The first thing we do, let's kill all the lawyers," as an epithet, reflect two things. First, they have not read the play. Second, they do not understand, as Dick the Butcher did, that lawyers are the bulwark of social order. Without lawyers to foster nonviolent dispute resolution and to assure the protection of individual freedoms and liberties, an orderly society as we know it would disintegrate. Our democratic institutions would crumble, and we, as citizens, would be subject to the whims of the person wielding the biggest stick or a totalitarian form of government suppressing freedom of expression and other precious liberties. Anarchy would reign. Yet, the image of lawyers still suffers.

In 1989, the American Bar Association's Task Force on Outreach to the Public submitted its report addressing the concerns shared by many of the public's perception of lawyers and the legal system. One of the report's several findings and recommendations addressing the profession's image problem was that:

"Individual lawyers have an obligation to adhere to the high standards of the profession and convey respect for those standards in court, to client and the community. The bar and the

judiciary should work in partnership to improve professionalism. Strong efforts of the American Bar Association and many state and local bars to encourage greater professionalism among lawyers should be redoubled."

With this responsibility in mind, the Young Lawyers' Division of the ABA developed a Lawyer's Pledge of Professionalism that was approved in 1990 by the ABA's House of Delegates to be sent to all state and local bars. The pledge consists of 12 precepts to help combat the increasing encroachment of unprofessional conduct, which although not necessarily unethical, certainly is not supposed to typify the profession. These 12 precepts are set out in the adjoining box.

Abiding by this pledge will not be easy, but if each of us, as a young lawyer, makes a personal commitment to follow these precepts, I believe we can become the nucleus of a positive force within our state bar that can help instill these important notions in future lawyers and encourage those now practicing to abide by them. We, the young lawyers of Alabama, can help restore the luster to this great profession which has grown fainter and fainter as the ideals of professionalism become clouded. I ask each young lawyer to make this commitment and accept the Lawyer's Pledge of Professionalism. (See next page.)



Keith B. Norman

Youth Judicial Program

For nearly ten years, the Youth Judicial Program has been one of the YLS's primary projects. The program is designed to give high school students an opportunity to learn, firsthand, about the judicial system by participating in mock trials. Young lawyers work with individual teams to help team members prepare their case for trial. Each year, teams representing high schools from many cities around the state travel to Montgomery to participate in a statewide mock trial competition.

Young Alabama lawyers give literally hundreds of hours of their time working with these high school students to prepare their case for trial. Executive Committee member Charlie Anderson of Montgomery has chaired the Youth Judicial Program for several years. Since his tenure as chair, the program has witnessed steady growth among participating high school students and Alabama young lawyers. The program is operated in cooperation with the Montgomery YMCA which works to supply an adult liaison for groups from high schools or YMCAs wishing to participate. Charlie works to ensure that each youth lawyer has a young lawyer advisor from that city.

If you are interested in working with the Youth Judicial Program or starting such a program in your area, contact Charlie Anderson at (205) 832-4202. ■

LAWYER'S PLEDGE OF PROFESSIONALISM

1. I will remember that the practice of law is first and foremost a profession, and I will subordinate business concerns to professionalism concerns.
2. I will encourage respect for the law and our legal system through my words and actions.
3. I will remember my responsibilities to serve as an officer of the court and protector of individual rights.
4. I will contribute time and resources to public service, public education, and charitable and pro bono activities in my community.
5. I will work with the other participants in the legal system, including judges, opposing counsel and those whose practices are different from mine to make our legal system more accessible and responsive.
6. I will resolve matters expeditiously and without unnecessary expense.
7. I will resolve disputes through negotiation whenever possible.
8. I will keep my clients well-informed and involved in making the decisions that affect them.
9. I will continue to expand my knowledge of the law.
10. I will achieve and maintain proficiency in my practice.
11. I will be courteous to those with whom I come into contact during the course of my work.
12. I will honor the spirit and intent, as well as the requirements, of the applicable rules or code of professional conduct for my jurisdiction, and will encourage others to do the same.

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OPINIONS OF THE GENERAL COUNSEL

By MILTON L. MOSS, assistant general counsel

Office sharing or partnership?

In recent months, the Office of General Counsel has discussed several situations in which lawyers are holding themselves out as a law partnership, when, in fact, they are only sharing office space in some fashion. This practice is a violation of the Rules of Professional Conduct because it is misleading to the public.

Rule 7.1 (a) states:

"A lawyer shall not make or cause to be made a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement as a whole not materially misleading."

Rule 7.5(a) operates in conjunction

with Rule 7.1(a) and states:

"(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1 . . ."

Notably, Rule 7.5(d) of the ABA Model Rules of Professional Conduct expressly addresses this practice.

"(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact."

While Alabama did not adopt a counterpart to 7.5 (d) in its Rules of Professional Conduct, it would have been redundant in view of the clear application of 7.5(a).

The Disciplinary Commission of the Alabama State Bar issued a formal opinion in February 1990 which dealt with this subject. That opinion (RO 90-14) essentially held that lawyers who share office space and even overhead costs may not list their names jointly on let-

terhead, even if it contains a disclaimer such as "An Association of Independent Practitioners." This holding conforms to ethics opinions issued by several other jurisdictions.

What this means is lawyers merely sharing office space and other overhead costs may not designate themselves as "Smith & Jones" or "Law Offices of Smith & Jones", etc., since those titles suggest the existence of a partnership in the practice of law. Disclaimers are not sufficiently understandable to the general public to cure the potential for misunderstanding.

While non-associated lawyers may not use the same letterhead or advertise jointly, nothing precludes having a secretary answering the telephone, "Law offices." This does not suggest the existence of a partnership or professional corporation. ■

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THE REWARDS OF PROFESSIONALISM

*An interview with Harold G. Clarke,
Chief Justice, Supreme Court of Georgia*

Editor's note: This article originally appeared in the June 1990 issue of the Decatur-DeKalb Bar Quarterly published by the Decatur-DeKalb Bar Association in Georgia. It is reprinted, in part, with the permission of that publication.

WHAT IS PROFESSIONALISM?

I think we have all struggled with the idea of coming up with a definition of professionalism It seems to me that the most troublesome thing is distinguishing between professionalism on one hand and ethics on the other hand. What I have felt from the very beginning is that ethics as we know them within the legal profession really are not ethics as some philosopher might know. They are really more the rules of lawyering—a code of professional responsibility Professionalism differs from legal ethics in the sense that ethics is a minimum standard required of lawyers while professionalism is a higher standard expected of all lawyers. Professionalism imposes no official sanctions. It offers no official reward. Yet, sanctions and rewards exist unofficially. Who faces a greater sanction than lost respect? Who faces a greater reward than the satisfaction of doing right for right's own sake?

WHY IS PROFESSIONALISM IMPORTANT?

The whole idea of professionalism is doing those things which are expected of a person who has a professional calling. A big part of it, of course, is public service. If lawyers fail to meet the mandate of doing those things which the people expect of them and fail in their mandate of doing those things which the system expects of them, then there is a possibility that the exclusive franchise to practice law may be taken from them. It only exists because people perceive it to be in their best interest.

Has something gone wrong that makes it necessary to mandate studying professionalism?

I am not sure that lawyers are any worse today than they were 40 years ago when I first came to the bar. I am not sure that lawyers were any worse then than they were at the beginning of this century. I think we have always had our failings, and just because we are trying to do better does not mean we are now doing worse than we did at an earlier time. Certainly, there are things that need to be improved, but there have always been things needing improvement. The effort that we're making is one that needs to be made earlier and certainly will need to be made in the future.

Georgia is a leader in the professionalism movement. What brought about the emphasis on professionalism?

I am proud that we are seen as a leader in this connection. I think that there are good people in the profession in this state who recognize that we can do better than we are doing, even though what we are doing is not all bad. I think those folks in the practice and on the

bench have recognized that we ought to make a determined effort to continually improve. I don't know that there is any one thing that was said to somebody one morning that we need to be more professional; it is just a whole bunch of things that led us to that conclusion.

DOES PROFESSIONALISM ADDRESS THE ISSUE OF HARDBALL LITIGATION?

Yes, it does address the questions of hardball litigation, Rambo tactics and all of that sort of thing. In my view, while there are instances where you may gain some advantage by hardball tactics, over the long haul, in looking at the big pic-

ture, you don't gain very often. Long experience as a lawyer and ten years as a judge have taught me that once you create a polarization between you and the opposing counsel and the opposing parties, the possibility of settlement and working things out just becomes more and more difficult. And, so by doing this, you oftentimes are performing a disservice to your client because you are not able to get your client's problem solved. Benjamin Franklin said something to this effect, "All things you have the right to do are not best to be done". . . . All rights that you might be entitled to ought not to be insisted on if it doesn't do any good for you or your client. There are those who sometimes just insist on it because it causes trouble for

the opponent rather than doing any good for them. That's bad. That's not what we ought to do.

IT SEEMS THAT COURTESY AND COMMON SENSE HAVE A LOT TO DO WITH PROFESSIONALISM.

We ought to apply our efforts as lawyers and judges with common sense, and there is nothing wrong with being courteous. I think people can differ and can be zealous in their advocacy without being obnoxious and without being discourteous and uncivil. . . . It seems to me that the spirit of the calling to the law practice needs to get more attention. We ought not . . . ignore the letter of the law and the letter of ethics, but we need also give attention to the spirit that's behind it, and maybe that is part of what professionalism is. Maybe once you've got the slavish adherence to all the rules — the standards and the code of professional responsibility — then the next thing is to not only adhere to them technically but to try to live up to the reasons behind them in a more philosophical way.

IS THE EMPHASIS ON PROFESSIONALISM AN EFFORT TO IMPROVE OUR PUBLIC IMAGE?

Our effort about professionalism is not a public relations effort. We are not doing this just to get the praise of our fellow [human being]. What we are really looking for is . . . the kind of satisfaction that you get for doing right for right's own sake. If you do it to get a better PR image, then I think you are doomed to failure from the beginning. So, my thinking is that professionalism ought to involve a commitment to solving problems, a commitment to public service, a commitment to the public interest and a commitment to being good human beings.

HAS PUBLIC PERCEPTION OF THE LEGAL PROFESSION CHANGED?

I am not sure we are that much worse than we were in another era. My next-door neighbor is a doctor, and I like to tell him the old joke that when lawyers were writing the Declaration of Independence and the Constitution, doctors were putting leeches on George Washington to solve his medical problems. And, of course, the doctor doesn't like

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for me to tell those stories and, of course, I get a laugh out of it. But the thing that concerns me now is . . . that was 200 years ago, and what are people going to be saying 200 years from now? Are they going to be saying that when doctors were finding a cure for cancer and a cure for AIDS and other things of that sort, that lawyers spent their time propounding unnecessary interrogatories, filing frivolous motions and padding their timesheets? Where would we have been 200 years ago if Thomas Jefferson in 1776 had been back at Monticello propounding interrogatories, or if in 1787 James Madison had stayed home and prepared various motions rather than going on to be the architect of the Constitution? What I hope for the profession is that we'll do those things necessary to be responsible members of the community, to make a good living for ourselves and at the same time recognize that the legal profession is a service effort. Not just service in the sense that it doesn't produce a concrete product, but in the sense that it's got to serve the interests of society.

HAS LAW BECOME TOO MUCH OF A BUSINESS AND TOO LITTLE A PROFESSION?

Law may be too much business today. It may be, however, that the economic realities of the 1990s and coming 2000s require this to be so. What I think lawyers who are interested in professionalism need to do is to find a way to accommodate the economic realities and economic demands of modern law practice with the good solid professionalism attitudes that involve all the things we have been talking about. There certainly must be ways that a lawyer can keep his or her head above the economic waters and still perform public service. I just don't think that making a good living and acting as a professional are incompatible factors.

Are there different standards or expectations of professionalism depending on where and with whom one practices?

Who can be a professional, who can't be a professional — whether it's a matter of a sole practitioner or thousand-member law firm, or somewhere in between, a big city or a little city — I don't think that matters. I think that really when you boil it down, it's more of an attitudi-

nal thing than anything else . . . I think professionalism can blossom in any kind of law office. Certainly, if you are talking about many, many hours of pro bono work, maybe a large law firm with a lot of backup support can afford to do more of that. But my experience of having been in a small law firm in a small town is that you do an awful lot of public service in that environment. It's a different sort of pro bono work because you do what comes in the door, and sometimes you recognize that folks can't pay very much, but you do it anyway because that is what the community demands of you.

IS STRAIGHT HOURLY BILLING CONSISTENT WITH PROFESSIONALISM?

A lot of people say that one of the greatest problems with professionalism in the present day law practice is the business of billing hours. That may be so. Maybe it would be good if we could go back to what I was taught years ago in the old "four factor billing process". What you would do is bill based on four factors: first, the results achieved, then the time spent, then the complexity of the problem and, finally, the ability of the client to pay. That was a nice way to do business in a different era. I think, however, that we have come so far down the road that the idea of saying we are going to junk the billing systems of today is an unrealistic proposition. The whole idea of billing by the hour or by time is one that may go beyond professionalism. . . . The client doesn't care whether you are spending two hours or four hours, what the client cares about is result achieved. So, I really think that maybe the marketplace is going to answer those problems down the road.

We [Georgia] now have mandatory CLE, specifically in ethics, trial practice and now professionalism. IOLTA is mandatory. Is this degree of regulation required because we as individuals have not done sufficiently well?

The important thing we need to remember is that we are unique among all other regulated activities in this state in the sense that we are self-regulated. That is vitally important. We are not subject to the [Georgia] regulation by, for instance, the state legislature. Our regulation comes from within the pro-

profession, and only after thoughtful members of the profession conclude that these are the kinds of regulations that they ought to impose upon themselves. Self-regulation is another thing that is at risk once you lose your professional characteristics. Once you become just part of the commercial mainstream, then I don't think you are entitled to self-regulation. From that point on, your regulation comes from without rather than from within.

EARLIER YOU MENTIONED THE POSSIBLE LOSS OF THE LEGAL FRANCHISE. IS EXTENSIVE REGULATION AN EFFORT TO AVOID THE LOSS OF THE FRANCHISE?

That's right, we have the exclusive franchise to practice law. When I say we, I am speaking of those in the legal profession. There is nothing in the Constitution that assures that franchise. It's only there because the people perceive it to be in their interest. And, once people look at it and say, "No, it's not in my interest," then we could just wake up one morning and see the franchise gone. So, if you want to look at it from a purely selfish point of view, professionalism is in the interest of the public, but lawyers better believe it's in their own self-interest as well, if they want to maintain the franchise to practice and the right of self-regulation.

WHAT IS YOUR GOAL FOR PROFESSIONALISM?

I think that the strongest goal that anyone could have would be a goal of awakening to the responsibilities that go with the profession, the duties that go with it, and the good feeling of satisfaction that comes from fulfilling those responsibilities and duties so that when you get through a week's practice you can not only look at the bottom line on your P & L statement and say that it was a good week, but you can look at your personal activity P & L statement and say that I did the right thing during that week and I solved some problems and I did right for my client and I did right for the system as an officer of the court and I did right for the public as one who is called to a profession which has got to serve the public interest. ■

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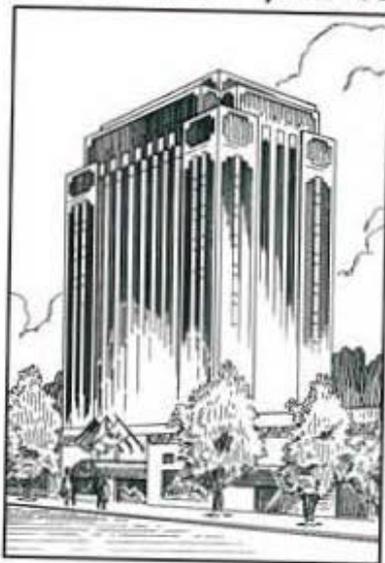
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• M • E • M • O • R • I • A • L • S •

JAMES LEE CALDWELL

Whereas, James Lee Caldwell departed this life in Huntsville, Alabama July 23, 1991; and

Whereas, James Lee Caldwell had been a member of this association since the year 1937; and

Whereas, he was a graduate of Huntsville High School (1932) and the University of Alabama School of Law (1937); and

Whereas, he was a member of the law firm of Griffin & Ford from 1937 to 1956 except for the time he served as an officer in the United States Navy in the South Pacific during World War II; and

Whereas, he was a partner in the firm of Ford, Caldwell, Ford & Payne, Huntsville, Alabama from the year 1957 to 1966; and

Whereas, he retired from the active practice of law in the year 1966 but was of counsel with the firm of Ford, Caldwell, Ford & Payne until August 1, 1988; and

Whereas, James Lee Caldwell served on the Board of Directors of First American Federal Savings and Loan Association of Huntsville and was active in real estate development in Huntsville, Madison County, Alabama; and

Whereas, James Lee Caldwell served

as a member of the City of Huntsville Board of Education from 1947 to 1952 and was its president for two years; and

Whereas, James Lee Caldwell was preceded in death by his wife, Mable Boyd Caldwell, and is survived by two daughters, Marcie Lanier Caldwell Latham and Lucy Lee Caldwell Troupe, and by five grandchildren; and

Whereas, James Lee Caldwell was a valued and respected friend and was a distinguished citizen of this community, and it is in grateful memory and appreciation for all of his contributions to his fellow man, to his profession and to this association that this resolution is adopted.

*Lloyd H. Little, Jr., President
Huntsville-Madison County Bar
Association
Huntsville, Alabama*

RALPH BROOKS

The members of the Calhoun/Cleburne Bar Association mourn the loss of Ralph Brooks, who died May 23, 1991. He was 39 years old.

Ralph was born in Calhoun County and attended public schools in Jacksonville, Alabama. He received his undergraduate degree from Jack-

sonville State University and graduated from the University of Alabama School of Law in 1977. Entering practice that same year, Ralph worked briefly for Roger Killian in Fort Payne, then became counsel with Alabama Legal Services Corporation in Gadsden, Alabama.

In 1978, Ralph and his twin brother, Randy, began private practice in Anniston, Alabama. The legal community of the Seventh Judicial Circuit soon came to know that a worthy advocate and gentleman had joined its ranks. Ralph Brooks possessed those rare qualities of knowledge and wit that made him admired by all who sought his counsel or defended against his efforts on behalf of clients. The ability to understand and define even the most complex legal issues, and then work toward achieving a successful resolution on behalf of his client, was a trait that Ralph possessed and to which most of us can only aspire. Analytical and insightful, Ralph freely shared his legal talents with those of the bench and bar who often sought his views. Ralph Brooks will be missed and always remembered.

*Thomas E. Dick, President
Calhoun/Cleburne Bar Association
Anniston, Alabama*

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Marion
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Died: August 24, 1991

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Anniston
Admitted: 1977
Died: May 23, 1991

CALDWELL, JAMES LEE
Huntsville
Admitted: 1937
Died: July 23, 1991

GROOMS, HARLAN HOBART
Birmingham
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Died: August 23, 1991

HAWKINS, GEORGE COPELAND
Gadsden
Admitted: 1942
Died: August 9, 1991

HORNSBY, JOSEPH ALLEN
Gadsden
Admitted: 1962
Died: September 20, 1991

WILLIAMS, RALPH ROGER
Tuscaloosa
Admitted: 1952
Died: May 19, 1991

ALABAMA STATE BAR VOLUNTEER LAWYERS PROGRAM

Pro Bono Publico Service In Alabama

W

hat is the difference between a dead dog in the highway and a dead lawyer there?

There are skid marks in front of the dog. What do you have when you see two lawyers up to their necks in sand? A shortage of sand.

It seems that more often than ever before in our history attorneys are the subject of ridiculous, tasteless "jokes" such as these. We are frequently compared to sharks, lab rats, skunks, and even toxic waste dumps. The quips and quotes about lawyers seem far more vicious than those

about other professionals. Clearly a gap exists between the actual professional conduct of attorneys and the public perception that attorneys fall far short of their professional responsibilities.

Educating the public about our longstanding commitment to pro bono publico work can help bridge this gap. We all know of many instances in which attorneys have represented indigent clients and non-profit corporations without expectation of compensation. Most attorneys give tirelessly of their time and skills assisting local bar associations and the Alabama State Bar with public service efforts. For all of this, we can, and should, be proud. However, misperceptions still exist. More must be done to provide the public with information about the good work done by attorneys.

Though not its primary purpose, the Volunteer Lawyers Program of the Alabama State Bar can aid efforts to enhance the image of our profession. Through organized pro bono projects sponsored by local bar associations, statistics on attorney hours donated to help indigent clients and the economic value of those hours can be generated. Actual, though anonymous, case studies of clients served through pro bono programs will be



**ALABAMA STATE BAR
VOLUNTEER LAWYERS PROGRAM**

prepared. With such facts and human interest stories upon which to draw, we can more effectively communicate that the law is a caring profession, and that lawyers, true to our ethical responsibilities, are promoting a fair system of justice for all Alabamians regardless of their financial circumstances.

In this and future issues of *The Alabama Lawyer*, information will be shared about pro bono projects undertaken by Alabama attorneys. Image enhancement is certainly not their reason for participating in these programs; rather,

these lawyers hope to help their local communities and society in general by ensuring equal access to justice for all citizens. However, rendering pro bono services often creates the additional benefit of helping to improve the much maligned image of the legal profession as a whole.

If your local bar association has sponsored, or is planning to sponsor, a project designed to help the poor in your community, you should contact the Volunteer Lawyers Program at the Alabama State Bar Headquarters, P.O. Box 671, Montgomery, 36101, or call the director of the Volunteer Lawyers Program in Montgomery at 269-9242 or 269-1515.

Birmingham Bar Association

With a membership dedicated to changing the lives of indigent citizens in the Birmingham area, the Young Lawyers' Section of the Birmingham Bar Association has undertaken a number of pro bono projects during the past few years.

Fire Station #6 in downtown Birmingham is the city's oldest remaining station. It currently serves as the "Firehouse Mission and Shelter" for area homeless sponsored by the Cooperative

ALABAMA STATE BAR VOLUNTEER LAWYERS PROGRAM

Downtown Ministries of Birmingham. In 1987, the Young Lawyers became interested in working with this shelter and began their "Service to the Homeless Project" which continues today.

imum wages to the participants, overhead costs (which are currently underwritten by a YLS attorney), and finally to the Firehouse Mission and Shelter itself. Approximately eight men have participat-

item, such as a new toothbrush or razor. The donated items are then delivered to the shelter.

These efforts by the Young Lawyers of Birmingham are having a positive, very visible impact on the lives of many destitute individuals. National attention was recently focused on this project to help the homeless when the Young Lawyers section was selected as a recipient of the 1990-1991 Single Project Award of Achievement given by the Young Lawyers Division of the American Bar Association.

Although this one project requires much time and devotion on the part of the Young Lawyers, they nevertheless give generously of themselves to several other worthy projects, one of which is known as S.E.E.D., or "Saving the Environment Each Day". This program is a public-private partnership in which disabled and unemployed persons work as staff to provide recycling services for offices in the Birmingham area. It is a federally chartered, non-profit organization which educates and employs citizens with disabilities.

The S.E.E.D. recycling staff places special waste containers in participating offices for the use of individuals employed in that office. White paper to be recycled is then placed in this container by office employees. S.E.E.D. workers regularly visit these offices to remove the full containers and replace them with empty ones. They then transport the paper to the recycling center for shredding. S.E.E.D. is paid by the recycling center for the paper and proceeds are used to defray operating costs and pay workers' salaries.

The YLS members helped organize this program in Birmingham by contacting 52 area law firms and soliciting their participation in the project. Materials about S.E.E.D. were then forwarded by the attorneys to interested firms. This unique project not only helps provide employment opportunities for citizens with disabilities, but also helps the entire Birmingham community by creating a cleaner environment through recycling office waste and by conserving precious resources.

In August of this year, the Young



Young Lawyers' Section members Tim Smith and Vic Haslip, shown third and fourth from left, serve dinner during a recent monthly visit at the Firehouse Mission and shelter in Birmingham.

On a monthly basis, approximately 15 attorneys go to the shelter to prepare and serve an evening meal for the homeless persons there. These meals, which are entirely underwritten by the Young Lawyers, are served to an average of 60 people each month.

In 1989, these attorneys began to explore ways through which they could have a more direct, positive effect on the lives of the homeless persons at the shelter. The "Fishing Lure Project" was developed by the lawyers to provide an opportunity for these individuals to learn a skill which could both help them earn money and improve their self-esteem. Techniques of lure-making and tying were taught to participants in the project by a Young Lawyers member. Fishing lures are now made by men from the shelter and sold to retailers for marketing to the general public. Proceeds from the sales go toward payment of mini-

ed in and benefitted from the Fishing Lure Project.

Through working at the shelter, it came to the attention of the Young Lawyers that a large number of the homeless individuals there had not completed high school. Contributions from section members were sought to establish a scholarship fund to aid these individuals with completing their education through the G.E.D. program. Approximately \$2,000 was donated for this purpose. Expenditures from this fund are also made to provide homeless persons with enrollment fees often needed for entry into professional substance abuse recovery programs.

The Young Lawyers regularly plan social events which have the additional purpose of providing the shelter with much needed personal items for the individuals there. As the "entry fee" to such a party, each attorney brings one needed

ALABAMA STATE BAR VOLUNTEER LAWYERS PROGRAM

Lawyers sponsored eight inner-city youths to play basketball in the "Hoop-It-Up Program" sponsored by Pepsi and Pizza Hut to benefit Children's Hospital. These youths could not otherwise have afforded the entry fees needed to participate. Additionally, a team of four Young Lawyers was sponsored by the section from money raised through annual fundraisers.

One such annual fundraiser is the "Race to the Courthouse" co-sponsored by the Young Lawyers and the YMCA. This year's event will be held on October 26th and proceeds will be used to benefit a worthy charitable organization. Money from last year's race was given to Camp Cosby, a day camp held for underprivileged children.

For the past three years, the Young Lawyers have held a spring fundraiser to support the Birmingham Young Lawyers Epilepsy Library housed in the offices of the Alabama Council on Epilepsy, Inc., in Birmingham. Members of the Young Lawyers section sell tickets for an

evening of music and h'ors d'oeuvres at a downtown location. Law firms are solicited as sponsors for the evening and local merchants donate items to be given as doorprizes. This year's prizes included, among other items, dinners at area restaurants and vacation packages. Funds raised have been used to purchase books, media tapes, research materials, and other publications for the Epilepsy Library, which may be used by attorneys, physicians, clients, or anyone interested in epilepsy.

This very active group of young attorneys finds time to sponsor a "Speakers Bureau" through which civic groups, churches, schools, or other professional organizations may find qualified speakers for meetings. The Executive Committee of the Young Lawyers also recently gave \$300 to fund a program, created by a local circuit judge, which takes troubled youth in the Birmingham area to visit the local jail in order to help them understand more fully the consequences of their actions. Additional projects in the

planning stages include the production of a video about substance abuse to be used in junior and senior high schools and a "One for the Road" program designed to show the effects of drinking on individuals.

It is truly remarkable that these fine attorneys have accomplished so much for the benefit of their community by donating a portion of their time, money and expertise to aid those less fortunate than themselves. Each of these lawyers is a "professional" in the truest, most noble sense of that word and each is setting an outstanding example for others to follow. ■

In the September issue of the Alabama Lawyer Ms. Oliva Willis was incorrectly identified in the article entitled "Access To Justice: An Overview of Pro Bono Projects in Alabama". Ms. Willis' correct title is PAI Coordinator of the Tuscaloosa Regional Office, Legal Service Corporation of Alabama.

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LOCAL BAR FOCUS

This feature of the state bar's Committee on Local Bar Services and Activities will highlight service programs of local bars throughout Alabama.

Mobile Bar Association

In 1985, Ben Kilborn, the president of the Mobile Bar Association, asked Judge Herndon Inge, Jr. to spearhead a committee to establish a pro bono program. From 1985 to 1988, 250 attorneys were recruited. There was no staff available at that time to coordinate the program and provide support to participating attorneys, other than the executive director of the association, Barbara Rhodes. This limited the form of participation to attorneys who could come into the Legal Services office to interview clients one afternoon per year. Attorneys were expected to take whatever cases they were given and, as a result, participation declined. In 1988, the Mobile Bar Association's Pro Bono Committee, under the leadership of Irvin Grodsky, sought the assistance of the American Bar Association on ways to improve the program and insure its existence. The ABA performed a study and made certain recommendations. One of these was to hire a coordinator at least part time.

Through the joint efforts of Sam Stockman, president of the MBA, and Bill McDermott, the newly-elected president for 1989, and with the strong support from the Executive Committee, a grant application was presented to IOLTA for funds to hire a parttime coordinator.

The grant application was approved and in August 1989, a part-time coordinator, Tonny Algood, was hired. An office for the pro bono program was opened with 56 volunteer attorneys. In June 1990, through an IOLTA grant, Algood was hired full time. Today the staff consists of Algood and a secretary, Beth Fincher, provided by Legal Services.

There are now 192 volunteer attorneys actively participating in the program. During the program's fiscal year (April 1990 through March 31, 1991), the office opened 907 cases and closed 704 cases, representing approximately 1,258.2 volunteer attorney hours. The cost per case closed was \$66.

The first four months of this fiscal year, beginning April 1, 1991, 419 new cases have already been opened and 329 cases closed at an average cost of \$55 per case based on the program's 1991-92 budget. The American Bar Association considers a cost of \$200 per case closed cost effective for pro bono attorneys.

The program has been successful because it has two main objectives. According to the 1980 census, 70,000 people in Mobile County live at or below the federal poverty level. Their legal needs in civil matters involve mainly family law, consumer-and debt-related matters, income maintenance, housing problems, and certain other health related matters. The program has as its top objective to provide quality legal service at no charge to indigent clients who seek legal representation and who are eligible for the program's service.

The second objective is to make it as easy as possible for attorneys to participate. Malpractice insurance is provided by the program for each case accepted through the pro bono office. In addition, attorneys are now given a variety of ways they can choose to participate.

They can come into the pro bono office once a year to interview clients and accept only those cases within their area of expertise. Attorneys can also have cases assigned directly to their office or assist in screening clients for eligibility. Some attorneys have volunteered to serve as advisors or mentors on pro bono cases.

Evaluation forms are also sent out periodically to clients and attorneys to monitor the delivery of services by the staff and to seek suggestions on how to improve the program.

Recruiting is continuing, and more and more attorneys are realizing that it is much easier to meet their ethical obligations to provide pro bono services through an organized program where their efforts are supported as well as appreciated.

The program expects to continue to grow with the strong support from the leadership of the MBA and its volunteer attorneys. ■



Jerry A. McDowell, president-elect of the Mobile Bar Association, and Alabama Supreme Court Chief Justice Sonny Hornsby at a recent ceremony honoring Mobile's pro bono program

Photo courtesy of Mobile Press Register

COURTING THE *Ideal* LAWYER

By CHARLEY REESE

(The following appeared in the August 7, 1991 edition of the *Conservative Chronicle*. It was suggested for publication in *The Alabama Lawyer* by the state bar's Task Force on Professionalism.)

In a column about lawyer-bashing, I said if you give me some time I will think of some good things to say about lawyers. Well, I haven't thought of any, but I found some.

Before we get into them, though, here's the main point for the day. One of our problems is that often we spend so much time dwelling on what is, we forget about what could be.

However, no situation presently existing will remain the same, much less has to remain the same. Existing laws can be repealed or amended. Existing institutions can be abolished or altered. Generally accepted behavior can become unacceptable behavior (see cigarette smoking for an example).

Human progress, as well as most religions, rests on the assumption that human beings can change their ways. That being true, the first step toward change is to hold onto ideals and to recognize that ideals are not impossible dreams but attainable goals.

The ideal lawyer is described in the prison memoirs of Alexander Stephens, a lawyer, a U.S. congressman and the vice-president of the Confederacy. Stephens actually lived up to these ideals. He was so well-liked that when the Southern states seceded, a move Stephens had opposed, he was the only departing Southerner that the Northern congressmen wanted to honor with a farewell dinner. He remained a personal friend of

Abraham Lincoln. One of Stephens' slaves who chose to stay with him after emancipation said of him that Stephens was kinder to dogs than most people were to people.

"No pursuit in life is more honorable or useful than that of the law, when followed as it should be."

Imprisoned like all Confederate officials after the war, Stephens said this of lawyers in his prison diaries:

"No pursuit in life is more honorable or useful than that of the law, when followed as it should be. None requires more rigidly a stout adherence to all the precepts and principles of morality, or the possession and practice of the highest and noblest virtues that elevate and adorn human nature.

"Not even the office of the holy minister opens up such a wide field for simply doing good to one's fellow man. The lawyer's province is to aid in the administration of justice, to assist the oppressed, to uphold the weak, to contend against the strong, to defend the

right, to expose the wrong, the find out deceit, and to run down vice and crimes of all grades, shades and characters.

"A good lawyer is ever a peacemaker. The tangled web of most private controversies can be better unravelled and straightened by bringing the parties together in private conference than by carrying them into court. But with that intense regard for truth, for right and justice, does the lawyer investigate facts and pore over his books, preparing himself for such occasions.

"In the Temple of Justice, he glories in the fact that everything is weighed in her scales. Reason and wisdom are his necessary weapons. The materials to be handled are human acts colored with human passions, prejudices, infirmities. What a field here for exhibition of the noblest virtues in exposing knavery, fraud, villainy and falsehood of every sort and of securing to honesty, right and truth, their just reward.

"He sits as it were in the marketplace and on the highways; not a day passes in which he may not and should not dispense with a liberal hand the Christian charities of his counsel in the succour of the needy, the destitute, the wronged, the widow and the orphan. There should be nothing mean or low about him. He should have no ambition but to serve his fellow man and to do good. In doing the greatest possible good to others, he achieves the greatest good for himself."

Believe it or not, there are such lawyers today and there could be more. Don't let the cynics control your mind. The first step toward achieving anything is to believe it's possible. ■

RECENT DECISIONS

By DAVID B. BYRNE, JR. and WILBUR G. SILBERMAN

SUPREME COURT OF THE UNITED STATES

Arkansas v. Sanders overturned

California v. Acevedo, 89-1690, ___ U.S. ___ (May 30, 1991). May police, without a search warrant, open a closed container found in a car if they have probable cause to believe the container holds criminal evidence? The Supreme Court, in a six-to-three decision, answered yes.

In an opinion authored by Justice Blackmun, the Supreme Court overturned a 13-year-old decision that had required warrants for such searches, i.e., *Arkansas v. Sanders*, 442 U.S. 753. In overturning the "closed container" doctrine of *Arkansas v. Sanders*, Justice Blackmun noted: "The Fourth Amendment does not compel separate treatment for an automobile search that extends only to a container within the vehicle."

Enhanced punishment beyond guidelines requires judicial warning

Burns v. United States, 89-7260, ___ U.S. ___ (June 13, 1991)

Must a federal judge give a criminal defendant advance warning before imposing a prison sentence stiffer than that called for by the Federal Sentencing Guidelines? The Supreme Court said yes in a five-to-four decision.

Congress, in enacting the guidelines, did not intend to give judges the authority to depart from them without giving defendants and prosecutors an opportunity to be heard. Justice Marshall, writing for the majority, reasoned that, "... Both sides are entitled to reasonable notice that [a judge] is contemplating such a ruling."

Fifth v. Sixth Amendment Right to Counsel

McNeil v. Wisconsin, 90-5319, ___ U.S. ___ (June 13, 1991). May a potential defendant represented by a lawyer in one

criminal case ever be questioned by police about another crime without the lawyer present? The Supreme Court answered yes by a six-to-three vote.

Justice Scalia, writing for the majority, held that a criminal suspect who requested a lawyer's help during an arraignment hearing had invoked *his Sixth Amendment right, not his Fifth Amendment right to such help.* (emphasis ours). Justice Scalia reasoned that the Sixth Amendment right to a lawyer, unlike the Fifth Amendment right to one, is offense-specific, thereby allowing law enforcement officers to question an accused with regard to a completely separate offense outside the presence of his appointed counsel.

Search without warrant of public conveyance

Florida v. Bostick, 89-1717, ___ U.S. ___ (June 20, 1991). Can law enforcement officers, acting without a warrant, board buses and ask any passenger to consent to a search? The Supreme Court, voting six to three, said yes.

The Supreme Court, led by Justice Sandra Day O'Connor, said police do not need a warrant or even a suspicion of criminal activity to ask public transportation passengers to submit to searches because such encounters are not seizures governed by the Fourth Amendment. Justice O'Connor critically observed, "No seizure occurs . . . so long as the officers do not convey a message that compliance with their request is required."

Justice Marshall, in one of his final dissenting opinions, said, "Officers who conduct suspicionless dragnet-style sweeps put passengers to the choice of cooperating or of exiting their buses and possibly being stranded in unfamiliar locations. This is no choice at all." Justices Blackmun and Stevens joined in the Marshall dissent.

In this writer's opinion, *Florida v. Bostick* comes dangerously close to eroding the "reasonable suspicion standard" required even for a *Terry* type stop.

Rule 5 appearance—is 48 hours too much to ask?

Riverside County v. McLaughlin, 89-1817, ___ U.S. ___ (May 14, 1991). Can persons arrested by police without warrants routinely be jailed for up to 48 hours before receiving a probable cause hearing (Rule 5, Federal Rules of Criminal Procedure)? The Supreme Court answered yes in a five-to-four decision.

Justice O'Connor, writing for the majority, held that, "... In our view the Fourth Amendment permits a reasonable postponement . . . while the police cope with the everyday problems of processing suspects through an overly burdened criminal justice system." The Court reasoned that a 48-hour delay, which is to include weekends and holidays, is not unreasonable.

Justices Scalia, Blackmun, Marshall and Stevens dissented.

Surprisingly, Justice Scalia's dissent said that such hearings should never be more than 24 hours after a suspect is arrested. "Hereafter, a law-abiding citizen wrongfully arrested may be compelled to await the grace of a Dickensian bureaucratic machine as it churns its cycle for up to two days — never once given the opportunity to show a judge that there is absolutely no reason to hold him, that a mistake has been made."

Victim impact in capital sentencing phase

Payne v. Tennessee, 90-5721, ___ U.S. ___ (June 1991). May a capital sentencing jury take into account evidence of the murder victim's character or the crime's impact on the victim's family? The Supreme Court answered yes by a six-to-three vote.

The Court's decision overturned two relatively recent precedents: *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989). The Court reasoned that "victim-impact evidence is simply another form or method of informing the [jury] about the specific harm caused by the crime in question". Chief Justice Rehnquist

labeled the Court's discarded precedents "unworkable or poorly reasoned".

Batson extended

Powers v. Ohio, 89-5011, ___ U.S. ___ (April 1, 1991). In *Powers v. Ohio*, the Supreme Court held that a white defendant could object to race-based exclusion of black jurors, whether the defendant and the jurors were of the same race.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court held that a state denies a black defendant equal protection of law when it puts him to trial before a jury from which members of his own race have been purposely excluded.

In *Powers v. Ohio*, a seven-to-two decision, the Supreme Court extended *Batson* and explicitly held that a criminal defendant may object to race-based exclusions of jurors whether the defendant and the excluded jurors share the same race. The Court reasoned that the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race. Justice Kennedy went on to state that Ohio's contention that racial identity between the objecting defendant and the excluded jurors does not constitute a relevant precondition for a *Batson* challenge and, in fact, would contravene the substantive guarantees of the Equal Protection Clause and the policy underlying federal statutory law.

Finally, the "bottom line" reasoning of the Court focused on the fact that the discriminatory use of peremptory challenges causes a defendant cognizable injury because racial discrimination in jury selection casts doubt on the integrity of the judicial process and places the fairness of the criminal proceeding in doubt.

SUPREME COURT OF ALABAMA

Alabama adopts *Powers v. Ohio*, thereby extending *Batson*

Owen v. State, 25 ABR 4947 (July 12, 1991). The Alabama Supreme Court issued the writ of certiorari to review the court of criminal appeals' decision that Owen, who is white, lacked standing to contest the State's use of its peremptory strikes to eliminate black venire persons from the trial jury.

While Owen's case was on certiorari, the United States Supreme Court decided *Powers v. Ohio*, ___ U.S. ___, 111 S.Ct. 1364 (1991). In *Powers*, the Court held that a white criminal defendant has standing under the Equal Protection Clause of the Fourteenth Amendment to challenge the prosecution's use of per-

emptory strikes of black venire persons.

With the supreme court's holding in *Owen, supra*, and *Ex parte Bird* [Ms. 89-1061, June 14, 1991] ___ So.2d ___ (Ala. 1991), the Alabama Supreme Court adopts the underlying rationale that racial discrimination in jury selection casts a cloud on the integrity of the judicial process and places the fairness of any criminal proceeding in doubt.

Venue — issue rising to constitutional dimension

Tubbs and Longmire v. State, 25 ABR 4759 (June 28, 1991). In an opinion written by Justice Ingram, the Alabama Supreme Court underscores the importance of venue in the trial of criminal cases. Although the supreme court failed to reverse Longmire's conviction, the court clearly rejected the State's argument under Rule 45 that the defendant's venue motion must include a showing of prejudice before he is entitled to reversal.

In answer to the State's contention, Justice Ingram critically noted:

Contrary to the State's argument, if the move constituted a change of venue, Rule 45 would not bar this appeal. Rule 45, A.R.App.P., provides that "[n]o judgment may be reversed or set aside, nor new trial granted in any . . . criminal case . . . , unless . . . it should appear that the error com-



David B. Byrne, Jr.

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



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.

ALABAMA BAR DIRECTORY

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plained of has probably injuriously affected substantial *rights* of the parties." Ala.R.App.P. 45 (emphasis supplied). *The right to be tried in the place where the offense occurred is a substantial constitutional right.* When a defendant objects to the change of venue, and the court upon its own motion proceeds to change venue, the result is a certain, not probable, injury to the defendant's substantial right to be tried in the county or district where the offense was alleged to have been committed. (emphasis added).

BANKRUPTCY

Exemptions—retirement plan

Morter, dba Swinengineering v. Farm Credit Services, 21 B.C.D. 1525, (7th Cir. July 16, 1991). Purdue University required participation in its retirement plan, the Teachers Insurance and Annuity Association of America/College Retirement and Equity Fund, the same plan which provides funding for over a half million employees in some 3,000 colleges and universities. The plan contained an anti-assignment provision which did not allow annuitants to obtain any other funds before retirement, and any assignment would be void. Also, it contained a provision that to the extent permitted by law, payments would not be subject to claims of any creditor.

The debtor listed on his Chapter 7

bankruptcy petition approximately \$280,000 due him from the plan. The Bankruptcy Court ruled that the retirement plan was property of the bankruptcy estate. Upon appeal, the District Court held that Congress intended to exclude only spendthrift trusts under applicable non-bankruptcy law. Both the debtor and TIAA contended that the debtor could not reach the funds until retirement, the pension should be excluded from the bankruptcy estate.

The Seventh Circuit, in reviewing other jurisdictions, stated that courts are split on determining standards warranting the exclusion of a retirement plan from a bankruptcy estate. It quoted the Eleventh Circuit cases of *In re Lichstrahl*, 750 f.2d 1488, 1499 and the Fifth Circuit case of *In re Goff*, 706 F.2d 574, 585, holding that §541(c)(2) of the Bankruptcy Code applies only to "the type of trust that traditionally has contained restrictions on assignments and not to trusts involving employee benefits", but that other courts have held that the plan only requires characteristics of spendthrift trusts under state law to be exempt. The plans need not be limited to traditional spendthrift trusts but may apply to pension funds exhibiting the characteristics of a spendthrift trust. The Seventh Circuit, in splitting with the Fifth and Eleventh circuits, decided that the plan need not meet the traditional spendthrift trust requirements, and thus, that the \$280,000 in the retirement plan was exempt, and could be retained by the debtor.

Discharge of interest and penalties on non-dischargeable federal taxes

In re Vincent L. Roberts, Central District Ill., June 14, 1991 (21 B.C.D. 1515). In this case after settling with the IRS on a tax deficiency, subsequent to filing a Chapter 7 petition, the debtor filed an adversary proceeding against the United

States to determine dischargeability to taxes and penalties. The Bankruptcy Court ruled that although the tax was not dischargeable, the interest and penalties, based upon §523(a) of the Bankruptcy Code, were dischargeable. The IRS argued that under Code Section 523(a)(7), there must be a penalty arising from a dischargeable tax which arose from an occurrence more than three years before the filing of the petition. The argument was that despite the use of the word "or" between subsections (A) and (B) the legislative history indicated that the intent was to require a dischargeable tax incurred more than three years before the petition was filed. The district judge, in relying on the Tenth and Eleventh circuits, stated that the statute means what it says, and there is no need to refer to legislative history. The penalty and interest are dischargeable. The Eleventh Circuit case mentioned is that of *In re Burns*, 887 F.2d 1541 (1989).

Interest on payroll tax penalty for corporation's failure to pay trust fund taxes

Bradley v. U.S., 936 F.2d 707 (2nd Cir.). This is another case involving interest, but this concerns interest on the withholding tax penalty. The corporation failed to pay the payroll tax. Bradley, as an officer of the corporation, received assessment from the IRS. The corporation filed Chapter 11 and paid the principal amount of the taxes. The IRS then proceeded against Bradley for payment of interest. The Court held that even though the filing of the Chapter 11 prevented interest thereafter from being assessed against the corporation, the individuals were nevertheless liable for the interest as the penalty is independent of an employer's liability for the interest. Such liability is separate and distinct from the employer's liability for trust fund taxes.

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Chapter 11—bad faith filing in single asset case; disgorgement of attorney's fees

In re Humble Place, joint venture, 936 F.2d 814 (5th Cir. 1991). The debtor divided 80 parcels of unimproved real estate, adding streets, curbs and basic utilities only. No other improvements were made. A Chapter 11 petition was filed, and there were two unsecured non-insider creditors owed less than \$7,000. A bankruptcy judge dismissed for lack of good faith.

The appellate court, relying upon *Little Creek*, 779 F.2d at 1072, and the Eleventh Circuit case of *In re Natural Land Corp.*, 825 F.2d 296, 297 firm, held that the principal reason for filing the case was to relieve certain insiders of their personal guarantees, which is not a legitimate concern of Chapter 11. Also in doing so, the court stated that counsel should be disinterested, that counsel in this case was not disinterested, and that the \$40,000 paid to the attorneys must be disgorged.

Excusable neglect in debtor's failure to timely file IRS proof of claim

In Thomas William Davis, 936 F.2d 771 (4th Cir. 1991). This case involved Bankruptcy rules 3004, 803 and 9006(b). Rule 3004 provides that a debtor must file proof of claim in behalf of a creditor within 30 days after the expiration of the deadline set by Rule 3002(c), which is the 90-day period from the initial 341 creditors' meeting. Rule 3004 is mitigated by Rule 9006(b) allowing for an enlargement for the time limitation if it can be shown that the failure to file was the result of "excusable neglect". Rule 8013 states that a determination of excusable neglect involves findings of fact which, unless clearly erroneous, should not be set aside. In the instant case, the debtors claimed that it was excusable neglect because the Bankruptcy Court did not notify them of the failure of the IRS to file proof of claim by the deadline.

The Fourth Circuit, in holding that there was no excusable neglect, said there was no duty on the part of the clerk to so notify the debtor as the debtor had full access to court filings, and, thus, there was no abuse of discretion by the court. ■

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Consultant's Corner



The following is a review of and commentary on an office automation issue that has current importance to the legal community, prepared by the office automation consultant to the state bar, Paul Bornstein, whose views are not necessarily those of the state bar.

This is the 21st article in our "Consultant's Corner" series. We would like to hear from you, both in critique of the article written and for suggestions of topics for future articles.

Sole practitioner checkup

Sole practice is growing in Alabama and elsewhere, as well. The reasons vary from disillusionment with firm practice to a desire for independence to a feeling that sole practice enables one to truly practice law that helps people. That said, sole practice is no more immune from the economic pressure of the marketplace than any other form of practice. In fact, sole practice can be very vulnerable, and its practitioners generally have a lot less staying power than their larger brethren. A checkup may be in order.

How am I doing? This is the most frequently heard question from the solos I have encountered. The answer I give them is very blunt, "If you break even the first year, you are successful." The statement generates a look of incredulity, followed by a look of relief.

Where am I?

This is not as trivial as it sounds. It calls for a rather profound analysis of one's current legal practice. It involves such issues as market analysis: "What is in demand in my service area?", market focus: "What do I have to offer?", and market niche: "What can I offer that

others cannot offer as well?" One must distinguish immediately between urban and rural practitioners. Urban practitioners in the '90s must specialize for long-term success. The rural practitioner, on the other hand, must generalize (within limits) to augur success. The suburban practitioner, like the term itself, is a hybrid. The suburban practitioner in the suburb of a minor urban area can probably continue to generalize. The practitioner in the suburb of a major urban area had better give strong consideration to specializing.

Financial indicators

Solos, just like their big firm acquaintances, had better watch two indicators closely: utilization and realization. Utilization is the ratio of hours billed to hours worked. It measures how effectively you use your available time. Realization is the ratio of effective billing rate to stated billing rate, effective rate being defined as the ratio of income produced divided by hours actually worked on a case. It measures how efficiently you manage matters.

Timekeeping

I (almost) weep when I hear solos tell me they do not need to keep detailed time records because they usually quote on a flat or contingent fee basis. The most precious commodity a lawyer has is time. In fact, it is his or her only "raw material". How in the world are you going to assess your progress (before income tax time) if you do not manage your inventory (of time)? A solo's expenses, within a few parameters, are virtually fixed. The only variable is income. You must account for every tenth of an hour of attendance time if

you are ever going to get a handle on where your time goes. "Leakage", the loss of time to unknown factors, should be the bane of every solo. I have never encountered a successful solo who did not keep scrupulously detailed time records.

Business development

The key to solo business development is referrals. A brief anecdote may illustrate this. In conferring with a very successful sole practitioner (in another state), I had asked his secretary to arrange motel accommodations for me. She put me up in a very nice major chain motel nearby. On checking in, the desk clerk noted who had made the reservation and immediately inaugurated a testimonial to this "great" lawyer, how effective he had been, how compassionate, etc. I teased the solo the next day about his use of "runners". He bristled a bit until I told him about the client (whom he could not remember) who was singing his praises to anyone who would listen.

When new clients come to you, ask how they came to know of you. If it was a referral, remember to write a thank-you note to the person who recommended you. If you are a generalist, remember to have a modest brochure available listing all the services you are competent to perform.

Conclusion

The "thumb rules" for successful sole practice are very nearly the same rules that apply to mega-firms:

- Assess your strengths and market position;
- Keep time!;
- Monitor your critical ratios; and

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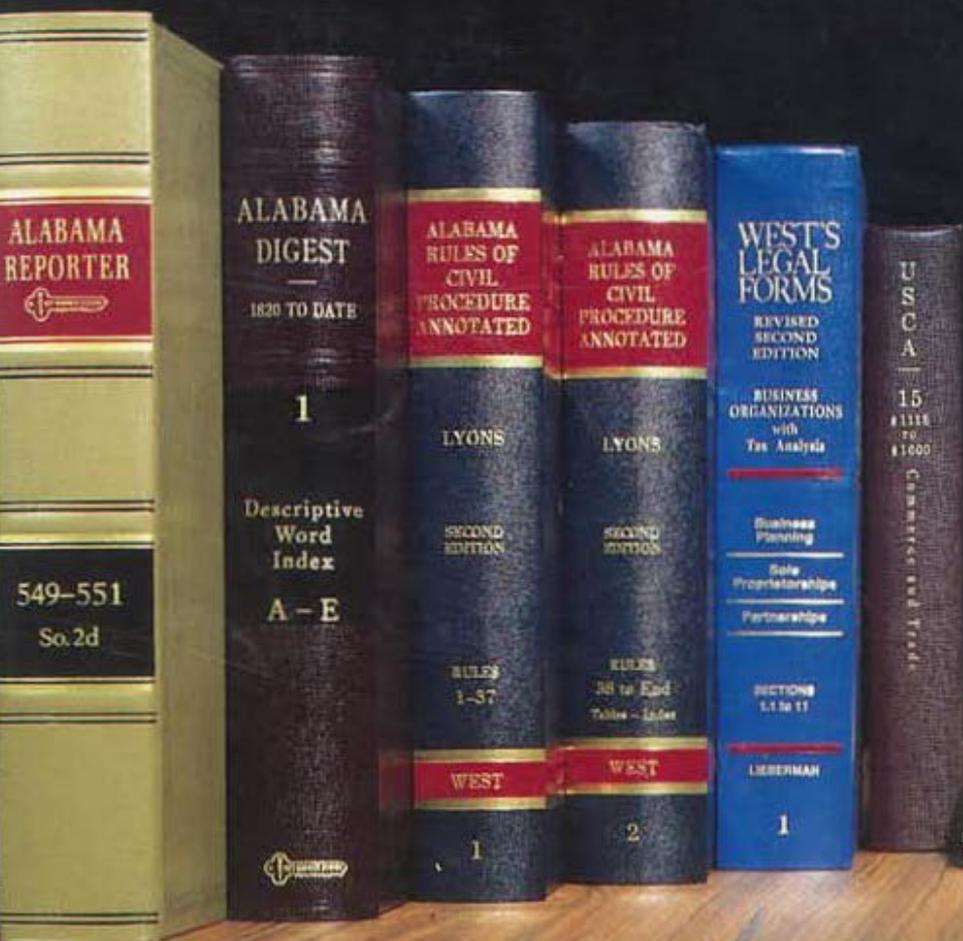
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