The Alabama Lawyer

Vol. 51, No. 2 March 1990

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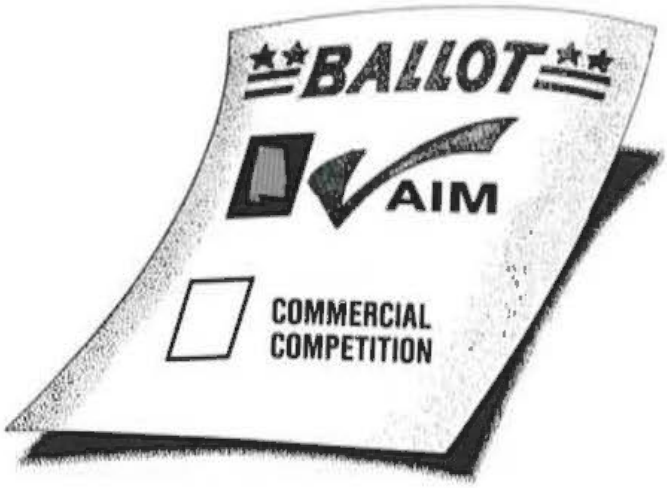

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The Alabama Lawyer In Brief

VOL. 51, NO. 2 MARCH 1990

Published seven times a year by The Alabama State Bar
P.O. Box 4156 Montgomery, AL 36101
Phone (205) 269-1515
Robert A. Huffaker—Editor
Susan Shirock DePaola—Associate Editor
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GENERAL INFORMATION **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, August (bar directory edition), September and November. Views and conclusions expressed in articles herein are those of the authors, not necessarily those of the board of editors, officers or board of commissioners of the Alabama State Bar. Subscriptions: Alabama State Bar members receive **The Alabama Lawyer** as part of their annual dues payment; $15 of this goes toward subscriptions for **The Alabama Lawyer.** Advertising rates will be furnished upon request. Advertising copy is carefully reviewed, but publication herein does not necessarily imply endorsement of any product or service offered.

The Alabama Lawyer is published seven times a year for $15 per year in the United States and $20 outside the United States by the Alabama State Bar, 415 Dexter Avenue, Montgomery, AL 36104. Single issues are $3, plus postage for the journal, and $15 for the directory. Second-class postage paid at Montgomery, AL.

Postmaster: Send address changes to **The Alabama Lawyer,** P.O. Box 4156, Montgomery, AL 36101.

On the cover – It's Springtime! Soon the fields and woods will be teeming with new life as nature's cycle is repeated. According to the Alabama Wildlife Federation, Alabama is home to over 300 species of songbirds, such as the baby Robin on the cover. *Photo courtesy of Auburn University, Educational Television Department.*

Punitive Damages and Post-Verdict Procedures: Where Are We Now and Where Do We Go From Here?
—by Davis Carr 90

The enactment of the Tort Reform Legislation in 1987 has engineered a "second trial" wherein the court considers evidence on the excessiveness of a punitive damage award.

The Second Injury Trust Fund and Alabama's Worker's Compensation Act
—by R. Blake Lazenby and Craig A. Donley 110

The Second Injury Trust Fund, which is applicable in worker's compensation case, is a statutory measure designed to encourage hiring of persons who have sustained permanent injuries in a prior employment.

The Tort of Bad Faith and Avoiding the $250,000 Cap on Punitive Damages
—by David H. Marsh and Susan J. Silvernail 114

One of the tort reform measures was a statutory cap on the award of punitive damages. Are there viable means to avoid the statutory limitations?

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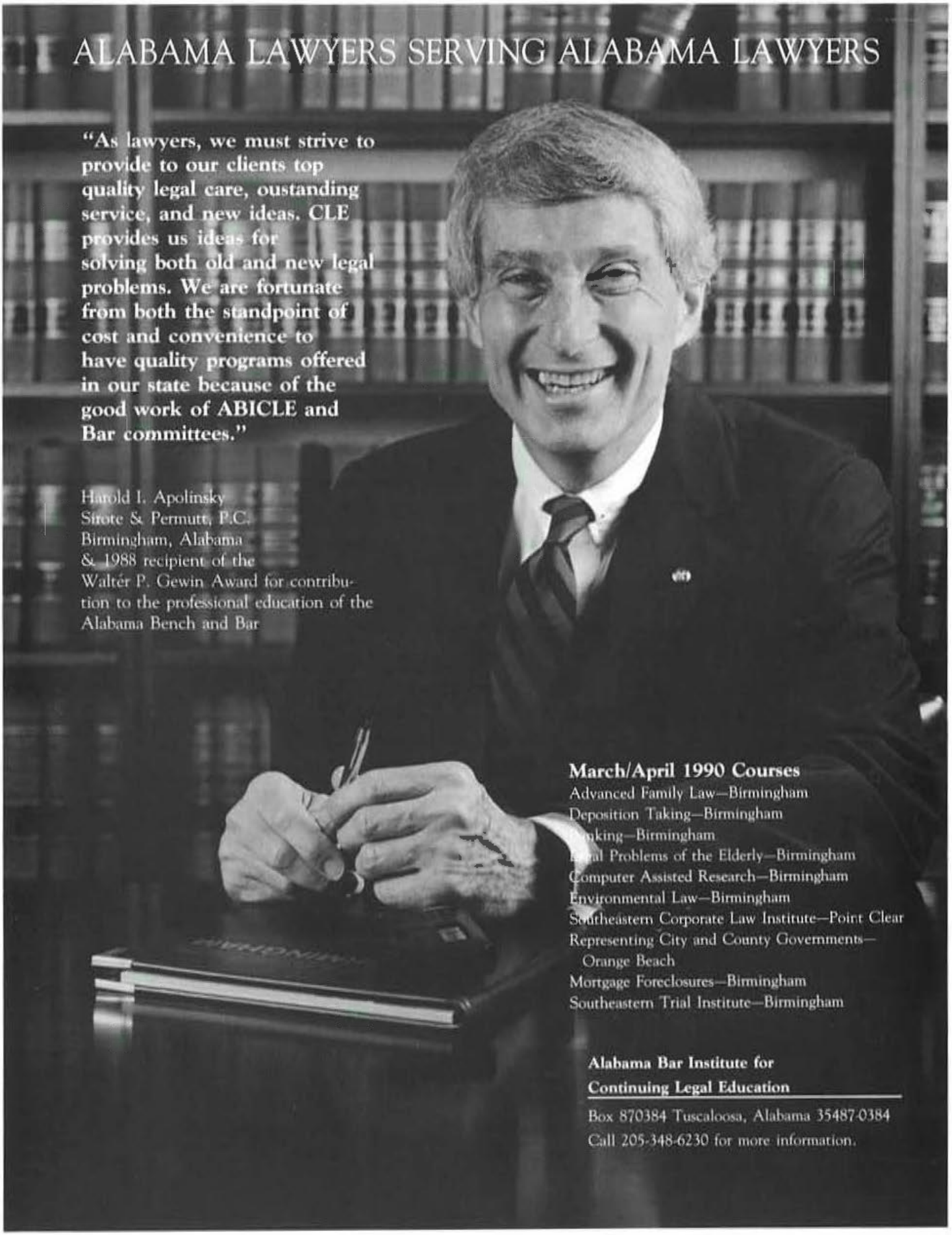

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& 1988 recipient of the Walter P. Gewin Award for contribution to the professional education of the Alabama Bench and Bar

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President's Page

CAINE

Court funding

The topic I present in this issue concerns funding of our state courts, including adequate judicial salaries. As president of your bar, it is my duty to investigate and report to you on issues concerning lawyers and affecting the administration of justice. I also see my job as requiring me to suggest remedies for these concerns and attempting to lead the members of the bar in reaching solutions.

In Alabama, we have a real problem of inadequate funding of our judicial system. This funding problem directly results in court delays, overcrowded dockets, unfair work loads, difficulty in recruiting and retaining judges of the highest quality, and a host of other problems.

One of the themes of my term in office is the repair of bench and bar relations. This funding issue also can be viewed as an aspect of that theme. In other words, we practicing lawyers ought to be more concerned and involved with issues affecting our judges. No system can be any better than the people who run it. In order to keep the system of justice we have—and improve on it—we lawyers ought to be more knowledgeable and involved in court funding.

Here are some statistics which illustrate the problem and ways in which the bar can get involved and help. These statistics were compiled by the chief justice and the Administrative Office of Courts.

1. Today in the classified service of the state there are nearly 100 positions which have a top salary level which is above the state salary paid to our circuit judges. The top level pay for attorneys and administrative law judges in the state service is $88,504.

2. Some attorneys in state government earn $4,000-5,000 per year more than the justices on the supreme court and nearly $30,000 per year more than some circuit judges. Therefore, it can be more attractive today for an attorney to begin a career in state service and stay there because in about ten years, if he or she has made all the right steps, they will be earning more than a justice on the supreme court—and without all the headaches of running for office.

3. While many think a good judicial retirement program is an incentive to attract people into judicial service, that is not as true as it was in the past. For example, at least one judge has recently resigned and withdrawn his retirement contributions, perhaps in part because that money placed in other investments would earn him greater dividends. Also, the vesting of benefits and the method of calculating benefits has been significantly changed since the 1970s. The current retirement system for incoming judges is not nearly as attractive as it once was.

4. Last month, the salary of federal district court judges went to $96,600 and will increase to $120,800 on January 1, 1991. Judges on the federal courts of appeal are now at $102,500 and will go to $128,100 in January 1991. These judges generally try the same type cases and hear the same type appeals as state court judges.

5. The latest salary information available for state court judges shows the average annual state-paid salary for general jurisdiction trial court judges in ten southeastern states, excluding Alabama, is nearly $74,000. The highest in the southeast is Virginia at $88,106—the lowest is Alabama at $56,760. Of course, many counties do provide a salary supplement, but the supplement is little or nothing in many circuits.

6. The judicial compensation commission has recommended to the current Legislature a state salary of $72,500 for circuit judges, $71,500 for district judges and district attorneys and staggered amounts above the total compensation of circuit judges for the supreme court and other appellate judges. The salary commission recommends that these amounts become effective October 1, 1990. However, in recognition of the current revenue problems in the general fund, the judges and district attorneys decided not to request the full amount of the salary commission's recom-

(continued on page 70)

Executive Director's Report

Million dollar baby

By the time you read this report, (I hope) Attorneys Insurance Mutual of Alabama, Inc. (AIM) will have written policies of professional liability coverage for Alabama lawyers generating over $1,000,000 in premiums.

Since our company (yes, I own a unit) became operational, we have met every goal our consultants projected and usually ahead of schedule. We have also confronted the obstacles which the mutual companies in our sister jurisdictions faced when they started up—namely, misinformation from agents of commercial carriers and an undercutting of our rates.

AIM is still the nation's newest bar-related insurance company. We have been accepted into membership as a charter member of NABRICO (National Association of Bar-Related Insurance Companies). NABRICO is incorporated in Minnesota. Other members are:

- Lawyers Mutual Insurance Company (California)
- Florida Lawyers Mutual Insurance Company
- Illinois State Bar Association Insurance Risk Retention Group, Inc.
- Lawyers Mutual Insurance Company of Kentucky
- Michigan Lawyers Mutual Insurance Company
- Minnesota Lawyers Mutual Insurance Company
- The Bar Plan (Missouri)
- Attorneys Liability Protection Society, Inc., a Risk Retention Group*
- Lawyers Mutual Liability Insurance Company of North Carolina
- Ohio Bar Liability Insurance Company
- Oklahoma Bar Professional Liability Insurance Company
- Oregon State Bar Professional Liability Fund
- Texas Insurance Exchange
- Wisconsin Lawyers Mutual Insurance Company

**Delaware, West Virginia, Kansas, North Dakota, Montana, Wyoming, Idaho, Nevada and Alaska (ALPS is a multi-state captive for states that were too small to form individual captives.)*

We are proud of our acceptance and the company we now keep. NABRICO members were extremely helpful to us in our formation. Together the bar-related captives have brought stability to a chaotic lawyers' professional liability market and a measure of reasonableness to insurance costs.

I remind those who may have been disappointed with their initial quote for AIM coverage and elected other coverage at a lower rate that AIM's goal is to offer continuing availability at the lowest competitive rate that sound insurers and insurance regulators dictate. Ours is a mutual company and any savings are returned to policy holders, not stockholders.

HAMNER

Those of you who may have purchased coverage from AIM's principal competitors in Alabama have obtained a significantly more favorable premium rating just because AIM is now a reality. Our commercial competitors are lowering their rates now that you have an alternative. They began doing this even as we were capitalizing AIM. It is amazing what a good book of business Alabama lawyers suddenly became and what good risks we became with the same car-

(continued on page 71)

President's Page

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mendation for October 1990. Instead, they are asking the Legislature to provide them this October the same percentage increase which might be provided state employees and then provide the remainder of the commission's recommendation on October 1, 1991. (Judges are not automatically included in periodic annual raises other state employees might receive.)

At the time of this writing, it appears that this salary proposal has a good chance of passage, but your help is solicited. Lawyers should contact state representatives and senators and let them know how important this issue is to the administration of justice.

On a broader plane, funding shortages exist in the unified judicial system as a whole. Besides our own self-interest in an efficient court system, the state bar owes a duty to the public to see to it that the needs of litigants are met. Judges, clerks and court administrators all over the state are getting more and more complaints from litigants about court delay. In most part, these delays are caused by a shortage in court personnel.

Let me relate a few statistics and tell you about some crucial needs of the state courts—and solicit your help to lobby your legislators about the problem—and solicit your advice and ideas about long-range solutions.

The unified judicial system has a budget of about $65 million per year. There has been no increase for two years. But this is not truly level funding because built-in, unavoidable costs (such as health insurance) continue to go up. In reality, the courts have been struggling with a budget cut during the current fiscal year. Therefore, personnel positions have had to go unfilled because the budget is not sufficient for even the employees we have.

Because of locked-in costs such as increased health benefits and personnel benefits, the unified judicial system needs an additional $2.5 million in next year's budget just to stay at level funding with 1988. The governor's budget includes this extra amount.

At the time this article went to press, the House, through the Ways and Means Committee, has added an extra $2 million to the court budget. We need your influence with your senators to make sure at least that $2 million stays in the budget for fiscal year 1991. The chief justice and AOC requested of the Legislature an additional $9 million to reach what was calculated to be minimally adequate funding. Of course, with the overall funding problem in this state, no one expected to get that amount.

I do not mean to exaggerate the funding problem, but my purpose today is to warn you of what I perceive to be the beginning of really serious difficulties.

Even with the additional $2 million, AOC will not be able to move into new areas and make much progress in court administration and court reforms. For example, a unified central records plan has been on hold for years, awaiting funding.

AOC estimates that at least 20 circuit clerks' offices need one to two new employees just to process cases at the same speed they were a few years ago. Without adequate funding, not only can we not make progress, but we are falling behind in serving the public and the litigants and lawyers.

Finally, one last example of impending crisis: the state's 15 largest circuits are automated and on the AOC mainframe computer in Montgomery. AOC has been trying to get the Legislature to understand that this mainframe is almost at full capacity, and when capacity hits, the courts almost literally will stop. Now that they are automated, the filing and processing of cases in these circuits cannot proceed adequately and efficiently without expanded computer capacity. It is estimated that the needed mainframe upgrade will cost about $3.5 million. Even if the money were available today, it takes about nine months to get a new mainframe fully operational. So, it is possible that this computer overload and resulting chaos may be the first objective proof to lawyers and to the Legislature that a real crisis is brewing.

We cannot afford to wait until such events explode in our face; our duty is to work within the political and judicial systems to find ways to adequately fund our courts and staff judicial and clerical offices. The law is a public profession and we have a duty to the public to defend the rule of law and improve the administration of justice. I fear that the public perception of our system as one full of delay and uncaring bureaucrats is a perception that is increasing. Lawyers, individually and through bar organizations, must be willing to take a public stand on these funding issues and endeavor to find the funds to adequately compensate our judges and fund basic court services.

I hope I have not sounded too "preachy" or appear to be "crying wolf." If you will investigate these issues by talking to your judges, clerks, AOC personnel and legislators, you will be convinced that funding inadequacies are already causing significant problems, and even greater problems are merely being ignored, but they will inevitably have to be addressed in the near future in what will probably then be a true crisis atmosphere.

I encourage all lawyers to consider these facts and take action to come to the aid and defense of our judicial system. To ignore these problems is a disservice to the public and ourselves. If lawyers will not get involved and speak up on these funding issues, what group will? ■

Report

(continued from page 69)

rier who earlier would have us believe their staying with our program "was an act of conscience and charity."

As our AIM pool of insureds continues to grow and we build our own Alabama lawyer experience base, our rates will reflect the good experience factor we anticipate.

This column was inspired by the need to respond recently to inquiries from attorneys in one area of our state where a commercial carrier and/or its agent blatantly misrepresented facts about AIM coverage.

Two issues need to be addressed. These are: (1) the liability of AIM insureds for debts of the company and (2) the selection of counsel and settlement provisions of the AIM policy.

Theoretically, the concept of a mutual insurance company makes its insureds entitled to the company profits and liable for its losses; however, AIM's policy provides that an insured is "not liable for the debts and obligations of the Company," (11. Mutual Company Policy Conditions). This protects our insureds but still allows them to enjoy any profits the company may develop.

Our policy provides a guarantee that, in the event of a claim, defense counsel will be selected by *mutual* agreement among the insured and AIM. (Commercial policies generally do not give an insured a voice in defense counsel selections.) Our policy also guarantees that AIM will not settle a claim without an insured's consent. We do *not* have a clause penalizing an insured for refusal to settle. Most commercial policies do by providing that the carrier is not liable for any overage between that which a case could have been settled for and the ultimate verdict. This saddles the insured with paying the difference.

Many Alabama lawyers have chosen to insure with AIM even though they could have saved money on this year's premiums with coverage through one or more commercial carrier competitors.

It is obvious to me that the sudden reduction in commercial rates is because AIM is here to stay! I wonder if the commercials are willing to make the same commitment. They have left Alabama lawyers without coverage in the not-too-distant past. You can now control your E&O destiny by supporting AIM. It may cost a bit more initially, but in the long run, AIM will not run out on you in the next hard market. ■

Notice of Election

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

President-elect

The Alabama State Bar will elect a president-elect in 1990 to assume the presidency of the bar in July 1991. Any candidate must be a member in good standing on March 1, 1990. Petitions nominating a candidate must bear the signature of 25 members in good standing of the Alabama State Bar and be received by the secretary of the state bar on or before March 1, 1990. Any candidate for this office also must submit with the nominating petition a black and white photograph and biographical data to be published in the May *Alabama Lawyer.*

Ballots will be mailed between May 15 and June 1 and must be received at state bar headquarters by 5 p.m. on July 17, 1990.

Commissioners

Bar commissioners will be elected by those lawyers with their principal offices on the following circuits: 8th; 10th-Places #4 and 7; Bessemer Cut-off; 11th; 13th-Place #1; 17th; 18th; 19th; 21st; 22nd; 23rd-Place #1; 30th; 31st; 33rd; 34th; 35th; and 36th. Additional commissioners will be elected in these circuits for each 300 members of the state bar with principal offices therein. The new commissioner positions will be determined by a census on March 1, 1990, and vacancies certified by the secretary on March 15, 1990.

The terms of any incumbent commissoners are retained.

All subsequent terms will be for three years.

Nominations may be made by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. Either must be received by the secretary no later than 5 p.m. on the last Friday in April (April 27, 1990).

Ballots will be prepared and mailed to members between May 15 and June 1, 1990. Ballots must be voted and returned by 5 p.m. on the second Tuesday in June (June 12, 1990) to state bar headquarters. ■

Letters to the Editor

Vaccine Injury Compensation Program

I am writing with regard to the Vaccine Injury Compensation Program, a no-fault compensation system for individuals who have been injured by specified childhood vaccines.[1] 42 U.S.C. § 300aa-10, *et seq.* The program, effective as of October 1, 1988, permits individuals who believe thay are eligible for compensation to file a petition with the United States Claims Court. The Secretary of Health and Human Services is named as the respondent, and is responsible for providing an answer to the Court regarding the allegations of each petition. The secretary has delegated his responsibilities under the program to the Bureau of Health Professions, a component of the Public Health Service.

The act imposes an ethical obligation on any attorney who is consulted by an individual regarding a vaccine-related injury or death to inform such individual that compensation may be available under the Vaccine Injury Compensation program. *See* 42 U.S.C. § 300aa-10(b). Individuals injured prior to October 1, 1988, must withdraw any pending civil suits if they choose to pursue a claim through the Vaccine Injury Compensation Program. Petitions for these injuries must be filed prior to October 1, 1990. *See* 42 U.S.C. § 300aa-16(a)(1). Anyone injured after October 1, 1988, may bring a civil action against the vaccine manufacturer or administrator only (1) if compensation is denied under the program or (2) by rejecting an award under the program. Accordingly, we think it is crucial that all attorneys be made aware of the program, the deadline for filing petitions relating to vaccines which were administered prior to October 1, 1988, and the statutory provision defining attorneys' ethical obligations.

Specific inquiries as to filing requirements and Claims Court procedures should be addressed to the United States Claims Court, 717 Madison Place, N.W., Washington, D.C. 20005. If anyone has any suggestions regarding how to make this information widely known, or any questions, please contact David Benor at (301) 443-2006.

Thank you for your cooperation.

Sincerely,
Michael J. Astrue
General Counsel
Department of Health & Human Services

1. Vaccines included at this time are those against the following diseases: diptheria, pertussis, tetanus, measles, mumps, rubella, and polio.

No-fault divorce—another opinion

It is with no little trepidation that I venture to comment on the letter of Hon. J. Edward Thornton, a giant of the Mobile Bar, and also, I believe, one who served as president of the Alabama State Bar, published in the January issue of *The Alabama Lawyer.* Mr. Thornton's views on many topics are frequently published by the *Mobile Press Register.* In this regard, I have had a few of mine published recently.

While I have the greatest respect for Mr. Thornton—he has been practicing far longer than I have—I frequently find myself unable to agree with his views on some issues. No-fault divorce is one instance. In this regard, I am reminded of a debate on the floor of the U.S. Senate in the late 1940s between the two Illinois senators, Democrat Paul Douglas and Republican Everet Dirksen. Toward the end of the debate, or colloquy, Sen. Douglas characterized his opponent as "a man dragged kicking and screaming into the twentieth century."

Further, your correspondent saith not.

Don Morgan,
Fairhope, Alabama

An open letter to the bar

Since the conclusion of the 1990 American Bar Association Midyear Meeting in Los Angeles, I have received a number of letters and telephone calls regarding the process and procedures used in adopting ABA policy positions. Most of these letters and telephone calls have been generated by the House's adoption of Resolution 106C concerning a woman's constitutional right to privacy in determining whether to continue or terminate her pregnancy.

I am pleased to have this opportunity to respond to these inquiries, explain the representative nature of the ABA's policy-making process, and let you know how your voice is heard in your association. Simply stated, your voice is heard through your elected representatives to the House of Delegates and through your role in the ABA Assembly.

The ABA policy-making body is the House of Delegates. Currently, the House is composed of 461 members. A state delegate is elected by the direct vote of members in every state. Various association sections and divisions, as well as ABA affiliated organizations, also have delegates in the House. More than half of the House members represent state and local bar associations.

How do policy matters come before the Association? Any group or organization represented in the House is eligible to bring resolutions forward for consideration. If you have an idea or suggestion about a policy matter, contact your state delegate or your state or local bar about introducing your proposal into the House.

Another means of bringing policy matters to the attention of the association is through the assembly. The assembly is convened at every annual meeting, and is composed of members of the association registered for that annual meeting. Any member of the association can bring a resolution before the assembly by filing it with the secretary not less than ten days prior to the meeting of the assembly. For example, on February 28, a resolution was filed with the Office of the Secretary which calls for the assembly to revisit the issues raised by Resolution 106C at the upcoming annual meeting. It is anticipated that a similar measure will be brought before the House of Delegates at that same meeting. Resolutions adopted by the assembly are referred to the House of Delegates. If the House concurs, the assembly resolution becomes association policy. If the House disapproves or amends the assembly resolution, it goes back to the assembly. If there is still no concurrence, the assembly may—by a two-thirds vote—call for a referendum of the membership.

Media accounts have highlighted the debate over Resolution 106C. This has heightened the interest of many ABA members in the policy-making procedures, and is an outstanding opportunity for all ABA members to become more involved in all of the association's vital work.

The strength of the American Bar Association is you, the member. Your association is playing an increasingly important role in public dialogue in Washington and throughout the nation. If we are to continue to serve effectively as a national voice of the legal profession, we need to hear the concerns, the interests and the views of all members. It is only by bringing together the diversity inherent in our wide membership that we can make our best effort to address the variety of critical issues confronting our profession and our society.

Sincerely,
L. Stanley Chauvin, Jr.,
President,
American Bar Association
March 1, 1990

■

Robert S. Vance Memorial Fund

A fund entitled the Robert S. Vance Memorial Fund has been established at the University of Alabama Law School, the judge's alma mater. In order to endow an academic chair in the judge's name, the fund must raise $600,000. Contributions to the fund are tax deductible.

Checks should be made payable to the University of Alabama Law School Foundation, indicating on the check and the cover letter that the check is intended for the Vance Fund. Contributions should be mailed to:

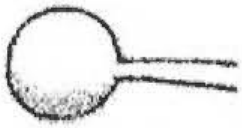
Alyce M. Spruell
Director of Law School Development
University of Alabama Law School
P.O. Box 870382
Tuscaloosa, Alabama 35487-0382

Questions about the fund may be directed to Spruell, at (205) 348-5752, or to Mary Nell Terry, at:

Chambers of the Honorable Robert S. Vance
900 United States Courthouse
Birmingham, Alabama 35203
(205) 731-1086

Unnecessary Delay in Our Reduces Respect for the Rule

by Sonny Hornsby
Chief Justice, Supreme Court of Alabama



It is my belief that unnecessary delay must be eliminated from our courts to ensure the continued respect for the rule of law in our justice system.

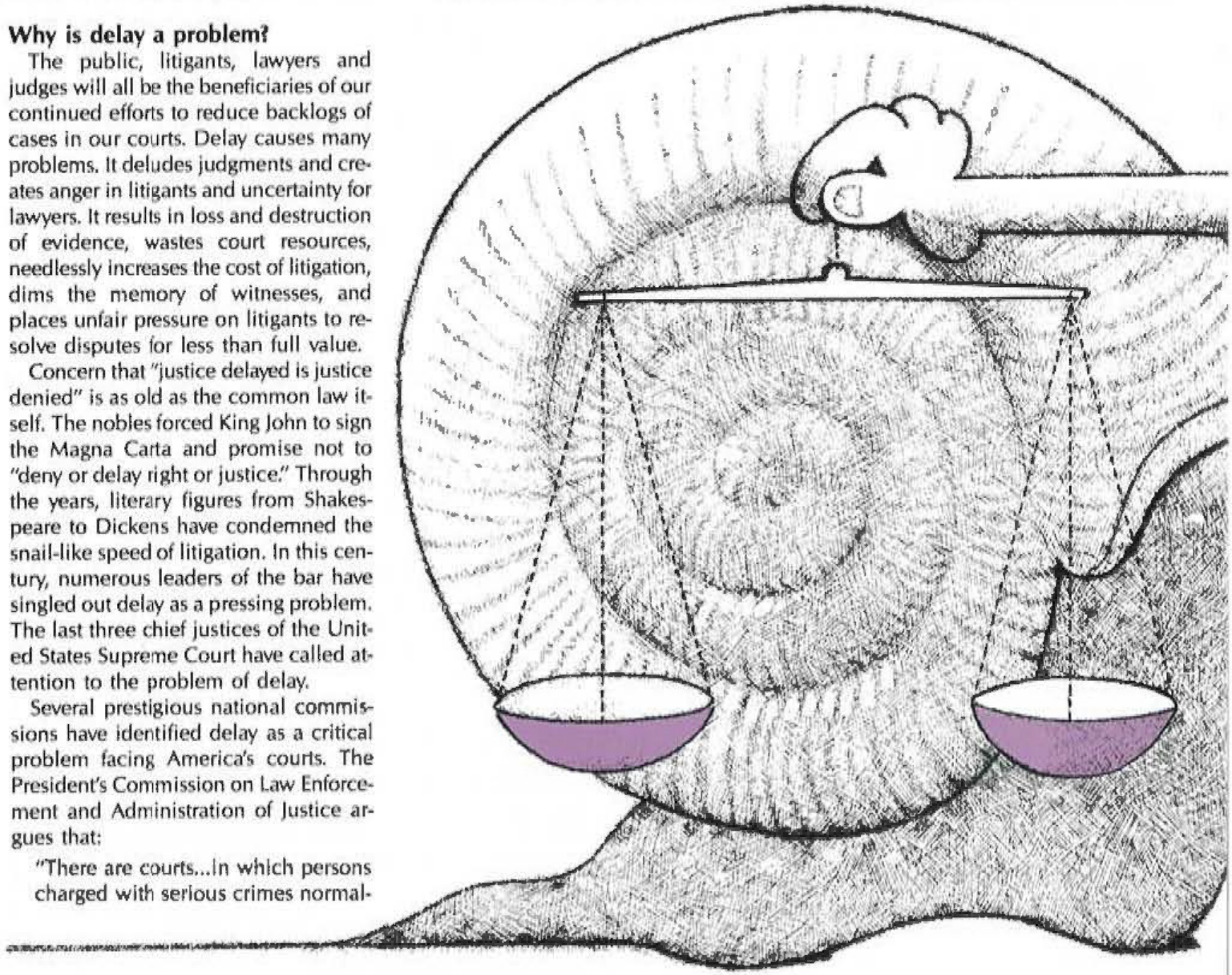
Why is delay a problem?

The public, litigants, lawyers and judges will all be the beneficiaries of our continued efforts to reduce backlogs of cases in our courts. Delay causes many problems. It deludes judgments and creates anger in litigants and uncertainty for lawyers. It results in loss and destruction of evidence, wastes court resources, needlessly increases the cost of litigation, dims the memory of witnesses, and places unfair pressure on litigants to resolve disputes for less than full value.

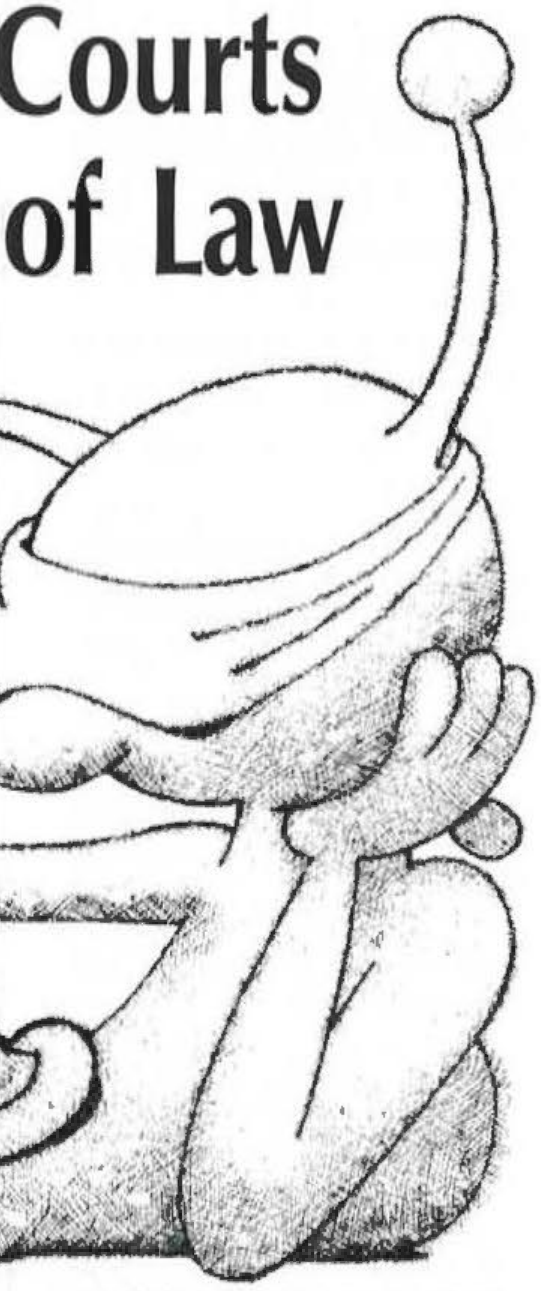
Concern that "justice delayed is justice denied" is as old as the common law itself. The nobles forced King John to sign the Magna Carta and promise not to "deny or delay right or justice." Through the years, literary figures from Shakespeare to Dickens have condemned the snail-like speed of litigation. In this century, numerous leaders of the bar have singled out delay as a pressing problem. The last three chief justices of the United States Supreme Court have called attention to the problem of delay.

Several prestigious national commissions have identified delay as a critical problem facing America's courts. The President's Commission on Law Enforcement and Administration of Justice argues that:

> "There are courts...In which persons charged with serious crimes normally await trial for over a year." Such courts, the Commission states, "make a mockery of bail decisions . . . Important cases are lost by attrition . . . and the delay undermines the law's deterrent effect by demonstrating that justice is not swift and certain but slow and faltering."



Courts of Law



In 1968, an American Bar Association commission proposed standards for speedy trials. Shortly thereafter, the National Advisory Commission on Criminal Justice Standards and Goals assigned first priority to ensuring "speed and efficiency in achieving final determination of guilt or innocence of a defendant."

Since 1967 these commissions have proposed standards and goals for processing criminal cases. Their general recommendations are reflected in legislative and judicial efforts to impose speedy trial provisions. In 1974 the United States Congress in the Speedy Trial Act mandated that federal defendants be tried within days of arrest when in custody and 120 days if not in custody.

In our civil justice system, delay is the most significant single problem. Court reformers from the time of Jethro, the father-in-law of Moses, have recognized the need to conclude disputes fairly and promptly. (Exodus 18:13-27)

Delay breeds a lack of confidence in the system

Why does reduction of delay in civil litigation merit the efforts of the bench and bar? National surveys of public attitudes reveal a remarkable lack of confidence not only in the legal profession but more specifically in our state and local courts. In a comprehensive survey commissioned by the National Center for State Courts, the confidence level attributed to state and local courts ranked 11th of the 15 institutions included in the poll, below the medical profession, business, public schools, and even Congress. The reasons for this unfavorable image of state and local courts are suggested by other data from this survey. Of those polled, 57 percent believed "efficiency in the courts" to be a serious national problem, an expression of greater public concern than for pollution, education, racial problems, even the threat of war. Almost half the respondents believed the courts to be either in "great" or "moderate" need to reform. Not surprisingly, pretrial delay was a major problem in court operation cited by those members of the general public most knowledgeable about the judicial system.

Lawyers and courts go hand-in-hand

In the minds of most of the public, lawyers and the law are closely associated with the actions of the courts. In short, the public's perception is that excessive costs and excessive delay render the law and lawyers incapable of performing the basic services for which they exist. Therefore, reduction of delay in litigation demands the immediate attention of the bench and the bar. The corollary that follows is that the key to successfully reducing delay is a commitment by the entire legal profession to the idea that court delay is a problem that can no longer be ethically or economically tolerated, a conclusion reached by Tom Gonser, executive director of the ABA in 1985.

Ethical obligation

I believe, as does the ABA Lawyers Conference Task Force on Reduction of Litigation Cost and Delay, that it is the ethical obligation of judges and lawyers to conclude litigation promptly. This obligation is specifically stated in the Model Rules of Professional Conduct, in Rules 1.2, 1.3, 1.4, 3.1, 3.2 and 3.4, and in the Code of Judicial Conduct, Canons 3A(5) and 3B.

The legal profession must continually deal with keeping its business current. If it does not, the public and the litigants will force upon the system their own solutions. The Lawyer's Conference Task Force reports that officers of some major corporations are making prompt disposition of cases handled by retained trial counsel and control of outside counsel's

The Honorable Sonny Hornsby, of Tallassee, Alabama, is Alabama's 26th chief justice.

pretrial activities by management, high-level corporate issues.

The Lawyer's Conference Task Force reports the following and I concur: "The organized bar and bench have a uniquely constructive opportunity to resolve the delay problem. Aside from the ethical responsibility and economic and social benefits to judges and lawyers, what more appropriate way can there be to reaffirm professional ideals than to improve the system for the benefit of the litigants and the public at large?

"Delay can be eradicated if system participants accept the fact that delay is a problem; if a program is designed to deal with all of its causes; if judges, lawyers and the public believe that the program can solve the problem; and if the judicial and bar leadership will openly and publicly commit themselves to meeting and maintaining the goal of delay reduction."

Time standards are first step toward solution

The first steps in combating delay must be the development of some standard by which a court can measure its performance and a recognition of the fact that the court must control the pace of litigation. The support and encouragement of the bar is always important to judges taking this first step.

The National Conference of State Trial Judges developed and adopted a set of Court Delay Reduction Standards. At the August 1984 annual meeting, the house of delegates of the American Bar Association overwhelmingly approved these standards. The ABA Lawyers Conference Task Force supports these standards. The standards are the basis not only for a delay reduction program but for a delay prevention system as well.

Section 2.52 of the Court Delay Reduction Standards deals with the timely disposition of cases, and provides:

> A. General Civil—90 percent of all civil cases should be settled, tried or otherwise concluded within 12 months of the date of case filing; 98 percent within 18 months of such filing; and the remainder within 24 months of such filing except for individual cases in which the court determines exceptional circumstances exist and for which a continuing review should occur.
>
> B. Summary Civil—Proceedings using summary hearing procedures, as in small claims, landlord-tenant and replevin actions, should be concluded within 30 days from filing.
>
> C. Domestic Relations—90 percent of all domestic relations matters should be settled, tried or otherwise concluded within three months of the date of case filings; 98 percent within six months; and 100 percent within one year.
>
> D. Criminal
>
> Felony—90 percent of all felony cases should be adjudicated or otherwise concluded within 120 days from the date of arrest, 98 percent within 180 days and 100 percent within one year.
>
> Misdemeanor—90 percent of all misdemeanors, infractions and other nonfelony cases should be adjudicated or otherwise concluded within 30 days from the date of arrest or citation and 100 percent within 90 days.
>
> Persons in pretrial custody—Persons detained should have a determination of custodial status or bail set within 24 hours of arrest. Persons incarcerated before trial should be afforded priority for trial.
>
> Juvenile—Juvenile cases should be heard within the following time limits:
>
> 1. Detention and shelter hearings—not more than 24 hours following admission to any determination or shelter facility;
> 2. Adjudicatory or transfer (waiver) hearings -
>   a. Concerning a juvenile in a detention or shelter facility: not later than 15 days following admission to such facility;
>   b. Concerning a juvenile who is not in a detention or shelter facility: not later than 30 days following the filing of the petition;
> 3. Disposition hearings—not later than 15 days following the adjudicatory hearing. The court may grant additional time in exceptional cases that require more complex evaluation. (ABA Standards Relating to Juvenile Justice: Court Org. and Adm. 3.3)

Alabama time standards committees

These are standards and goals that courts should reach and maintain if possible. I have recently appointed Circuit Judge Joe Phelps of Montgomery to chair a committee to develop statewide time standard goals for the circuit courts and District Judge Gerald Topazi of Birmingham to chair a similar committee to develop standards for district courts. These committees are now working on a set of standards which will be similar to the ABA time standards.

I am convinced time standards can be an important step in reducing litigation delay, and I cite excerpts of a recent success story reported in the fall issue of the *Judge's Journal:*

"The Wayne County Circuit Court in Detroit, Michigan, has had a long-standing history of delay in civil cases. A 1978 study, which sampled data on 1976 dispositions, reported a median tort disposition time of 788 days, or about 26 months from filing. For the full range of general civil cases, the median time was 24 months. For cases disposed of by jury trial, the median in 1976 was 41 months. In a 1984 follow-up study, data from 1983 dispositions showed only a slight change: median tort disposition time was 24 months, median general civil case disposition time was 21 months, and the median time to jury trial was 37 months.

"But this year, something important is happening in the Wayne County Circuit Court—something that deserves the attention of everyone interested in the reduction of litigation costs and delays. In a program aimed at enabling the court to meet the ABA Time Standards for Civil Case Disposition, the court has taken control of its caseload, reduced its pending case inventory, and is bringing all of its cases to conclusion more quickly than at any time in the recent past.

"The initial results of this barely three-year-old program have been dramatic. The pending civil caseload has been reduced by more than 33 percent since January 1985, the median time to disposition has dropped from 21 to 13 months, and the number of civil cases pending more than two years has been cut in half. For the seven judges in a pilot program—the first ones to convert to an individual calendar system—the results are even more striking: All have reduced their combined civil and domestic relations caseloads from more than 1,300 cases in mid-1986 to fewer than 700 in mid-1989,

and five of the seven had caseloads of less than 600 as of August 1989."

Appellate standards

While the emphasis to this point has been on the trial courts, I now turn to the process of appeals.

It is my belief that as a lawyer you should be able to tell clients, with some degree of certainty, that their case, no matter how complex, ought to get to trial in two years. You also ought to be able to tell clients that if their case has to be appealed, it will be heard, and a decision rendered within a year—and that the total maximum time they could possibly be tied up in litigation in Alabama courts would be three years.

The ABA Appellate standards say a case should not take more than 280 days from the time of notice to appeal until a decision is reported. Our court of civil appeals in Montgomery is more than meeting this standard and our entire appellate system is very close to this goal.

In his farewell address as 1986-87 President of the American Bar Association, Eugene Thomas made an observation which demonstrates quite vividly the need for time standards:

> "We know that it should not be necessary for cases that 15 years ago could be tried in two days now require two months—cases that when I was a lawyer beginning my practice 25 to 35 years ago could be tried by all the attorneys in the case for less than one single court reporter takes out of it today in disposition fees."

It is necessary today that management be exerted in all phases of a trial. A court's control of its docket is the key to maintaining a congestion-free judicial system.

Newscaster Edwin Newman sums it up in simple terms:

> "Nobody wants summary justice. That, however, need not be the alternative. The alternative should be reasonable dispatch, without dilatory tactics and self-indulgence by lawyers, and with judges who are able—and want to keep things moving. Why is that too much to ask for? It ought to be taken for granted."

The following general sources were used for this article:

Defeating Delay, a publication by the American Bar Association and the Lawyer's Conference Task Force on Reduction of Litigation Cost and Delay.

Standards Relating to Court Delay Reduction, a publication of the ABA and the National Conference of State Trial Judges.

Managing to Reduce Delay, a publication of the National Center for State Courts.

Justice Delayed, a publication of the National Center for State Courts.

On Trial: The Length of Civil and Criminal Trials, a publication of the National Center for State Courts.

The Judges' Journal: article entitled "Straightening out Delay in Civil Litigation," by Douglas K. Somerlot, Maureen Solomon and Barry Mahoney.

Managing the Pace of Justice, a publication of the National Institute of Justice.

■

JUDICIAL AWARD OF MERIT NOMINATIONS DUE

The Board of Commissioners of the Alabama State Bar will receive nominations for the state bar's Judicial Award of Merit through **May 15.** Nominations should be prepared and mailed to **Reginald T. Hamner, Secretary, Board of Bar Commissioners, Alabama State Bar, P.O. Box 671, Montgomery, Alabama 36101.**

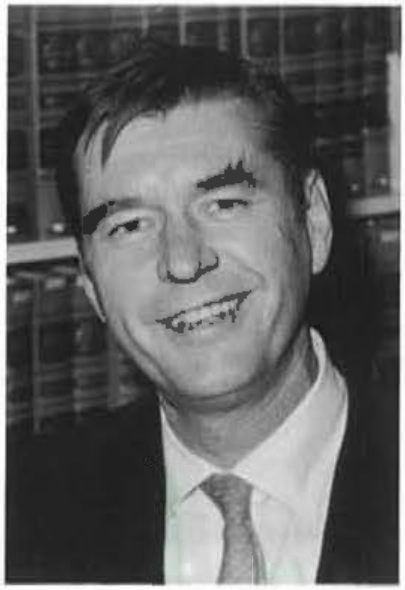
The Judicial Award of Merit was established in 1987 and the first recipients were Senior U.S. District Judge Seybourn H. Lynne and retired Circuit Judge James O. Haley.

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

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

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

By the Lawyers and for the Judges: An Irreverent History of the Bill of Rights



(Professor Michael E. Tigar presented this speech during the Alabama State Bar's Mid-year Meeting Bicentennial Luncheon. This keynote address was part of the meeting and the celebration of the Bicentennial of the Bill of Rights, February 2, 1990, in Birmingham. Professor Tigar is currently Joseph D. Jamail chair-in-law at the University of Texas School of Law.)

I have a photograph of myself. I am not proud of it, but I wanted to share it with you before you see it on the front page of those tabloids at the supermarket checkout counter.

In this photograph, I am wearing a white shirt, blouson-style jacket, fancy belt, black shoes—and a pleated skirt. My son has been quite tolerant about all of this: "Well, Dad," he said, "if you want to be a cross-dresser, I can live with it."

The story behind the picture is as follows: My wife's younger brother proposed marriage to his future bride while they were strolling in the ruins of St. Andrew's Cathedral in Scotland, where they were on vacation. My wife's family professes a provable lineage in that part of Scotland, and can even point to an ancestor or two on the headstones near the ruins.

It therefore seemed just and right to young Bill that he and his intended should be wed in that very spot—in those roofless yet still consecrated Episcopal precincts. My mother-in-law, having married off four daughters in a fashion that still has Rye, New York, in awe of her organizational abilities, found this challenge worthy.

But, Bill insisted, the males in the wedding party would all be required to turn up in full Highland costume, including dirk, sporran and kilt. Hence this photograph.

How did I feel about this? The appointed day was cold, and the wind whipped droplets of drizzle in our faces. I can report that the man who invested the kilt went on to invent the wind tunnel. And we in central Texas do not own a lot of woolen undergarments. But the wedding was joyous and fun and the party later on—well, my wife tells me that I enjoyed myself.

How do I feel about it now, in retrospect? Very much like I do today, where I am to speak of the Bicentennial of the Bill of Rights.

The kilt and tartan plaid are, you see, part of an invented tradition, designed to support an elaborate but entirely fictitious Scottish historical ethos. No less a person than Sir Walter Scott, in an otherwise masterful essay, falsely claimed in 1807 that Caledonian warriors of old had worn the kilt to battle. They had not done so, and the so-called Caledonian warriors were probably refugees from Ireland.

The kilt was introduced in a big way by an English Quaker industrialist early in the 18th century, and tartans were elaborated a century later. But none of this subtracts the slightest bit from the recollected human warmth of my brother-in-law's wedding day.

What does this tell us? It tells us that celebrating tradition can be joyous, evocative and even inspiring. We have no more duty to debunk a tradition than to inquire if it is true that mares eat oats and does eat oats but little lambs eat ivy.

For this reason, it is all right for us to conjure with the sketchy and inconclusive evidence of the adoption and early history of the Bill of Rights, as well as with the bold and certain main outlines of its reception into the frame of government. We can downplay the political battles of the first two decades of our national life under the Constitution.

After all—and I believe this to the core of my being—for us to come together and celebrate the ideal of sheltering the rights even of those whom we despise is a far worthier enterprise than some others we could name.

But when we—as citizens, lawyers, judges—step down from the tableau of ritual into the theater of action, more discernment may justly be demanded of us. For then we parse the historical record in search of elusive truths that have concrete consequences.

By and for whom was the Bill of Rights written, and have all of its intended addressees got the message? One popular tradition is to envision the federal judiciary as pillar and roofbeam of this charter. In 1920, the constitutional historian Edward S. Corwin wrote these words:

"If the Church of the Middle Ages was

'army encamped on the soil of Christendom, with its outposts everywhere, subject to the most efficient discipline, animated with a common purpose, every soldier panoplied with inviolability and armed with the tremendous weapons which slew the soul,' the same words, slightly varied, may be applied to the Federal Judiciary created by the American Constitution."

I yield to no one in my regard—even awe—of federal judges, particularly when arguing before them. But I have always thought they could more readily take to heart the words of former Fifth Circuit Chief Judge John Brown, uttered as a stern reminder to a newly-sworn in colleague, "Just remember, you were appointed, not anointed." Of course, in their lives, demeanors, opinions and persons, Hugo Black and Bob Vance lived this aphorism, to their eternal credit and our secular gratitude.

An evocative but verifiable tradition shows the origins of the Bill of Rights to have been political and not oracular. In the northeast, particularly Massachusetts, debates over ratification of the Constitution itself focused on the need for a charter of liberties to protect individuals against the general government.

In Virginia, the proposed federal union seemed to threaten the power of the states, and debate was tinged with apprehension that the national legislature would interfere with the institution of chattel slavery.

These northern and southern concerns were not exclusive of one another, and all observers understood that the proposed federal judiciary was not only a recourse for endangered rights, but a potential magnet of power to be exercised by and for the general government.

As it happened, the Bill of Rights addressed both individual and state concerns. I will not tarry over the states' rights provisions, as these were irrefragably reworked by the 13th, 14th and 15th amendments. No, it is the judge's intended role that I seek to find in this drama.

Fortunately, we have some fragments from John Marshall himself, a leader of the ratification forces in Virginia, who welcomed a diminution of the states' power to affect private rights. When called upon in the 1788 Virginia debate to declare whether he would support a Bill of Rights, he said such a provision should be "merely recommedatory. Were it otherwise, . . . many laws which are found convenient would be unconstitutional." Marshall had earlier in the same debate said that if Congress "makes a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard; they would not consider such a law as coming within their jurisdiction. They would declare it void."

Against this background, the Bill of Rights was crafted and ratified, as a set of commands and not recommendations. But if any thought the federal judges would be warmest friends and soonest expounders of this charter, they were disappointed. In 1798, fearful of alien ideas from the French Revolution and about to lose control of the reins of government, the Federalist Party secured passage of the Alien Act, the Enemy Alien Act and the Sedition Act. The first two were not enforced, but no doubt chilled a good many newspaper editors and publicists.

The Sedition Act passed into the hands of Federalist judges, who charged grand juries on its terms with evangelic fervor. So, for example, Republican Congressman Matthew Lyon was jailed for writing of John Adams' avarice and vanity. Two hapless citizens of Dedham, Massachusetts, were imprisoned for erecting a sign that said, "No Stamp Act, no Sedition, no Alien bills, no Land Tax; downfall to the Tyrants of America, peace and retirement to the President."

Not a voice was raised from among the article three judges against these prosecutions, even though anyone who reflected for a moment on the history, both bitter and triumphant, of the colonial press would see that the new Bill of Rights forbade the statute and discountenanced its enforcement.

It is sorry to relate that when the Republicans' turn came to wield the levers of government, they fared no better. It is certainly true that they smarted over what Adams had done to them in the last months of power. He took every opportunity to put loyal Federalists on the bench, here at least the article three judges among them would have life tenure.

Predictably, the Jeffersonians fought back. Secretary Madison withheld Judge-designate Marbury's commission as justice of the peace. And the machinery of impeachment was fired up to remove some of these Federalists from the bench. Judge Pickering, certainly a drunk and probably insane, was removed.

The day the Senate voted him out, the House of Representatives returned eight articles of impeachment against Justice Samuel Chase. Seven of these charges recounted Chase's unseemly zeal in presiding over sedition and alleged treason trials with a vigor more suited to an overreaching prosecutor than to a judge. Chase had deservedly won the title "the bloody Jeffreys of America" for his ferocity on the bench. One could plausibly find in those charges a desire to discipline Chase for having paid no attention to the First Amendment. But the eighth article proved that the young Bill of Rights still had no true friends in the councils of power: It charged Chase with making an intemperate antigovernment speech. Although the offense was not cast strictly as sedition, Jefferson himself so characterized it when urging the Congress to proceed against Justice Chase.

To be sure, there are some passing references to the Bill of Rights in the early decisions, but not so as to inspire confidence that the judges had taken its true meaning to heart. For example, when Attorney General Levi Lincoln appeared to argue in the Supreme Court on behalf of Secretary Madison and against Marbury's right to a mandamus, he was asked where Marbury's commission might be. Chief Justice Marshall, not entirely gratuitously, advised the attorney general that he could invoke his privilege against self-incrimination if he wished.

Then, in the trial of Aaron Burr, Chief Justice Marshall on circuit reaffirmed the Sixth Amendment right of compulsory process in terms that still repay study. But these were isolated bursts of rhetoric on an otherwise silent stage.

The history I have limned is familiar. Some recount it with wonder that the judges did not take the Bill of Rights more seriously, and some with disappointment that they did not. Still others, such as Justice Holmes, have cited these early actions—or inactions—as proof that the magisterial words of those ten amendments could not have been meant as literal and indisputable commands.

All three groups are misguided, I believe. To begin with, as Hugo Black kept

reminding us, the words are clear and commanding, not elastic and hortatory: "Congress shall make no law," "the accused shall enjoy," "no person . . . shall be compelled." You do not need to be a constitutional scholar to see this point, a less elegant metaphor will do: If you take your dog to obedience school, and begin to say things like "sit," "heel," and "come," and for the first few classes your dog doesn't respond, this does not mean that obedience schooling is a failure or that your dog knows better than you do how dogs should behave.

More respectfully, the Bill of Rights was written by people who knew of particular abuses and wished to make unmistakable that they should not occur again. It was written about judges and for judges, by lawyers and on behalf of clients, clients, whose collective life experience showed the need for such a testament disposing and directing how the legacy of revolutionary struggle should be distributed as the patrimony of their children.

These clients had stood in the dock of England and America. They had, with Zenger in New York, Penn in Westminster, and the dozens of others charged with sedition and insurrection, borne the censor's lash and the policeman's boot. The judges' record in all of this vividly recollected history had given little reason to believe that they were worthy keepers of freedom's flame. Lord Mansfield's reluctant concession in Miller's case, fragments of Chief Justice Holt's jury charges, Lord Camden's opinion for Wilkes—these stood out as exceptions. The truer heroes were, first, the clients who had dared to speak and publish and protest and disobey, and second, the lawyers who had at times risked joining their clients in the dock. As Goveneur Morris said of Andrew Hamilton's defense of Zenger, here was the morning star that lighted the path to liberty.

From these fresh memories came these amendments, as reminders to the citizen, weapons to the lawyers and entreaties to the judges.

For the citizen, who after all swears no particular oath to be liberty's friend, these amendments remind us to hold in our hands two dialectically-opposed notions at the same time: The idea of social cohesion and the injunction of tolerance and respect to the despised, the dispossessed, the outcast.

For the lawyers, these are our weapons, willed to us by those who preceded us in this profession, and without the taking up and using of which we are not worthy of our role. Ours is the special duty assigned in different societies to different classes and kinds of people—it is the duty of remembering. Remembering the dark times and sacrifice that brought forth these words, written on a paper by our grandfathers for our grandfather's clients. And, having remembered, to wield these words worthily.

For the judges, these words are entreaties about power and the limits of power. They are in terms and by their origins a reminder that judges do not own and did not invent the law. They are simply appointed its keepers. The judges are named by the Constitution's third article and catechized by these enumerated rights. The judges are custodians of the house of the law, so that when a client seeks refuge and a lawyer takes up her cause, the two of them can come in out of the din and darkness and find there a kind of sanctuary in the jungle. ■

Alabama State Bar Proposed Communications Law Section Survey

A task force has been commissioned to survey the membership of the Alabama State Bar to determine whether there is sufficient interest to form a Communications Law Section.

The section's focus would be four-fold:

(a) Development of a network of experienced attorneys for the sharing of information and identification of knowledgeable attorneys throughout the state;

(b) Publication of a periodic newsletter dealing with communications law topics of special interest to Alabama attorneys;

(c) Presentation of an annual seminar, either in conjunction with the state bar convention or perhaps in conjunction with other communications business groups, such as the Alabama Cable Television Association, Alabama Press Association or Alabama Broadcasters Association; and

(d) Legislative efforts and oversight as the need arises.

Attorneys who might be interested in joining the Alabama State Bar Communications Law Section would be those who have an interest in radio, television, cable, newspaper, magazine/book publications, or public utility or common carrier issues (including cellular telephone service), and related subjects such as defamation, privacy and public access law. Not only attorneys who represent businesses of this nature, but also attorneys representing municipalities on these issues would likely be interested in this section.

The annual dues for membership in this section would probably range from $10 to $20, depending on the number of members and the level of activity of the section.

If you would be interested in becoming a charter member of this section, please indicate on the survey form below and return it to Keith B. Norman at the state bar headquarters in Montgomery by **April 15, 1990.**

ALABAMA STATE BAR PROPOSED COMMUNICATIONS LAW SECTION SURVEY

I would be interested in joining the proposed Communications Law Section of the Alabama State Bar.

_____

(Name)

_____

(Firm)

_____

(Mailing Address/City/State/Zip)

AREAS OF SPECIAL INTEREST (Mark with an "X" as many areas as apply):

_____ Cable Television
_____ Broadcasting (Radio, Television)
_____ Newspapers/Magazines/Book Publication
_____ Common carrier issues (including telephone, cellular and satellite media)
_____ Defamation/Privacy Law
_____ Access to Public Records/Open Meetings Law
_____ Other: Please Describe

Please return by **April 1, 1990** to Keith B. Norman, Director of Programs, Alabama State Bar, P.O. Box 671, 415 Dexter Avenue, Montgomery, Alabama 36101.

About Members, Among Firms

ABOUT MEMBERS

Matthew S. Ellenberger announces the opening of his office at 1318 Alford Avenue, Suite 102, Birmingham, Alabama 35226. Phone (205) 822-0271.

■

Rodger M. Smitherman announces the opening of his office January 2, 1990. Offices are located at Bank For Savings Building, Suite 1418, 1919 Morris Avenue, Birmingham, Alabama 35203. Phone (205) 322-0012.

■

William F. Addison, formerly of Reese & Addison, announces the opening of his office at 602 South Hull Street, Montgomery, Alabama 36104. Phone (205) 269-0700.

■

C. John Dezenberg, Jr. announces the opening of his office for the practice of law. Offices are located at 121 Jefferson Street, North, Huntsville, Alabama 35801. Phone (205) 533-5097.

■

Bryan Duhé announces the relocation of his law office to 1110 Montlimar Drive, Suite 1080, Mobile, Alabama 36609. Phone (205) 344-9006.

■

John N. Pappanastos, formerly of Pappanastos & Samford, P.C., announces the formation of The Law Offices of John N. Pappanastos, and the relocation of his offices to Suite 303, Corporate Square, 555 South Perry Street, Montgomery, Alabama 36104. Phone (205) 264-8500.

■

AMONG FIRMS

Balch & Bingham, founded in Birmingham in 1922, announces that **John David Snodgrass** opened its fourth office in Huntsville's Central Bank Building.

Balch & Bingham maintains other offices in Birmingham and Montgomery.

■

The firm of **Finkbohner, Lawler & Olen** announces the relocation of its office to Landmark Square, 169 Dauphin Street, Suite 300, Mobile, Alabama 36602. Phone (205) 438-5871.

■

Ball, Ball, Matthews & Novak, P.A. announces that **James A. Rives** and **Fred B. Matthews** have become associates with the firm. Offices are located at 60 Commerce Street, Montgomery, Alabama 36104.

■

The firm of **King & King** announces that **Joseph W. Strickland** has become an associate of the firm. Offices are located at The King Professional Building, 713 South 27th Street, P.O. Box 10224, Birmingham, Alabama 35202-0224. Phone (205) 324-2701.

■

Allen W. Howell, Richard D. Shinbaum and **Frank L. Thiemonge, III** announce their association and the formation of the firm of **Shinbaum, Thiemonge & Howell, P.C.** Offices are located at 608 South Hull Street, Montgomery, Alabama. Phone (205) 269-4440.

■

Roy H. Phillips, Jeffrey C. Ezell and **Richard M. Kemmer, Jr.** announce the formation of a partnership to be known as **Phillips, Ezell & Kemmer.** Offices are located at 703 13th Street, P.O. Drawer 2500, Phenix City, Alabama 36868-2500. Phone (205) 297-2400.

■

W. Mark Anderson, III, Charles A. Graddick, formerly attorney general of Alabama, and **G. Dennis Nabors** announce the formation of a professional corporation for the practice of law under the firm name of **Anderson, Graddick & Nabors, P.C.** Offices are located at 461 South Court Street, P.O. Box 948, Montgomery, Alabama 36101. Phone (205) 264-8011.

■

Ramsay, Baxley & McDougle announces that **Lori S. Collier** has become a partner of the firm. The firm name has been changed to **Ramsey, Baxley, McDougle & Collier.** Offices are located at 207 West Troy Street, P.O. Box 1464, Dothan, Alabama 36302. Phone (205) 793-6550.

■

Hamilton, Butler, Riddick, Tarlton & Sullivan, P.C. announces that **J. David Brady, Jr.** has become a partner in the firm. Offices are located at Tenth Floor, First National Building, P.O. Box 1743, Mobile, Alabama 36633. Phone (205) 432-7517.

■

The firm of **Watterson & Singer, P.C.** announces that **Thomas C. Hollingsworth** has become associated with the firm, effective January 8, 1990. Offices are located at 2007 Lancaster Road, Birmingham, Alabama 35209. Phone (205) 871-3980.

■

Hand, Arendall, Bedsole, Greaves & Johnston announces that **Karen Pailette Turner** has become associated with the firm, and that **Blane H. Crutchfield** and **David R. Quittmeyer** have become members of the firm. Offices are located at Suite 3000, First National Bank Building, P.O. Box 123, Mobile, Alabama 36601. Phone (205) 432-5511.

■

Sadler, Sullivan, Herring & Sharp, P.C. announces that **Turner B. Williams** has become a member of the firm, and the offices of the firm are now located at 2500 SouthTrust Tower, Birmingham, Alabama 35203-3204. Phone (205) 326-4166.

■

Morring, Schrimsher & Riley announces that **Sharon D. Hindman** has become a member of the firm. Offices are located at 117 East Clinton Avenue, Huntsville, Alabama 35801. Phone (205) 534-0671.

■

Smith & Taylor announces that **A. Joe Peddy** has become a member of the firm and **Michael B. Walls** has become associated with the firm. Offices are located at Suite 1212, Brown Marx Tower, Birmingham, Alabama 35203. Phone (205) 251-2555.

■

The firm of **Holt, Cooper & Upshaw** announces that **James L. Kessler, II** has become a partner of the firm. Offices are located at 529 Frank Nelson Building, Birmingham, Alabama.

■

William James Samford, Jr. and **Susan Shirock DePaola,** formerly partners in the firm of Pappanastos & Samford, P.C., announce the formation of the firm of **Samford & DePaola, P.C.,** with offices located in the Colonial Financial Center, Suite 601, One Commerce Street, Montgomery, Alabama 36104. Phone (205) 262-1600.

■

The firm of **Otts & Moore** announces that **J. David Jordan** has joined the firm as a partner, and the firm name has been changed to **Otts, Moore & Jordan.** Offices are located at 401 Evergreen Avenue, Brewton, Alabama 36426, and the firm's mailing address is P.O. Box 467, Brewton, Alabama 36427. Phone (205) 867-7724.

■

The firm of **Reeves & Stewart** announces **Robert E. Armstrong, III** has become a partner. Offices are located on the 2nd Floor, First Alabama Bank Building, P.O. Box 457, Selma, Alabama 36702-0457. Phone (205) 875-7236.

■

First Title Corporation of Atlanta, Georgia, announces the opening of its Birmingham branch office at One Perimeter Park South, Suite 100N, 35243 and has named **Scott J. Humphrey** as its statewide district manager. Humphrey is a 1981 graduate of Cumberland School of Law, and has been district office attorney for the Small Business Administration for the past seven years.

■

D. Grant Seabolt, Jr. has been elected to the position of junior partner in the firm of **Bird & Reneker.** The firm's offices are located at 1100 Premier Place, 5910 North Central Expressway, Dallas, Texas 75206. Phone (214) 373-7070.

■

Frank M. Bainbridge, Walter L. Mims and **Bruce F. Rogers** announce the formation of a partnership under the name of **Bainbridge, Mims & Rogers.** Offices are located at The Luckie Building, Suite 415, 600 Luckie Drive at Highway 280 South, P.O. Box 530886, Birmingham, Alabama 35253. Phone (205) 879-1100.

■

Corley, Moncus & Ward, P.C. announces that **Ezra B. Perry, Jr.** has become a member of the firm. Offices are located at 2100 SouthBridge Parkway, Suite 650, Birmingham, Alabama 35209. Phone (205) 879-5959.

■

The firm of **Nowlin & Summerford** announces that **J. Calvin McBride** has joined the firm effective January 1, 1990. The firm will be known as **Nowlin, Summerford & McBride.** Offices are located at 118 E. Moulton Street, Decatur, Alabama 35601. Phone (205) 353-8601.

■

The firm of **Lanier, Ford, Shaver & Payne, P.C.** announces that **Robert E. Ledyard, III** has become a partner in the firm. Offices are located at 200 West Court Square, Suite 5000, Huntsville, Alabama 35801.

■

Beasley, Wilson, Allen, Mendelsohn & Jemison, P.C. announces that **Randall B. James** has become a member of the firm. Offices are located at 207 Montgomery Street, P.O. Box 4160, Montgomery, Alabama 36103-4160. Phone (205) 269-2343.

■

Lynn W. Jinks, III and **L. Bernard Smithart** announce the formation of the firm of **Jinks & Smithart** with offices located at 219 N. Prairie Street, Union Springs, Alabama 36089. Phone (205) 738-4225.

■

The firm of **Rives & Peterson** announces that **Ralph C. Bishop, Jr., Nat Bryan** and **Richard E. Smith** have become partners. They are all graduates of the Cumberland School of Law. Offices are located at 1700 Financial Center, Birmingham, Alabama 35203-2607. Phone (205) 328-8141.

■

W. Cameron Parsons, formerly a partner in Ray, Oliver, Ward & Parsons, and **James A. Hall, Jr.,** formerly an associate in Mountain & Mountain, announce the formation of a partnership for the practice of law under the name of **Parsons & Hall.** Offices are located at Suite 324, Secor Bank Building, 550 Greensboro Avenue, Tuscaloosa, Alabama. The mailing address is P.O. Box 031847, Tuscaloosa, Alabama 35403. Phone (205) 349-5500. ■

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.

Last issue's article on a scenario of legal practice in the '90s emphasized technological issues that would very likely have an impact on law firms in the coming decade. True, they very likely will. Equally true, there are other significant issues that will have an impact on law firms as well. One of these is profitability, the ability to earn enough money to make the practice of law worthwhile. Another is governance and structure, the ability to organize oneself to be in a position to earn a decent income.

Responding to these more than obvious needs, over the past year we have developed a new program of assistance called a practice management audit. It is a program that has been offered to more than a dozen Alabama and Georgia firms over the past year, and their acceptance has been quite favorable.

Practice management audit

This program is intended to assess the efficiency of the firm as a whole, without specific emphasis on technical functions. The four primary areas of evaluation are:

—firm profitability,
—governance and organization,
—support staff adequacy and
—administration.

Profitability looks at fee income per partner (or principal) in comparison with other firms of similar size and geographic area. It also examines fee income in terms of per horam realization. Finally, partners' (principals') income distribution formulas are reviewed for equity and incentive. Specific remedies, where appropriate, are recommended.

Governance and organization focus on how the firm is managed, both from an executive and administrative perspective. Topics reviewed include executive decision-making, associate development and staff administration. Special attention is given to who does what—in particular, the division of duties between the professional staff and support staff.

Bornstein

The support staff is assessed in terms of capacity and size. Particular attention is paid to the versatility of the staff, its ability to support multiple practice disciplines. Administration is surveyed in terms of its effectiveness in carrying out its mission in areas of risk management, personnel management, text and data processing software and hardware, filing, telephone and reception procedures, wages and benefits.

Recommendations are quite specific. If you are under-utilizing paralegals, slighting associates, employing obsolete equipment or carrying excess overhead, the findings will be clearly stated and detailed corrective action recommended. There will be no surprises. It is our custom to keep you informed daily of our tentative findings and to offer you a verbal summary of our anticipated recommendations prior to leaving the premises.

Our recommendations are presented in written form within two weeks of completion of the engagement and include a cost/benefit recap as well as an action plan. Post-engagement telephone consultation is available to all clients at no cost. Our methodology includes observation, interviews, analytic measurement and professional judgment gleaned from experience with more than 100 law firms in the southeast ranging in size from one to 250 lawyers.

A practice management audit will not solve all problems. In fact, it will not solve any problems unless you are at least open to the suggestion of doing some things differently. There still remain our other three programs: word processing, data processing and administration, if that seems to fit your needs. This new program is offered for those who:

—have a backlog of work,
—apply themselves industriously to it and
—yet still find prosperity elusive. ■

Request For Consulting Services Office Automation Consulting Program

SCHEDULE OF FEES, TERMS AND CONDITIONS

Firm Size*	Duration**	Fee	Avg. cost/ lawyer
1	1 day	$ 500.00	$500.00
2-3	2 days	$1,000.00	$400.00
4-5	3 days	$1,500.00	$333.00
6-7	4 days	$2,000.00	$307.00
8-10	5 days	$2,500.00	$277.00
Over 10			$250.00

*Number of lawyers only (excluding *of counsel*)
**Duration refers to the planned on-premise time and does not include time spent by the consultant in his own office while preparing documentation and recommendations.

REQUEST FOR CONSULTING SERVICES

OFFICE AUTOMATION CONSULTING PROGRAM

Sponsored by Alabama State Bar

THE FIRM

Firm name _____

Address _____

City _____ Zip _____ telephone # _____

Contact person _____ title _____

Number of lawyers _____ paralegals _____ secretaries _____ others _____

Offices in other cities? _____

ITS PRACTICE

Practice Areas (%)

Litigation	_____	Maritime	_____	Corporate	_____
Real Estate	_____	Collections	_____	Estate Planning	_____
Labor	_____	Tax	_____	Banking	_____
_____	_____	_____	_____	_____	_____

Number of clients handled annually _____
Number of matters handled annually _____

Number of matters presently open _____
How often do you bill? _____

EQUIPMENT

Word processing equipment (if any) _____
Data processing equipment (if any) _____
Dictation equipment (if any) _____
Copy equipment (if any) _____
Telephone equipment _____

PROGRAM

% of emphasis desired

Admin. Audit _____ WP Needs Analysis _____ DP Needs Analysis _____

Preferred time (1) W/E _____ (2) W/E _____

Mail this request for service to the Alabama State Bar for scheduling. Send to the attention of Margaret Boone, executive assistant, Alabama State Bar, P.O. Box 671, Montgomery, Alabama 36101.

Bar Briefs

Hunt appoints Peebles to Securities Commission

Mobile attorney E.B. Peebles, III was appointed a member of the Alabama Securities Commission by Governor Guy Hunt.

Peebles

The five-member commission enforces state laws governing the issuance and sale of securities and related transactions.

Peebles will serve nearly a four-year term on the commission. His term will expire Oct. 31, 1993.

He is a partner of the firm of Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves. He has lectured at programs on developments in business law on behalf of the Alabama Bar Institute for Continuing Legal Education.

He serves on the Council for the Alabama Law Institute, the state's advisory law revision and law reform agency, and various business law committees associated with the American Bar Association.

—Mobile Press Register

■

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Riding the Circuits

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President—Arnold W. Umbach, Jr., Opelika

Vice-president—Cecil M. Tipton, Jr., Opelika

Secretary/treasurer—W. Banks Herndon, Opelika

ADDRESS CHANGES

Please check your listing in the current 1989-90 Alabama Bar Directory and complete the form below ONLY if there are any changes to your listing.

Due to changes in the statute governing election of bar commissioners, we now are required to use members' office addresses, unless none is available or a member is prohibited from receiving state bar mail at the office. Additionally, the Alabama Bar Directory is compiled from our mailing list and it is important to use business addresses for that reason.

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. This notification must be in writing.

Member Identification (Social Security) Number

(Circle One) Mr. Mrs. Ms. Miss Hon. Other

Full Name

Business phone number

Race

Sex

Firm or Organization

Birthdate

Year of admission

Office Mailing Address

City

State

Zip Code

County

Office Street Address (if different)

City

State

Zip Code

County

Membership Registration
ALABAMA STATE BAR
FAMILY LAW SECTION

The Family Law Section of the Alabama State Bar is committed to improving the practice of Family and Domestic Relations Law in Alabama. Please join us by registering for membership today. (Section dues are $15).

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1. NAME: _____

   Address: _____

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   Telephone Number: _____

2. Are you willing to assist in monitoring the progress of pending legislation? YES _____ NO _____

3. Are you willing to write articles for the section newsletter? YES _____ NO _____

4. On which committees would you like to serve? (Program, Legislative, Nominating, Membership, Newsletter, Continuing Legal Education)

   _____

5. What goals or aims should the section have? _____

   _____

   _____

6. Other comments and suggestions: _____

   _____

   _____

PLEASE MAIL THIS RESPONSE
AND YOUR CHECK TO:
Membership Committee—Family Law Section of the Alabama State Bar
P.O. Box 2141
Birmingham, Alabama 35201

Building Alabama's 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

Wilcox County

Wilcox County was named to honor Army Lieutenant Joseph M. Wilcox. Wilcox was a native of Connecticut who had graduated from West Point in 1812. His first assignment in the army was to the Southern frontier, shortly before the outbreak of the Creek Indian War.

During the Indian uprising, which began in 1813, Wilcox led a detachment of five men in a canoe on a mission to locate an overdue supply barge on the Alabama River. He and three of his soldiers were captured by hostile Indians. The Indians tortured, scalped and then killed the captives. Wilcox was buried with military honors at Fort Claiborne in Monroe County in January 1814. Less than six years later the grateful people of Alabama named one of their new counties for him.

The territory that is now Wilcox County was opened for settlement after the Treaty of Fort Jackson which ended the Indian wars in the summer of 1814. The first white settlers arrived in 1815. The county was established December 13, 1819, one day before Alabama became a state. It was formed from lands previously in Dallas and Monroe counties.

One of the first orders of business in the new county was the selection of a county seat. Commissioners were appointed to select a temporary seat of justice. Although no records exist of this temporary location, it is likely that the home of one of the commissioners was used.

In 1821 the town of Canton, located on a bluff on the west bank of the Alabama River, entered into an agreement with the commissioners to become the county seat. The town donated 50 acres to the county, designated a lot for a public square and authorized the sale by the county of the remaining lots. On July 29, 1822, Wiley, Benjamin and Ezekiel Glover agreed to construct a courthouse in Canton by October 1 of that year for a contract price of $2,500. The two-story frame structure was described as being 36 feet long, 24 feet wide and 18 feet high. It is known from early court records that this courthouse was in use in 1823. Canton thrived during this period as the county seat town.

By 1830 a movement began to relocate the courthouse to a place closer to the geographic center of the county. The State Legislature appointed a committee to select a new site. On September 14, 1832, Thomas and Martha Hobbs Dunn signed a conditional deed to 12 acres of land approximately five miles east of Canton, provided that the county move the courthouse to this new location. The gift was accepted, and the county seat was moved from Canton in 1833. The new town became known first as Wilcox Courthouse and then Barboursville, in honor of Senator Philip P. Barbour of Virginia. The town of Canton declined and then gradually disappeared over the years following the courthouse removal.

The courthouse built in the new town was erected by the Rev. James Thompson, a Methodist minister. It was a two-story wooden structure having offices on the first floor and a courtroom and jury rooms on the second. On December 20, 1833, the County Commission approved the payment of $1,495 for the building.

The name "Barboursville" proved to be unpopular with many citizens. Due to lingering resentment over the courthouse relocation from Canton, people outside the town sometimes called the residents of Barboursville "Shavers," much to their chagrin. In 1841, Dr. John D. Caldwell, a pioneer in the community, suggested that the town change its name to Camden which was his former hometown in South Carolina. The idea was accepted, and Camden was incorporated that year.

The wooden courthouse at Camden served the county until 1857 when it was razed to be replaced by a new building. Architect Alexander Bragg, a native of North Carolina and the brother of General Braxton Bragg, was employed by the county on February 14, 1857, to build a

Samuel A. Rumore, Jr., is a graduate of the University of Notre Dame and the University of Alabama School of Law. He served as founding chairperson of the Alabama State Bar's Family Law Section and is in practice in Birmingham with the firm of Miglionico & Rumore.

Old Wilcox County Courthouse, completed in 1859, now the Wilcox County Library

more elaborate brick structure. The contract provided that he would remove the old building, build a new structure and have until January 1, 1859, to complete the work. The contract price was $16,764. After the old courthouse was torn down, court was held in the Wilcox Hotel until the new courthouse was completed.

Bragg designed a Greek Revival brick courthouse. The west, or front, entrance has four fluted Doric columns. A bracketed overhanging cornice extends around the building. An interesting feature is the pattern of the supporting brackets which alternate around the roof first as paired and then as single brackets. The building was originally designed with interior staircases. However, double wrought iron external stairs and an iron porch were added to the front of the building in the 1880s.

In 1963, north and south annexes were added to the main courthouse. The style used for these additions conformed to the original Greek Revival style used in 1859. The contractor for this project was Weston Scarsbrook. Sherlock, Smith and Adams, Inc. served as architects.

In 1978 a three-story courthouse annex was constructed within a block of the original building. The courts were removed to the new structure. The former courtroom in the 1859 building was renovated to become the Wilcox County Library. The contractor for the new building was Rodgers and Bullard Construction Corporation of Montgomery. The architect was Martin J. Lide Associates, Inc. of Birmingham.

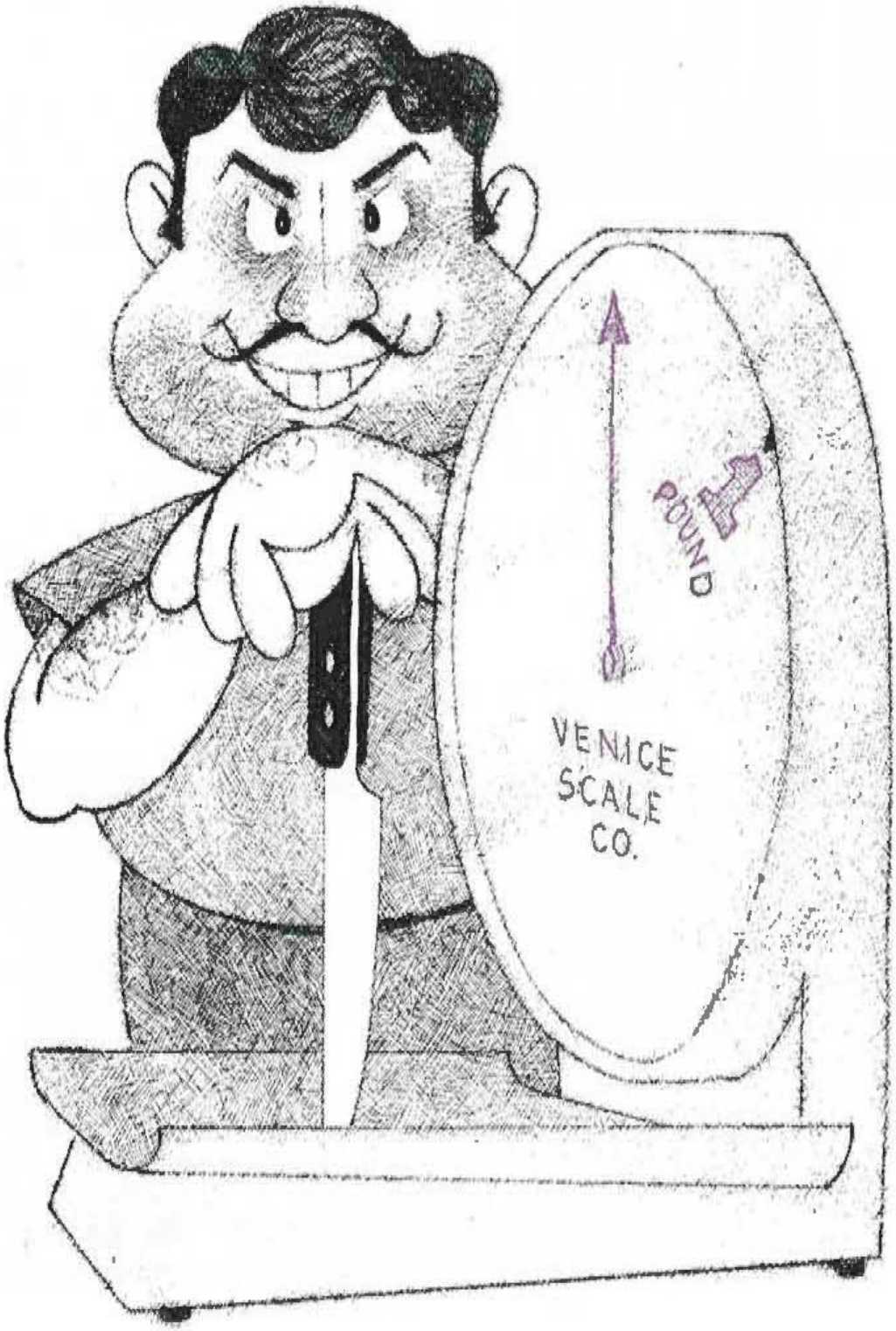
Before completing the story of the Wilcox County Courthouse, a footnote must be added to acknowledge the contributions of the Cook family to Wilcox County. Attached to the front of the old courthouse is a marker honoring Enoch Hooper Cook. Cook was more than 50 years old when he enlisted in the Confederate Army as a private. Ten of his sons, as well as two of his grandsons, likewise served the Confederacy. Their names are listed on the marker as the largest number of persons from one family—13—to render military service in the War Between the States. Four of his sons and both of the grandsons were killed in the war.

One of the surviving sons, Zoroaster S. Cook, made another significant contribution to Wilcox County. He served as probate judge. In 1865 the County Commission authorized Zo Cook to take whatever steps he thought necessary to preserve Wilcox County records from Federal raiders. Judge Cook enlisted the aid of a local coffin maker, James P. Dannelly, who built a number of strong wooden boxes. Under cover of night, the deed, mortgage, estate, marriage, tax and other permanent records of the county were packed into the boxes and taken to a hiding place several miles away. The troops who entered the courthouse later destroyed or carried away whatever papers they could find. But all of the permanent and valuable documents of the county were hidden. Due to the efforts of Judge Cook, the records of Wilcox County from 1819 to 1865 today remain virtually intact, unlike those of many other counties.

The author acknowledges with deep appreciation material furnished to him by John L. Godbold, attorney in Camden, Alabama; his wife, Mary Scott Godbold; and Wilcox County historian Ouida Starr Woodson. ■

Wilcox County Courthouse Annex

Punitive Damages and Post-Verdict Where Are We Now and Where Do We



by Davis Carr

There are procedures for post-verdict review of punitive damages, both pre- and post-tort reform. This article examines those procedures. First, pre-tort reform case law is presented, focusing on *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989), which may still be relevant after the Alabama Supreme Court examines the tort reform statute on the same topic, *Alabama Code* § 6-11-23 (1975) (Supp. 1989). The second portion of this article will address this statute. Finally, practice pointers pursuant to both procedures will be discussed.

Pre-tort reform—the *Green Oil* factors

To understand the *Green Oil* factors, a brief history is helpful.

The origins of *Green Oil*—The genesis of the *Green Oil* factors are found in a special concurrence by Justice Jones in *Ridout's-Brown Service, Inc. v. Holloway*, 397 So.2d 125, 127 (Ala. 1981). *Holloway* involved a $220,000 award relative to preparation and embalmment of a body. While concurring in affirming the entire award, Justice Jones addressed the "unguided discretion accorded in both the fact-finding process and the judicial review that fixes the amount of punitive damages." *Id.* While punitive damages "ought to sting in order to deter," Justice Jones wrote, "only in the rarest of cases should it be large enough to destroy; this is not its purpose." *Id.* The current system furnishes "virtually no yardstick for measuring the amount of the award over against the purpose of the award." *Id.* While recognizing that evidence of wealth of the defendant was entirely too prejudicial to inject in the trial before a jury decides liability, Justice Jones suggested that a post-judgment proceeding

Procedures: Go from Here?

by way of judicial review could examine the financial worth of a defendant, and then measure the amount of the award over against the purpose of the award. *Id.* at 128.

Six years later in *Aetna Life Ins. Co. v. Lavoie*, 505 So.2d 1050 (Ala. 1987) (the "final chapter" of this case), Justice Houston wrote a special concurrence which began with his observations that a substantial portion of the judgment in that $3.5 million punitive damage award (on the bad faith refusal to pay $1,579.74) violated constitutional standards. *Id.* at 1060. "We have permitted punitive damages to be levied without the constitutional safeguards that we insist attend every criminal prosecution." *Id.* at 1061. Justice Houston proceeded to enumerate seven factors which "should be taken into consideration by the trial court in setting the amount of punitive damages." *Id.* at 1062. It is submitted this was a request for legislation along these lines; however, when the legislature met, this was not the law enacted.

These seven factors later became the *Green Oil* factors, and briefly they are as follows:

1. Punitive damages should bear a reasonable relationship to the harm. If actual or likely harm is slight, damages should be small. If grievous, damages should be greater.
2. The degree of reprehensibility of defendant's conduct should be considered, including the duration of this conduct, the degree of defendant's awareness of any hazard, concealment, along with existence and frequency of similar past conduct.
3. Punitive damages should remove the profitability of the wrongful conduct so that defendant recognizes a loss.
4. The financial position of defendant is relevant.
5. All costs of litigation should be included to encourage plaintiffs to bring wrongdoers to trial.
6. If defendant has been criminally sanctioned for his conduct, this should be taken into account in mitigation.
7. Other civil actions against the same defendant, based on the same conduct, should be taken into account in mitigation.

Id.

Accordingly, it is submitted that *Green Oil* factors have their origin from two entirely different sources. Justice Jones was seeking to ensure that punitive damages would "sting" the tortfeasor. Justice Houston was seeking to make punitive damages constitutional by affording guidelines to satisfy due process arguments. It is this latter rationale which the court has apparently embraced, in what are submitted to be the only opinions to date by a majority of the court squarely addressing the arguments as to constitutional deficiencies with regard to punitive damages, *Central Alabama Elec. Co-op. v. Tapley*, 546 So.2d 371 (Ala. 1989) and *Industrial Chem. and Fabricators, Inc. v. Chandler*, 547 So.2d 812 (Ala. 1989).

Meanwhile, another relevant trend in post-verdict analysis was developing, *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986). *Hammond* was a $12,000 verdict for fraud, breach of contract and negligence regarding misrepresentations as to the effect of change of insurers on an employee who participated in an insurance program. The trial court ordered a remittitur of that portion of the verdict in excess of $2,000.

In an opinion by Justice Shores, the court noted that it was not only appropriate, "but indeed our duty," to require trial courts to "reflect in the record the reason for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages." *Id.* at 1379. A number of factors appropriate for consideration, according to Justice Shores, included culpability of the defendant's conduct, desirability of discouraging others from similar conduct, impact upon the parties, as well as impact on innocent third parties. *Id.* (citing cases). Accordingly, there ensued a series of *Hammond* remands, wherein the trial judges, as originally understood,[1] were required to state their reasons for either granting a remittitur, or refusing to grant a remittitur. All reported opinions which set forth trial judges' *Hammond* findings are noted below.[2] Considering these cases should be helpful in a *Green Oil* analysis.

The *Green Oil* factors—With this background, in January of 1989 the court released its opinion in *Green Oil*. A small oil company operated by the Green brothers in Union Springs sued store owners for recovery of personal property and for money due on an open account for gasoline delivered. The store owners counterclaimed seeking compensatory and punitive damages for breach of contract and fraud. The jury awarded the oil company $2,000 on its claim, but

Davis Carr, a partner in the Birmingham firm of Hand, Arendall, Bedsole, Greaves & Johnston, received his undergraduate degree from the University of South Alabama and law degree, cum laude, from the University of Alabama School of Law. He is a member of the Alabama Defense Lawyers Association, DRI and the Litigation Section of the ABA.

then awarded the store owners compensatory damages of about $15,000 and punitive damages of $150,000. The trial judge remitted all but $25,000 of the punitive damage award, and this action was affirmed on appeal in an opinion authored by Justice Houston. After reviewing the *Hammond* developments, and after quoting Justice Jones in the *Holloway* case, discussed previously, Justice Houston observed that a jury verdict may be excessive "even when it is the result of a properly functioning jury." 539 So.2d at 222. That is, since the jury does not know the impact its verdict is having on the defendant, the verdict may not be accomplishing "society's goals." *Id.* Accordingly, the seven factors set forth by Justice Houston in his special concurrence in the 1987 *Lavoie* case was adopted by the full court, with Justice Maddox concurring specially. The trial judge's *Hammond* findings, which were turned into the *Green Oil* analysis in this case, are set forth in the opinion and are instructive.

Specifically, it was noted that defendant was not incorporated, was operated as a partnership out of Union Springs by the two Green brothers, and therefore any judgment was a personal judgment against the Greens. "It doesn't take a large verdict to be heard and felt a few miles down the road in Union Springs by two local individuals." *Id.* at 221. It is hoped this does not mean to suggest that there should be some relationship between the amount of the verdict to the geographical distance between plaintiff and a corporate defendant's headquarters.)

***Green Oil* factors applied**—Again, it is suggested that *Hammond* findings are instructive for *Green Oil* analysis. Accordingly, it is helpful to review those *Hammond* findings by trial courts which are reported in the decisions, as listed in footnote 2.

Moreover, there are presently four cases which lend specific insight as to how *Green Oil* factors are to be applied.

The most interesting *Green Oil* application to date is *Wilson v. Dukona Corp. N.V.*, 547 So.2d 70 (Ala. 1989). *Wilson* involved approximately $20,000 in compensatory damages and roughly $21,000 in punitive damages for the wrongful cutting of timber. Once again Justice Houston authored the majority opinion. Justices Jones, Adams, Steagall and Kennedy concurred. Chief Justice Hornsby, along with Justices Maddox, Almon and Shores, dissented, although only Justice Maddox wrote a dissenting opinion.

The majority opinion in *Wilson* examined evidence tendered at a post-judgment hearing, which in essence disclosed the abject poverty of the individual defendant against whom the punitive damages were assessed. He was on social security and received $580 a month. He got a monthly pension of $300. He was 57 years old and had a disabling nerve disease. He had a total monthly inoome of about $970, and owed about $450 on a house note, $190 for a car, and the remainder went for "medication and other living expenses." *Id.* at 73. Moreover, the jury did not know that in order to satisfy this judgment defendant would have to sell 306 acres of land which had been in his family "for many years and on which he planned to retire." *Id.* at 74.

Consequently, the majority held that the post-judgment hearing disclosed punitive damages were excessive in this case, and ordered that plaintiffs either accept remittitur of the *entire* punitive damage award, or the judgment would be reversed and the case remanded.

While it is therefore clear from *Wilson* that impoverished defendants may be protected from punitive damage awards, what impact does or should the availability of liability insurance have in this analysis? While that question was not directly answered in *Industrial Chem. and Fiberglass Corp. v. Chandler*, 547 So.2d 812 (Ala. 1989), Jefferson County (Bessemer Division) Circuit Judge Ralph Cook did specifically note that defendant was "fully insured" for the two separate $2.5 million awards, without any further discussion.[3] *Industrial Chemical* is not, technically, a *Green Oil* factor analysis case, but the discussion by Judge Cook is nonetheless instructive when considered in conjunction with *Green Oil* factors.

The third *Green Oil* factors analysis is found in *United Services Auto. Asso. v. Wade*, 544 So.2d 906 (Ala. 1989). In *Wade*, Walker County Circuit Judge Horace Nation, III awarded $3.5 million punitive damages for bad faith refusal to pay on a homeowner policy. Judge Nation entered his *Hammond* findings, which the court reviewed by also considering the new *Green Oil* factors. Justice Almon, writing for the court, affirmed the judgment conditioned on plaintiff's acceptance of a $1 million remittitur.

The fourth case which gives guidance as to application of *Green Oil* factors is actually a special concurrence by Justice Houston in *Olympia Spa v. Johnson*, 547 So.2d 80 (Ala. 1989). *Olympia Spa* affirmed a $3 million wrongful death award for the negligence of a spa when plaintiff's decedent died in a steam room at the spa. The trial court's *Hammond* findings are set forth in the majority opinion. Justice Houston's concurrence stated his preference to remand the case for the trial court to evaluate the award by the new *Green Oil* standards. He then proceeded to analyze them in the context of the case. The harm which occurred was great, "a painful, horrifying death." *Id.* at 89. On the other hand, the degree of reprehensibility was so slight that the trial court directed a verdict in favor of defendants on the wanton misconduct claim. There was no evidence of past problems with the steam room, or of anyone being burned previously, and no evidence that the negligence was profitable to the defendants. No criminal sanctions were imposed against any defendant, no other civil actions were filed against these defendants for the same issue, and the "cost" factor of *Green Oil* would not enhance the award. The only question Justice Houston had was whether the amount of the judgment would "substantially affect the financial well-being of these defendants."[4] *Id.* at 90.

With this case law in mind, a brief overview of the tort reform bill is discussed next.

Tort reform post-verdict analysis

On June 11, 1987, the legislature enacted tort reform legislation, including *Alabama Code* § 6-11-23 (1975) (Supp. 1989), which provides:

(a) No presumption of correctness shall apply as to the amount of punitive damages awarded by the trier of the fact.

(b) In all cases wherein a verdict for punitive damages is awarded, the trial court shall, upon motion of any party, either conduct hearings or receive additional evidence, or both, concerning the amount of punitive damages. Any relevant evidence, including but not limited to the economic impact of the verdict on the defendant or the plaintiff, the amount of compensatory damages awarded, whether or not the defendant has been guilty of the same or similar acts in the past, the nature and the extent of any effort the defendant made to remedy the wrong and the opportunity or lack of opportunity the plaintiff gave the defendant to remedy the wrong complained of shall be admissible; however, such information shall not be subject to discovery, unless otherwise discoverable, until after a verdict for punitive damages has been rendered. After such post-verdict hearing the trial court shall independently (without any presumption that the award of punitive damages is correct) reassess the nature, extent and economic impact of such an award of punitive damages, and reduce or increase the award if appropriate in light of all the evidence.[5]

There are no reported Alabama Supreme Court decisions addressing this legislation. Several significant changes from existing law are obvious, however.

Pursuant to this statute, there is no presumption of correctness as to the amount of the award. Also, upon motion of any party, a hearing can be conducted to receive *additional* evidence. The "economic impact" of the verdict on the plaintiff is to be considered, as well as on the defendant. The amount of compensatory damages awarded is to be considered, addressing Justice Jones' concerns in the *Holloway* case.

Whether the defendant has done the same thing in the past is material, whether the defendant remedied the wrong is also relevant, as well as the opportunity plaintiff gave defendant to remedy the defect. This information is not discoverable, unless otherwise discoverable, until after a verdict for punitive damages has been rendered, which means that there must be a provision now for post-verdict discovery.

In any event, it is clear that there now can be an additional discovery period, post-verdict, for either party in which these factors are to be gathered, and then presented in evidence to the trial court. Some suggested areas of inquiry are discussed in the final portion of this article.

Practice pointers

As suggested previously, a combination of the *Hammond* findings and *Green Oil* factors can come into play even in an analysis under the tort reform statute. Some specific potential problem areas are noted.

Filing a *Hammond/Green Oil* motion—As noted previously, *Hammond* seemed to require *Hammond* findings in all cases, by the very terms of its own opinion. Then, when *Green Oil* came along, it was obviously applied "retroactively" as patently made clear in the case of *Alabama Elec. Co-op., Inc. v. Tapley*, 546 So.2d 371 (Ala.1989) which was decided in May 1989. Remember that *Green Oil* was decided in January 1989, *after Tapley* had been tried, and *after Tapley* had been appealed. Notwithstanding that counsel for defendant at trial could not have foreseen *Green Oil*, the *per curiam* opinion rejected certain of defendant's arguments by stating that it "did not object to the trial court's failure to give such an instruction (charging the jury with *Hammond* and *Green Oil* guidelines), nor did [defendant] request such an instruction." *Id.* at 376. Moreover, the same opinion stated: *"If a defendant properly moves the trial court to do so,* the trial court is obligated to state on the record its reasons for either interfering with the jury's verdict, or not interfering with it." *Id.* at 377. Until the court clarifies this issue, at a minimum, defendants must move the court to enter *Hammond* and *Green Oil* factors. *Tapley* also seems to suggest that should a litigant want to preserve certain constitutional arguments, he must move the court to have the *jury* apply the *Hammond* and *Green Oil* factors.[6] It should also be noted that it would appear that counsel for plaintiff should file such a motion should plaintiff wish to argue additur.

Entry of judgment—There is no requirement as to when a trial court must enter judgment on the jury verdict. Obviously, counsel for plaintiff should move for immediate entry of judgment so that interest will accrue. If counsel for defendant is going to challenge the amount of the awards, then counsel should also move to delay entry of the judgment because if the judgment is going to be less than the jury verdict, interest should not accrue. There are no Alabama cases discussing this issue. In *Browning v. Michaels of Ore.*, CV #88-T-413-N, a case pending in the Middle District of Alabama which addresses (among other things) whether the punitive damages limit is constitutional, the judge did not enter judgment on a punitive damage verdict pending certification of the question of the constitutionality of the limit on punitive damages, found in *Alabama Code* § 6-11-21 (1975) (Supp. 1989), to the Alabama Supreme Court.

Discovery—The trial court only has 90 days to dispose of post-trial motions, absent an agreement on the record. Rule 59(e) Ala.R.Civ.P. This can be 90 days of rather intense discovery if all of the factors previously discussed in this article are considered. In demonstrating "economic impact" on both sides, creative counsel could spend considerable time and money. "Economic impact" on both parties can be rather broad. One can readily envision teams of accountants pouring over financial sheets of corporations. One can just as easily envision investigators trying to determine whether an individual defendant indeed has any assets to satisfy a punitive damage award, even for a seemingly insignificant amount of $20,000, as in the *Wilson* case. As well, if *plaintiff* is wealthy, should that reduce the verdict? Prudent counsel on both sides will be engaging n this post-verdict discovery to try and uttress whether there would indeed be ny economic harm. The broad term conomic impact" indicates that the only limits to post-verdict discovery on this issue will be the limits of counsel's imagination.

A hearing—Obviously, there is no need to gather all of the data if one does not have a hearing. Counsel on both sides should be prepared to present this evidence at a hearing, and bear in mind that this evidence should be admissible. Preparation for such a hearing, whether the punitive damage award was $20,000 or $2 million, will be time consuming and costly in and of itself, but crucial. Conducting such hearings in *all* cases in which punitive damages have been awarded will also retard the disposition of civil cases even further.

A summary: categories—At the risk of being redundant, the following is a summary of the factors to be considered, both from case law and the statute:

From the statute:

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

From *Green Oil*:

1. Does the punitive damage award bear a reasonable relationship to the harm likely to occur from defendant's conduct?
2. The degree of reprehensibility of defendant's conduct, including:
   (a) the duration of this conduct;
   (b) the degree of defendant's awareness of any hazard which this

FOOTNOTES

1. In *Hammond* the court stated: "We simply now *require* the trial courts to state for the record the factors considered in either granting or denying a motion for new trial based upon the alleged excessiveness or inadequacy of a jury verdict." 493 So.2d at 1379 (emphasis supplied). Subsequently, in *Carnival Cruise Lines, Inc. v. Goodin*, 535 So.2d 98, 104 (1988) the court remanded a case because the trial judge did not enter *Hammond* findings and noted that *Hammond* held that a trial court "must set forth its reasons for interfering with a jury verdict, or refusing to interfere, when the issue of excessiveness is properly raised." It is interesting to note that the court has apparently retreated from this position that *Hammond* findings must be specifically set forth in all cases. *See, e.g., Towder Realty Corp. v. Sabry*, 542 So.2d 1240, 1242 (1988) ("Since *Hammond* we have noted it was never our intention to automatically remand every case in which excessiveness was an issue.") and *Water Works & Sewer Bd. v. Wales*, 533 So.2d 212, 215 (Ala. 1988). This issue will be addressed in the practice pointers section of this article.
2. The following list should contain all reported decisions by the court in which the entire *Hammond* findings are recited, as of the time this article went to print, in chronological order: *Alabama Power Co. v. Cantrell*, 507 So.2d 1295 (Ala. 1987) (on return after remand) (Judge NeSmith) ($1 million electrocution death verdict left undisturbed; *Black Belt Wood Co., Inc. v. Sessions*, 514 So.2d 1249 (Ala. 1987) (on return after remand) (Judge Hughes) ($3.5 million accidental death verdict left undisturbed); *State Farm Fire & Cas. Ins. v. Lynn*, 516 So. 2d 1373 (Ala. 1987) (on return after remand) (Judge Macon) ($250,000 insurance fraud verdict left undisturbed); *Davison v. Mobile Infirmary*, 518 So.2d 675 (Ala. 1987) (on return after remand) (Judge Byrd) (refusing to accept trial court's remittitur from $8 million to $1.35 million); *Ensor v. Wilson*, 519 So.2d 1244 (Ala. 1988) (on return after remand) (Judge Mullins) ($2.5 million verdict for brain damaged baby left undisturbed); *Citi Bank of Ala. v. Eskridge*, 521 So.2d 931 (Ala. 1988) (Judge Thorn) ($62,500 verdict for fraud in suit versus bank left undisturbed); *Haynes v. Payne*, 523 So.2d 333 (Ala. 1987) (on return after remand) (Judge Crowder) ($140,000 fraud verdict affirmed); *John Hancock Variable Life Ins. Co. v. Pierce*, 530 So.2d 719 (Ala. 1987) (on return after remand) (Judge Robert L. Byrd) (affirming $150,000 punitive damages in fraud action against insurance company); *United Services Asso. v. Wade*, 544 So.2d 906 (Ala. 1989) (Judge Nation) (remitting $3.5 million bad faith award by $1 million); *Olympia Spa v. Johnson*, 547 So.2d 80 (Ala. 1989) (Judge Zoghby) ($3 million death award sustained); *Industrial Chem. and Fiberglass Corp. v. Chandler*, 547 So.2d 812 (Ala. 1989) (on return after remand) (Judge Cook) (two $2.5 million wrongful death verdicts left undisturbed); *Vintage Enterprises, Inc. v. Jaye*, 547 So.2d 1169 (Ala. 1989) (Judge Howard Bryan) (affirming $500,000 punitive damage award for breach of warranty and fraud in connection with sale of mobile home); *Estate of Jackson v. Phillips Petroleum Co.*, 676 F.Supp. 1142 (S.D. Ala. 1987) (Judge Howard) ("indirectly" applying *Hammond*) (reducing punitive damages from $5,041,694.04 to $300,000 in one case, and from $2,519439.85 to $150,000 in another).
3. For an interesting discussion concerning whether a tortfeasor should have the availability of liability insurance to indemnify him from wrongful conduct which would impose punitive damages, and whether this satisfies the goals of society, see the discussion by Professor George Priest, in Priest, *Insurability and Punitive Damages*, 40 Ala.L.Rev. 1009 (1989). There does seem to be some compelling logic in support of the proposition that, if one societal purpose of punitive damages is to *punish the wrongdoer*, how can that purpose be served if the wrongdoer can shift financial responsibility to an insurance carrier? The topic of whether the court should disallow insurance coverage for wrongful conduct which leads to the imposition of punitive damages is best left to another article, on another day, but it is more than an interesting philosophical discussion in light of what the court is doing on the *Green Oil* factors, as illustrated in *Industrial Chemical*.
4. As co-counsel of record for defendant in that case, the author can state that the answer to this question was mooted by the availability of ample insurance coverage, but the relevant question as to whether the punitive damages should be shifted to the carrier, as noted previously, has not been adequately raised and addressed by the court. Indeed, it may not be possible to do so because counsel retained by an insurance company to represent an insured cannot undertake any actions which would be adverse to insurance coverage. *See, e.g., L&S Roofing Co., Inc. v. St. Paul Fire & Marine Ins. Co.*, 521 So.2d 1298 (Ala. 1987). It is therefore difficult to conceive how a proper analysis of whether punitive damages should be insured will be presented to the court, short of a declaratory judgment action, which up to this point, the court has not been willing to entertain. *See, e.g., United States Fid. & Guar. Co. v. Adams*, 485 So.2d 720 (Ala. 1986). As of the time this article is going to print, there are cases on petition for writs of mandamus to allow limited intervention by insurance carriers in underlying damage suits to ascertain coverage matters. *Ex parte Universal Underwriters Inc. Co.*, S.Ct. No. 89-541. These cases do not address the question of insuring punitive damages, but would set up a vehicle to do so in future cases.
5. As to the effective date of this provision, Alabama Code § 6-11-30 (1975) (Supp. 1989) provides: "This article shall not affect the rights of any person if such rights accrued prior to June 11, 1987," whatever that means. As of this date, no cases have addressed whether that means that the act applies to *causes of action* accruing after June 11, 1987, or whether it applies to all *judgments on punitive damage awards* (since the "right" of punitive damages could, arguably, not "accrue" until the jury awards such damages) occurring after June 11, 1987.
6. Indeed, on December 11, 1989, the author presented oral argument to the court addressing such a procedure, but still noting constitutional deficiencies with regard to punitive damages. That is, even if the court were to bifurcate liability and damages and allow a jury to consider

conduct has caused or is likely to cause;
(c) any concealment or cover-up of the hazard;
(d) existence and frequency of similar past conduct.

3. Punitive damages should remove the profit, if any, from the defendant and should be in excess of the profit so that defendant recognizes a loss.
4. Defendant's "financial position."
5. Cost of litigation to the plaintiff.
6. If defendant has received criminal sanctions, that should be taken into account in mitigation.
7. If there have been other civil actions against the same defendant based on the same conduct, this should be taken into account in mitigation of the punitive damages.

From *Hammond*:
1. Culpability of defendant's conduct.
2. The desirability of discouraging others.
3. "The impact" on the parties.
4. "Impact" on innocent third parties.[7]

From *Holloway*: The punitive damage award should sting, but ordinarily it should not destroy.

From *Wilson*: Defendant's "right to fair punishment" must be considered *above* plaintiff's right to recover the fullest amount of punitive damages. 547 So.2d at 73. *But see*, Justice Maddox, dissenting, *id.* at 74, and the tort reform statute discussed in this article.

From *Lavoie*: "A comparative analysis with other awards in similar cases." 505 So.2d at 1053.[8]

Conclusion

We have nothing but unlimited opportunities before us, on both sides of the bar, and along with the trial bench, in addressing punitive damages, post-verdict, given the guidelines we have been provided thus far. It certainly is an interesting time to be an Alabama litigator. ■

Green Oil factors (again, only after reaching a decision as to liability), that would not obviate the constitutional objections currently raised by defendants with regard to the maximum amount of the penalty or punishment being assessed against defendants not being set. As stated at oral argument, bifurcation of trials and allowing the jury to assess punitive damages by applying the *Green Oil* factors would not cure the remaining constitutional deficiency as to the maximum amount of the penalty not being determined. *See, e.g., Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988) (O'Conner, J., concurring); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, ____ U.S. ____, 109 S.Ct. 527, 57 U.S.L.W. 4985 (1989) (Brennan, J., concurring). Since Alabama's due process clause clearly applies equally to civil litigants as well as criminal defendants, see, e.g., *Thomas v. Diversified Const.*, 551 So.2d 343 (Ala. 1989), how can an undetermined civil punishment withstand constitutional scrutiny when a criminal one could not? It would be analogous to upholding legislation affording juries the discretion in all criminal cases to determine the appropriate penalty, whether it be one day in jail or the electric chair. Imagine a judge charging a jury in a criminal case along the lines of what juries are charged with respect to punitive damages in Alabama Pattern Jury Instructions 11.03. The author's case on appeal is *Charter Hospital v. Weinberg*, supreme court no. 88-639.

7. Supposedly this could mean that if the children of a deceased breadwinner would be adversely affected, they could be considered "innocent third parties." On the other hand, it would seem logical to presume that shareholders of a corporation, or perhaps taxpayers of a governmental entity, who have to pay a large adverse verdict, should also be considered "innocent third parties."
8. As to this listing of factors, the author hereby acknowledges limited plagiarism from a handout by Danner Frazer, Jr., *How to Handle a Post-Judgment Punitive Damage Hearing—Discovery to End*, presented at the Alabama Defense Lawyers Association fall meeting, 1989.

cle opportunities

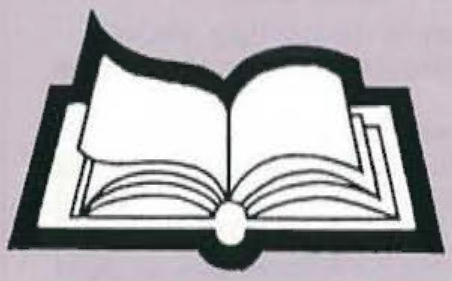
march

15-16

ADVANCED CHAPTER 11 BANKRUPTCY SYMPOSIUM
Phoenix, Arizona
Professional Education Systems, Inc.
Credits: 12.0 Cost: $395
(717) 836-9700

15-18

ENVIRONMENTAL LAW CONFERENCE
Keystone Conference Center, Keystone, Colorado
American Bar Association
Credits: 8.3 Cost: $200
(312) 988-5000



16-17

PREPARATION & TRIAL OF MOTOR VEHICLE COLLISION CASE
Caesar's Palace, Las Vegas
Association of Trial Lawyers of America
Credits: 10.0 Cost: $300
(800) 424-2725

22 thursday

BASIC REAL ESTATE LAW
Birmingham
National Business Institute
Credits: 6.0 Cost: $98
(715) 835-8525

23 friday

DEPOSITION TAKING
Carraway Convention Center, Birmingham
Alabama Bar Institute for CLE
Credits: 6.0
(205) 348-6230

GOVERNMENT CONTRACTS
Birmingham
Cumberland Institute for CLE
Credits: 6.0 Cost: $110
(205) 870-2865

BASIC REAL ESTATE LAW
Huntsville
National Business Institute
Credits: 6.0 Cost: $98
(715) 835-8525

24-26

SKI WITH THE STARS
Sheraton Hotel, Steamboat Springs, Colorado
Association of Trial Lawyers of America
Credits: 14.0 Cost: $300
(800) 424-2725

29-31

23RD ANNUAL UNIFORM COMMERCIAL CODE INSTITUTE
Drake Hotel, Chicago
Uniform Commercial Code Institute
Credits: 15.3 Cost: $645
(717) 249-6831

29-April 1

BANKRUPTCY LITIGATION INSTITUTE
The Registry Hotel, Scottsdale, Arizona
Institutes on Bankruptcy Law
Credits: 15.0 Cost: $550
(404) 535-7722

30 friday

BANKING LAW
Harbert Center, Birmingham
Alabama Bar Institute for CLE
Credits: 6.0
(205) 348-6230

LABOR ARBITRATION
Drake Hotel, Chicago
National Practice Institute
Credits: 7.0 Cost $195
(612) 338-1977

LEGAL PROBLEMS OF THE ELDERLY
Birmingham
Alabama Bar Institute for CLE
Credits: 6.0
(205) 348-6230

30-31

PRODUCTS LIABILITY LAW
Drake Hotel, Chicago, Illinois
National Practice Institute
Credits: 10.5 Cost: $295
(612) 338-1977

april

6 friday

NEGOTIATION & SETTLEMENT
Birmingham
Cumberland Institute for CLE
Credits: 6.0 Cost: $110
(205) 870-2865

8-12

PROSECUTION OF VIOLENT CRIME
Westin Hotel, Chicago, Illinois
National College of District Attorneys
Credits: 22.8 Cost: $460
(713) 747-6232

13 friday

ENVIRONMENTAL LAW
Harbert Center, Birmingham
Alabama Bar Institute for CLE
Credits: 6.0
(205) 348-6230

18-24

BASIC COURSE IN TRIAL ADVOCACY
The Hilton, Scottsdale, Arizona
Association of Trial Lawyers of America
Credits: 47.8 Cost: $600
(800) 424-2725

19-21

SOUTHEASTERN CORPORATE LAW INSTITUTE
Point Clear
Alabama Bar Institute for CLE
Credits: 12.0
(205) 348-6230

20 friday

MORTGAGE FORECLOSURES
Birmingham
Alabama Bar Institute for CLE
Credits: 6.0
(205) 348-6230

20-21

REPRESENTING CITY AND COUNTY GOVERNMENTS
Perdido Hilton, Orange Beach
Alabama Bar Institute for CLE
Credits: 6.0
(205) 348-6230

23-27

PLANNING TECHNIQUES FOR LARGE ESTATES
Waldorf-Astoria, New York
American Law Institute-American Bar Association
Credits: 28.0 Cost: $700
(215) 243-1600

26 thursday

MORTGAGE FORECLOSURE & REPOSSESSION IN ALABAMA
Birmingham
National Business Institute
Credits: 6.0 Cost: $98
(715) 835-8525

27 friday

SOUTHEASTERN TRIAL INSTITUTE
Birmingham
Alabama Bar Institute for CLE
Credits: 6.0
(205) 348-6230

MORTGAGE FORECLOSURE & REPOSSESSION IN ALABAMA
Huntsville
National Business Institute
Credits: 6.0 Cost: $98
(715) 835-8525

may

3-4

INSTITUTE ON WILLS AND PROBATE
Westin Hotel, Dallas
Southwestern Legal Foundation
(214) 690-2377

4 friday

OIL, GAS AND MINERAL LAW
Law Center, Tuscaloosa
Alabama Bar Institute for CLE
Credits: 6.0
(205) 348-6230

REPRESENTING ALABAMA BUSINESSES
Birmingham
Alabama Bar Institute for CLE
Credits: 6.0
(205) 348-6230

11 friday

ADVANCED REAL ESTATE
Birmingham
Alabama Bar Institute for CLE
Credits 6.0
(205) 348-6230

18-19

ANNUAL SEMINAR ON THE GULF
Sandestin Resort, Destin
Alabama Bar Institute for CLE
Credits: 6.0
(205) 348-6230

■

Recent Rule Changes Make It Easier for Lawyers to Receive CLE Credit for Attending Out-of-state Programs

by Keith B. Norman

In 1988, several mandatory CLE states and the American Bar Association Information Resources Office began a cooperative accreditation reporting program. The purpose of the program was to establish a system whereby each MCLE state would accept the accreditation decisions of all other MCLE jurisdictions, but retain the right of refusal as appropriate to the individual state's MCLE rules. The program had two primary objectives: (a) to better serve attorneys striving to meet MCLE requirements in multiple states and (b) to reduce the workload of each MCLE state as well as that of CLE providers presenting courses in multiple states. At its November 10, 1989, meeting, the Alabama MCLE Commission approved our state's participation in the cooperative accreditation program. Alabama becomes the 15th of 33 states with mandatory continuing legal education to take part in this innovative program.

In addition to Alabama's participation in the cooperative accreditation program, the Commission approved two rule changes at its December 15, 1989, meeting, making it easier for Alabama attorneys to obtain CLE credit in Alabama for attending out-of-state programs offered by non-presumptively approved sponsors. The changes approved by the Commission involve Regulation 4.1.10 and Regulation 4.5, and apply only to those CLE programs conducted outside the state.

Previously, for a program offered by a non-presumptively approved sponsor to be considered for accreditation, the sponsor was required to file an application with the commission. Consequently, if an attorney attended an out-of-state program and desired to receive CLE credit for attending the program, it was necessary for the attorney to request the commission staff to send the sponsor an application to be filled out and returned to the commission for an accreditation decision. The amendments to Regulations 4.1.10 and 4.5 allow the attorney to utilize the former procedure or to seek his or her own accreditation decision for the out-of-state program by completing and submitting an application to the commission. If the program has been approved under the cooperative accreditation system, an application will be unnecessary. By calling the commission staff, an attorney may find out if an application for an out-of-state program must be filed.

This process will avoid the delays often encountered when sponsors are dilatory in submitting the necessary application and materials to the commission for an accreditation decision. Program evaluations still will be required whether the attorney has filed an accreditation application or a program has been approved through cooperative accreditation, but the attorney attending the program will be responsible for submitting a completed evaluation survey to the commission before receiving credit for attendance. Applications and evaluation forms will be furnished by the Commission to attorneys requesting them. The underscored portion of Regulations 4.1.10 and 4.5 included below reflect these most recent changes to these regulations.

Regulation 4.1.10

At the conclusion of an approved *in-state* program or activity, each participating attorney must be given the opportunity to complete an evaluation questionnaire addressing the quality, effectiveness and usefulness of the particular activity. Within thirty (30) days of the conclusion of the activity, a summary of the results of the questionnaires must be forwarded to the commission. If requested, copies of the questionnaires also must be forwarded to the commission. Sponsors must maintain the questionnaires for a period of 90 days following a program pending a request for submission of them to the commission.

Attorneys desiring credit for an activity attended outside of Alabama may be required to complete an evaluation questionnaire furnished by the commission and to return it within a reasonable time following the conclusion of the activity.

Regulation 4.5

Any organization not included in Regulation 4.2 above, desiring approval of a course, program or other activity, will apply to the commission by submitting the required application and supporting documentation at least thirty (30) days prior to the date on which the course or program is scheduled. The commission will advise the applicant whether the activity is approved or disapproved in writing by mail within thirty (30) days of the receipt of the completed application. Applicants denied approval of a program or activity may appeal such a decision by submitting a letter of appeal to the commission within fifteen (15) days of the receipt of the notice of disapproval. No application submitted more than 60 days after the close of the program year (December 31) will be approved.

Any attorney may request approval in advance of a course, program, or other activity to be held outside Alabama by completing and submitting an application form available from the Commission.

Cooperative accreditation and changes to Regulation 4.1.10 and Regulation 4.5 reflect the commission's and staff's efforts to streamline the accreditation process to afford attorneys greater ease in obtaining credit for quality out-of-state CLE programs. ■

Opinions of the General Counsel

originally rendered by Holly L. Wiseman
(February 3, 1988)
revision by Alex W. Jackson, assistant general counsel
(February 14, 1990)

QUESTION #1:

"I am requesting an opinion as to whether or not this firm is prohibited by the canons of ethics or otherwise from handling collection accounts.

"This firm handles collection matters on a daily basis for many different clients. The local credit bureau, on occasion, has need of legal assistance to collect accounts which have been referred to it for collection. The credit bureau has been authorized by the creditors to authorize an attorney to file suit after other means of collecting the debt are exhausted. A lawyer in this firm is connected with the credit bureau as a partner in the partnership which owns the credit bureau. He also takes part in management decisions regarding the operation of the credit bureau.

"Considering the above, please respond to the following inquiries:

A. May this firm handle collection matters for third parties referred to it directly by the credit bureau?

B. May this firm handle collection matters directly referred to it from creditors who have previously used the credit bureau to attempt to collect the debt?

C. May this firm handle collection matters which the credit bureau previously tried to collect if the creditor selected this firm from a list maintained by the credit bureau of attorneys who handle collection matters?

D. Does it affect your answer to any of the above questions that the creditor/client is aware that a member of this firm is a partner in the credit bureau?"

ANSWER:

Your law firm may not represent collection clients referred to it by a credit bureau in which a member of your firm maintains an interest. This is so whether the third parties are referred directly to your firm by the credit bureau or whether the credit bureau first attempts to collect the debt on behalf of the clients. Disclosure to the clients of the law partner's interest in the credit bureau does not remedy the solicitation problems presented by this arrangement. Your firm may handle collection matters previously handled by the credit bureau if the creditor selects your firm from a list of firms maintained by the credit bureau, provided that the bureau in no way recommends your employment and further provided that the list contains a sufficient number of firms to offer the client a meaningful choice of attorneys.

DISCUSSION:

It is well established that an attorney can simultaneously engage in the practice of law and in another business or profession. The Disciplinary Commission has issued ethics opinions permitting attorneys to engage in such varied professions as insurance sales, medicine, private investigation, engineering, mortgage brokerage, and others. (See, e.g. RO-86-15, RO-87-105, RO-87-31, and RO-86-101.) An attorney whose client is in need of services offered by the attorney's other business may ethically refer those clients to that business if full disclosure is made of the attorney's interest in the business. However, the converse is not true. The attorney's non-legal business cannot ethically refer customers to the attorney. To do so would circumvent the rules against direct in-person solicitation, as the attorney's non-legal business is not prohibited from directly soliciting customers. (See RO-87-161.) Temporary DR 2-103, provides that:

> "A lawyer may not solicit nor cause to be solicited on his behalf professional employment from a prospective client, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term 'solicit' includes contact in person or by telephone."

Accordingly, your law firm cannot handle matters referred to it by the credit bureau in which one of your partners maintains an interest. This is so whether the credit bureau has attempted to collect the debts or not. Disclosure of the attorney's interest in the credit bureau and consent by the client would not obviate the dangers of solicitation and would therefore not avoid this prohibition. [RO-87-518]

by Alex W. Jackson,
assistant general counsel

QUESTION #2:

"Is it ethical and permissible for me to hire lay employees in connection with my substantial collection practice on a commission basis?

My collection practice is done primarily on a contingency fee basis. That is, I am paid a percent of monies collected by me on accounts turned over to this office for that purpose. I have always paid my law employees a straight salary for their work in telephoning debtors to arrange payment of the various debts. From an overhead standpoint, it would be beneficial to me to be able to pay an employee an amount based on a percentage of collections directly attributable to her efforts on my behalf to get the accounts paid."

Opinions

ANSWER:

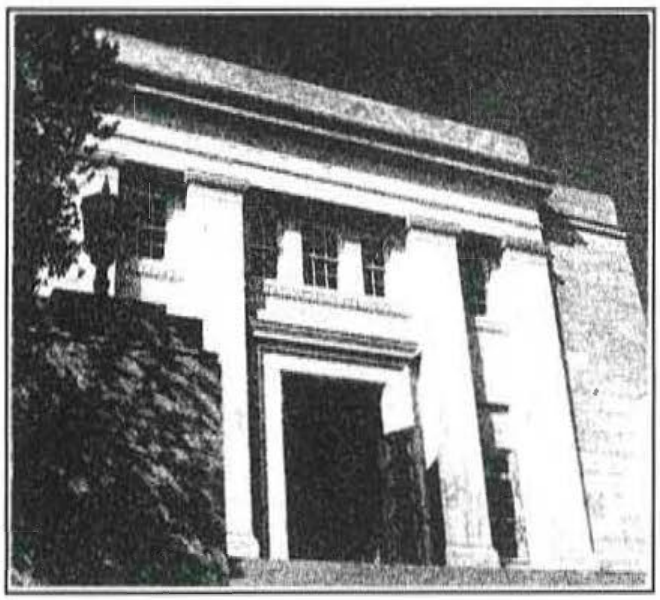
It is not permissible for you to pay lay employees in your collection practice on a commission basis. Disciplinary Rule 3-102(A) provides that a lawyer or law firm shall not share legal fees with a non-lawyer and Disciplinary Rule 3-103(A) provides that a lawyer shall not form or continue a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

Ethical Consideration 3-8 of the *Code of Professional Responsibility* states that since a lawyer should not aid or encourage a layman to practice law, he should not practice law in association with a layman or otherwise share legal fees with a layman.

Thus, it would be impermissible for you to employ lay employees in connection with your collection practice and to pay them on a commission basis.

DISCUSSION:

While, in your request, you make a distinction between the fees that you collect, on a contingency basis, and the compensation that you propose to pay to your employees, on a commission basis, such a distinction is not warranted. In fact, what you propose is that your employees receive a direct commission upon collections, which is to say that they are compensated in exactly the same fashion that you are compensated. Such an arrangement is impermissible and clearly constitutes sharing a legal fee with a non-lawyer, whether the contingency is a direct contingency applied against the debt, or a smaller contingency applied against your contingent fee. Such a plan is fee-splitting and/or "profit sharing" and clearly runs afoul of DR 3-102(A). [RO-88-78] ■



Recent Decisions

by John M. Milling, Jr.,
and David B. Byrne, Jr.

Recent Decisions of the Alabama Court of Criminal Appeals

Anonymous tip insufficient to justify investigatory stop

White v. State, 550 So.2d 1074 (Ala.Crim.App. 1989), *cert. denied*, 550 So.2d 1081 (Ala. 1989)—This is a case of first impression involving an issue of national concern—the right of the police, relying on an anonymous tip, to make an investigatory stop of an automobile.

On April 22, 1987, Corporal Davis of the Montgomery Police Department received a phone call from an anonymous person, stating that Vannessa White would be leaving 235-C Lynwood Terrace Apartments at a particular time in a brown Plymouth station wagon with the right taillight lens broken and that she would be going to Dobey's Motel and would be in possession of about an ounce of cocaine inside a brown attache case.

After receiving the call, Davis and his partner proceeded to Lynwood Terrace Apartments to keep building 235 under surveillance. The officers spotted a brown Plymouth station wagon with a broken right taillight in the parking lot. Later, the officers observed White leave the building, carrying nothing in her hands, and enter the station wagon. The officers followed White to the Mobile Highway, the highway on which Dobey's Motel is located. At about 4:18 p.m., the vehicle was stopped. As the officers approached the car, they observed that it was full of clothes and it appeared that White was in the process of moving. White was asked to step to the rear of the vehicle where the officers informed her that the reason she had been stopped was that she was suspected of carrying cocaine in the vehicle, and they asked her if they could look for cocaine. White told the officers that they could look and they proceeded to search the car and found a brown, locked attache case. Upon request, White gave the officers the combination to the lock and they opened the case. Inside they found a quantity of marijuana. After White's arrest and advisement of *Miranda* rights, she was taken to police headquarters. During the time she was being processed, the officers found three milligrams of cocaine in her purse.

The trial court denied the defendant's motion to suppress. Subsequently, White pled guilty to the charge reserving the right to raise on appeal the issue of the trial court's denial of her suppression motion.

The court of criminal appeals, in a unanimous opinion authored by Judge Patterson, reversed and rendered the case. Judge Patterson's opin-

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ion seeks to contrast the two-pronged test of *Aguilar v. Texas, 378 U.S. 108 (1964)* and the totality of the circumstances test enunciated in *Illinois v. Gates*, 462 U.S. 213 (1983). Judge Patterson focused the issue as follows:

> "In *Illinois v. Gates*, 462 U.S. 213 (1983), the Supreme Court decided to abandon the 'two-pronged test' in favor of a much more ambiguous 'totality of the circumstances analysis.' It is thus less clear now than it once was just when an informant's information will suffice to show probable cause for a full arrest or search. At least indirectly, *Gates* appears to have likewise created greater uncertainty on the issue discussed here."
>
> However, the Court in *Gates* cautioned that it had not abandoned entirely the teachings of *Aguilar* and its progeny; it is still true 'that an informant's veracity, reliability and basis of knowledge are all highly relevant in determining the value of his report.' Consequently, it is still sensible after *Gates*, in trying to ascertain in informant cases 'the degree of relaxation from the probable cause standard entailed by the *Williams-Terry* standard of reasonable cause to stop,' to examine those particular factors. That is, it remains useful to ask just how differently those factors weigh in the determination when the issue concerns grounds to stop rather than grounds to arrest or search.

In applying an *Aguilar* analysis, Judge Patterson was careful to point out the presence of two factors. "First, corroboration of the details of the anonymous informer's tip—even innocent details—may establish the informant's veracity . . . We strongly caution, however, that the details corroborated should be impressive, as to number and specificity, under the particular circumstances, if corroboration is to be utilized to establish the tipster's credibility." Second, "detail in the anonymous tip can support the inference that the informant has an adequate basis of knowledge."

Applying that standard to the facts in *White*, the court of criminal appeals concluded:

> "We find that the tip exhibits no 'indicia of reliability.' The police officers knew nothing about the informer; Davis testified that he simply assumed that the informant was a concerned citizen. The tipster offered no information tending to show that he was a credible person. Moreover, we cannot resort to corroboration of details to find the informer to be reliable, for the details corroborated consisted of information that could have been obtained by almost anyone, and the details were not significantly corroborated."

Finally, a unanimous court of criminal appeals concluded that White's stop cannot be supported by specific and articulable reliable facts raising a reasonable suspicion that the defendant was engaged in wrongdoing. The court specifically reiterated that "this demand for specificity in the information upon which police action is predicated is *the central teaching of [the United States Supreme] Court's Fourth Amendment jurisprudence.*" *Terry*, 392 U.S. at 21, n. 18.

Because White was illegally detained when she gave her consent to search, the marijuana from the briefcase and the cocaine from her purse are fruits of an unconstitutional detention; thus, White's motion to dismiss should have been granted.

On September 22, 1989, the Supreme Court of Alabama denied certiorari. The Supreme Court of the United States has granted certiorari in the *White* case which makes the Fourth Amendment question an issue of national significance and impact. It is expected to be argued sometime in April 1990.

Constitutionality of drug sentence enhancement upheld

Wright v. State, 8 Div. 264 (December 29, 1989)—Wright was indicted for the unlawful sale or distribution of marijuana in violation of §13A-12-211, *Code of Alabama* (1975). The jury found the defendant guilty and the trial court sentenced him to six years imprisonment pursuant to §20-2-79, *Code of Alabama* (1975) (the Drug Sentence Enhancement Statute).

On appeal, Wright challenged the constitutionality of §20-2-79, which provides in pertinent part as follows:

> In addition to any penalties heretofore or hereafter provided by law for any person convicted of an unlawful sale of a controlled substance, there is hereby imposed a penalty of five years incarceration in a state corrections facility with no provision for probation if the situs of such unlawful sale was on the campus or within a one-mile radius of the campus boundaries of any public or private school, college, university or other educational institution in this state.

Wright contended that because the indictment did not charge him under §20-2-79, it was unconstitutional for the court to sentence him under the enhancement provisions of the statute.

On December 1, 1989, the court of criminal appeals, in *Harrison v. State*, [Ms. 4 Div 371 December 1, 1989], held that "an indictment for the unlawful sale of drugs need not contain any reference to the sentence enhancing provisions of *Ala. Code* 1975, §20-2-79 in order for the defendant's sentence to be enhanced under that statute."

In the case *sub judice*, the record reveals that before trial, the prosecutor orally informed the defendant of the state's intention to sentence under the enhancement statute if the defendant was convicted.

Judge Tyson, writing for a unanimous court of criminal appeals, found that although Wright was provided with actual notice of the State's intention to sentence him under §20-2-79, *Code of Alabama* (1975), that *no formal notification was required*. Accordingly, Wright was not denied due process and his case was affirmed.

Search and seizure cannot be predicated upon false affidavit

Villemez v. State, 7 Div. 201 (December 1, 1989)—Villemez was indicted for the offense of trafficking in marijuana and was found guilty as charged. He was sentenced to life imprisonment without parole as a habitual felony offender.

The case against Villemez was based

entirely upon a search of a room at a motel in Gadsden, Alabama.

The defendant, on appeal, argued that Officer McCurley's statement in the affidavit that the "informant *relayed to me* that the person she got the marijuana from was a Ronnie Miller and that he was at the Travelers Motor Inn at 421 E. Broad St. in Gadsden, Alabama, in Rm. #36," was a misstatement because the evidence at the suppression hearing showed that the informant actually told another police officer this information who in turn relayed the information to McCurley by phone.

A careful reading of the affidavit in support of the search warrant did not show that McCurley indicated that he was relying upon information supplied by another police officer. The affidavit clearly states that the informant relayed the information to McCurley personally. Clearly McCurley did not indicate in the affidavit that Miller gave this information to Entrekin, another police officer, who then relayed the information to him. Thus, McCurley's failure to properly identify his source of information was at least reckless if not intentional.

Judge Tyson, writing for a unanimous court, observed that the court was compelled to delete the false information contained in the affidavit to determine whether the rest of the information contained in the affidavit was sufficient to support a finding of probable cause. The information the court decided that had to be excised was the information "that the informant told McCurley that she obtained the marijuana from Ronnie Miller in Room 36 of the Travelers Motor Inn." See W. LaFave, 2 *Search and Seizure* §4.4(c), p. 10-11 (2d Ed. 1987) (1989 Supp.).

After the misstatement was excised from the affidavit, the Alabama Court of Criminal Appeals held that the remaining portion of the affidavit did not support a determination of probable cause. Judge Tyson critically observed, "Suppression is required only when it appears that 'with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause.'" *Gray v. State*, 507 So.2d 1026, 1028 (Ala.Crim.App.), *cert. denied*, (Ala. 1987), quoting *Franks v. Delaware*, 438 U.S. 254, 156, 98 S.Ct. 2674, 2676, 57 L.Ed.2d 667 (1978).

Based upon the standard set forth in *Gray v. State, supra*, the search warrant in this case was invalid and the defendant's motion to suppress should have been granted.

Recent Decisions of the Supreme Court of Alabama—Civil

Accountant's liability . . . accountant's third party liability standard established

Colonial Bank of Alabama v. Ridley & Schweigert, 23 ABR 4393 (September 22, 1989). Ridley and Jamison, accountants, were employed by Leedy Mortgage Company, Inc. to audit financial statements for fiscal years 1979 through 1983. The annual financial statements were audited at Leedy's request, and Leedy was provided with multiple copies of each year's audit. Neither Ridley nor Jamison was requested to, or did, provide copies of the audits to anyone other than Leedy.

In the course of auditing, the accountants requested that Colonial Bank, one of Leedy's creditors listed on the financial statement, complete certain standard bank confirmation inquiries. Leedy furnished Colonial with a copy of each of the annual audits, and Colonial made loans to Leedy. Leedy defaulted on those loans, and Colonial sued the accountants under theories of negligence, wantonness and breach of contract. The trial court entered a summary judgment for the accountants, and the supreme court affirmed.

In a case of initial impression in Alabama, the supreme court was asked to determine the scope of an accountant's duty to third parties. The supreme court recognized that there is a split of authority and adopted the standards set forth in *Credit Alliance Corp. v. Arthur Anderson & Company*, 483 N.E.2d 110 (N.Y. 1985). The supreme court quoted from that case at length as follows:

> Before accountants may be held liable in negligence to noncontractual parties who rely to their detriment on inaccurate financial reports, certain prerequisites must be satisfied: (1) the accountants must have been aware that the financial reports were to be used for a particular purpose or purposes; (2) in the furtherance of which a known party or parties [were] intended to rely; and (3) there must have been some conduct on the part of the accountants linking them to that party or parties, which evinces the accountants' understanding of that party or parties' reliance. While these criteria permit some flexibility in the application of the doctrine of privity to accountants' liability, they do not represent a departure from the principles articulated in *Ultramares, Glanzer* and *White [White v. Guarente*, 43 N.Y.2d 356, 401 N.Y.S.2d 474, 372 N.E.2d 315 (1977)], but, rather, they are intended to preserve the wisdom and policy set forth therein.

The supreme court held that the accountants owed no duty to Colonial and, therefore, could not be liable for negligence or wantonness. The court also held that they could not be liable to Colonial on a third party beneficiary theory because there was no evidence that the contracting parties intended to bestow a direct, as opposed to an incidental, benefit on Colonial.

Civil procedure . . . foreign corporations treated like domestic corporations for venue purposes

Ex parte Walker (In re: Walker v. Thompson), 24 ABR 14 (October 16, 1989). Defendant Mitchell, a resident of Montgomery County, purchased alcoholic beverages in Macon County from defendant Thompson. Mitchell drove his car to Autauga County, and collided with a Honda automobile driven by the plaintiff, a resident of Montgomery County. Plaintiff sued the defendants in Macon County under the Alabama Dram Shop Act.

Plaintiff also sued American Honda, a foreign corporation, alleging that the Honda had defective seatbelts. American Honda filed a motion to transfer the cause to Autauga County where the accident occurred. The trial court granted American Honda's motion to transfer, noting that American Honda is a foreign

corporation and has never done business in Macon County. The plaintiff filed a petition for a writ of certiorari to set aside that order.

The supreme court granted the writ. The supreme court noted that the 1987 amendment (Amendment No. 473) to Section 232, Alabama Constitution 1901, specifically authorizes suit against a foreign corporation in those counties where suit would be allowed if the foreign corporation were a domestic corporation. Therefore, American Honda may be sued in counties where suit would be allowed if American Honda were a domestic corporation. Since American Honda is a co-defendant pursuant to Rule 82(c), Ala.R. Civ.P., and because venue is proper as to those other defendants in Macon County, venue is proper in Macon County as to American Honda.

Insurance . . . umbrella policy true excess insurance

Independent Fire Insurance Co., Inc. v. Mutual Assurance, Inc., 24 ABR 79 (November 3, 1989). Turnipseed was injured in a boating accident. She sued James Bennett, the operator of the boat, and Dr. Bennett, the owner of the boat. James Bennett was insured by Independent Fire under a homeowner's policy. Dr. Bennett had a $300,000 policy with American States, which paid its limits in partial settlement of the suit. Dr. Bennett also had a $5 million personal umbrella liability policy with Mutual Assurance (MASA). MASA maintained that its policy was excess over Independent Fire's policy. Independent Fire maintained that MASA's policy should provide primary coverage since Dr. Bennett owned the boat and primary coverage follows ownership. Independent Fire filed this declaratory judgment action and MASA counterclaimed. The trial court ruled in favor of MASA and held that "as between a non-owned vehicle policy and an umbrella policy, the umbrella policy will be excess over all other policies, both excess and primary." The supreme court affirmed the trial court's judgment.

The supreme court noted that although both the Independent Fire policy and the MASA policy contained "excess" or "other insurance" language, the MASA policy is an umbrella policy, which is generally considered "true excess" insurance and the last to provide coverage, after a primary policy or another excess policy. The supreme court noted that it has been recognized that the umbrella policy is designed to pick up where primary coverages end, providing extended protection in a time when verdicts can be extremely high. Another reason is the disparity between the premiums paid for simple excess insurance and an umbrella policy. Umbrella policies are sold at comparatively modest prices to pick up where primary coverages end in order to provide extended protection.

Professional conduct . . . violation of 26 U.S.C. §7203 does not require disbarment or suspension

Clark v. Alabama State Bar, 23 ABR 2599 (June 9, 1989). Clark filed his federal tax return and admitted that he owed taxes. However, he failed to timely pay the taxes and was convicted of a violation of 26 U.S.C. §7203, a misdemeanor. The Alabama State Bar filed a Rule 14(b), Rules of Disciplinary Enforcement, petition to have his license revoked or suspended. Rule 14(b) requires disbarment or suspension when an attorney is convicted of a crime involving "moral turpitude." A hearing was held and the Disciplinary Commission found that the crime involved moral turpitude and Clark was suspended from practice for six months. He appealed, and the supreme court reversed.

The supreme court stated that it was unable to find any case holding that the failure to pay income taxes is a crime of moral turpitude, as matter of law, where an income tax return has been filed. The supreme court found that there was no fraud or deceit as to the fact that the taxes were owed. A violation of 26 U.S.C. §7203 does not constitute a crime of moral turpitude and does not require suspension or revocation of a license to practice law.

Recent Decisions of the Supreme Court of Alabama—Criminal

More guidance on *Batson*

Harrell v. State, 24 ABR 119 (November 9, 1989). The Alabama Supreme Court, in an opinion authored by Chief Justice Hornsby, gave trial judges and practitioners additional guidance on *Batson*.

Batson demands that in deciding whether the defendant has carried his burden of proving a *prima facie* case, the trial court "must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Batson*, 476 U.S. at 93. Trial judges are instructed in this opinion to be "sensitive to the defendant's *Batson* claims and to not lightly brush them aside."

Batson requires the presence of three elements to establish a *prima facie* case of racial discrimination in the selection of a petit jury. The defendant first must prove that he is a member of a cognizable minority and that peremptory challenges were used to remove members of his race from the jury. Second, the defendant is entitled to rely on the fact that a peremptory challenge will allow a prosecutor to make discriminatory choices in jury selection if he chooses to do so. Third, the defendant must prove from these and any other relevant facts that he may be aware of that an inference of discrimination may be drawn from the prosecutor's conduct.

In *Ex parte Branch*, 526 So.2d 609 (Ala. 1987), the supreme court set out certain specific kinds of conduct by a prosecutor that would raise the inference of discrimination under *Batson*. Every practitioner should make the *Branch* opinion required reading; all defense attorneys must prove from those and other relevant facts the *prima facie* case and thus meet the burden of going forward.

An otherwise qualifying defendant is entitled to a *Batson* inquiry when he makes his objection to the empanelment of the jury after it is selected but *before it is sworn*. At that point, the trial judge must conduct a *Batson* inquiry on the record, but out of the hearing of the jury. The defendant then must prove a *prima facie* case of discrimination under *Batson*. If the trial court determines that a *prima facie* case exists, the burden shifts and the prosecution then must come forward with a race-neutral explanation as to why peremptory challenges were used to exclude members of a minority. Where the prosecution fails to offer a reasonable explanation for its strikes, even as to

one juror, jury selection must begin anew or otherwise infect the record with reversible error.

Incentive good-time credit—case of first impression

Otts v. State, 24 ABR 1 (October 13, 1989)—The supreme court consolidated three petitions for writ of certiorari involving an issue of first impression: Whether a person sentenced to more than ten years under the Alabama Split Sentence Act, §15-18-8, *Code of Alabama* (1975), is entitled to receive good time credit under the Alabama Correctional Incentive Time Act, §14-9-40 through -44, if his period of confinement is less than ten years.

Justice Maddox, writing for a unanimous supreme court, adopted the rationale of the court of criminal appeals in *Thomas v. State*, ____So.2d____ (Ala.Crim.App. 1989), i.e., that a person *sentenced* to more than ten years is ineligible for "good time" credit even though his *confinement* is less than ten years. Accordingly, the supreme court affirmed the court of criminal appeals' denial of the petitioners' habeas corpus petitions.

Juror misconduct—failure to truthfully respond to voir dire

Clark v. State, 23 ABR 4609 (September 29, 1989)—The Alabama Supreme Court granted certiorari to determine whether the defendant, Richard E. Clark, *might have been prejudiced* by the failure of a juror to make a proper response to a question regarding his or her qualifications to serve as a juror in a criminal case. The Supreme Court of Alabama, speaking through Justice Kennedy, concluded that Clark might have been prejudiced and, therefore, affirmed the decision of the court of criminal appeals reversing his conviction. (emphasis added).

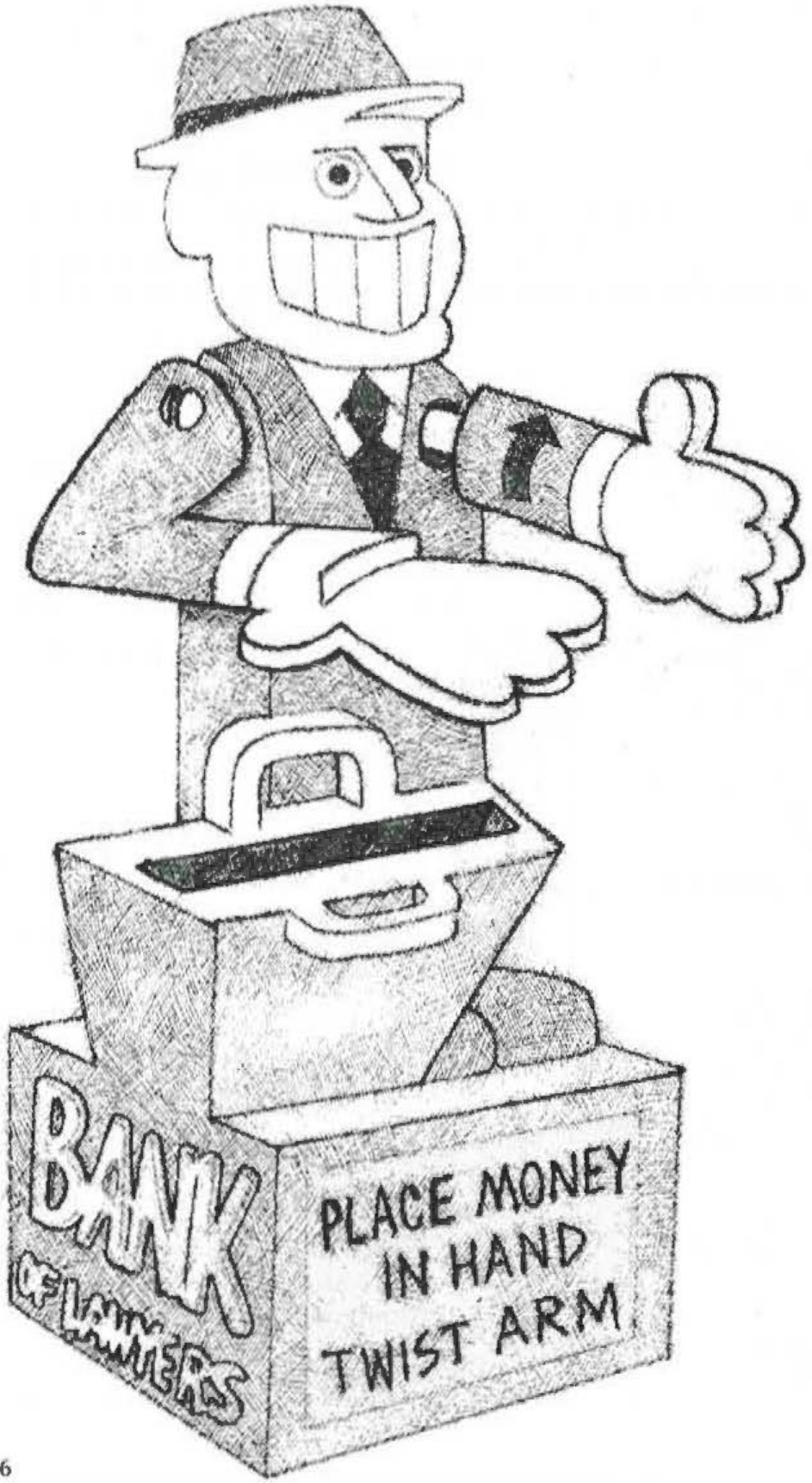
The supreme court was compelled to find that Clark might have been prejudiced as a result of a juror's failure to disclose his previous jury service in another drug case in which the defendant (Clark) was convicted. Justice Kennedy, on behalf of the supreme court, reaffirmed the holding in *Ex parte O'Leary*, 417 So.2d 232, 240 (Ala. 1982), *cert. denied*, 463 U.S. 1206 (1983).

The court specifically cited with approval the following language from *O'Leary*:

> "Parties have a right to have questions answered truthfully by prospective jurors to enable them to exercise their discretion wisely in exercising their peremptory strikes . . . " . . . '[t]he proper inquiry in such cases is whether the defendant's rights were prejudiced by such failure to respond properly.' . . . To be more correct, however, '[t]he test is not whether the defendant was prejudiced but whether *he might have been*.'" (emphasis added).

Applying the *O'Leary* test, the court concluded that Clark might have been prejudiced because of a juror's failure to disclose his previous jury service in a drug case in which Clark was convicted. ■

Assessing the Legal Needs of the Poor: Building an Agenda for the 1990s



by Elise Moss and Anne Mitchell

(This is the first part of a three-part series.)

This is the story of how what began as an amusing anecdote became the inspiration of the Committee on Access to Legal Services. At a meeting in 1988, one of the members told of an acquaintance who belonged to a group which decided to express its social concerns by "doing something" for the homeless. Their idea—a free resume-writing service. They printed notices and posted them all over town. When no one showed up to take advantage of their offer, they were indignant. "It just proves," they concluded, "that those people don't want to be helped!"

Although the committee members all laughed at the other group's insensitivity, there was a troubling message for us in that story. Our committee was charged by the bar to "review, evaluate and foster the development of pro bono publico programs designed to assure access to legal services by those citizens of Alabama who cannot afford them." Yet what did any of us really know about what types of legal services those citizens of Alabama needed? Although several committee members were associated with existing Legal Services' programs, their knowledge generally extended no further than their own service areas, and for those of us in private practice, exposure to indigent clients was minimal or in some cases, nonexistent.

While we were determined not to repeat the experience of the well-intentioned but misguided would-be resume writers, we knew that we lacked the time and skills necessary to determine the actual legal needs of Alabama's indigent population by ourselves. We were aware that other states had conducted legal needs surveys with impressive results. In Maryland, for example, the findings of such a study have been credited with in-

creased state appropriations for legal services initiatives, including expansion of law school clinical programs, enlargement of pro bono activity by local bar groups, encouragement of pro bono participation of the attorney general's staff and even a proposal to amend the Rules of Professional Responsibility to require pro bono service by all attorneys in the state.

After much discussion, we concluded that such a survey in Alabama would do much more than merely provide guidance for our committee. We hoped that the results could be used by the bar as a whole, as well as by other groups in the state which were interested in creating greater understanding of and support for provision of legal services to the poor population. Only one obstacle now remained—money. With a committee budget barely able to cover postage, we could not hope to fund the thousands of dollars we knew such a survey would cost. Fortunately, the timing of our decision coincided with the time for submission of grant proposals to IOLTA. In April 1989, we received the exciting news that our request for a $25,000 grant had been approved. With additional funding from the Montgomery-based Legal Services Corporation of Alabama, we were able to hire Davis Penfield & Associates, a professional research firm, to conduct the first comprehensive survey of the legal needs of Alabama's indigent population.

The following is a summary of how the survey was designed, how it was conducted among the subject population and some of the results.

Focus groups

The first two segments of the study involved direct contact with poor Alabamians. In order to gather the qualitative data upon which to base the research questionnaire, the researchers organized focus groups. Focus groups are frequently used in advertising and product research, but also have useful applications for social and community research. In this setting, a facilitator works from a prepared script with a small group (usually eight-12 persons) to elicit discussion of the research topic. To reach a cross-section of the poor residents of the state, focus groups met at three sites: Jackson County, Greene County and Montgomery. These specific sites were chosen to get a racially mixed urban group, a black group and a predominantly white group.

Within these parameters, the organizers sought representation by men and women, young and old, and persons living in public housing.

In our case, focus groups were used to gather information about the types of legal problems most frequently cited by poor people, their awareness of the legal system and the availability of legal services, as well as their attitudes toward lawyers. Each session lasted a little more than an hour, and was videotaped. (Participants were made aware of this when they were recruited.) Some of the responses were predictable, while others were quite surprising.

Discussion centered on four major issues—the likelihood of participants having a legal problem and needing legal assistance, awareness of legal services or other methods of finding legal help, the types of problems the poor typically encounter, and the attitudes of the poor toward lawyers and the law. In each of the groups, there were real legal problems and a general dissatisfaction with the way such problems are resolved.

A striking feature of the discussions was the fact that the poor tend to personalize their problems, often to the extent that they see an issue or law as applicable only to themselves. Therefore, it is impossible for them to draw analogies or foresee the potential ramifications of other actions for themselves or others, and they frequently do not have a clear understanding of what has happened or why. They may not even be aware that a problem they face has a legal solution.

Attitudes toward lawyers were generally negative, particularly as applied to court-appointed lawyers. There were such statements as, "[c]ourt appointed lawyers don't help; that's why he's free," (Montgomery) and "[c]ourt appointed lawyers are not worth ten cents" (Greene County). While Legal Services' attorneys are thought of a bit more positively, the same "you get what you pay for . . ." attitude comes across. Those who had been to Legal Services' attorneys did experience some frustration with waiting lists and the very low eligibility guidelines that those offices use. As to the legal profession in general, lawyers were viewed as individuals whose bottom line concern is the fee, or worse, who collude with each other and treat their clients as superfluous.

Attitudes toward the law were also somewhat negative. One participant's rather revealing statement that "[t]he law keeps people that got it to have it" and another comment, "[l]awyers fix it so they come out okay," sum up the pervasive attitude of participants. As the researchers point out:

> "There is a sense that the law does not respond to the individual problems that people face, that individuals get lost in the process, that the system is not geared to solving 'their' problems but for solving 'someone else's' problems." (p. 7)

A strong sense of alienation is obvious throughout the focus group responses. The study notes a summary comment

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from one of the participants: "Laws are okay, but people are bad."

Field study

Following the focus groups, the data gathered was used to develop the survey instrument for the field study. Personal interviews with 499 low income residents of the state were conducted. One of the clearest findings of the study is that the poor do not have a clear understanding of their legal needs. Because of the same personalization evident in the focus groups, they find it difficult to become aware of solutions to their problems. This fact complicated the process, but there were some very interesting facts:

(1) 44 percent of low-income households have at least one member who is a minor;

(2) 37 percent have senior citizens;

(3) 22 percent have handicapped or disabled household members;

(4) 77 percent have a high school degree or less. Only 5 percent of the respondents are college graduates;

(5) 27 percent do not have a telephone;

(6) The sample was disproportionately female;

(7) Not as many take advantage of social programs as are eligible.

Not surprisingly, the questions on the survey which dealt with the most immediate problems received a stronger response. For instance, 26 percent said they had deferred medical treatment because there was no way to pay for it, and utilities service was a major concern, with 37 percent noting an inability to make payments on time and another 54 percent reporting a dispute over service within the last year. Problems involving utilities had a relatively high incidence as compared to other problems in the survey, probably due to the day-to-day and no-deferable need for heat, water and light.

It is not surprising that low-income persons have problems directly related to their finances. Ninety-eight percent of those surveyed had some difficulty with credit or accounts. Ten percent had considered bankruptcy and 19 percent had been bothered by bill collectors, on the average, three times a year. While inadequate income is not, of itself, a problem with a legal solution, there are many related problems, including harassment by collectors, repossessions and garnishments for which individuals can, and probably should, seek legal assistance.

Housing problems break down into two main categories, the problems of home ownership and of renting. Thirty-five percent of those questioned own their own homes. Of those who rent, 16 percent live in public housing. While few of the homeowners listed problems other than with foreclosure or the threat of it, renters experienced numerous problems with landlords, ranging from rat infestation to non-working heating and plumbing, and the inability to obtain the return of a security deposit. It should be noted here that Alabama is one of the last four states not to have enacted any of the key provisions of the Uniform Landlord Tenant Act, and that the Alabama Supreme Court has refused to find that any implied warranty of habitability exists in the state. This problem crosses class lines, as renters are not universally poor, but difficulties stemming from lack of tenant protection may disproportionately affect the poor.

Family problems were not experienced by everyone. Obviously, not everyone in the survey was married, and the survey asked only for problems in the past year. If the questions had asked for problems in the past "few" years, the researchers noted, "The percentage would have been driven up dramatically." It is notable that the second highest number of reported problems involved the educational system. These problems included obtaining the right special education program for a child or disagreeing with the placement of a child in a special education program, as well as discipline problems.

After requesting information on types of problems confronted by the poor, the research focused on the impact of particular factors or needs. The study analyzed the relationship between legal problems and education; particular problems affected by race/sex; problems relevant to the handicapped/disabled; and specialized segments (households with aged/children).

Education and awareness

Perhaps it is not surprising that the two most common areas in which poor Alabamians had sought legal advice were problems including collection or debts/bankruptcy and the domestic relations area. Twenty-one percent of college graduates sought assistance on a matter involving the former; this drops to 8 percent among those without a high school diploma. This does not mean that people with college degrees have more problems than those without them; rather, they tend to be more knowledgeable of legal remedies and how to find them. This theme recurs throughout the study. When considered as a whole, individuals with a college degree are a great deal more likely (58 percent) to have seen a lawyer than those with less education. Further, blacks and those without college education were more likely to contact Legal Services, while whites and those with a college degree were more likely to have contacted a private attorney.

Age

Both senior citizen households and households with children under 18 have special problems. Senior citizens were more likely to have property or debt-related problems, while households with children were more likely to experience family related problems. This is not surprising, but may indicate special needs of the two groups.

Race and sex

Blacks perceive difficulty with obtaining credit because of race. (This was more often cited by black men than black women.) Thirty-four percent believe they have been taken advantage of by lawyers and others associated with the law. Roughly the same percentage would prefer a black attorney to a white one, although there appears to be an inverse correlation between the level of education and this preference.

Four percent of women believe they have been denied credit due to their sex. Roughly the same percentage believe they have been taken advantage of by lawyers and others associated with the law, as did blacks. Twenty-one percent would rather have a female than a male attorney.

Handicapped/disabled

It was striking to the researchers that 20 percent of the low-income households had individuals who were handicapped or disabled. It may, in fact, be an accurate reflection of the relationship between handicapped or disabled status and poverty. In 44 percent of these households an attorney had been consulted within the last five years. This is approximately 15 percent higher than for the sample as a whole. When questioned concerning the type problems they had encountered, 24 percent mentioned problems in the area of property and debt, while 6 percent mentioned domestic relations questions.

Locating attitudes toward attorneys

When asked, "How do you find assistance?" 49 percent said they had no idea. Thirty-two percent would go to Legal Services and 11 percent stated they would simply ask an attorney for free assistance.

Most surveyed believe lawyers chose the profession "in order to make money." Only 24 percent believe that lawyers chose the profession in order to help people. On the other hand, only 26 percent believe lawyers do not care about people. While only 38 percent believe lawyers are honest, only 27 percent actually commit to a belief that they are somewhat dishonest. It should be noted that the negatives were less visible in the interviews than in the focus groups.

On a positive note, nearly one-half rate lawyers as doing an "excellent" or "good" job; 30 percent say they do an "only fair" or "poor" job. Highest rankings came from women, blacks and those with higher educations. Lowest performance ratings are characteristic of households with minor children and respondents who have had contact with an attorney in the last five years.

Next issue: surveys of attorneys and Legal Services personnel

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The Second Injury Trust Fund and Alabama's Worker's Compensation Act

by R. Blake Lazenby and Craig A. Donley

The Second Injury Trust Fund can be an important, even critical, factor to both the employer and the employee following an on-the-job injury which results in the permanent total disability of the employee. While the specific code sections establishing and dealing with the fund are relatively few, the possible benefits afforded by the fund are numerous.

Obviously, Alabama's state legislature established the fund to encourage employers to hire individuals who have suffered a permanent disability adversely affecting their employability and earning capacity. Generally, the fund, where applicable, partially insulates the employer from financial liability for the total permanent disability of its employee arising out of an on-the-job injury. When the fund accepts liability or when liability is assessed against the fund by the court, the employer is held liable only for that percentage of disability and reduction of earning capacity attributable to the employee's on-the-job injury with that employer, and the benefits due from the employer are then limited to a maximum of 300 weeks based upon that percentage. In such a situation, the financial savings to the employer can be staggering.

The employee also benefits when the fund applies or may apply. As mentioned above, the provisions creating and establishing the fund offer an incentive program to employers to hire a partially disabled employee at the very outset. Once hired and after a permanently totally disabling on-the-job injury, the employee often can use the largest of the fund as a bargaining tool in settling his claim for permanent total disability with his employer. Obviously, the employer would very much appreciate the opportunity to avail himself of a significantly limited liability and a settlement often can be facilitated between the employer and employee in the hopes of passing on a significant portion of the liability to the fund. For these and other reasons, the practitioner, when representing either an injured employee or his employer, should always keep in mind the benefits afforded by the fund and the possibility of securing acceptance or assessment of liability against the fund.

The provisions of the Second Injury Trust Fund ('SITF') are set out in the Alabama Workmen's Compensation Statute, *Code of Alabama* (1975), as amended, §25-5-1, *et seq.* Specifically, the SITF is created and established pursuant to §25-5-70. The moneys and interest from the investments in the fund are custody of the state treasurer and held for benefits of the persons so designated. The director of the Department of Industrial Relations is the statutorily designated trustee of the fund.

The SITF is funded from three sources, §25-5-71. The major source of income is from the interest on investments of the principal currently in the fund. At the conclusion of fiscal year 1988, the SITF had assets in the total sum of $1,600,595.23 and interest income for fiscal year 1988 was $97,851.28. The moneys in the fund may be invested in obligations of the United States of America, in obligations fully guaranteed by the United States of America or in general obligations of the State of Alabama.

The second source of income is when a death is suffered by an employee covered by the Workmen's Compensation Law by a cause which imposes liability under said law, the employer pays the sum of $100 into the SITF, §25-5-71(a). In fiscal year 1988, the SITF received only $11,000 from this source pursuant to the 119 job-related fatalities reported.

The third source, which is nonexistent, is where damages lie under the Employer's Liability Act and there is no person to whom judgment may be paid,

the net judgment escheats to the benefit of the SITF, §25-5-71(b). The SITF receives *no* state or federal appropriations. While the trust fund is currently solvent, it does not appear to be actuarially sound.

The problem with financing and anticipating moneys for the fund is severalfold. No one knows exactly how many new claims will be presented for payment, nor the amount of attorneys' fees that may become due. Also, it is hard to predict the amount of income which will be earned. The current trend of the fund is that the principal and interest income is dropping, while the benefit payments and attorneys' fees are increasing.

Section 25-5-73 establishes the lawful payments which may be made from the fund and the priority of claims. This section authorizes the payment of premiums on the required fidelity bonds of the trustee and custodian, and it authorizes refunds and weekly compensation to qualified claimants. As will be discussed later, the appellate courts also have authorized lump-sum attorney's fees to be paid from the SITF, although not specifically allowed by said section. Section 25-5-73 directs the director of the Department of Industrial Relations to make requisition to the state comptroller who shall draw warrants on the state treasurer for payment of weekly compensation. Such warrants shall be drawn only if there are sufficient moneys in the fund for immediate payment. The section further provides that claims take priority in ascending numerical order according to the time of the accident.

Section 25-5-74 establishes the procedure for making determinations of liability from the SITF. Basically, this section requires every employer making a report of an accident in which there is a prima facie evidence of liability against the SITF to so state in said report. In the ordinary setting, the employer is unaware of the provisions and mandates surrounding the SITF, and upon the employer's first report of injury, there will be no mention of the possible liability of the fund and it becomes the obligation of the employer's attorney to notify the fund of its possible liability. Attached hereto is a copy of a letter to the director of the Department of Industrial Relations in an actual case in which the fund admitted its liability. When such a letter is sent to the department, ordinarily the department will respond by stating that it is too early for the trustee to make its decision regarding liability; however, it is recommended that the notice be sent as soon as practicable in order to preclude the fund from asserting that it was not notified of its exposure in the report of the accident.

Upon a *settlement* between the employer and employee, the director shall be deemed to have admitted liability against the fund unless within 60 days after receiving a copy of the settlement, the director shall have notified the parties that he does not consider the fund liable for payments. In making such determination of liability, the director reviews the requirement of §25-5-57(a)(4)d, e, f & g.

Section 25-5-57(a)(4)d defines permanent total disability as the total and permanent loss of the sight of both eyes or the loss of both arms at the shoulder or any physical injury or mental impairment resulting from an accident, which injury or impairment permanently and totally incapacitates the employee for gainful employment.

Section 25-5-57(a)(4)e merely provides that if an employee has a permanent disability or has previously sustained another injury which resulted in permanent disability and receives a second permanent injury, then he is entitled to compensation only to the degree of injury that would have resulted from the latter accident if the earlier disability or injury had not existed.

Section 25-5-57(a)(4)f sets out the basic statutory requirements for receiving benefits from the SITF. This section provides that if an employee receives a permanent injury after having sustained another permanent injury *other than in the same employment*, and if the *combined effects* of the previous and subsequent injury results in *permanent total disability*, compensation will be paid for permanent total disability. The employer will pay compensation to the extent he would have been liable if the first injury had not existed. The remainder of the compensation will be paid by the SITF upon completion of the payments by the employer. However, this section contains two additional requirements, that is: (1) *the employer must have had prior knowledge of the previous injury* and (2) *such previous injury must have been of a disabling nature which adversely affected the employability of the employee.* (emphasis supplied). This subsection must be read and applied in pari materia with §25-5-74 for a determination of liability of the SITF.

Permanent total disability may be established in several ways. Of course, the best way is a physician's and/or a vocational rehabilitation specialist's testimony that the employee is permanently and totally disabled. Although it has been held that a trial court may make a finding of permanent total disability without medical testimony, *Bankhead Forest Indus. Inc. v. Lovett*, 423 So.2d 899 (Ala.Civ.App. 1982), we suggest medical and vocational testimony to be the most prudent and safest method to prove such a disability. Generally, these cases go to the circuit court regarding the second injury either to approve a lump-sum settlement, §25-5-83, or to resolve a dispute, §25-5-81(a)(1). Normally, the circuit judge

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will, when appropriate, make a finding of permanent total disability in his order. All of this is sufficient to establish permanent total disability to make a claim against the SITF. It should be noted that the Alabama Appellate Courts have given a liberal interpretation to what constitutes permanent total disability. It has been held that total disability does not mean absolute helplessness or entire disability, but the inability to perform the work at one's trade or inability to obtain reasonably gainful employment. *Blue Bell, Inc., v. Nichols,* 479 So.2d 1264 (Ala.Civ.App. 1985); *Den-Tal-Eze Mfg. Co. v. Gosa,* 388 So.2d 1006 (Ala.Civ. App. 1980); *J.S. Walton & Co. v. Reeves,* 396 So.2d 699 (Ala.Civ.App. 1981).

After the employee has established by competent evidence his permanent total disability and permanent total loss of earning capacity, in order to tap the resources of the SITF the parties must demonstrate that the employer had notice of the employee's prior injury or disabling condition. Often, this is accomplished by an affidavit from the employer, a statement of notice on the employment application, or by affidavit of the employee maintaining that the employee informed his employer of the previous injury at the time he was hired.

Once the parties establish that the claimant is permanently totally disabled, and that the employer had notice of the prior injury or condition, the parties must demonstrate that the previous injury or condition was, in fact, of a disabling nature which adversely affected the employability of the employee. There is no specific test or general standard which can be uniformly applied. The facts of each case, along with common sense and reason, must be applied to the individual case and circumstances. *Drummond Company, Inc., v. Wilson,* 547 So.2d 564 (Ala.Civ.App. 1989). Some obvious examples of disabling injuries which would affect the employees' employability would be stated limitations on the type of work one could perform, or a requirement of "light duty" work. Other examples, unfortunately, are more subtle in nature, such as evidence of the inability of the employee to seek or perform certain jobs because of the physical disability. In any event, each case must be evaluated on its own particular facts and circumstances.

The procedure for making a claim against the SITF is, theoretically, rather simple. Once the second injury is settled between the employer and employee or tried to judgment, a letter to the Department of Industrial Relations making a claim is sufficient. As a practical matter, this request should be sent to the department by certified mail in order to document the date of receipt of the request by the department. Although the statute does not require it, the request should have attached documentation in the form of medical testimony or reports that verify the employee is permanently and totally disabled resulting from two separate injuries in different employments; if possible, a vocational rehabilitation specialist's report verifying that the employee is disabled and cannot reasonably return to gainful employment; a copy of the court's order reflecting the second injury; verification that the employer had prior knowledge of the previous injury; and some sort of verification that the previous injury was of a disabling nature which adversely affected the employee's employability, §25-5-57(a)(4)f. Furnishing this information, though not required, assists the Department of Industrial Relations in passing judgment upon the claim and facilitates the ultimate resolution of liability, *vel non* of the fund.

Once this information is received, the Director of Industrial Relations will make a determination of liability against the SITF. The director is deemed to have admitted liability against the fund unless, within 60 calendar days after receipt of a claim, he notifies the parties by registered or certified mail that he does not consider the fund liable. Either party may, within *30 days* after the date of making such notice, appeal to the circuit court of the county of residence of the employee. Said appeal is without a jury and upon the issues stated in the complaint and answer. The case is given the same priority on the docket as other workers' compensation cases. Appeals for the circuit court shall be taken as in other appeals, but shall be filed within 30 days of the final ruling of the circuit judge, §25-5-74.

If a claim against the SITF is accepted, the director will send a letter stating the fund is liable, the schedule for payments, the amount of payments and the conditions under which payments will be made. After acceptance of a claim against the SITF, it usually takes approximately 30 days to begin payments and bring the claimant up to date.

Section 25-5-57(A)(4)g provides that if an employee receives two injuries which render him permanently and totally disabled in the *same* employment, then compensation shall be paid by the employer for permanent total disability only, and the SITF is not liable. In order to avail themselves of the benefits of the SITF, the parties must demonstrate that the two injuries or disabling conditions did not arise out of on-the-job injuries while the employee was working for the same employer. The question often arises as to whether or not an employee whose first injury is non-work related and subsequently suffers an on-the-job injury, the combined effect of which renders the employee permanently disabled, is entitled to benefits under the fund. While there is no appellate court decision which directly addresses this question,

this writer is of the opinion that said employee, if he meets the other criteria of the fund, would be entitled to benefits. For example, an employee could have had a non-work related automobile accident which rendered him 40 percent disabled. Thereafter, that employee could secure employment with an employer who has knowledge of his 40 percent disability, suffer a job-related injury while in said employ and if said job-related injury, together with the disability from the non-work related vehicular accident, render the employee permanently totally disabled, the employee and his employer could avail themselves of the benefits of the SITF if they successfully jumped through the other hoops hereinabove described.

Section 25-5-89 is the statutory authority for payment of attorneys' fees in worker compensation cases. Said section provides the following:

> "No part of the compensation payable under this article shall be paid to attorneys for the plaintiff for legal services unless, upon application of the plaintiff to a judge of the circuit court, such judge shall order or approve of the employment of an attorney by the plaintiff, and in such event the judge upon the hearing of the complaint for compensation, shall fix the fee of the attorney for the plaintiff for his legal services and *the manner of its payment*, but such fee shall *not exceed 15 percent* of the compensation awarded or paid."

The state previously had taken the position that since §25-5-73, "payments from fund" did not specifically authorize payment of attorneys' fees from the SITF, then the state could not pay lump-sum, attorneys' fees from the SITF. Also, the state felt that section only authorized *weekly compensation* payments. Therefore, if liability of the fund was accepted, weekly benefit checks, in some cases, were sent directly to the claimant's attorney, and the matter of attorneys' fees was left up to the attorney and his client. However, in the *Second Injury Trust Fund v. Stanton*, 512 So.2d 1377 (Ala.Civ.App. 1987), cert. denied, the circuit court of Mobile County ultimately found the claimant permanently and totally disabled under circumstances giving rise to liability under the SITF. Thereafter, the plaintiff's counsel filed a motion requesting lump sum attorney's fees to be paid from the SITF. Over the Department of Industrial Relations' objection, the trial court entered an order awarding a lump sum attorney's fee to be paid from the SITF. SITF appealed the judge's order solely on the issue of the propriety of the lump sum attorney's fee award payable from the SITF. The court of civil appeals in *Stanton* maintained that it was not an abuse of the trial court's discretion to order a lump sum attorney's fee payable from the SITF. It should be noted that the amount of the attorney's fee was not commuted to its present value; however, the recent case of *Ex Parte St. Regis Corp.*, 535 So.2d 160 (Ala. 1988) would dictate that when the trial court awards a lump sum attorney's fee, said fee must be reduced to its present value.

The practitioner also should note that Alabama's appellate courts have maintained that post-judgment interest upon the attorney's fee is recoverable from the SITF at the rate of 12 percent per annum, by virtue of the application of §8-8-10, *Code of Alabama* (1975). *Ex Parte Stanton*, 23 ABR 1498 (March 17, 1989).

Currently, there is pending on appeal before the court of civil appeals the case captioned *J.G. Allen, Director, Department of Industrial Relations, as Trustee of the Second Injury Trust Fund v. Franklin Blankenship*, Civ. No. 7204. In Blankenship, the employer and employee agreed upon a settlement of Blankenship's worker's compensation claim surrounding this second job-related injury, which rendered him permanently totally disabled. This second injury occurred in a different employment than his original injury. The parties agreed that upon payment of the settlement, the employer would be released and the employee would be free to pursue the SITF for additional benefits. The parties petitioned the court to approve their settlement and in the court's judgment, the trial judge, in fact, approved the proposed settlement and further found that the employee was permanently totally disabled; that he had had a second injury in different employment; that he had had a previous injury which disabled or incapacitated him; that the employer knew of the prior disabling condition; and that the SITF was liable to the employee for the benefits and attorney's fees.

Immediately upon receipt of the judgment, counsel for the employee forwarded a copy of the judgment to the SITF requesting payment of the benefits. Within 60 days of the judge's order, the Department of Industrial Relations filed a Motion for Relief of Judgment; however, none of the grounds stated in the post-trial motion specifically denied that the SITF was liable to the employee. The state's post-trial motion was denied and appeal was taken. As hereinabove stated, the Department of Industrial Relations has 60 days from its receipt of the employee's claim for benefits within which to admit or deny liability. One issue presented in this appeal will be whether the post-trial motion (which did not specifically deny liability) operated to suspend the 60-day time limit imposed by §25-5-74.

Because the SITF can provide some significant benefits, monetarily and otherwise, many attorneys representing plaintiffs and defendants alike now have begun efforts to tap this resource in appropriate cases. The statutes establishing the fund and setting out its procedural guidelines provide only a sketchy outline and framework within which the parties must operate. Every case should be thoroughly examined and evaluated with regard to the possible liability of the fund. If questions should arise, the practitioner should not hesitate to contact the Department of Industrial Relations, Worker's Compensation Division, (205) 261-2868, or the Legal Division, (205) 261-5411. These departments of the state are available and willing to give advice on any problems or questions the practitioner may have about the SITF. ■

The Tort of Bad Faith and the $250,000 Cap on Punitive

by David H. Marsh and Susan J. Silvernail

Alabama juries have returned numerous punitive damage awards on bad faith claims against defendant insurance companies. For example, recently in *United Services Automobile Association v. Wade*, 544 So.2d 906 (Ala. 1989), the Supreme Court of Alabama upheld an award of punitive damages in the amount of $2,500,000 on a bad faith claim against an insurance company which "literally manufactured" an arson case against its insured, rather than pay a claim under a homeowner's policy. *Id.* at 916. In *United American Insurance Company v. Brumley*, 542 So.2d 1231 (Ala. 1989), a punitive damage award of $1,000,000 was affirmed where the defendant insurance company virtually ignored the insured's repeated attempts to be paid under a policy for Medicare supplemental benefits. *Id.* at 1236. In *Nationwide Mutual Insurance Co. v. Clay*, 525 So.2d 1339 (Ala. 1987), the supreme court upheld an award of $1,250,000 in punitive damages and indicated it was willing to uphold "substantial jury awards for damages, even in excess of $1,000,000, when the facts warrant such an award." *Id.* at 1344. In *Clay*, the insurance company belatedly made a partial payment under a disability income policy, then argued the insured had misrepresented his income in his application; yet, the company continued to demand and accept premium payments. *Id.* at 342-3.

Will such substantial punitive damage awards be possible in the future? Punitive damage awards for bad faith claims which accrue after June 11, 1987, like most other civil actions, are not to exceed $250,000. *Ala. Code* § 6-11-20 et. seq. (Supp. 1987). The new statutory cap on punitive damages, however, contains three exceptions. *Ala. Code* § 6-11-21. In particular, the first exception states the $250,000 cap does not apply if an award of punitive damages is based upon "a pattern or practice of intentional wrongful conduct, even though the damage or injury was inflicted only on the plaintiff." *Ala. Code* § 6-11-21(1). The second and third exceptions do not apply to bad faith or fraud claims and, therefore, are not addressed in this article.

At least for the foreseeable future, large punitive damage awards for bad faith claims against defendant insurance companies will depend upon the plaintiff's ability to demonstrate the first exception, "a pattern or practice of intentional wrongful conduct." This article will outline the elements of a successful bad faith case, and then suggest ways in which the plaintiff's lawyer may discover whether a defendant insurance company engaged in a systematic course of wrongdoing (i.e. pattern or practice) and if so, prove it. While emphasis will be placed on the tort of bad faith, the methods suggested to avoid the $250,000 cap also may be used in fraud actions.

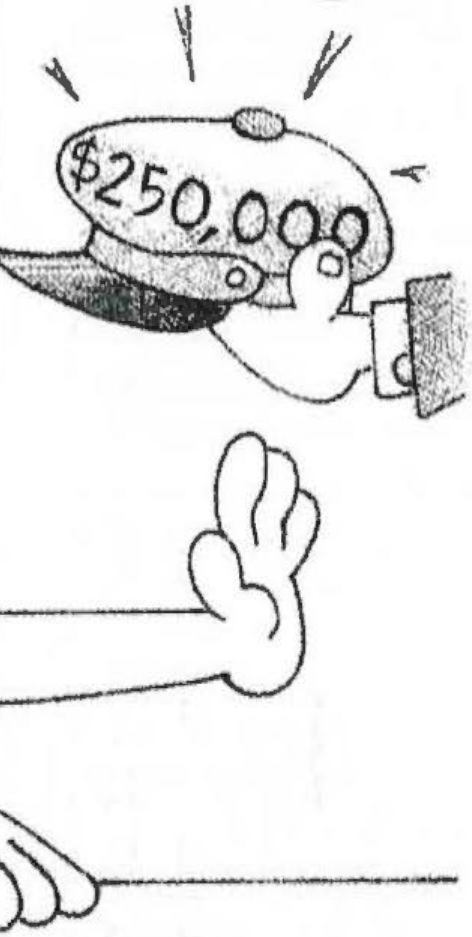
I. Elements of bad faith

The tort of bad faith is founded upon an insurance company's implied-in-law duty to act in good faith and deal fairly with its insured. The Alabama Supreme Court first recognized the tort of bad faith in first party insurance actions in *Chavers v. National Security Fire & Casualty Co.*, 405 So.2d 1 (Ala. 1981). *Chavers* teaches that the duty is not one of due care; rather, bad faith lies only where the insurance company has intentionally failed to perform in good faith. *Id.* at 5. So, for example, in *Prudential Insurance Co. of America v. Coleman*, 428 So.2d 593 (Ala.

1983), where an insurer's decision not to pay a claim under a health policy was based upon a "mistake, perhaps a negligent mistake," the supreme court found a lack of "dishonest purpose" and, thus, held there was no basis for recovering on the bad faith claim. *Id.* at 598-9.

Under *Chavers*, a bad faith claim may be proven in one of two ways against an insurance company which intentionally refuses to settle a direct claim. The plaintiff may show there was "no lawful basis for the refusal coupled with actual knowledge of that fact" or, alternatively, that there was an "intentional failure to determine whether or not there was any lawful basis for such refusal." *Chavers, supra* at 7.

Avoiding Damages



The Alabama Supreme Court elaborated on the meaning of this two-tier test in *Gulf Atlantic Life Insurance v. Barnes*, 405 So.2d 916 (Ala. 1981). "No lawful basis" may be understood as the absence of any reasonably legitimate or arguable reason for failing to pay the claim. *Id.* at 924. This is true whether the debate concerns a matter of fact or law. *Id.* Knowledge of the lack of a legitimate or reasonable basis may be inferred from a reckless indifference to facts or to proof submitted by the insured. *Id.* The second tier involves an inquiry into "whether a claim was properly investigated and whether the results of the investigation were subjected to a cognitive evaluation and review." *Id.*

Further, the Supreme Court of Alabama has held that whether an insurance company is justified in denying a claim under a policy must be judged by what was before it at the time the decision was made. *National Savings Life Insurance Co. v. Dutton*, 419 So.2d 1357 (Ala. 1982). In *Nationwide Mutual Insurance Co. v. Clay, supra*, for example, the supreme court found that evidence as to a dispute over the amount of benefits owed the insured was not relevant to the propriety of the conduct of the insurance company because the issue surfaced after the time at which the insurance company denied the disability claim. *Id.* at 342.

The plaintiff's burden of proof in a bad faith case is summarized in *National Security Fire & Casualty Co. v. Bowen*, 417 So.2d 179 (Ala. 1982), as follows: (a) an insurance contract between the parties and a breach thereof by the defendant; (b) an intentional refusal to pay the insured's claim; (c) the absence of any reasonably legitimate or arguable reason for that refusal; (d) the insurer's actual knowledge of the absence of any legitimate or arguable reason (such "knowledge," as mentioned earlier, may be inferred from a reckless indifference to the facts); (e) if the intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim. *Id.* at 183.

In *National Savings Life Insurance Co. v. Dutton, supra*, the supreme court adopted what has become known as the "directed verdict on the contract claim standard":

> In the normal case in order for a plaintiff to make out a prima facie case of bad faith refusal to pay an insurance claim, the proof offered must show that the plaintiff is entitled to a directed verdict on the contract claim and thus, entitled to recover on the contract claim as a matter of law. Ordinarily, if the evidence produced by either side creates a fact issue with regard to the validity of the claim and thus, the legitimacy of the denial thereof, the tort claim must fail and should not be submitted to the jury.

Id. at 1362. The qualifying language, "in the normal case," has proven to be problematic in its application. Recently, in *Burkett v. Burkett*, 542 So.2d 1215 (Ala. 1989), the supreme court wrote that it had not yet formulated a general rule for deciding whether a claim is an ordinary or an extraordinary bad faith claim. *Id.* at 1218. The court stated that analysis has been made on a case-by-case basis. *Id.* In *Continental Assurance Co. v. Kountz*, 461 So.2d 802 (Ala. 1984), the court found that the evidence of the insurance company's intentional failure to determine whether there was a lawful basis for denying the insured's claim was sufficient to render the case "extraordinary." *Id.* at 808. The insurance company's refusal to pay for the insured's oral surgery was apparently based on a diagnosis found in the medical records, but the company failed to investigate other reports of the insured's traumatic injury. *Id.*

In another example of an "extraordinary" case, *Jones v. Alabama Farm Bureau Mutual Casualty Co.*, 507 So.2d 396

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(Ala. 1986), the court found that the disputed factual issue arose solely from a contradicted oral conversation between the insured and the insurance company's agent. The supreme court reasoned that if the directed verdict on the contract claim standard was allowed to bar a claim on these facts, the purpose of the bad faith action would be frustrated. Although *Dutton* characterizes the "extraordinary" case as "extreme," the case of *Aetna Life Insurance Company v. Lavoie*, 470 So.2d 1060 (Ala. 1984), indicates that the directed verdict on the contract claim standard was never meant to be "unyielding" or given "universal application." It is clear that it is not always necessary to receive a directed verdict on the contract claim in order to prevail on the related bad faith claim.

II. The "cap" and how to avoid it

The new $250,000 cap on punitive damages, and the exception thereto, should be considered during the initial client interview. The interview should be conducted with an eye toward punitive damages and, more specifically, finding a "pattern or practice" of similar wrongful conduct if it exists. How can this be done? Of course, the lawyer must listen carefully as the client explains what he or she feels their insurance company has done wrong; remember, what the average client feels is important, generally, also will be what a jury considers to be important. The lawyer should obtain all written documents from the client, including the entire policy of insurance at issue, any claims made under the policy and any correspondence sent to or received from the insurance company. Note that a claim denial, not just late payment, generally, is necessary before a bad faith claim is "ripe." The insurance policy must be read carefully. If the insurance company has refused to pay the client's claim, the lawyer must ascertain the exact basis for that refusal.

Once reasonably satisfied that a cause of action for bad faith against a defendant insurance company exists, the lawyer should determine whether the client knows any other persons who have had similar experiences with the same insurance company. This could yield valuable evidence as to "a pattern or practice of intentional wrongful conduct." Also, the lawyer should determine the full name and address of the selling agent. Contacting the local agent during investigation often proves helpful; the agent may state that, in his or her opinion, the particular claim should have been paid or the insurance company's conduct was wrong. Also, the agent often knows of other policyholders whose claims have been denied. Such evidence is clearly relevant now in light of the "pattern or practice" exception. Finally, a lawyer should not be discouraged if the size of the client's contract claim is small. Arguably, the fact that the claim involves a small amount makes the claim denial more reprehensible. Further, when investigating the wrongful denial of a small claim, the plaintiff's lawyer may smoke out other similar denials the insurance company has made.

Another key to proving a "pattern or practice of intentional wrongful conduct" on the part of the insurance company is obtaining documents. These documents should include interoffice memorandums concerning claims practices, policy and procedure manuals used by the company's employees, and past complaint files. There are three primary methods to obtain the needed documents: (1) interrogatories and requests for production under ARCP 33 and 34; (2) depositions under ARCP 30; and (3) the State Department of Insurance.

The plaintiff's lawyer gains the advantage if he or she files interrogatories and requests for production at the same time the complaint is filed. If the plaintiff's lawyer files interrogatories and requests for production before the defendant's lawyer does the same, most courts will require the defendant to respond first. Also, the plaintiff's lawyer must be persistent in order to obtain adequate responses to interrogatories and requests for production. Rarely will the defendant adequately and completely respond to initial discovery. The plaintiff's lawyer who accepts inadequate responses and does not follow up with appropriate motions simply rewards the defendant for this practice.

The critical information and documents which always should be requested in interrogatories and requests for production include the following:

(1) The entire claim file referable to the insured and policy at issue. If the plaintiff has had numerous claims denied during a sufficient period of time a "pattern or practice of intentional wrongful conduct," arguably, may be established through the plaintiff alone.

(2) Any and all internal memorandums, recordings or writings of any type growing out of the handling of the claim involved and/or the decision to deny said claim. Many insurance companies require their claims employees to document, through taped recordings or writings, all conversations with the insured concerning the denial of a claim. For example, memorandums or recordings might reveal a particular claims employee recommended that the claim be paid or represented to the insured that the claim would be paid.

(3) A listing of current and prior lawsuits against the insurance company alleging bad faith, fraud, outrage, misrepresentation, and breach of contract. The list should include the jurisdiction of the lawsuit, the date on which it was filed and the name of the plaintiff. Such information is clearly discoverable, and

perhaps admissible, by virtue of the "pattern and practice" exception found in § 6-11-21(f).

(4) Copies of all policyholder complaints sent directly to the insurance company or received by the company through the State Department of Insurance. Most state departments of insurance send copies of policyholder complaints to the insurance companies involved. Such complaints may be relevant to show "pattern and practice" and, also, to show prior notice of a problem by the insurance company.

(5) The names of all persons involved in any way in the decision to deny the claim at issue.

(6) The names of all selling agents involved in the sale of the policy.

(7) Information concerning whether the policy or contract at issue has been declined or amended by any state departments of insurance.

(8) A copy of the actuarial memorandum or memorandums generated when the policy was first compiled. Insurance companies use such memorandums to set premiums and insure profitability.

(9) A copy of the Loss Experience Exhibit concerning the same type of policy or contract for the years prior to and including the sale of the policy at issue. This document is required by almost all insurance departments and shows the ratio between premium dollars received versus claims paid. Where required, it must be filed annually. The Loss Experience Exhibit may contain evidence that the insurance company does not pay its claims, does not meet state ratio requirements or that the policy value is minimal.

(10) The corporate history of the insurance company, including all sister and parent companies.

(11) All reprimands or written evidence of any disciplinary actions against the insurance company or its agents by officials of any state.

(12) All training materials used by the insurance company in its sales and claim departments, including all procedures manuals which govern the handling of claims.

The plaintiff's lawyer should frame his or her notice for deposition under ARCP 30(b)(5) and (6) so as to include all documents not covered during initial paper discovery. Of course, where time is short, a 30(b)(5) and (6) deposition notice may be used as a substitute for requests for production. Requested documents can and should be received prior to the actual date of the deposition to provide the plaintiff's lawyer with adequate opportunity to examine them. Every person involved in the decision to deny the claim and in the sale of the policy should be deposed. Also, the plaintiff's lawyer should consider taking the depositions of the insurance company's highest executive officers.

The State Department of Insurance provides a gold mine of information in any bad faith or fraud action, particularly when attempting to prove "pattern or practice." The Department of Insurance maintains files of complaints filed against insurance companies doing business in the state, files referable to each policy or contract written by insurance companies within the state and files containing the licensing status of insurance agents within the state. Complaints and formal charges brought against companies and agents also are kept at the State Department of Insurance. The plaintiff's lawyer should obtain the following documents from the State Department of Insurance:

(1) Copies of all complaints filed against the defendant insurance company by its policyholders. Surprisingly, a great number of people write to the State Department of Insurance to complain of treatment they perceive as unfair by insurance companies. For example, during the course of one lawsuit against an insurance company which had issued Medicare supplement policies, this author located more than 300 such complaints written during the one-year period immediately preceding the denial of the claim at issue. Most of these complaints focused on the amount of the premiums charged or contained assertions that the insurance company would not pay valid claims. This type of evidenoe is admissible now on the issue of "pattern or practice."

(2) The file on the policy or contract of insurance involved. This file will indicate what changes were required by the State Department of Insurance before the policy could be sold to state residents.

(3) The file on the defendant agent. The Department of Insurance maintains a file on insurance agents in the state. This should contain the licensing history of the agent and any complaints filed against the agent.

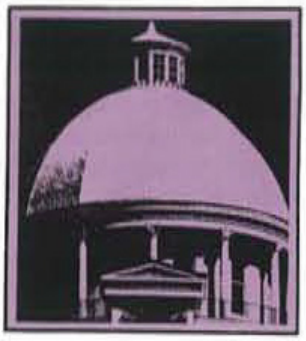
(4) Copies of all formal charges brought by the State Department of Insurance against the insurance company or any of its agents, along with the final disposition of the charges.

(5) All correspondence between the State Department of Insurance and any officer or employee of the insurance company.

(6) A complete list of all agents licensed to sell for the insurance company for a period beginning five years prior to the claim denial. These former agents should be contacted and questioned about the company's claim payment history.

III. Conclusion

It is somewhat ironic that a statute intended to limit punitive damages actually will result in broader discovery and the introduction of evidence of prior wrongful acts. However, the clear language of the statute allows and, indeed, demands the introduction of any evidence indicating a pattern or practice of intentional wrongful conduct. The general rule disallowing evidence of prior similar wrongful acts by a defendant no longer applies in bad faith and fraud actions against defendant insurance companies. The trial practitioner should use all of the tools discussed above in an effort to locate policyholders, agents and documents, and take full advantage of the "pattern and practice" exception contained in *Ala. Code* § 6-11-21(f). ■



Legislative Wrap-up

by Robert L. McCurley, Jr.

The Alabama Law Institute has revised its bill to completely rewrite Alabama's adoption law. The bill is sponsored in the House of Representatives (H. 256) by Representatives Beth Marietta-Lyons, Mike Box, Bill Fuller, Dutch Higginbotham and Jim Campbell; in the Senate (S. 269) by Senators Charles Langford, Frank Ellis, Steve Windom and Jim Preuitt.

Commissioner Andy Hornsby of the Department of Human Resources and the Alabama Probate Judges' Association have unequivocally endorsed the bill as providing the much-needed changes in the adoption laws.

The new Adoption Code will provide many additional safeguards. It will substantially toughen the laws against baby selling by changing the offense from a misdemeanor to a felony. Punishment will be increased from a maximum of three months in jail to ten years in prison.

Additionally, the bill provides for preplacement investigation and enhanced legal protections for all of the parties involved in the adoption proceeding.

The following is a comparison of the major changes in the adoption law:

CURRENT LAW	1990 ADOPTION CODE
1. CONSENT	1. CONSENT
A. May be given at any time, including prior to birth.	A. Same.
B. May give oral consent.	B. Consent must be in writing and sworn to before enumerated officials.
C. Consent may not be withdrawn once the child has been placed with the adopting parents except for legal cause.	C. Consent of the parents with unlimited right of recision for 5 days after signing or birth whichever comes last. Also right of recision for 14 days after signing or birth whichever comes last with court approval.
D. Not addressed	D. A minor parent must have a guardian ad litem appointed to represent them.
E. Normally consent of natural parents or agency having custody is required unless parents have abandoned child or are incapable of giving consent. In case of illegitimacy the mother's consent is sufficient except when (1) paternity is established; (2) natural father's name is on petition; or (3) the father's name is otherwise known to the court. In those three instances, the natural father must be given notice.	E. Consent required by (1) adoptee 14 years old or older; (2) mother; (3) presumed father; (4) agency, (5) putative father if known to the court and he responds within 30 days of receiving notice.
2. PREPLACEMENT INVESTIGATION	2. PREPLACEMENT INVESTIGATION
A. No investigation required prior to placement of the child with the adopting parents.	A. Preplacement investigation required except for good cause shown and notice to court and DHR.

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.

CURRENT LAW	1990 ADOPTION CODE
B. Not addressed	B. Investigation may be made by DHR, LCPA, DHR licensed investigator or qualified court appointee.
3. PETITION AND INVESTIGATION	3. PETITION AND INVESTIGATION
A. Not addressed.	A. Adoption petition is to be filed within 30 days after placement.
B. Court orders investigation after a petition has been filed.	B. Court orders investigation after petition if preplacement investigation has not been done within 24 months of petition.
C. Investigation is to be performed by DHR or LCPA.	C. Investigation to be performed by DHR, DHR licensed investigator, LCPA or qualified court appointee.
4. INTERLOCUTORY AND CONTESTED HEARINGS	4. INTERLOCUTORY AND CONTESTED HEARINGS
A. Court files interlocutory order after hearing on merits.	A. Interlocutory order is issued immediately giving adoptive parents right to make medical and other decisions unless custody is retained by DHR or agency.
B. Not addressed.	B. If the adoption is contested a guardian ad litem must be appointed for the adoptee and any minor who is a party to the proceedings.
C. Hearing may be transferred to district court on motion of party.	C. Contested hearing may be transferred to courts having jurisdiction over juvenile matters.
5. FINAL ORDER	5. FINAL ORDER
A. Final order may be issued six months after entry of interlocutory decree. Interlocutory decree may be revoked at any time prior to final order for good cause.	A. Final order rendered after hearing. Dispositional hearing must be held within 90 days if there has been a preplacement investigation or 120 days if there was not a preplacement investigation. The child must have lived with the petitioner at least 60 days.
B. Best interest of child is determining factor.	B. Same.
6. FEES AND PAYMENTS	6. FEES AND PAYMENTS
A. It is a misdemeanor for someone to advertise that they will pay parents to give up their child for adoption.	A. No one may take payment for placing a child. Punishment is enhanced to Class C Felony.
B. Not addressed.	B. Prior to payment, the petitioners must file a full accounting of everything to be paid in relation to the adoption or place the payment in escrow subject to court approval.
C. Not addressed.	C. The adopting parents and the natural parents must sign an affidavit that no money or other thing of value has been paid or received for giving up the child for adoption. Penalties range from a misdemeanor to a felony.
D. Not addressed.	D. Maternity-connected medical or hospital and necessary living expenses of the mother may be paid as an act of charity.
7. ADOPTION RECORDS	7. ADOPTION RECORDS
A. Prior to final order the adoption records are only open to natural and adoptive parents and their attorneys and DHR.	A. Prior to final order the adoption records are open only to petitioner, attorneys of record, investigator and other person by order of court for good cause shown.
B. Adoption records only open to natural and adoptive parents and their attorneys and DHR.	B. Open by court order for good cause shown. Identifying information not given except with consent of parties or through court order.
C. New birth certificate issued with original certificate sealed and filed.	C. Same.
D. Original certificate may be inspected by adult adoptee, adopting parents or by court order.	D. Original certificate may be inspected by state and federal governmental officials and by court order for good cause shown.
E. Not addressed.	E. Information about adoption must be retained by DHR and agencies for 75 years.
F. Not addressed by current adoption code. Is provided for under separate law for agency adoptions.	F. The agency or investigator shall furnish to natural and adoptive parents and adult adoptees nonidentifying information.
G. Original birth certificate available to adult adoptee. DHR and LCPA prohibited from giving adult adoptee identifying information without consent of party under §38-7-12.	G. Identifying information available to adult adoptee with consent of party or through court order. ■

The Montgomery County, Alabama, Inn of Court Chapter Organized and Holds Its Inaugural Meeting

John R. Matthews, Hon. Frank M. Johnson, Hon. Hugh Maddox, Hon. Patrick E. Higginbotham and Hon. Joseph D. Phelps

After several months of planning by an enthusiastic group of judges and attorneys, the Montgomery County, Alabama, Inn of Court chapter celebrated its chartering with an inaugural luncheon November 27, 1989. The chapter's charter application was approved October 30, 1989, making the Montgomery County, Alabama, Inn of Court the nation's 92nd chapter and the first in the State of Alabama.

An American Inn of Court is an intimate amalgam and interaction of no more than 65 judges, master lawyers, less experienced barristers and pupils in an organized and continuing structure designed to enhance directly the ethical and profession quality of legal advocacy in America. A chapter's essence is its small size and personal contact among its members. At an Inn meeting, members engage in mock trials and make appellate arguments, receive critical evaluation, share insights into the judicial process and discuss ideas and experiences. Between meetings, members meet in law offices, courtrooms and judges' chambers.

The Honorable Joseph D. Phelps, circuit judge for Alabama's 15th Judicial Circuit and a member of the chapter's organizing committee, served as master of ceremonies for the luncheon. He welcomed the more than 50 masters, barristers, pupils and guests and introduced the other members of the organizing committee who were: Hon. Truman Hobbs and Hon. Joel Dubina, judges for the United States District Court for the Middle District of Alabama; Hon. Hugh Maddox, associate justice of the Alabama Supreme Court; David B. Byrne, esq., and John R. Matthews, esq.

Justice Maddox gave the invocation and following the meal Judge Phelps called on Emeritus Master Frank M. Johnson, United States Circuit Judge for the 11th Circuit, to introduce the meeting's keynote speaker and Alabama native, Hon. Patrick E. Higginbotham, United States Circuit Judge for the 5th Circuit. Judge Higginbotham, organizer and president of the Dallas Inn of Court Chapter, spoke on his experiences with the Dallas chapter and the pride in advocacy and professional ideals which Inns of Court foster.

The keynote address was followed by a report of the nomination committee. Elected as officers for the 1989-90 year were: President-Hon. Joseph D. Phelps; Counselor-Hon. Hugh Maddox; Secretary-Treasurer-John R. Matthews, esq.; and Administrator-Keith B. Norman, esq. The following members were elected to the executive committee: Hon. Joel Dubina; David B. Byrne, Jr., esq.; Thomas S. Lawson, Jr., esq.; and Oakley W. Melton, Jr., esq. A program agenda for 1990 has been set, with the chapter's first program being held in January.

For further information about organizing an Inn of Court chapter, contact the American Inns of Court Foundation, 1225 Eye Street, N.W., Suite 500, Washington, D.C. 20005, (202) 682-1613, or contact Keith Norman at state bar headquarters, (205) 269-1515. ■

Alabama State Bar Participates in National Bar-School Partnership Program

Due to the efforts of the Alabama State Bar Task Force on Citizenship Education, the American Bar Association Special Committee on Youth Education for Citizenship has chosen the Alabama State Bar as one of only 12 state bars to participate in the ABA's bar-school partnership program. The purpose of the program is to increase knowledge, understanding and respect for law by uniting attorneys and educators in a committed effort to develop quality law-related education (LRE) programs. Chris Christ of Birmingham is chairperson of the task force, and Mike Odom of Mobile is the vice-chairperson.

LRE incorporates interactive teaching methods, resource people, materials and places to teach students of all levels and abilities the important citizenship skills necessary for becoming responsible citizens.

Attorneys have been paired off with teachers in three cities: Birmingham,

Opelika and Mobile. After training workshops, these attorneys work throughout the school year enhancing the LRE curriculum already in place. Through regular classroom visits, field trips, mock trials, and other hands-on activities, these attorneys provide students with a familiar resource person who can help them understand the legal system.

Mike Odom, assistant district attorney for Mobile County, was instrumental in initiating this program for Alabama and is overseeing the local program in Mobile. Attorneys assisting in Mobile are: Richard Shields, Elizabeth Shaw, Larry Moorer, Paul Brown, Herman Thomas, David Peeler, Michael Mills, Ian Gaston, Andy Citrin, Richard Alexander, and Wanda Rahman.

Linda Felton, social studies educator and graduate assistant in curriculum at Auburn University, is heading up the program in Opelika. Working with the program there are attorneys Trip Walton, Marrell McNeal, Jacob Walker and James Cox.

Jan Loomis, social studies educator, is coordinator of the Birmingham program.

Mobile lawyers and teachers gathered to discuss the bar/school program.

Loomis is also involved in developing an LRE outreach resource center to provide ongoing support and assistance in these three areas. Attorneys assisting in Birmingham are: John Lavette, Katy Pugh, Lynn Stephens, Lois Beasley, Morris Wade Richardson, Anthony Cicio, Charles Allen, Marcus Jones, Robert Cooper, Michael Edwards, Sandy Falkner, Frank Farish, Betsy Palmer Collins, Suzanne Ashe, Barry Alvis, Jane Ragland, Patricia Gail Dickinson, Katheree Hughes, Jr., Roger Smitherman, and Connie Parson.

The 1989-1990 program will serve as a model for the expansion of new partnerships throughout the state in future years. If you want to become involved in the bar-school partnership program or to receive more information about starting a similar program in your area, please contact Keith Norman, Director of Program, Alabama State Bar, (205) 269-1515. ■

MCLE NEWS

by Keith B. Norman

The Mandatory Continuing Legal Education Commission met November 10, 1989, at the bar headquarters in Montgomery, Alabama. At this meeting the Commission: (1) approved for CLE attendance credit only, the annual meeting of the Alabama Law Institute which is held in conjunction with the annual state bar meeting; (2) approved a program on current issues in employment law held in December 1988, belatedly submitted by its sponsor, Mississippi Law Institute, and waived the report of compliance amendment deadline to allow an Alabama bar member to claim teaching credits for her participation in this program; (3) approved a mixed-audience seminar on nursing home law sponsored by a presumptively approved sponsor for six credits; (4) declined to overturn the director's decision denying credit for two programs, one involving cults, crime and ritual abuse and the other an executive seminar in communication skills; (5) granted the Baldwin County Bar Association's requests for approved sponsor status; (6) granted a sponsor's request to extend the reporting deadline past December 31, 1989, for any Alabama attorney attending the 22nd Transportation Law Institute in San Francisco that was changed from an original October 1989 program date to January 1990 due to the earthquake in October; (7) granted two bar members' request for exemptions from the 1989 CLE requirements because of health problems; (8) designated approved sponsors for 1990; (9) withdrew the following sponsors from the list of presumptively approved sponsors due to the fact that they failed to conduct at least three or more CLE activities during 1989: Morgan County Bar Young Lawyers' Section, Federal Bar Association-Montgomery Chapter, Federal Bar Association-North Alabama Chapter, Library of Congress-Congressional Research Service, Tuscaloosa Trial Lawyers Association; (10) removed the National College of Juvenile Justice from the list of presumptively approved sponsors for its failure to notify either the Commission or the staff of CLE activities offered for credit and for failure to meet the evaluation and attendance list requirements for 1989; (11) approved Alabama's involvement in the cooperative accreditation program (see article regarding changes to Alabama's MCLE rules and regulations); (12) agreed to approve interactive video programs on an ad hoc basis and study survey results of participants taking part in approved interactive video programs before determining the necessity of a permanent regulation change; (13) granted the MCLE staff authority to approve comparative law seminars which satisfy commission rules and regulations without submitting each program to the commission. ■

Transfer to Disability Inactive Status

● Huntsville lawyer **Lawrence A. Anderson** was transferred to disability inactive status on October 13, 1989. [ASB Nos. 87-176 & 87-396]

Disbarments

● On January 4, 1990, the Supreme Court of Alabama entered an order disbarring Birmingham attorney **Ronald L. Spratt** from the practice of law in the State of Alabama, effective December 14, 1989. Spratt's disbarment was based upon his having plead guilty to two counts of theft in the first degree in the Jefferson County Circuit Court, resulting in two felony theft convictions. [14(b) Petition No. 89-01]

● Birmingham lawyer **Mark Andrew Duncan** has been ordered disbarred by the supreme court, effective December 12, 1989. The disbarment order was based upon findings by the Disciplinary Board that Duncan had violated various provisions of the *Code of Professional Responsibility*, by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; by engaging in conduct adversely reflecting on his fitness to practice law; by willfully neglecting a legal matter entrusted to him; by failing to promptly notify a client of the receipt of client funds; and by misappropriating client funds. [ASB Nos. 87-716 & 88-654]

● On January 4, 1990, the Supreme Court of Alabama entered an order disbarring Birmingham attorney **Harold O. McDonald, Jr.**, from the practice of law in the State of Alabama effective February 15, 1990. A default judgment was entered against McDonald on the formal charges pending against him. This default judgment resulted in the Disciplinary Board of the Alabama State Bar finding McDonald guilty of engaging in illegal conduct involving moral turpitude; of engaging in conduct involving dishonesty, fraud, deceit, misrepresentation, and willful misconduct; of misappropriating funds of a client to his own use; of willfully neglecting a legal matter entrusted to him; of failing to seek the lawful objectives of his client and failing to carry out a contract for legal services entered into by him; of prejudicing or damaging his client during the course of the professional relationship; of failing to deposit monies of a client entrusted to him in an insured depository trust account; and of otherwise engaging in conduct which adversely reflects on his fitness to practice law. [ASB Nos. 85-363, 85-459, 85-592 and 86-51]

● Birmingham lawyer **Warner G. Hammett, Jr.**, was ordered disbarred by the Supreme Court of Alabama, effective February 15, 1990, based upon July 7, 1989, findings of the Disciplinary Board of the Alabama State Bar. Hammett was found guilty of engaging in illegal conduct involving moral turpitude, engaging in conduct involving dishonesty, fraud, deceit, misrepresentation and willful misconduct, all of which adversely reflect on his fitness to practice law. [ASB No. 88-517]

Suspensions

● Lawyer **Homer Crawford Coke,** of Birmingham and Decatur, was suspended from the practice of law in the State of Alabama for a period of nine months, effective December 29, 1989, by order of the Supreme Court of Alabama. Coke was found guilty by the Disciplinary Board in three separate cases of having violated the *Code of Professional Responsibility*. He

Disciplinary

was found guilty of having engaged in conduct that adversely reflects on his fitness to practice law and of having been guilty of willful misconduct. [ASB Nos. 88-657, 88-282 & 88-150(B)]

● Effective December 1, 1989, **George N. Babakitis** of Birmingham has been suspended from the practice of law for non-compliance with the Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 89-02]

● Birmingham lawyer **Edward M. Coke** is suspended from the practice of law in the State of Alabama for a period of six months, effective January 29, 1990, by order of the Supreme Court of Alabama. The suspension is based upon Coke's conviction before the Disciplinary Board of the Alabama State Bar of various ethics violations. [ASB No. 88-655]

Public Censure

● Scottsboro lawyer **Pamela McGinty Parker** is hereby publicly censured for having been guilty of willful misconduct, and conduct adversely reflecting on her fitness to practice law. In 1987, while representing a man in a divorce proceeding, Parker raised the possibility with her client of his breaking out the windows or slashing the tires on his wife's car, in order to "get back at her." [ASB No. 89-431]

Private Reprimands

● On Friday, December 15, 1989, a lawyer was privately reprimanded for misappropriating the funds of a client by appropriating them to his own use in violation of DR 9-102(B)(2) and (4). The lawyer issued a trust account check to another lawyer in settlement of a lawsuit, said check being returned for insufficient funds. The returned check was not made good for over two months. In addition, the lawyer's trust account was an interest bearing NOW account in violation of DR 9-102(D)(1). [ASB No. 89-500]

● On December 15, 1989, a lawyer was privately reprimanded for having violated DR 5-101(C) by having filed a petition to modify in a domestic relations matter on behalf of the former husband, after having originally represented the former wife in the matter some four years and eleven months earlier. [ASB No. 88-781]

● On December 15, 1989, a lawyer was privately reprimanded for having engaged in conduct that adversely reflects on his fitness to practice law, in violation of DR 1-102(A)(6). The lawyer was provided with a copy of the complaint that a former client had filed against him, and thrice requested to provide the Disciplinary Commission with a written response to this complaint, but failed to do so. [ASB No. 89-37]

Report

● On December 15, 1989, a lawyer was privately reprimanded for having violated DR 5-101(C). The lawyer was retained by and represented the wife in an uncontested divorce in 1978. Thereafter, in 1984 and again in 1987, the lawyer appeared on behalf of the former husband, against the former wife, in court proceedings relating to child support obligations under the original divorce decree. [ASB No. 89-443]

● On December 15, 1989, a lawyer was privately reprimanded for the violation of DR 1-102(A)(4), (5) & (6), DR 7-102(A)(7) & (8), and DR 7-102(B)(1). The lawyer, on behalf of a client involved in civil litigation, signed a consent settlement with opposing counsel, agreeing that when his client received the settlement proceeds from another, unrelated lawsuit, the lawyer would pay $9,000 of that sum to opposing counsel in the first lawsuit, for the opposing party. When the proceeds came in from the other lawsuit, on instructions from his client, the lawyer failed to deliver the $9,000 pursuant to the settlement agreement, but, rather, delivered the money to his own client. [ASB No. 89-07]

● On December 15, 1989, a lawyer was privately reprimanded for using and compensating a non-lawyer employee to solicit a client or professional business for the lawyer in violation of DR 2-103(A)(2), DR 2-104(B) and DR 2-104(C) of the Rules of Professional Responsibility of the Alabama State Bar in effect prior to October 25, 1985 (subsequently superseded by Temporary DR 2-103). [ASB No. 85-541(A)] ■

Memorials

DRAYTON N. HAMILTON

Drayton N. Hamilton of Montgomery departed this life January 4, 1990. With his passing our profession, state and all its people have suffered a great loss. Born in Birmingham October 8, 1916, his was a lifetime of unselfish and untiring service.

Drayton moved to Montgomery in 1935 and began work for the Alabama Revenue Department, ultimately holding the position of chief of the tobacco tax division. With the onset of World War II, he joined the Navy in 1941 and shortly thereafter was commissioned an officer. During the war he commanded four ships, including the Destroyer Escort U.S.S. Foss and a high-speed transport, the U.S.S. Cook. At the end of the war, he transferred to the U.S. Navy Reserve, from which he retired in 1972 with the rank of captain.

In 1948 Drayton graduated from the University of Alabama School of Law and engaged in the general practice of law in Montgomery until his death. His contributions to the legal profession were many. A past president of the Montgomery County Bar Association, he also served on many committees of the association, as well as committees of the state bar. He was particularly active and effective as a member of the Legislative Liaison Committee of the local and state bars. He was highly respected for his expertise, integrity and fairness as a lobbyist for the Alabama League of Municipalities, for which he served for many years as general counsel. In addition, he served as counsel for the City of Montgomery for 23 years, earning a well-deserved retirement. He was generally recognized as the leading expert on municipal law.

Drayton Hamilton was well known for his generosity, which is amply reflected by the many plaques and certificates of appreciation that adorned his office. He served as president of the Boys Clubs of Montgomery, and was a member of the board for more than 30 years. He also served on the board of the Montgomery Area Council on Aging, on the Board of Trustees of the First United Methodist Church and as chairman, and was extremely active in the Kiwanis Club and served as president of the South Alabama State Fair in 1986. He was a strong supporter of the United Way and virtually every other charitable organization in the community.

Drayton's life was filled with love. First

Paul Pruitt Adams—Montgomery
Admitted: 1949
Died: February 9, 1990

Faulkner Eugene Broadnax—Dothan
Admitted: 1987
Died: November 9, 1989

Dovie Elizabeth McPherson Elrod—Reform
Admitted: 1943
Died: October 11, 1989

David McGiffert Hall—Eutaw
Admitted: 1936
Died: January 20, 1990

Drayton N. Hamilton—Montgomery
Admitted: 1948
Died: January 4, 1990

Ben Dwight Hixon—Union Springs
Admitted: 1973
Died: December 8, 1989

Robert Jones Hooten—Roanoke
Admitted: 1959
Died: January 25, 1990

John Huddleston—Montgomery
Admitted: 1948
Died: December 14, 1989

Earl Cornice Morgan—Birmingham
Admitted: 1950
Died: February 19, 1990

Wade Hampton Morton, Jr.—Columbiana
Admitted: 1964
Died: February 19, 1990

Gilbert Woodrow Nicholson—Birmingham
Admitted: 1951
Died: February 20, 1990

Don Gregg Parker—Courtland
Admitted: 1973
Died: November 9, 1989

William Borden Strickland—Mobile
Admitted: 1955
Died: January 3, 1990

Arnold Buford Thompson—Athens
Admitted: 1958
Died: September 21, 1989

he loved his family, his wife, Hilda; son Drayton and daughter-in-law Hae Seung; his brother, John William Hamilton, Jr.; and his sister, Mary Virginia Overton. Then he loved his country, his God and his church, his profession and his Navy, each with an intensity that defies ranking them in any particular order. His love and concern for his clients was clearly demonstrated during his brief stay at the hospital. The first few days he continuously sent instructions to the office for things to do in pending files. When the necessity of oxygen therapy precluded this, he continued with written notes on a steno pad for as long as his strength permitted.

Throughout his life Drayton Hamilton was a true gentleman and scholar, and lived and worked on the highest moral and ethical levels. He will be sorely missed by all who were blessed to have shared a portion of his port-of-call here on earth, but his bright spirit will always live in our hearts. As his ship set sail on its final course, he would have had us recall the words of Tennyson:

Sunset and evening star,
And one clear call for me!
And may there be no moaning of the bar
When I put out to sea.

—Edwin K. Livingston and Oakley W. Melton, Jr., Montgomery, Alabama

BEN DWIGHT HIXON

WHEREAS, Dwight Hixon, late judge of the district court of Bullock County, Alabama, has departed this life after many years of distinguished service to the bench and bar of the State of Alabama; and

WHEREAS, the work that he did as a learned, able and competent jurist and lawyer will long serve as permanent testimony of his judicial knowledge and ability, reflecting his search for truth and justice; and

WHEREAS, his character and integrity and devotion to duty were an example to all who knew him; and

WHEREAS, Judge Hixon's purpose at all times was to administer justice without respect to persons. The power of the strong did not awe him, and the weakness of the lowly did not sway him from justice, for his judicial life was an exemplification of the principles of fairness and justice embodied in the laws and institutions of this Republic; and

WHEREAS, Judge Hixon was graduated from the public schools of Bullock County, Alabama, following which he received undergraduate and law degrees from the University of Alabama. He served his country honorably and well as an officer in the United States Air Force, seeing duty in the Republic of Viet Nam. Following his release from active duty he practiced law in Tuscaloosa and Union Springs, Alabama, distinguishing himself in these endeavors by hard work, exemplary scholarship and devotion to the causes of his various clients; and

WHEREAS, he subsequently ascended to the bench and held the office of district judge of Bullock County, Alabama, a position in which he served with distinction until his untimely death; and

WHEREAS, Judge Hixon was a member of the First Presbyterian Church of Union Springs, where he served in the offices of deacon, elder and chairman of a Committee of Presbytery. That he lived his life as a Christian was obvious in the compassion, fairness and love for fellow man which characterized his public life; and

WHEREAS, his professional accomplishments, great though they were and acknowledged as they must be, were not so much the mark of the man as was the gentleness and sweetness of his nature. His hand was a stranger to greed, his heart a stranger to malice and his mind a stranger to duplicity. For his works he was esteemed, for his personal qualities he was loved. Generous, kind, thoughtful and modest, he pursued his course, always with unfailing good humor and often with a twinkle in his eye. As a private citizen none lived a purer nor kindlier life. He was loved not only by his neighbors in his beloved Bullock County, but also by a legion of friends in all parts of Alabama. He was benevolent, charitable and liberal in his judgments, and thoughtful of the rights and feelings of

others. He was free from self-seeking, intolerance and arrogance. He had the humility of a truly great man, and a sincere piety, which spoke of its force in every act of his life.

NOW, THEREFORE, BE IT RESOLVED that the bar association of the Third Judicial Circuit of the State of Alabama expresses its deep regret and profound loss in the passing of Judge Dwight Hixon; that it acknowledges with appreciation the work which he did for his country, state and community, and for the bench and bar of the State of Alabama and extends its sympathy to the members of his family.

BE IT FURTHER RESOLVED, that though we grieve deeply at his departure and at our own personal sense of loss in his passing, we at the same time may celebrate his life as an example of God's love for us; and may derive much consolation from the thought that:

"They are not gone who pass
Beyond the clasp of hand,
Out from the strong embrace;
They are but come so close
We need not grope with hands,
Nor look to see nor try
To catch the sound of feet;
They have put off their shoes
To softly walk by day within our thought,
To tread at night our dream-led paths of sleep.

"They are not lost who find
The sunset gate, the goal
Of all the weary years;
Not lost are they who reach
The summit of their climb,
The peak above the clouds and storms.
They are not lost who find
The light of sun and stars and God.

"They are not dead who live
In hearts they leave behind.
In those whom they have blessed
They live a life again,
And shall live through the years
Eternal life, and grow
Each day more beautiful,
As time declares their good,
Forgets the rest, and proves their immortality."

—Donald J. McKinnon, president
Third Judicial Circuit Bar Association

WILLIAM ERNEST HOLLINGSWORTH, JR.

WHEREAS, the members of the Talladega County Bar Association were professional associates and friends of William E. Hollingsworth, Jr., who died on the 2nd day of June 1989, and knew him to be fair and honorable in all his dealings with them, in and out of the courtroom; and

WHEREAS, the members of the Talladega County Bar Association knew William E. Hollingsworth, Jr., to be a formidable opponent and yet always reasonable and ethical in every adversarial situation; and

WHEREAS we wish to recognize the service of William E. Hollingsworth, Jr., as an honorable and courageous elected public official whose integrity and superior performance of his duties is attested to by the fact that he was re-elected for four consecutive terms as district attorney without opposition; and

WHEREAS, in his second period of service he was recognized by the Attorney General's Office of the State of Alabama as one of the best, probably the best, district attorney in this state, and as a consequence was called upon to prosecute numerous felony cases in other counties and did answer these calls to service and achieved an excellent record; and

WHEREAS he served as district attorney for a quarter of a century, some of that time with no legal or clerical assistance and represented the State of Alabama in the circuit and county courts of this state, during which time he fulfilled his duties in an exemplary manner; and

WHEREAS, we recognize that he served his country honorably in World War II;

WHEREAS, he served his community as a volunteer in various youth programs and rendered valuable services to his church and further was a loving husband to his wife and exemplary father to his children, and later, a loving grandfather to his grandchildren.

—Edwin B. Livingston, Jr., president
Talladega County Bar Association

MARION R. VICKERS, JR.

It is fitting at this time that we pause to honor the memory of the late Monnie Vickers, who departed this life in Mobile, Alabama, on the 30th day of November 1989.

Monnie was born January 28, 1925, in Mobile, Alabama. He attended parochial schools in Mobile, graduating from McGill Institute. At an early age, Monnie developed into an excellent golfer and won the Alabama State Amateur Championship at age 18 in 1953. He attended Georgetown University in Washington, D.C., and obtained his undergraduate degree from that institution in 1956. While at Georgetown, he was an active member of the intercollegiate golf team.

He entered the United States Navy and served in Cape Hatteras, North Carolina, and later in Bermuda. Following his honorable discharge, he attended the University of Alabama School of Law and graduated in 1962, being awarded his LL.B. degree that year, which was the same year he was admitted to the Alabama State Bar. He began the practice of law in Mobile with the firm of Vickers, Riis, Murray & Curran, the senior partner of which was his father, Marion R. Vickers, who is one of the Mobile Bar Association's most prominent and oldest living members.

Monnie was an active and devoted member of St. Ignatius Catholic Church, serving in numerous capacities, including president of the parish council. Monnie also was a member of the Mobile, Alabama State and American bar associ-

ations. He served for many years and was, at the time of his death, a member of the board of directors of the Mulherin Custodial Home in Mobile. He also served on the board of directors of the Athelstan Club, including one year as president.

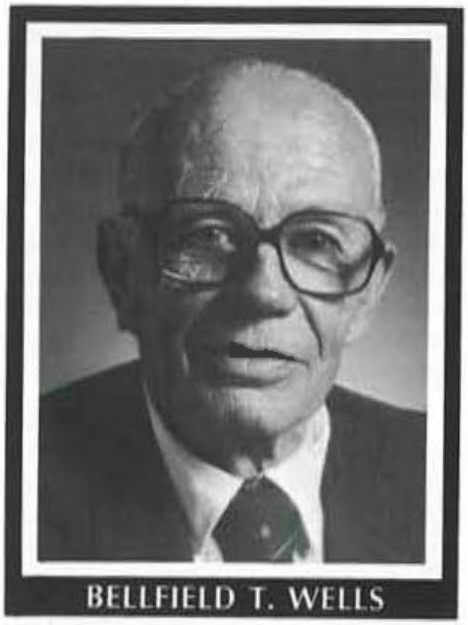
Throughout his life, Monnie maintained a keen interest in golf, enjoying success in that sport until the time of his death. He was also an avid fisherman and particularly enjoyed speckled trout fishing with his family on weekends.

In addition to his father, Marion R. Vickers, Monnie is survived by his wife, Noreen McAllister Vickers, and three children, Michael P. Vickers of Mobile, Sheila Vickers of Birmingham, and Erin Vickers, who is a student at the University of Alabama, and one sister, Elizabeth Courtney.

Monnie was an able lawyer, possessed of a quiet dignity, sincerity and integrity which were outstanding.

NOW, THEREFORE, BE IT RESOLVED by the members of the Mobile Bar Association in regular meeting duly assembled that we mourn the loss of Marion R. Vickers, Jr.; that his life be remembered as one of a kind-hearted, warm-spirited and compassionate lawyer, as well as a Christian gentleman and devoted husband and father who will be greatly missed by all the members of his family and his many friends, to all of whom we extend our sincere and deepest sympathy.

—William H. McDermott, president
Mobile Bar Association



BELLFIELD T. WELLS

WHEREAS, Bellfield T. Wells died October 14, 1989, and

WHEREAS, the Mobile Bar Association desires to commemorate the life of Bell Wells;

BE IT KNOWN that Bellfield T. Wells was born in New York City May 18, 1920. His father died when he was an infant and he was raised by his mother, Cassie Wells, a native of Scotland. His mother died when he was a young man.

He attended a military prep school in upstate New York where he played football and was an outstanding student. He graduated from the prep school with highest honors.

After reading brochures and seeing pictures of the beautiful state of Alabama, he decided to come south and attend college at the University of Alabama, where he received his undergraduate degree. He later entered the United States Army Air Corps (now the U.S. Air Force) and served his country in the European theatre of operations during World War II. While he was in the service he was a gunner on a B-17 with the Eighth Air Force. He attained the rank of sergeant.

While he was based in Scotland he attended the University of Aberdeen. However, he contracted a serious illness while in the service and received an honorable medical discharge.

As a disabled American veteran he returned to the University of Alabama where he entered law school and received his law degree in 1950. While at the University of Alabama Law School he was a classmate of, among others, Al Seale, M.A. Marsal, William M. Clarke, Jerry Shinault and the late Charlie White-Spunner.

His classmates in law school described him as a "brilliant" student who made As while they struggled to make average grades.

He chose Mobile for the practice of law. For three years he served as an Alabama Assistant Attorney General, handling condemnation cases. He maintained a law office here as a sole practitioner for many years and was a member of the Alabama State Bar. Although he suffered long from the disability he contracted in the military service, he maintained his license to practice law until he died.

Wells was a quiet, humble man, possessed of a dry wit. His friends and colleagues have said they "never heard him utter an unkind word about anybody." He was known as one who was ready to offer a helping hand to anyone in need.

He was buried with full military honors in the National Cemetery adjacent to Magnolia Cemetery in Mobile. The United States flag which covered his casket was donated in his memory to the Friends of Magnolia Cemetery and will fly near his grave. His next of kin are cousins on his father's side who live in Helena, Arkansas.

—William H. McDermott, president
Mobile Bar Association

Please Help Us . . .

We have no way of knowing when one of our membership is deceased unless we are notified. Do not wait for someone *else to* do it; if you know of the death of one of our members, please let us know.

Memorial information **must be in writing** with name, return address and telephone number.

Classified Notices

RATES: Members: no charge, except for "position wanted" or "position offered" listings, which are at the nonmember rate (two free listings per bar member per calendar year); Nonmembers: $35 per insertion of 50 words or less. $.50 per additional word. Classified copy and payment must be received according to the following publishing schedule:

May '90 Issue—Deadline March 31

July '90 Issue—Deadline May 31

No deadline extensions will be made. Send classified copy and payment, made out to *The Alabama Lawyer*, to: Alabama Lawyer Classifieds, c/o Margaret Lacey, P.O. Box 4156, Montgomery, AL 36101.

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FOR SALE: Alabama Digest with 1989 pocket parts; complete set of Ala. App. Reporters (1 Ala. App. to 57 Ala. App.); 255 Ala. to 295 Ala. and 331 So.2d to 543 So.2d. (All cases from 1950 to present). **Contact Calvin McBride, P.O. Box 1661, Decatur, Alabama 35602. Phone (205) 353-8601.**

ANTIQUE ALABAMA MAPS: From 1820s-1860s. Excellent office decoration. Guaranteed authentic—not reproductions. These are fascinating historical documents. **Sol Miller, P.O. Box 1207, Huntsville, Alabama 35807.**

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THE UAW LEGAL SERVICES PLAN, a national pre-paid legal services organization with offices in 19 states, seeks an attorney for its Decatur/Huntsville offices to serve the civil legal needs of employees of GM and Chrysler. Applicants must be admitted to the Alabama State Bar with civil practice experience. Bankruptcy experience a plus. Salary ranges between $29,000 and $34,000, depending on experience, with liberal fringe benefits. The UAW Legal Services Plan is an equal opportunity employer. **Send résumé and writing sample to Manager, P.O. Box 2416, Decatur, Alabama 35602.**

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EXPERTS IN STATISTICS: Discrimination, EPA or other matters. Our experts have consulted and testified on statistics and economics over the past 15 years. Plaintiffs or defense. Qualified in many federal districts. Full service consulting firm, not a referral service. **Dr. R.R. Hill, Analytic Services, Inc., P.O. Box 571265, Houston, Texas 77257. Phone (713) 974-0043.**

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INSURANCE LITIGATION CONSULTANT: 24 years' industry experience, former claims executive; attorney; expert witness; case analysis—plaintiff/defendant: policy interpretation; case evaluation; professional insurance conduct; agency, broker, company, policyholder, relationships and responsibilities; bad faith. Curriculum vitae upon request. **William B. Jones, Jr., 3445 Beauclerc Road, Jacksonville, Florida 32217. Phone (904) 739-2796.**

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etc.

ABA solicits nominations for award recognizing lawyers who volunteer to help poor

Nominations now are open for the 1990 American Bar Association Pro Bono Publico Award, which recognizes lawyers who "enhance the human dignity of others by improving or delivering volunteer legal services to the poor."

Eligibility is open to any individual attorney or law firm who does not obtain income from delivery of legal services to poor persons. Up to four awards are given each year. Nominations will close April 15.

For information on nominating procedures, contact Tishia Jordan at the American Bar Association, 750 N. Lake Shore Drive, Chicago, Illinois 60611, phone (312) 988-5764. ■

NOTICE

New procedure regarding publication of criminal cases

Previously, when a nonfinal case was remanded by the court of criminal appeals to the trial court, the opinion of the court of criminal appeals was withheld from publication in *Southern Reporter* until a final appellate decision had been rendered and the case was completed. Upon completion of the case in the appellate system, all related opinions were published in *Southern Reporter* consecutively. Henceforth, these opinions will not be held for the trial court's return following the remand, but will be published shortly after the court of criminal appeals releases them. Thus, the court's opinions will not always appear in sequence with the Alabama Supreme Court opinions, as they have theretofore. The case synopsis in *Southern Reporter* will contain cross-references to any earlier published opinions in the same case. This new procedure will allow earlier publication of criminal cases. Opinions in cases pending on rehearing applications or certiorari petitions will continue to be held pending final action as they have been in the past.

George Earl Smith,
Reporter of Decisions,
Alabama Appellate Courts

The United States District Court for the Northern District of Alabama

U.S. Courthouse
1729 Fifth Avenue North
Birmingham, Alabama 35203

NOTICE

POSITION AVAILABLE FOR FULL-TIME UNITED STATES MAGISTRATE

The Judicial Council of the United States has authorized the appointment of a full-time United States Magistrate in the United States District Court for the Northern District of Alabama with an official duty station at Birmingham, Alabama. The duties of the office are demanding and wide-ranging and will include: (1) the conduct of all initial proceedings including acceptance of complaints, issuance of arrest warrants or summonses, issuance of search warrants, conduct of initial appearance proceedings for defendants informing them of their rights, imposing conditions of release and admitting defendants to bail, appointment of attorneys for indigent defendants, and conduct of preliminary examination proceedings; (2) the trial and disposition of federal misdemeanor cases with or without a jury where the defendant is willing to consent to trial before the magistrate; and (3) acceptance of grand jury returns, conduct of arraignments, and hearing all pretrial matters and motions. In civil cases, the duties include: (1) the service as a special master in appropriate civil cases; (2) the review of appeals from final determinations by administrative agencies such as those under the Social Security Act and similar statutes and submitting a report and recommendation as to disposition of the case to the United States District Judge; (3) to conduct hearings and submit recommendations in habeas corpus actions and prisoner petitions challenging the conditions of their confinement; and (4) the conduct of pretrial and discovery proceedings in any civil case on reference from a United States District Judge. The basic jurisdiction of the United States Magistrate is specified in 28 U.S.C., Sect. 636.

To be qualified for appointment an applicant must:

(1) Be a member in good standing of the highest court of a state for at least five years;

(2) Have been engaged in the active practice of law for a period of at least five years;

(3) Be competent to perform all the duties of the office; be of good moral character; be emotionally stable and mature; be committed to equal justice under the law; be in good health; be patient and courteous; and be capable of deliberation and decisiveness;

(4) Be less than 70 years old; and

(5) Not be related to a judge of the district court.

A merit selection panel composed of attorneys and other members of the community will review all applicants and recommend to the judges of the district court in confidence the five persons whom it considers best qualified. The court will make the appointment, following an FBI and IRS investigation of the appointee. An affirmative effort will be made to give due consideration to all qualified candidates, including women and members of minority groups. The salary of the position is $88,872 per annum.

Application forms and further information on the magistrate position may be obtained from: **Clerk, United States District Court, Northern District of Alabama, 140 U.S. Courthouse, Birmingham, Alabama 35203.**

Applications must be submitted only by potential nominees personally and must be received no later than **March 30, 1990.** ■

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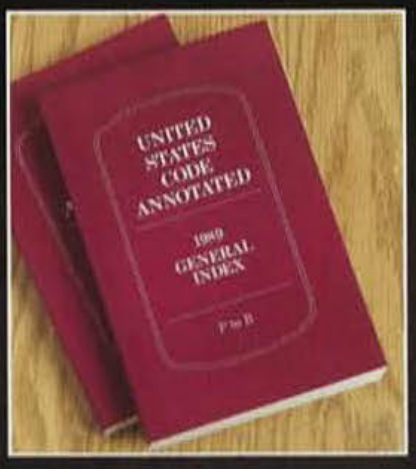

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